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# ANTI-CORRUPTION ENFORCEMENT

2019 - 2020

A Guide to the FCPA, UK Bribery Act  
and International Anti-Corruption Laws

**JENNER & BLOCK**



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## INTRODUCTION TO THE ANTI-CORRUPTION GUIDE

In 2019, anti-corruption efforts continued in earnest around the world. In the United States, enforcement of the Foreign Corrupt Practices Act (FCPA) maintained the elevated pace of recent years, as did the announcements of individual prosecutions; on the policy front, the US Department of Justice (DOJ) focused primarily on fine-tuning or formalizing existing policies rather than bold initiatives. In the United Kingdom, authorities published new guidance relating to two of their anti-corruption enforcement policies. Other European countries pursued notable anti-corruption matters, including in Iceland, Spain, Greece, France, and Denmark. And around the world, more countries adopted or took steps to adopt anti-corruption legislation.

DOJ and the Securities and Exchange Commission (SEC) brought enforcement actions against dozens of businesses and individuals, announced nine corporate resolutions, and collected over \$2.6 billion in connection with FCPA-related cases. These included the two largest corporate resolutions in FCPA history. DOJ continued to emphasize its efforts to charge individuals with FCPA-related offenses: DOJ charged 35 individuals in 2019, of whom 30 entered guilty pleas. The year also featured high-profile FCPA trials in New York and Connecticut. Although DOJ announced various policy updates, it focused on clarification, formalization, and articulation rather than breaking significant new ground. DOJ announced tweaks to its Corporate Enforcement Policy (first adopted in November 2017) that ease certain disclosure and remediation requirements, and it formalized existing guidance regarding its evaluation of corporate compliance programs. In addition, DOJ issued a memorandum instructing prosecutors how to consider a company's ability to pay when fashioning monetary penalties. Meanwhile, the SEC demonstrated a continued commitment to civil enforcement of the FCPA, bringing a number of independent cases involving improper but non-criminal conduct. Finally, both DOJ and the SEC continued to highlight their cooperation with foreign authorities, publicly crediting the authorities' work, and in some cases crediting fines paid to other countries.

In the United Kingdom, the Serious Fraud Office (SFO) moved toward an enforcement strategy similar to that

in the United States, announcing a policy clarifying its expectations for companies seeking cooperation credit under the UK Bribery Act (UKBA). In particular, the so-called Co-operation Guidance encourages companies to identify misconduct and those responsible for it, report promptly, and preserve and provide evidence to authorities. The SFO also released guidance describing how it will evaluate the adequacy of companies' anti-bribery procedures, which largely mirror DOJ guidance but include several important differences. Finally, although guidance based on UKBA enforcement practice remains sparse, one case in 2019 addressed a key question regarding the applicability of legal privilege to internal investigations.

Anti-corruption efforts continued in other countries as well. Several significant cases were brought or resolved in Europe, including resolutions of multi-year investigations in France, Denmark, and the United Kingdom; new charges against companies in Iceland and Spain; and convictions of individuals in Greece. Elsewhere, foreign governments pursued new policies and legislation to combat corruption, and international organizations like the Organization for Economic Cooperation and Development (OECD), and the International Monetary Fund (IMF) continued to push for additional reforms.

This *Guide* analyzes these and other significant developments in anti-corruption laws and practice. It offers an overview of the FCPA and the UKBA, describes new policies and their implications, and answers questions that may be pertinent to companies operating in the international marketplace. Of course, the information presented here is not legal advice. If you have questions about the *Guide*, or about anti-corruption laws more generally, please contact any of the lawyers listed in this publication or in our Investigations, Compliance, and Defense Practice.

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**FAQ I****Who is subject to the FCPA?**

Potentially anyone. The anti-bribery provisions identify three classes of possible offenders: “issuers,” 15 U.S.C. § 78dd-1; “domestic concerns,” *id.* § 78dd-2; and all other persons, *id.* § 78dd-3. An “issuer” is any natural person, company, government, or political subdivision, agency, or instrumentality of government that issues or proposes to issue any security within the United States or files reports with the SEC. *Id.* §§ 78c(a)(8), 78dd-1(a). A “domestic concern” is a US citizen, national, or resident or a business entity that either has its principal place of business in the United States or is organized under US law. *Id.* § 78dd-2(h). The third, catch-all section applies to everyone else (which generally means foreign non-issuers, including non-US nationals), if acting within the territory of the United States. *Id.* § 78dd-3(a)(1)-(3).

Liability under the books and records and internal controls provisions is limited to issuers, 15 U.S.C. § 78m(b)(2), although individuals can be held liable under traditional vicarious liability principles for violations of the books and records provisions. *Resource Guide* at 27-28.

**UNITED STATES****THE FOREIGN CORRUPT PRACTICES ACT**

The FCPA directly prohibits bribery, known as the “anti-bribery provisions,” and failing to reflect the true nature of transactions in a company’s accounts, known as the “books and records provisions.” The FCPA also contains “internal controls” provisions, requiring an issuer to maintain adequate internal controls to provide assurance that transactions are properly authorized and accurately recorded. Together, these provisions prohibit both bribery of foreign officials and accounting practices that may conceal such activity. Importantly, however, the books and records and internal controls provisions require a company to account accurately for the disposition of assets and to maintain controls to ensure that it can do so, even where no improper payment has been made.

The FCPA’s provisions are broadly worded and subject, in certain instances, to competing interpretations. Case law interpreting these provisions is rare, leaving companies seeking to comply with them to rely on the combination of the few decided cases, DOJ and SEC guidance, and established enforcement practice. While this structure can be a recipe for confusion, the discussion below is intended to provide a straightforward description of these provisions and answers to the frequently asked questions they prompt.

**THE FCPA’S ANTI-BRIBERY PROVISIONS**

The FCPA’s anti-bribery provisions prohibit an offer of payment, promise to pay, or authorization of payment, of any money or anything of value to any foreign official, or to any other person (*i.e.*, a third party) while knowing that any portion of the thing of value will be offered, given or promised, directly or indirectly, to a foreign official with corrupt intent for the purposes of influencing an official to obtain or retain business, or to direct business to any person.

The FCPA contains certain limitations on who may be prosecuted under this provision and a few substantive affirmative defenses.

These statutory elements, limitations, and defenses are discussed in more detail below.

**I. Jurisdiction**

FCPA jurisdiction is broad. It extends to all US companies or persons and their agents, as well as to foreign companies that are registered with the SEC, and foreign companies or persons that act in furtherance of an improper payment or offer while in the United States.

Territorial-based jurisdiction extends to any “issuer,” “domestic concern,” officer, director, employee, or agent of such issuer or domestic concern, or stockholder acting on behalf

**FAQ 2****Can the US government prosecute foreign companies under the FCPA?**

Yes. Foreign companies that issue securities in the United States or that are required to file reports with the SEC are considered “issuers” and are treated just as any US issuer would be. 15 U.S.C. § 78c(a)(8). Prosecution of foreign companies has been a growing enforcement trend. To date, several of the largest FCPA enforcement actions, measured by dollar volume of total penalties and disgorgements, have been brought against foreign companies.

Furthermore, even non-issuer foreign companies and individuals are subject to the FCPA if they commit any act in furtherance of an improper payment while within the territory of the United States. See 15 U.S.C. § 78dd-3(a). DOJ has advanced aggressive theories to support jurisdiction over such defendants. For example, in the 2002 Syncor Taiwan matter, DOJ asserted jurisdiction over a foreign non-issuer company based on one of its officers sending an email while in the United States that contained a budget referring to the improper payments, thereby committing a relevant act “while in the United States.” *United States v. Syncor Taiwan, Inc.*, No. 02-cr-1244 (C.D. Cal. Dec. 5, 2002), ECF No. 1. But in 2011, a federal court rejected an even more

of such issuer or domestic concern, that makes use of any instrumentality of interstate commerce in furtherance of any improper payment or offer of payment. 15 U.S.C. § 78dd-1(a); *id.* § 78dd-2(a).<sup>1</sup> An “issuer” is any person – American or foreign – who either issues securities within the United States or is required to file reports with the SEC. *Id.* § 78c(a)(8). A “domestic concern” is a US citizen, national, or resident or a corporation or other business entity with its principal place of business in the United States or organized under the laws of the United States. *Id.* § 78dd-2(h).

Another type of territorial-based jurisdiction extends to foreign citizens and foreign companies (or, more specifically, foreign companies that are not issuers) that commit any act in furtherance of an improper payment or offer in the territory of the United States. See 15 U.S.C. § 78dd-3(a).

Finally, the FCPA’s anti-bribery provisions include an “alternative jurisdiction” that applies, based on US nationality alone, to acts outside the United States in furtherance of an improper payment or offer by any of the following: (1) any issuer organized under the laws of the United States; (2) US persons who are officers, directors, employees, agents, and stockholders of such issuer and are acting on behalf of such issuer; (3) any other corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States; or (4) any other citizen or national of the United States. See 15 U.S.C. § 78dd-1(g); *id.* § 78dd-2(i). Thus, US companies and citizens are subject to the FCPA regardless of where the act in furtherance of an improper payment or offer takes place, and, if the act takes place overseas, even if no means of interstate commerce is used.

Questions about the scope of jurisdiction often arise in the context of a company’s liability for conduct of foreign subsidiaries. A company can be liable for its subsidiary’s improper payments under two theories: (1) because the parent sufficiently participated in the payment by authorizing the payment or providing funds “knowing” that the funds would be used for an improper purpose, or (2) because the subsidiary’s acts in making the payments can be attributed to the parent under traditional agency principles. DOJ and the SEC endorsed both theories of parent liability in their 2012 joint *Resource Guide to FCPA enforcement*. See DOJ and SEC, *A Resource Guide to the Foreign Corrupt Practices Act* (Nov. 14, 2012), at 27-28 (hereinafter *Resource Guide*).

DOJ and the SEC have taken fairly aggressive positions with respect to a parent’s liability for its subsidiary’s actions. In 2013, for example, both agencies reached non-prosecution agreements with Ralph Lauren Corporation for alleged bribes paid by an Argentine subsidiary to expedite customs clearances. The government did not allege actual knowledge or participation by the parent in the subsidiary’s conduct. Rather, liability appeared to be premised on the fact that Ralph Lauren Corporation was the sole owner of the subsidiary and had appointed its general manager.

Moreover, it is important to be aware that a foreign subsidiary may be considered an “agent” of its parent, a relationship that could trigger FCPA liability for both the foreign subsidiary and/or the parent corporation. The statute makes “agents” of issuers as well as “agents” of domestic concerns subject to the FCPA. In addition, under US common

<sup>1</sup> Interstate commerce includes making use of the mail, telephones, email, and any form of interstate travel. See, e.g., *United States v. Brika*, 487 F.3d 450, 455 (6th Cir. 2007) (telephone); *United States v. Hausmann*, 345 F.3d 952, 959 (7th Cir. 2003) (interstate mail and wire communications systems); *Doe v. Smith*, 429 F.3d 706, 709 (7th Cir. 2005) (email and internet).

aggressive theory that a British national had acted within the United States when he mailed from London to the United States a purchase agreement related to an alleged bribery scheme. See *United States v. Patel, et al.*, No. 1:09-cr-00335 (D.D.C June 6, 2011).

Also, the Second Circuit has held that a foreign defendant not otherwise subject to the FCPA can be charged under the FCPA if the defendant acts as an agent of a company that is subject to the FCPA, such as a US subsidiary of a foreign corporation. See *United States v. Hoskins*, 902 F.3d 69, 97-98 (2d Cir. 2018). In *Hoskins*, the defendant was working for an Alstom S.A. subsidiary based in France but was charged and ultimately convicted of FCPA violations on the theory that he was working as the agent of Alstom's US subsidiary when he engaged in a conspiracy to pay bribes to officials in Indonesia. *United States v. Hoskins*, No. 3:12-cr-00238 (D. Conn. 2019).

law principles of vicarious liability, a corporation can be held liable for the conduct of its agent. For example, in 2014, the SEC held Alcoa Inc. (Alcoa) liable for alleged improper payments by its subsidiaries, despite making "no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme." *In re Alcoa Inc.*, Securities Exchange Act Release No. 71261 (Jan. 9, 2014). The SEC's finding of liability was based on the level of control Alcoa exercised over its subsidiaries, including its appointment of key leadership for the subsidiaries, its development of business and financial goals for them, and its coordination of legal, audit, and compliance functions. This approach is consistent with the statement in the *Resource Guide* that "[t]he fundamental characteristic of agency is control." *Resource Guide* at 27.

A company may also be held liable for or suffer other consequences from the prior illegal acts of a company that it acquires or with which it becomes associated as the result of a merger. In a 2014 Opinion Release,<sup>2</sup> DOJ made clear that the mere act of acquisition cannot create liability where none existed before. See *Opinion Release 14-02*. DOJ explained that a US company that wished to acquire a foreign target would not be liable for that target's past extraterritorial conduct because the prior conduct had no connection to the United States, putting it beyond US jurisdiction in the first place. *Id.* But where potential liability existed prior to an acquisition, the acquiring company can be held liable for the past conduct of its acquisition.

DOJ and the SEC devote substantial space to this topic in their *Resource Guide*, in which they explain that actions against the acquiring or successor company are generally reserved for cases "involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition." *Resource Guide* at 28; see, e.g., *SEC v. Alliance One Int'l, Inc.*, No. 1:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010) (\$19.5 million in penalties and disgorgement paid by successor company and foreign subsidiaries). They are less likely to take action against an acquiring company where an acquiring company discovered and quickly remediated violations. *Resource Guide* at 29. Consequently, the *Resource Guide* recommends that companies conduct extensive due diligence prior to acquisition and quickly integrate the target company into the parent's compliance program and internal controls. See *id.* at 28. February 2017 Guidance from DOJ echoed this recommendation. Fraud Section, Department of Justice, *Evaluation of Corporate Compliance Programs* (Apr. 2019). In July 2018, Deputy Assistant Attorney General Matthew S. Miner stated that DOJ intended to apply the principles of the FCPA Corporate Enforcement Policy to successor companies that uncovered wrongdoing in the course of a merger or acquisition and subsequently disclosed that wrongdoing and cooperated with DOJ, in accordance with the terms of the Policy. See Department of Justice, Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (July 25, 2018).

The Second Circuit has held that jurisdiction cannot be established simply based on a foreign national entering into a conspiracy to violate the FCPA with a US person. In an August 2015 decision, the district court in *United States v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. 2015), held that a person who is not himself subject to the FCPA cannot

<sup>2</sup> Under 15 U.S.C. § 78dd-1(e), the attorney general is obligated to have in place an opinion procedure by which DOJ provides "responses to specific inquiries by issuers concerning conformance of their conduct" with the FCPA. The opinion releases are available on the Department's website.

## FAQ 3

**Are companies liable for the prior illegal acts of companies they purchase?**

Yes, in some circumstances. DOJ and the SEC state in their *Resource Guide* that successor liability will generally be limited to circumstances where the successor company continued the misconduct or failed to stop it. *Resource Guide* at 28. A company may mitigate its risk by conducting due diligence prior to an acquisition or merger or, sometimes, immediately following an acquisition or merger, but that is not a legal defense and the company still may be legally susceptible to criminal prosecution. *Id.* at 28-30. Further, as stated in DOJ guidance regarding the evaluation of corporate compliance programs under the principles of federal prosecution of business organizations, a well-designed compliance program should include comprehensive due diligence of any acquisition targets, and the extent to which a company subjects its acquisition targets to appropriate scrutiny indicates whether its compliance program is, as implemented, able to effectively enforce internal controls and remediate misconduct. Dep't of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* at 8 (April 2019). Factors that DOJ will evaluate include the breadth and quality of the due diligence process, the compliance function's degree of involvement in mergers and acquisitions, and the extent to which the company tracks and remediates misconduct and ensures the implementation of

be charged as a co-conspirator or an accomplice to an FCPA violation. In *Hoskins*, the government alleged that, from 2002 through 2009, Alstom Power, Inc. (Alstom US), a company headquartered in Connecticut, was engaged in a bribery scheme to secure a \$118-million project to build power stations for Indonesia's state-owned and state-controlled electricity company. From 2001 through 2004, defendant Lawrence Hoskins, a UK national, was employed by Alstom UK, a British company, and assigned to work for Alstom Resource Management SA, a French company, in France. The government claimed that Hoskins participated in the bribery scheme by approving and authorizing payments to individuals hired to pay bribes to Indonesian officials in order to influence the award of the power stations contract. The government alleged multiple theories of jurisdiction over Hoskins, who is not American and did not act within the United States. Among other theories of jurisdiction, the government alleged that even if Hoskins was not an agent of Alstom US, he conspired with others to violate the FCPA. The district court rejected that argument, reasoning that "where Congress chooses to exclude a class of individuals from liability under a statute, 'the Executive [may not] . . . override the Congressional intent not to prosecute'" those parties by charging them for conspiracy to violate that statute. 123 F. Supp. 3d at 321 (citing *United States v. Castle*, 925 F.2d 831, 833 (5th Cir. 1991)). The government appealed the decision to the Second Circuit.

On appeal, the Second Circuit affirmed in part and reversed in part the district court's decision. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). The Second Circuit concluded that Hoskins (a foreign national) could not be liable for conspiring to violate (or violating) the FCPA without a showing that he was acting as an employee, officer, director, or agent of Alstom US when he engaged in the prohibited conduct or that he took action in furtherance of the violation while in the United States. *Id.* at 96-97. But the Second Circuit reversed the district court's ruling insofar as it prohibited the government from attempting to establish that Hoskins was liable as an agent of Alstom US for conspiring with foreign nationals who committed relevant acts while in the United States. *Id.* at 98. The Second Circuit's opinion establishes that there is a limit on the use of federal conspiracy charges to expand the scope of FCPA prosecutions, although agency remains a basis for establishing jurisdiction over foreign nationals. Hoskins was subsequently convicted at trial, including under the agency theory. *United States v. Hoskins*, No. 3:12-cr-00238, Doc. 583 (Jury Verdict) (D. Conn. Nov. 8, 2019). However, on February 26, 2020, the district court acquitted Hoskins as to the agency theory charges, while upholding his convictions for money laundering. After a thorough review of the facts and legal standard for establishing agency, the court held that the Government had failed to present evidence upon which a rational jury could conclude that Hoskins was an agent of Alstom US. The court's decision will provide a roadmap for future considerations of agency theory under the FCPA.

compliance policies and procedures in the acquired entity. *Id.*

Even where enforcement authorities do not take direct action against the acquiring company, actions against the acquired subsidiary can still have significant consequences for all parties. In 2007, eLandia International Inc. discovered after the fact that its recently acquired subsidiary, Latin Node Inc., had paid as much as \$2.2 million in bribes to officials in state-owned telecommunications firms in Honduras and Yemen. *United States v. Latin Node, Inc.*, No. 09-cr-20239 (S.D. Fla. Mar. 23, 2009), ECF No. 1. As a result of the ensuing investigation and remediation, Latin Node's viability was weakened, and the company was eventually wound down. eLandia Int'l, Inc., Annual Report (Form 10-K), (Apr. 2, 2009). Although the acquiring company, eLandia, was ultimately spared a criminal charge of its own, it was obligated to pay the defunct Latin Node's fine and, of course, saw its investment wiped out. Press Release, "US Dep't of Justice, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay \$2 Million Criminal Fine" (Apr. 7, 2009). In addition, several executives of Latin Node were convicted of FCPA violations, and three of them received terms of imprisonment. *United States v. Salvoch*, No. 10-cr-20893 (S.D. Fla. Dec. 17, 2010), ECF No. 3; *United States v. Vasquez*, No. 10-cr-20894 (S.D. Fla. Dec. 17, 2010), ECF No. 3; *United States v. Granados, et al.*, No. 10-cr-20881, (S.D. Fla. Dec. 14, 2010), ECF No. 3.

## 2. Corrupt Intent

The FCPA requires that the pertinent acts be committed "corruptly." The Act's legislative history reflects that the payments "must be intended to induce the recipient to misuse his official position." H.R. Rep. No. 95-640, at 4 (1977). "An act is 'corruptly' done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991); see also *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181-83 (2d Cir. 2003) (a "bad or wrongful purpose and an intent to influence a foreign official to misuse his official position" satisfy the element of corrupt intent).

In *United States v. Kozeny*, 582 F. Supp. 2d 535 (S.D.N.Y. 2008), a federal district court considered whether a defendant may obtain a jury instruction that corrupt intent could be absent because the bribe was the result of extortion. The court agreed that "true extortion" can be a viable defense to an FCPA charge and held that, where a defendant presents sufficient evidence on that point, the court should instruct the jury as to what constitutes true extortion such that a defendant cannot be found to have the requisite corrupt intent. 582 F. Supp. 2d at 540. The *Kozeny* court was not called upon to decide the precise parameters of "true extortion" but concluded that it must involve more than a simple demand for payment. *Id.* Citing the FCPA's legislative history, the court stated: "While the FCPA would apply to a situation in which a 'payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,' it would not apply to one in which payment is made to an official 'to keep an oil rig from being dynamited,' an example of 'true extortion.'" *Id.*

## 3. Anything of Value

The FCPA does not define "anything of value," but the term has been "construed broadly" to include a variety of benefits, such as offers of employment, travel expenses, and charitable contributions. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 597 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016). In 2015, the SEC's Director of Enforcement Andrew Ceresny emphasized that "anything of value" is a "broad term" that is not limited to cash or tangible gifts but includes less traditional items of value that have been given in order to influence foreign officials. Andrew Ceresny, ACI's 32nd FCPA Conference Keynote Address (Nov. 2015), <https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html>. He observed that the SEC has brought bribery charges in cases involving contributions to charities affiliated with foreign government officials, the provision of no-show jobs to the spouse of a foreign official, payment of a honeymoon of a foreign official's daughter, and the provision of student internships to family members of a foreign government official. *Id.* Similarly, the *Resource Guide* states that "[a]n improper benefit can take many forms," including not only cash but also travel expenses and expensive gifts. *Resource Guide* at 14-15. The *Resource Guide* further states that "the FCPA does not contain a minimum threshold amount for corrupt gifts or payments." *Id.* at 15. What may be considered a modest payment in the United States could be viewed as a larger and more significant amount in a foreign country. *Id.*

**FAQ 4****Can a company make a charitable contribution at the request of a foreign official?**

Yes, but it should be very careful when doing so. Past enforcement actions have relied on such contributions as evidence of an improper payment. See, e.g., *In the Matter of Nu Skin Enters.*, Order Instituting Cease-and-Desist Proceedings, Release No. 78884, Fil No. 3-17556 (Sept. 20, 2016). Still, DOJ and the SEC have recognized that *bona fide* charitable contributions are permissible. See *Resource Guide* at 19.

At a minimum, companies should conduct due diligence into the charity, take care to document the purpose of the donation, and evaluate whether the circumstances suggest the contribution will go to the charity and not to any government official. See *id.*; see also Opinion Release 10-02; Opinion Release 97-02.

In addition to cash and cash equivalents (e.g., stock, stock options), things of value in the FCPA context have included: travel and entertainment (e.g., 2013 DOJ *Diebold* matter); charitable contributions (e.g., 2004 SEC *Schering-Plough* matter); college scholarships (e.g., 1993 DOJ McDade prosecution); the services of a prostitute (e.g., DOJ *Girard* and *Marmolejo* matters); offers of future employment (e.g., DOJ *Girard* matter); and offers of employment to friends and family of an official (e.g., 2016 DOJ and SEC *JP Morgan Chase* matter).

Charitable contributions raise a particularly difficult issue. DOJ and the SEC have both advised that legitimate charitable donations do not violate the FCPA. See *Resource Guide* at 19; see also Opinion Release 10-02 (declining to take enforcement action where requestor undertook adequate due diligence of recipient and imposed significant controls on the grant); Opinion Release 97-02 (declining to take enforcement action where facts demonstrated that donation would be given directly to a government entity – “and not to any foreign government official” – for the purpose of building a school). Yet enforcement practice reflects that the government will closely scrutinize donations made to charitable organizations or for educational purposes to ensure that any officials requesting donations, or otherwise associated with the donees, have no possible role in reviewing matters for, or providing preferential treatment to, the donating business. For example, in 2012, the SEC brought an FCPA enforcement action against Eli Lilly & Co. alleging that a subsidiary of the pharmaceutical company made \$39,000 in donations to a Polish charity. The SEC claimed the donation had been made at the request of a government official who had influence over pharmaceutical purchases in Poland.

**4. Authorization of Unlawful Payments**

The FCPA prohibits not only the making, but also the “authorization” of any payment or giving of anything of value to a foreign official. 15 U.S.C. § 78dd-1(a).

The FCPA does not define the term “authorization,” and as with many aspects of the statute, the case law is undeveloped. The legislative history makes clear that authorization can be implicit or explicit. See H.R. Rep. 95-640 (Sept. 28, 1977) (“[I]n the majority of bribery cases . . . some responsible official or employee of the US parent company had knowledge of the bribery and either explicitly or implicitly approved the practice . . . [S]uch persons could be prosecuted.”); see also Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 414, 98th Cong., 1st Sess. (1983), at 38 (Memorandum from Deputy Attorney General Edward C. Schmults) (describing standard for implicit authorization under the FCPA, noting that one may implicitly authorize a corrupt payment merely by pursuing a course of conduct that conveys an intent that an illicit payment be made).

Note that it is not necessary that a company affirmatively authorize improper payments by its agents, vendors, distributors, or subcontractors in order for liability to attach. Simple knowledge of such payments will suffice, and, critically, knowledge is defined broadly enough to include even well-founded suspicions as described in the next subsection.

**FAQ 5****Can a company be liable for the acts of a third party?**

Yes. The FCPA prohibits the “authorization” of improper payments, which could include payments made by agents and business partners. 15 U.S.C. § 78dd-1(a).

Furthermore, the Act specifically prohibits payments to third parties “while knowing” that all or a portion of the payment will be used as an illegal bribe. *Id.* at § 78dd-1(a)(3). And a person’s awareness “of a high probability of the existence of [a] circumstance” is sufficient to demonstrate knowledge of the circumstance; a company can therefore be liable for willful blindness toward the conduct of a third party acting on its behalf. *Id.* at § 78dd-1(a)(2)(B).

Certain factual situations raise unique questions about the “authorization” of a third-party improper payment. For example, distributors typically purchase goods and re-sell them to other end-users rather than facilitate a company’s direct sales as an agent or representative. Because of this distinction, any illegal payments a distributor makes after taking title to the goods generally cannot be attributed to the original seller, absent a prior specific conspiratorial agreement to make the payment or an ongoing relationship between the seller and the distributor in which the seller knowingly benefits from the illicit activity. For example, in Opinion Release 87-01, DOJ took no action on a US company’s sale of a product to a foreign company that planned to resell the product to its government on terms to be negotiated. The US company represented that it was not aware of any illegal payment plans.

Nevertheless, distributor relationships are not immune to risk. Where a company is aware or reasonably suspects that its distributor is offering or making improper payments to government officials, the company can be liable for the distributor’s actions. For example, in 2013, Weatherford International settled charges that stemmed in part from a distributor arrangement. The government alleged that Weatherford offered up to \$15 million in “volume discounts” to a distributor in an unnamed Middle Eastern country, believing that the discounts would be used to pay illegal bribes to employees of the national oil company.

In addition, foreign governments often require that a US contractor hire a local entity to do some portion of the work on a contract. A company should carefully monitor and document such arrangements because a corrupt subcontractor easily could pad its subcontract price to include improper payments. A US company, as the original source for those payments, therefore may be liable if some portion is subsequently offered or paid to a foreign official. Accordingly, margins should be reasonable.

**5. Knowing**

In addition to prohibiting “authorizing” payments by a third party, the FCPA prohibits providing something of value to a third party while knowing that the third party will in turn provide it to a government official. The statute defines the term “knowing” broadly. Knowledge of a relevant circumstance exists “if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. § 78dd-1(f)(2)(B). Willful blindness to circumstances indicating a high probability of unlawful activity will satisfy the knowledge requirement. See *Resource Guide* at 22 (highlighting the FCPA’s legislative history to show that the Act was intended to cover actors who exhibit “conscious disregard,” “willful blindness” or “deliberate ignorance” of known circumstances that “should reasonably alert them of the ‘high probability’ of an FCPA violation”); *United States v. Kozeny*, 667 F.3d 122, 132 (2d Cir. 2011) (affirming jury instruction that stated that “[w]hen knowledge of existence of a particular fact is an element of the offense, such knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact”).

**FAQ 6****What provisions should an agreement with a third party contain to minimize risk?**

An agreement should take into account the specific circumstances of any relationship, but as a general matter, a company entering into an agreement with a foreign representative should consider the elements outlined in DOJ's Opinion Release 81-01, the Department's most comprehensive pronouncement on the subject:

1. Payments be made (a) by check or bank transfer, (b) to the foreign representative by name, (c) at its business address in-country (or where services were rendered), and (d) upon the written instructions of the foreign representative;
2. A representation of the representative's familiarity with and commitment to adhere to the FCPA, including a requirement for the representative to notify the company of any request it receives for improper payments;
3. A representation that no member of the entity is a government official, an official of a political party, a candidate for political office, a consultant to a government official or affiliated with a government official;
4. The agreement is lawful in the foreign country;
5. Any assignment by the representative of any right, obligation, and/or services to be performed under the agreement must be approved in writing by the company;

Accordingly, while one might believe that it is safest to know as little as possible about what service partners and third parties do with the payments they receive, exactly the opposite is true. Companies therefore should be alert to possible warning signs, such as, for example, when a government official directs the use of a specific third party; where a provider's services are unclear or ill-defined; or where payments are made through non-traditional channels. Under the FCPA liability framework, US companies should closely monitor and document their third-party relationships to ensure that they are not viewed as taking a "head-in-the-sand" approach should payments ultimately be redirected to government officials.

**6. Offers or Promises**

The Act prohibits not only improper payments but also offers or promises to make such payments; thus, the payment need not actually be made in order for a violation to occur.

**7. Foreign Official**

Under the FCPA, related case law, and DOJ and SEC guidance, the term "foreign official" includes elected and appointed government officials; officials of international organizations such as the International Monetary Fund, the World Bank, and the Red Cross; and employees of any "government instrumentality," which can include state-owned enterprises that provide what might otherwise be thought of as commercial services. See 15 U.S.C. § 78dd-1(f)(1)(A); *Resource Guide* at 21. The FCPA also defines "foreign official" as including "any person acting in an official capacity" for or on behalf of a foreign government. 15 U.S.C. § 78dd-1(f)(1)(A). Finally, the FCPA's anti-bribery provision also extends to foreign political parties, foreign political party officials, and candidates for foreign political office. 15 U.S.C. § 78dd-1(a)(2).

In a 2014 decision, the Eleventh Circuit focused on two critical features to determine whether a state-affiliated entity qualifies as a "government instrumentality": (1) government control and (2) public function. *United States v. Esquenazi*, 752 F.3d 912 (11th Cir.), cert. denied, 135 S. Ct. 293 (2014). Assessing either of the features is a fact-intensive exercise, but the court identified several factors that will often affect the analysis.

Regarding government control, the court considered a non-exhaustive list of six factors: (1) the foreign government's formal designation of the entity; (2) whether the government had a majority ownership interest; (3) the government's authority to appoint or remove the entity's principals; (4) the extent to which the entity's profits are returned to the public treasury; (5) whether the entity would perform at a loss absent government subsidies; and (6) the length of time that the other factors indicated government control. *Id.* at 926.

With respect to whether a state-affiliated entity performs a public function, the court considered these non-exhaustive factors: (1) whether the entity enjoys a monopoly over its goods or services; (2) the extent of government subsidies for the entity; (3) whether the entity's goods and services are available to the public at large; and (4) whether the public and government perceive the entity as performing a governmental function. *Id.*;

6. The company can terminate the agreement where the representative has violated any of its provisions;
7. The company is permitted to disclose the agreement, including to the foreign government;
8. Adequate controls over reimbursable expenses, including potentially audit rights; and
9. A representation that the representative is well-established with sufficient resources to perform the work. The agreement should also refer to the company's selection criteria for representatives, such as: years in operation; size and adequacy of support staff; business outlook; reputation; professional and/or technical expertise; and familiarity with and willingness to adhere to the FCPA. See also Opinion Release 97-01 (documenting depth of due diligence).

In addition to those anti-bribery focused provisions, DOJ and SEC enforcement actions have emphasized that an agreement with a foreign representative should also include specific detail about the services that the representative should provide.

## FAQ 7

### ***If necessary, how should a company make an overseas payment?***

Ideally, by wire transfer to a business partner's bank account in its home country or the location where the work was done. DOJ and the SEC insist on visibility and transparency in payments made to agents and other business partners abroad.

see also *United States v. Duperval*, 777 F.3d 1324, 1333 (11th Cir. 2015) (applying the same tests).

The Eleventh Circuit's holdings closely track the past approach of DOJ and the SEC as seen both in their prior enforcement actions, see, e.g., *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); *United States v. Carson*, No. 09-cr-00077 (JVS), 2011 WL 5101701 (C.D. Cal. May 18, 2011), and in the joint *Resource Guide*, see *Resource Guide* at 20-21.

Members of royal families also present particular difficulty. Often, such individuals have no official role in government but occupy important ceremonial roles and wield significant influence. In Opinion Release 12-01, DOJ set out the following factors for assessing whether a royal is a foreign official: (1) the degree of control or influence the individual has over the levers of governmental power, execution, administration, finances, and the like; (2) whether the foreign government characterizes the individual as having governmental power; and (3) whether and under what circumstances the individual may act on behalf of, or bind, a government. Applying these factors, DOJ concluded that the royal family member at issue in Opinion Release 12-01 was not a foreign official because he had no official or unofficial role in his country's government and no authority to bind the relevant governmental decision makers.

Thus, consultants and unofficial advisors to government officials, or others outside the formal government apparatus, may be deemed to be government officials under certain circumstances, particularly where they have decision-making authority or significant influence with respect to governmental actions. For example, in the 2006 *Statoil ASA* matter, Statoil was charged with making improper payments to the president of the National Iranian Oil Company. DOJ did not allege, however, that this position made him a foreign official, arguing instead that he was an "advisor to the Iranian Oil Minister" and a "very important guest"; that his family "controlled all contract awards within oil and gas in Iran"; and that Statoil had tested his influence by having him send a message back to Statoil through the Iranian Oil Minister.

## **8. Improper Purpose**

To violate the FCPA, a promise, payment, or offer to a foreign official must be given for one of four purposes: (1) to influence any act or decision of such foreign official in his official capacity; (2) to induce such foreign official to do or omit to do any act in violation of the lawful duty of such official; (3) to secure any improper advantage; or (4) to induce such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

These purposes encompass nearly every act a foreign official might take that could benefit the party making the promise, payment, or offer. The first applies when the foreign official has some sort of discretion within the laws of the pertinent foreign country and the promise, payment, or offer is made in order to influence the exercise of that discretion. The second comes into play when a foreign official breaks the laws of the pertinent foreign country. The third purpose, "securing any improper advantage," broadly concerns "something to which the company concerned was not clearly

Therefore, wire transfers are preferable to checks because they provide proof that funds were sent to an agent's primary business account. If checks are used, they should be retained to show the place of deposit. Companies should ensure that payments to business partners are accurately recorded in their books, and domestic parents should require their subsidiaries to follow US accounting rules regarding business expenditures.

## FAQ 8

### **Can a company make a payment, contribution, or donation to a foreign government entity?**

Yes, but it should be very careful when doing so. The FCPA prohibits payments to government officials but not to government entities themselves. *Resource Guide* at 20.

Nonetheless, a payment to a government entity may be improper where it appears that it is substantially benefitting a particular government official. For example, in 2013, the SEC brought an enforcement action against medical device manufacturer Stryker Corporation. Among the alleged improper payments was a \$200,000 donation to fund a Greek public university laboratory for a public official with influence over the purchase of Stryker products. *Press Release, SEC, SEC Charges Stryker Corporation with FCPA Violations (Oct. 24, 2013)*.

<sup>3</sup> If the person or entity is a not a US person or issuer, the interstate commerce nexus is unnecessary. Rather, such a defendant can be liable for any act within the United States in furtherance of an unlawful payment.

entitled, [such as] an operating permit for a factory which fails to meet the statutory requirements." *United States v. Kay*, 359 F.3d 738, 754 (5th Cir. 2004) (*Kay I*). An advantage that is not readily available to other competitors and that is secured by a payment could be deemed to fall within the scope of this provision. See *id.* at 750–55. The fourth purpose focuses on the foreign official's use of his or her influence within the foreign government. For example, in the 2006 *Statoil ASA* matter, US authorities brought an enforcement action against a foreign oil company that entered into a \$15 million consulting agreement with an Iranian official, the purpose of which was to induce the official to use his influence to assist the company in obtaining a contract.

## 9. To Obtain or Retain Business

The leading case on this issue is *Kay I*, in which the Fifth Circuit held that this statutory requirement was satisfied by payments designed "to secure illegally reduced customs and tax liability" because lower tax payments would "more generally help" a domestic payor obtain or retain business for some person in a foreign country." 359 F.3d at 756. Thus, the "obtain or retain business" provision will be read broadly.

## 10. Use of Interstate Commerce in Furtherance of an Unlawful Payment

The FCPA's anti-bribery provisions require a nexus between an issuer's or a domestic concern's use of interstate commerce and the unlawful payment.<sup>3</sup> In most cases this requirement is easily met – for example, by email or telephonic communications relating to the payments or by the wiring of money or other payment mechanisms. Importantly, DOJ reads the provision as encompassing a much broader range of circumstances. An example is the 2008 *AGA Medical Corporation* matter, which involved the payment of improper "commissions" to doctors and patent agents in China in connection with sales of and patent approvals for certain medical devices. While the charging documents described email communications relating to the payments, DOJ also alleged that shipping the products to China qualified as the use of interstate commerce in furtherance of the unlawful payment. More recently, a federal district court held that even email sent and received in foreign locations may satisfy the interstate commerce requirement if the messages were routed through US-based servers. *SEC v. Straub*, 921 F. Supp. 2d 244, 262–64 (S.D.N.Y. 2013).

## DEFENSES TO AN ANTI-BRIBERY PROSECUTION

The breadth of the FCPA is reinforced by the relatively narrow nature of the exceptions and affirmative defenses to liability. *Kay I*, 359 F.3d at 756 ("Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country."). The recognized statutory exceptions and defenses are:

- **Facilitating Payments:** The FCPA does not apply to any payment to secure the performance of a routine governmental action.

There is also a risk that any payment to a foreign government may be improperly diverted to an individual official. Accordingly, any payments to government entities should be made to accounts clearly identified as such, in the country where the government operates, and supported by clear documentation, including written direction of the government entity. *Compare* Opinion Release 06-01 (approving payments to customs department of an African nation as part of an incentive program to improve anti-counterfeiting measures); *compare* Opinion Release 97-02 (permitting \$100,000 donation to a government entity to build a school) to Opinion Release 98-01 (stating DOJ's intention to initiate a criminal investigation if proposed payments of "fine[s]" and "modalities" were made to foreign officials rather than to an agency account).

It is important to exercise caution when making payments, contributions, or donations to foreign governments, even when acting with the best of intentions. As DOJ and the SEC warn, "companies contemplating contributions or donations to foreign governments should take steps to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials." *Resource Guide* at 20.

## FAQ 9

### **Can a US company do business with an entity in which a foreign official is a participant?**

Yes, but it should exercise great care in doing so. A US company does not violate the FCPA merely by doing business with an entity in which a foreign official is a passive owner.

- **Lawful Under Local Law:** It is an affirmative defense that an action is permitted by the law of the official's country. This defense applies only to formal law, not the local custom.
- **Reasonable and Bona Fide Expenses:** It is an affirmative defense that an expense was a reasonable and bona fide business expense, such as reasonable travel for a product demonstration.

## I. Facilitating Payments

The FCPA does not apply "to any facilitating or expediting payment to a foreign official, political party, or party official, the purpose of which is to expedite or to secure the performance of a routine governmental action." 15 U.S.C. § 78dd-1(b). This so-called "facilitating" or "grease" payment exception is meant to cover routine, nondiscretionary "ministerial activities performed by mid- or low-level foreign functionaries," see *Kay I*, 359 F.3d at 750–51, such as:

- Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- Processing governmental papers;
- Providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods;
- Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; or
- Actions of a similar nature so long as the official's decision does not involve whether, or on what terms, to award new business to or to continue business with a particular party.

15 U.S.C. § 78dd-1(f). By carving out these narrow categories of payments for "routine government action" from the FCPA's coverage, Congress sought to differentiate between those acts "that induce an official to act 'corruptly,' i.e., actions requiring him 'to misuse his official position' and his discretionary authority," and those acts that are "essentially ministerial [and] merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action." *Kay I*, 359 F.3d at 747.

Those who seek to justify a payment under the "facilitating payment" exception should focus on the purpose of the payment and whether the official in question must exercise any discretion or judgment in deciding whether to take the requested action.

A payment that convinces an official to bestow his good graces upon a company is suspect, whereas a payment that merely expedites a routine action to which the company is otherwise entitled is less problematic. Companies that permit such payments should ensure that they are reviewed and approved in advance by in-house or other counsel and that they are recorded properly in their books and records.

In general, to avoid violating the FCPA, a foreign official's participation in such an entity should be legal under the laws of the official's country and transparent to the official's government, and the official should not participate in any decision or transaction involving the US company.

DOJ has issued a number of opinion releases addressing this issue. For example, in Opinion Release 08-01, DOJ took no enforcement action where a US company entered into a joint venture with an entity in which a foreign official was a principal because the US company had (1) conducted extensive due diligence and made disclosures; (2) obtained representations and warranties that its joint-venture partner had not violated and would not violate anti-corruption laws; and (3) retained a broad contractual right to terminate the joint venture agreement in the event of a violation of anti-corruption laws. Upon similar prophylactic measures, DOJ took no action when a US firm sought to establish an agency agreement with a foreign company whose principals were related to and managed the affairs of a foreign country's head of state. See Opinion Release 84-01.

## FAQ 10

### **Does the FCPA forbid corrupt payments to obtain a business advantage, such as a lower tax rate or customs duty?**

Yes. The FCPA forbids corrupt payments to influence foreign officials to use their positions to assist "in obtaining or retaining business." 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). This prohibition is not limited to commercial transactions between a US company and a foreign government, such as the award or renewal of

In their *Resource Guide*, DOJ and the SEC emphasize that the size of a payment does not determine whether it qualifies for the facilitating payment exception. See *Resource Guide* at 25. For example, in a 2009 matter brought against oilfield company Helmerich & Payne, Inc., DOJ cited a series of infrequent payments to Venezuelan customs officials, each of which was less than \$2,000 and which, together, totaled only \$7,000. In that case, however, the payments were allegedly made to avoid customs regulations and inspections rather than to obtain routine, non-discretionary action. The *Resource Guide*, however, also notes that especially large payments are less likely to be true facilitating payments. *Id.*

Even if a payment arguably fits within the exception for facilitating payments, issuers must be careful to ensure the transactions are properly recorded as such. In the 2014 *Layne Christensen* matter, the SEC faulted the company for some payments as small as \$4 where the payments were mischaracterized as "honoraires," "commissions," and "service fees," leading to books and records violations. *In re Layne Christensen*, Securities Exchange Act Release No. 73437 (Oct. 27, 2014).

Finally, it should be noted that the UK Bribery Act of 2010 does not contain a facilitating payments exception as described in detail below. The scope of the UK Bribery Act is quite broad, covering not only UK concerns but any companies conducting business in the United Kingdom, even where the charged conduct occurred elsewhere. Thus, companies subject to both the FCPA and UK Bribery Act may not be in a position to take advantage of the "facilitating payments" exception to the FCPA.

## 2. Lawful Under Local Law

Under the FCPA, it is an affirmative defense that "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country." 15 U.S.C. § 78dd-1(c)(1). Note that the payments must be legal under the written laws or regulations of the foreign country and that such authorization must be express. While a country's laws may acknowledge the existence of certain payments – for example, by including a provision in the tax code for how to treat them – this defense requires something greater: an explicit authorization for the payment itself.

*Kozeny* addressed the scope of this affirmative defense. In that case, the defendant was alleged to have paid bribes in Azerbaijan related to obtaining business with SOCAR, the state oil company. The defendant argued that the alleged payments were legal under local law because he had reported the payments to Azeri authorities, and under Azeri law, the payor of a bribe is relieved from punishment if he makes such a report. See 582 F. Supp. 2d at 538. The court disagreed, concluding that the Azeri legal provision may waive punishment but does not render the payment itself lawful. "[T]here is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality." *Id.* at 539.

More recently, in *United States v. Ng Lap Seng*, No. 1:15-cr-00706, Doc. 584 (Trial Transcript) at 133-34 (S.D.N.Y. Aug. 3, 2017), the court rejected an argument

contracts. After a lengthy analysis of the statute's legislative history, the Fifth Circuit reasoned in *Kay I*, that the FCPA prohibits payments "intended to assist the payor either directly or indirectly, in obtaining or retaining business," 359 F.3d at 755, and that it "encompass[es] the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states." *Id.* at 748. The court thus concluded that payments to Haitian officials to understate quantities of imported grain so as to reduce import taxes violated the FCPA. See *id.* at 761.

## FAQ II

### **May a company sponsor an educational trip for a foreign official or provide other hospitality?**

Yes, but only under strict conditions. The FCPA itself provides an affirmative defense for "reasonable and bona fide expenditures, such as travel and lodging expenses" when directly connected with a legitimate promotion or product demonstration, or when a required part of contract performance. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

Nevertheless, expenses should be reasonable, relate to legitimate educational or training needs, and not suggest an attempt to induce favorable treatment with regard to the company's business. Indeed, both DOJ and the SEC have brought actions related to travel and entertainment expenses that have not met these guidelines. See, e.g., Press Release, Dep't of Justice, *Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$25.2 Million Criminal Penalty* (Oct. 22, 2013); Press Release, SEC, *SEC Charges Diebold with FCPA Violations* (Oct. 22, 2013).

that, where a foreign country has anti-bribery laws that do not speak to whether a particular kind of payment is unlawful, the affirmative defense should apply, regardless of whether the local laws specifically authorize such payments. The court held that this interpretation of the statute was inconsistent with the plain meaning of the FCPA's text, was not supported by a majority of sources addressing the affirmative defense, and would lead to impractical results. *Id.*

### **3. Promotional Expenses**

It is an affirmative defense that the payment or thing of value "was a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to . . . the promotion, demonstration, or explanation of products or services; or . . . the execution or performance of a contract . . ." 15 U.S.C. § 78dd-1(c)(2). This provision creates a limited exception for expenses associated with ordinary product demonstration and testing by companies seeking government contracts or for ongoing inspections related to the execution of such a contract.

DOJ Opinion Releases on this subject make clear that any expenditures must be closely tailored to the payor's legitimate goals. For example, in connection with a product demonstration, the host may pay for foreign officials' non-extravagant travel, lodging, and meals. See Opinion Release 82-01 (approved reasonable travel, meals, and entertainment); Opinion Release 81-02 (approved provision of product samples to government officials for testing and quality assurance); Opinion Release 83-02 (approved travel and entertainment expenses for official's wife) (note, however, that more recent enforcement actions suggest that companies should not pay any expenses for an official's family); Opinion Release 85-01 (approved payment of travel period closely related to the length of time required to demonstrate the product); Opinion Release 07-02 (approving expenses paid directly to providers for domestic air travel and other expenses of delegation of six junior to mid-level foreign officials for educational program at company's US headquarters); and Opinion Release 07-01 (approving domestic expenses for a four-day trip by a six-person delegation of the government of an Asian country).

DOJ's Opinion Releases also permit some digression for the officials' entertainment so long as they do not resemble added "perks" for the officials. It must be clear from the overall expense plan that the trip is for the purposes outlined in the statute and that the vast majority of expenses are advancing those ends. In Opinion Release 07-02, for example, DOJ approved payment for a modest four-hour city sightseeing tour for the six visiting foreign officials. In general, airfare should be economy class, but business class travel may be appropriate for higher-ranking officials. See Opinion Releases 07-02, 12-02. Finally, although there may be situations in which an official's family members may be included, that is rarely appropriate and should probably be avoided. See Opinion Release 83-02 (approving payment of less than \$5,000 to pay for the wife of a foreign official to travel with the official while in the United States visiting company sites).

The body of guidance from Opinion Releases and enforcement actions regarding educational trips provide a sound framework to consider gifts and hospitality generally.

**FAQ 12*****Is having an adequate compliance program a defense to corporate criminal liability for the actions of an employee violating company policy?***

No. DOJ and the SEC take the position that, under principles of agency law, any action taken to benefit the company, even if also taken to benefit an employee and even if against company policy, can be attributed to the company. See *Resource Guide* at 27 (citing *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962)).

While there is no formal defense for having an adequate (or superlative) compliance program (as there is under the UK Bribery Act), DOJ and SEC guidance provides that the effectiveness of a company's pre-existing compliance program may be a factor in making charging decisions or assessing the amount of a potential monetary sanction. See *Principles of Federal Prosecution of Business Organizations*, US Attorney's Manual § 9-28.300; see *SEC Enforcement Manual* at 98.

Hospitality and gifts may be extended if they are reasonable, have a sound business purpose, and are not intended to influence a government official to use his authority improperly to the business advantage of the company. These common-sense guidelines dictate that reasonable entertainment expenses (e.g., meals) are usually acceptable if connected to conducting business. Similarly, low-value tangible gifts (e.g., marketing items with company logos, such as pens, caps, cups, and shirts) may be given, provided such gifts are acceptable under the applicable government rules of the official's home country and are permitted by the US company's ethics policies. DOJ and the SEC have advised that "[i]tems of nominal value" are less likely to curry improper influence, while "[t]he larger or more extravagant the gift . . . the more likely it was given with an improper influence." *Resource Guide* at 15.

Hospitality, travel, and entertainment that are unconnected to bona fide business activities or that include luxurious or extravagant expenses potentially violate the FCPA's anti-bribery provisions. In 2013, both DOJ and the SEC brought enforcement actions against Diebold, Inc., for providing leisure trips to Las Vegas and Disneyland, entertainment, and gifts to Chinese and Indonesian officials. Similarly, in 2014 the SEC charged that Bruker Corporation provided a series of non-business and leisure side-trips to Chinese officials at state-owned enterprises.

**THE FCPA'S BOOKS AND RECORDS AND INTERNAL CONTROLS PROVISIONS**

The books and records provisions of the FCPA work in tandem with the anti-bribery provisions. They require public companies to account accurately for and report expenditures, as well as to maintain accurate records to support accounting entries and expenditures. The internal control provisions require that an issuer devise and maintain internal controls that allow for this accurate record keeping.

These provisions apply regardless of whether any improper payments have been made and have been used as the basis for liability by DOJ and the SEC in matters where they have not (and arguably could not have) brought anti-bribery charges.

**I. Substantive Requirements**

The books and records and internal controls provisions require that an issuer:

- A. Make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
- B. Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:
  - (i.) transactions are executed in accordance with management's general or specific authorization;

(ii.) transactions are recorded as necessary (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (2) to maintain accountability for assets;

(iii.) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv.) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. § 78m(b)(2). These provisions make clear that issuers must compile records in accordance with generally accepted accounting standards. These requirements are not based on any sense of "materiality" as that term is generally used in securities laws. Rather, the requirement is grounded in the concept of reasonableness and accuracy – what a business manager would reasonably want and expect in the day-to-day operation of a business.

Knowing violation of the books and records or internal controls requirements can trigger both civil and criminal liability. See 15 U.S.C. § 78m(b)(5); 15 U.S.C. § 78m(b)(4).

Because liability under the books and records or internal controls provisions does not depend on an improper payment, these provisions may be, and often are, used to sanction a company in cases involving suspected improper payments in which, for whatever reason, the government is unable to prove, or chooses not to pursue, an anti-bribery charge. For example, the SEC brought a settled civil enforcement action against Oracle Corporation where an Indian subsidiary of Oracle created slush funds for the purpose of paying future bribes to foreign government officials even though there were no bribes offered or currently contemplated. *SEC v. Oracle Corp.*, No. CV-12-4310 (N.D. Cal. Aug. 16, 2012). Companies should avoid all arrangements that cannot be or are not openly recorded in the books.

Indeed, recent enforcement actions have reflected how the enforcement agencies use the books and records provision to reach accounting misconduct associated with corrupt conduct outside the FCPA's reach. In a landmark 2012 case, the SEC brought charges against FalconStor Software, Inc. related to bribes paid to private sector employees of a JP Morgan Chase subsidiary in exchange for lucrative contracts. According to the SEC, the bribes were inaccurately recorded in FalconStor's books as "compensation," "sales promotion," and "entertainment" expenses. The SEC charged FalconStor under the FCPA's books and records provision for failing to accurately record the expenses associated with the bribes on the company's books and records. FalconStor agreed to pay \$2.9 million to settle the charges. *United States v. FalconStor Software, Inc.*, No. 1:12-mj-00615-VVP (E.D. N.Y. June 27, 2012).

In 2015, the SEC brought charges against Goodyear Tire & Rubber Company for violating the FCPA's books and records provision by paying more than \$3.2 million

in bribes to government officials and employees of private companies. These bribes were falsely recorded in the books and records of Goodyear's subsidiaries as legitimate business expenses. Goodyear agreed to pay more than \$16 million to settle the SEC's charges. *In the Matter of the Goodyear Tire & Rubber Co., Respondent*, Release No. 3640 (Feb. 24, 2015).

*The Goodyear and FalconStor* matters both involved allegations of the failure to properly record payments associated with commercial bribery rather than official corruption. The SEC went one step further in the 2015 Polycom matter. There, the SEC applied the FCPA's books and records provision to the accounting of benefits paid to a company's own employee. The SEC alleged that Polycom's former CEO used almost \$200,000 of company money to pay for personal meals, entertainment, travel, and gifts, and Polycom falsely recorded these personal expenses as business expenses in its books and records. *SEC v. Andrew Miller*, No. 3:15-cv-1461-YGR (LB) (N.D. Cal. Jan. 27, 2016).

The theory of liability pursued by the SEC in these matters continues to potentially expand the scope of conduct subject to scrutiny under the FCPA's books and records provisions. These resolutions also highlight certain inadequate expense reporting processes – *i.e.*, Polycom allowed its CEO to approve his own expenses and to book and charge airline flights without providing any description of their purpose – of which companies may want to take note and ensure the robustness of their own internal controls in the area of expense reporting.

In the 2016 *LATAM Airlines* matter, DOJ brought criminal books and records charges against LATAM (the successor to LAN Airlines) based on underlying conduct that arguably did not involve official corruption. In that case, a South American airline entered into a sham consulting contract with a government official. Rather than perform services under the contract, the official paid a portion of the contract's proceeds to union officials in order to induce the union to acquiesce to more favorable terms in negotiations with the airline. The applicability of the anti-bribery provisions in these circumstances, where the official is making a corrupt payment and may not be acting in his official capacity, is not clear. Yet DOJ brought criminal charges under the books and records and internal controls provisions in light of the fact that the sham consultant agreement and associated payments were not accurately recorded. LATAM Airlines entered into a deferred prosecution agreement and agreed to pay a \$12 million criminal penalty. *United States v. LATAM Airlines Group S.A.*, No. 0:16-60195-CR-DTKH (S.D. Fla. July 25, 2016).

## FAQ 13

**Can an individual be prosecuted for conduct prohibited under the books and records or internal controls provisions?**

Yes. By their terms, the books and records and internal controls provisions apply to issuers only. 15 U.S.C. § 78m(b)(2). But natural persons can be subject to criminal or civil liability as aiders and abettors, 18 U.S.C. § 2; for causing an issuer's books and records violations, 15 U.S.C. § 78u-3(a); and for knowingly falsifying books and records or circumventing or failing to implement adequate internal controls, 15 U.S.C. § 78m(b)(5). They also can be subject to civil liability as control persons. In recent years, DOJ and the SEC have brought several cases against individuals under the books and records provisions. See, e.g., Press Release, Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012).

**2. Applicability**

The books and records and internal controls provisions apply only to issuers – that is, entities that have a class of securities registered pursuant to 15 U.S.C. § 78l and entities that are required to file reports with the SEC pursuant to 15 U.S.C. § 78o(d). See 15 U.S.C. § 78m(b)(2).

There is no “jurisdictional” requirement for civil liability for failure to maintain adequate books and records or internal controls pursuant to 15 U.S.C. § 78m(b)(2). Any “issuer” within the meaning of the statute must comply with the statute’s requirements to maintain accurate books and records and adequate internal controls, wherever the books and records may be kept.

Where a subsidiary’s financial results are consolidated with a parent issuer’s financial statements, the FCPA’s requirements have been found to apply to books and records or internal control deficiencies occurring at the subsidiary. Thus, inaccurate books and records or internal control failures at the subsidiary level can trigger civil liability for the parent issuer without any US nexus (beyond issuer status of the parent). See *SEC v. Hohol*, No. 2:14-CV-00041(RTR) (E.D. Wis. Jan. 14, 2014). Even where an issuer owns 50 percent or less of the voting power of a subsidiary, it must make “good faith” efforts to “use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with” the FCPA. 15 U.S.C. § 78m(b)(6).

But the jurisdictional limits of this section have not been fully tested in the courts; thus, for example, it is not entirely clear whether it would apply to a foreign non-issuer defendant who acts entirely outside the United States to knowingly falsify an issuer’s books and records. The government is likely to argue, however, that a US prosecution of such conduct would fall within established principles of extraterritorial jurisdiction, insofar as Congress clearly intended this provision to have extraterritorial reach and that the conduct at issue inherently has an impact on the United States (or the US securities market) because it involves the books and records of an issuer. See, e.g., *SEC v. Panalpina, Inc.*, No. 4:10-cv-4334 (S.D. Tex. Nov. 4, 2010) (settled enforcement action against a foreign company that paid bribes for issuers and provided inaccurate invoices to support the improper payments).

DOJ relied on the criminal prohibition on circumventing internal accounting controls and falsifying books to bring criminal charges against Siemens AG, a foreign issuer directly subject to this provision. *SEC v. Siemens Aktiengesellschaft*, No. 1:08-cv-02167 (D.D.C. Dec. 12, 2008). Specifically, Siemens AG pleaded guilty to failing to address internal controls and books and records problems in the face of information that it had grave issues with its internal controls and with accuracy in books and records as a result of its ongoing engagement in bribery. No US jurisdictional nexus was alleged. In addition, one of Siemens AG’s foreign subsidiaries, Siemens Argentina, pleaded guilty to conspiracy to knowingly falsifying and causing to be falsified the books and records of an issuer (i.e., of its parent corporation, Siemens AG), in violation of 18 U.S.C. § 371 (the conspiracy statute). To satisfy the jurisdictional requirements of a conspiracy charge,

## FAQ 14

## Who enforces the FCPA?

DOJ and the SEC have joint enforcement responsibility.

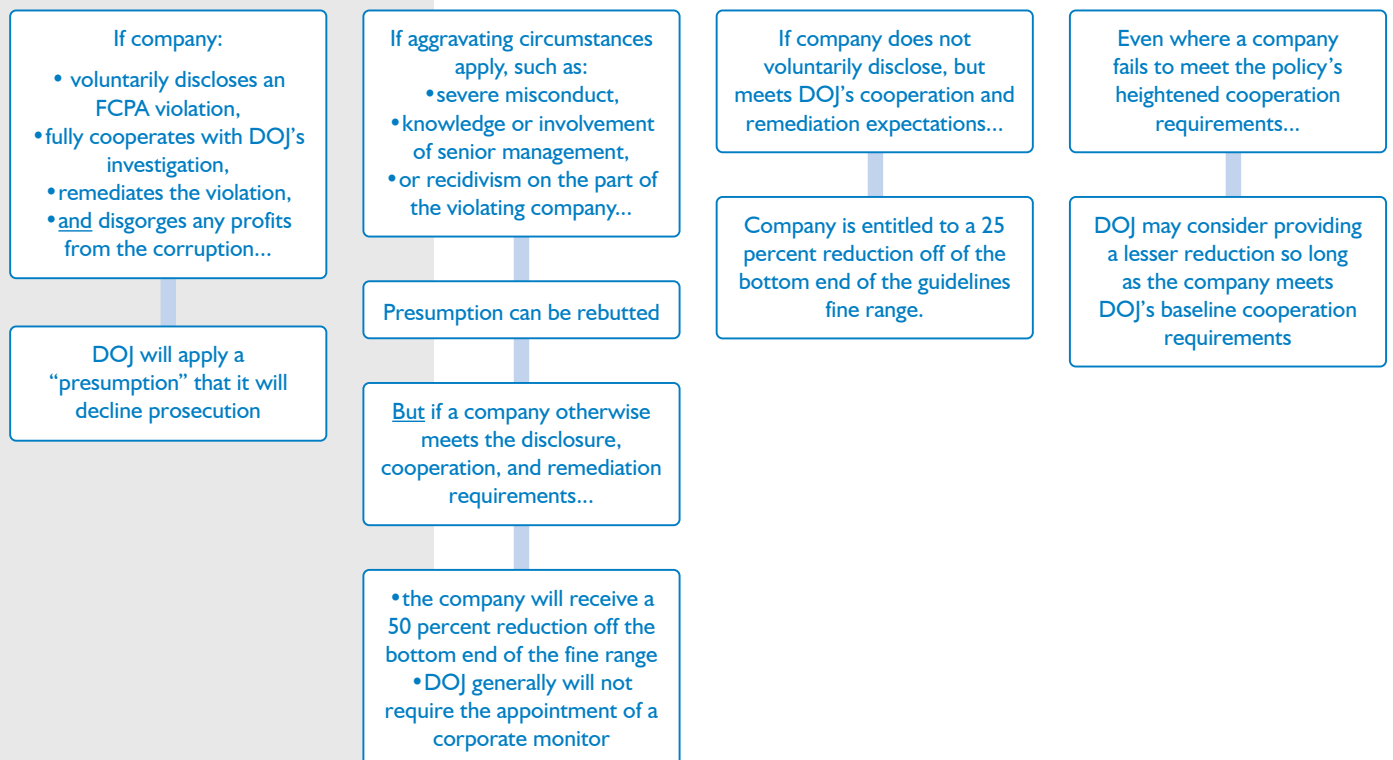
Resource Guide at 4.

- DOJ has all criminal enforcement responsibilities for violations of the anti-bribery and books and records provisions of the FCPA. *Id.* at 4.
- The SEC has civil enforcement responsibility for violations of the anti-bribery provisions committed by issuers (or agents of issuers, including individuals) and violations of the books and records provisions. *Id.* at 4-5.

DOJ alleged two meetings in the United States and a bank transfer of bribe funds that went through a US correspondent bank account. See, e.g., *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998) (the United States may prosecute an extraterritorial conspiracy if there is an overt act within the United States in furtherance of the conspiracy).

By their terms, books and records and internal controls provisions apply only to issuers – and not individuals – but individuals have been charged with either criminal or civil violations of the books and records or internal controls provisions in a number of recent cases under various theories of vicarious liability such as aiding and abetting. Individuals also can be subject to civil liability as control persons. For example, in 2018, the SEC charged two of Panasonic's former executives with knowingly circumventing Panasonic's internal auditing controls and falsifying Panasonic's books and records. *In the Matter of Paul A. Margis, Respondent*, Release No. 4003 (Dec. 18, 2018). In 2012, a former managing director of Morgan Stanley pleaded guilty to conspiracy to circumvent internal controls in connection with a scheme to bribe a Chinese official. *United States v. Garth Peterson*, No. 12-224 (JBW) (E.D.N.Y. April 25, 2012). In 2011, the former CEO of Innospec, Inc. was charged civilly with aiding and abetting violations of the books and records and internal controls provisions, circumventing internal controls, falsifying books and records, making false statements to accountants, and signing false certifications. *SEC v. Paul W. Jennings*, No. 1:11-cv-00144 (D.D.C. Jan. 24, 2011). And in 2009, two executives of Nature's Sunshine Products were charged civilly, as control persons of the company, with violations of the books and records and internal controls provisions. *SEC v. Nature's Sunshine Products, Inc., Douglas Faggioli and Craig D. Huff*, No. 09CV672 (D. Utah July 31, 2009).

## RESOLUTION OF FCPA INVESTIGATIONS



Government investigations into suspected corporate FCPA violations typically result in either a negotiated resolution between the enforcement agency and the company under investigation or a decision by the agency not to take action, often called a “declination” in cases where the enforcement agency has determined there was a violation of the law. A corporation, like an individual, could exercise its trial rights and put the government to its burden of proof, but corporations have rarely done so.

Any resolution of a potential violation other than a declination typically carries a hefty fine or civil penalty, in addition to the extensive costs associated with conducting an internal investigation and/or defending against government inquiries, harm to reputation, imposition of a compliance program meeting specific requirements (or a compliance monitor overseeing a company’s FCPA compliance program for a term of years), and the risk of imprisonment. Depending on the circumstances, resolutions of investigations may also carry collateral consequences for the company and more recent updates to that policy.

DOJ and the SEC have both asserted in speeches and other public pronouncements that voluntary disclosure and cooperation with the government’s investigation receive significant weight in their determination of an appropriate resolution. DOJ formally adopted principles related to such mitigation credit in its November 2017 FCPA Enforcement Policy.

## **I. DOJ FCPA Corporate Enforcement Policy**

DOJ’s Corporate Enforcement Policy, announced in November 2017, describes the conditions under which DOJ will confer favorable credit during the negotiation of a corporate resolution of an alleged FCPA violation.

Under the policy, DOJ will apply a “presumption” that it will decline prosecution of any company that voluntarily discloses an FCPA violation, fully cooperates with DOJ’s investigation, remediates the violation, and disgorges any profits from the corruption. As discussed in detail in the below sections, the policy defines DOJ’s expectations in each of these areas, including providing a definition of cooperation that is expressly more stringent than what DOJ requires to provide cooperation credit in other non-FCPA enforcement situations. The presumption can be rebutted by aggravating circumstances, including severe misconduct, knowledge or involvement of senior management, or recidivism on the part of the violating company.

The enforcement policy also provides for limited credit in situations where a company does not qualify for a declination under the policy. Where aggravating circumstances make a declination inappropriate but a company otherwise meets the disclosure, cooperation, and remediation requirements, the policy provides that the company will receive a 50 percent reduction off the bottom end of the fine range recommended under the federal sentencing guidelines and that DOJ generally will not require the appointment of a corporate monitor.

Where a company does not voluntarily disclose, but meets DOJ’s cooperation and remediation expectations, a company is entitled to a 25 percent reduction off of the bottom end of the guidelines fine range. Even where a company fails to meet the

policy's heightened cooperation requirements, the policy provides that DOJ may consider providing a lesser reduction so long as the company meets DOJ's baseline cooperation requirements.

The FCPA Corporate Enforcement Policy, like the 2016 FCPA pilot program on which it is based, is intended to encourage corporate self-disclosure and cooperation by making the benefits of such conduct transparent. Skeptics may suggest that the significant charging discretion possessed by prosecutors could blunt the effect of DOJ's quantification of cooperation credit and related guidance in the enforcement policy. The federal sentencing guidelines range forms the basis of any federal criminal fine from which a reduction under the enforcement policy will be calculated. The guidelines range is calculated based on scope of the wrongdoing and the facts and circumstances of a case, both of which may be subject to interpretation in any given case. In practice, this means that in some cases DOJ's discretion over the scope and factual basis of a disposition could be more important than the promised "discount" under the policy. To use an extreme example, a prosecutor seeking a \$10 million fine could resolve the case based on conduct supporting a fine of that size. Or, if a company is due a 50 percent discount under the enforcement policy, the prosecutor could seek resolution of the case based on broader or more severe conduct that supports a \$20 million fine. Even if that fine is reduced to \$10 million by the discount, the result would be the same regardless of the cooperation credit. While prosecutors will rightly note that they are bound by law, what the evidence shows, and a company's willingness to resolve a case in a negotiated manner, skeptics could equally insist that companies often have little choice but to seek a negotiated resolution and that the constraints of the enforcement policy still leaves significant play in the joints as to the resulting fine amount.

## 2. Types of Negotiated Resolutions

Broadly speaking, there are three ways that the government will resolve an FCPA investigation with a company through a negotiated resolution: (1) a non-prosecution agreement (NPA); (2) a deferred prosecution agreement (DPA); or (3) a negotiated entry of a judgment against the company, either a guilty plea for a criminal charge or, in a civil case, an administrative cease-and-desist order or entry of a civil injunctive order.

The basics of a non-prosecution and deferred prosecution agreement are the same in both civil and criminal contexts. An NPA is a letter of agreement between the government and the defendant. As part of the NPA, the defendant corporation typically must agree not to contest the relevant facts, waive the statute of limitations, and agree to certain compliance undertakings for a specific period, usually two to three years. In exchange, the government agrees not to pursue charges if the company completes the undertakings and commits no additional wrongdoing during the NPA's term.

A DPA operates much the same as an NPA, except that in a DPA the government files the agreement with a court along with formal charges against the corporation, and the case is stayed for the duration of the DPA. Generally, DOJ and the SEC reserve NPAs for cases involving less egregious conduct, though there is little practical difference between the

**FAQ 15*****Under what circumstances will DOJ or the SEC decline to take enforcement action despite finding that misconduct occurred?***

Declination decisions are highly fact-specific. DOJ's FCPA Corporate Enforcement Policy states that DOJ will decline prosecution where a company voluntarily discloses misconduct, cooperates with the investigation, remediates the issues that led to the misconduct, and disgorges any ill-gotten profits, except in cases with aggravating circumstances, such as widespread misconduct or recidivism. See FCPA Corporate Enforcement Policy, US Attorney's Manual § 9-47-120,

The SEC has issued no comparable policy, but available guidance suggests that it will similarly take disclosure, cooperation, remediation, and the severity of the conduct into account. See SEC Enforcement Manual at 26.

two types of resolutions. Both carry the critical advantage that they avoid a final judgment entered against the company of an FCPA violation.

In some cases, the agreement will require certain remediation, including improvements to a company's internal controls or the appointment of an independent compliance monitor, at the company's expense, for some period of time (typically two or three years). The independent monitor is charged with making recommendations for FCPA compliance with which the company generally must comply and with reporting the state of the company's compliance to the government. An independent monitor can be an expensive and burdensome proposition for a company subject to it. In other cases, the government will refrain from imposing an outside compliance monitor, but will require a company to self-review and self-report on its FCPA compliance for a period of time after a settlement, typically for two or three years.

The SEC has required reporting obligations in some of its negotiated resolutions rather than an appointed monitor. While different in scope from an independent monitor, this "monitor-light" requirement may nevertheless impose a significant burden. It sacrifices a measure of independence, requiring a company to provide the SEC with a detailed description of its compliance program. The review and preparation associated with the written reports likely will require a significant expenditure of corporate resources. More importantly, this new remedial measure imposes an affirmative duty to disclose both actual violations as well as any "credible evidence" of a potential FCPA violation.

Another important factor in negotiated resolutions is which entity takes the charge. Companies have typically sought to have the subsidiary that was directly involved in the misconduct, rather than the parent company, formally enter into the settlement. In other cases, parent companies have entered into a less severe resolution than a subsidiary, e.g., a parent agreeing to a DPA while the subsidiary pleads guilty, or a subsidiary entering into a settlement while the parent is not charged at all. For example, in the 2014 investigation of Hewlett-Packard's operations in Russia, Poland, and Mexico, the foreign subsidiaries each entered into settlements with DOJ, while the parent company agreed to undertakings with DOJ as part of its subsidiaries' settlements (and settled a related matter with the SEC) but entered into no criminal deal of its own. *United States v. Hewlett-Packard Polska, SP. ZO.O.*, No. 14-cr-00202 (N.D. Cal. April 9, 2014).

Such resolutions can reflect a compromise of sorts between the enforcement authorities' aggressive approach to vicarious liability through subsidiaries and corporate parent companies' insistence that they should not be responsible for the actions of rogue individuals at foreign subsidiaries.

**3. Declinations**

A declination is a decision by the enforcement authority to forgo charges notwithstanding a finding that misconduct occurred. In general, DOJ will decline to prosecute an FCPA matter if the facts and the law will not support a prosecution, or if other discretionary factors counsel against a prosecution. See *generally* Principles of Federal Prosecution of Business Organizations, US Attorney's Manual §§ 9-28.000 et seq.

As detailed above, DOJ's Corporate Enforcement Policy defines the circumstances under which DOJ will decline prosecution even if it has found otherwise prosecutable FCPA-related misconduct: a company that self-discloses the misconduct; cooperates with the investigation; remediates the circumstances that led to the violation; and agrees to disgorge ill-gotten gains will presumptively receive a declination that can be rebutted only if aggravating circumstances, such as widespread or severe misconduct, or recidivism, are present. Because this type of resolution requires the company to pay money to the SEC or DOJ, some commentators consider it to be a fourth form of negotiated resolution rather than a pure "declination."

The SEC does not have any comparable policy, but the SEC and DOJ provided some guidance on circumstances that may lead to a declination in the 2012 *Resource Guide*. The agencies offered six anonymized examples of past declinations. The examples shared several common features that largely track the commonalities among the recent declination letters:

- Either a voluntary disclosure or the provision of the results of an internal investigation to the government;
- Prompt and thorough internal investigations;
- Cooperation with the government's investigation; and
- Significant remedial action, such as improved training and internal controls and termination of employees and business partners involved in wrongdoing.

Other factors included the small size of improper payments and potential profits and the strength of the company's preexisting compliance program. See *Resource Guide* at 77-79.

#### 4. Penalties

For individuals, the penalties for a criminal violation of the FCPA include imprisonment. Individuals may be sentenced to up to five years' incarceration per violation. See 15 U.S.C. §§ 78ff(c)(1), 78dd-2(g), 78dd-3(e); 18 U.S.C § 3571. Notably, individuals cannot be held criminally liable unless they commit a "willful" violation. The term "willfully" is not defined in the FCPA, but it has generally been construed by courts to mean an act committed voluntarily and purposefully, and with a bad purpose. See *Resource Guide* at 14; see *United States v. Kay*, 513 F.3d 432, 446-51 (5th Cir. 2007). As stated by the Supreme Court in *Bryan v. United States*, 524 US 184, 191-92 (1998), "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" Both the Fifth and Second Circuits have held that, although the defendant must know generally that he was engaging in unlawful conduct, the FCPA does not require the government to prove that a defendant was specifically aware of the FCPA or knew that his conduct violated that particular statute. *Kay*, 513 F.3d at 448; *Stichting Ter Behartiging Van de Belangen Van*

**FAQ 16****How are monetary FCPA penalties calculated?**

The statute provides specific maximum penalty amounts per violation: **\$2,000,000 criminal fine and a \$16,000 civil penalty for a corporate entity.** See 15 U.S.C. §§ 78ff(c)(1), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571. In addition, a criminal fine of up to twice the gross pecuniary gain may be levied under the Alternative Fines Statute. 18 U.S.C. § 3571(d).

As a practical matter, the fact that each violation may be a separate basis for a fine gives the enforcement agencies wide discretion in setting the amount of a monetary sanction. In many corporate settlements, the final amount paid is subject to negotiation between the settling defendant and the enforcing agency.

The amount of a criminal fine imposed as a result of an FCPA violation is ostensibly based on a calculation of the recommended fine under the federal sentencing guidelines, which provide federal courts with non-binding guidance governing criminal penalties arising from federal crimes. The guidelines contain a formula for calculating a corporation's criminal fine that takes into account the nature of the crime, the amount of benefit obtained, and culpability factors such as the size of the organization, the company's policies, and involvement of senior management. See generally US Sentencing Guidelines (2018).

In many cases, following negotiation, a settling defendant will receive a "discount" off DOJ's calculation of the recommended Guidelines range. The FCPA Corporate Enforcement Policy is intended to make this discount process transparent and predictable by

*Oudaandehouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003).

Corporations, in contrast, can be held criminally liable even absent a showing of a "willful" violation, as long as there is proof of a corrupt intent. See *Resource Guide* at 14. In addition to imprisonment, violations of the FCPA's provisions can also result in significant monetary penalties for both corporations and individuals. Both DOJ and the SEC can and do regularly seek monetary sanctions in the form of criminal fines or civil penalties, respectively, on companies resolving alleged violations of the FCPA. As a practical matter, monetary sanctions can be significant, with the largest criminal fine ever paid to US authorities topping out at more than \$850 million in the 2018 Petrobras settlement. In a related resolution with the SEC, Petrobras also agreed to pay disgorgement and prejudgment interest totaling more than \$930 million, to be reduced by the amount of any payments by Petrobras under a related class action settlement.

These large monetary penalties flow from the statutory language that authorize the fines and civil penalties and the federal sentencing guidelines, which provide non-binding recommendations about the amount of a criminal fine based on various factors relating to the offense. The maximum statutory penalties per violation of the anti-bribery provisions are a \$2,000,000 criminal fine and a \$16,000 civil penalty for a corporate entity. 15 U.S.C. §§ 78dd-2(g)(1), 78dd-3(e)(1), 78ff(c)(1); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation). For individuals, the maximum criminal fine per violation is \$250,000, and the maximum civil penalty per violation is \$16,000. 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fine provisions). Because these fine amounts are per violation and many payment schemes can involve multiple technical violations, in practice the government has significant discretion in setting the fine amount, and the fine amount is subject to negotiation. In addition, a criminal fine of up to twice the gross amount of pecuniary gain may be levied under the Alternative Fines Act and federal sentencing guidelines.

There are three tiers of civil penalties for violations of the books and records provisions, depending on a series of aggravating factors. The penalties range from \$7,500 to \$160,000 per violation for individuals and \$75,000 to \$775,000 per violation for corporate entities or may be calculated based upon the gross amount of the pecuniary gain. In addition, the SEC typically seeks disgorgement of any ill-gotten gains. Violations of the books and records provisions are civil violations unless they are committed willfully, in which case they are punishable as criminal offenses. Criminal violations carry maximum penalties of a \$25 million fine per violation for entities and a \$5 million fine per violation and 20 years' incarceration for natural persons.

**5. Other Collateral Consequences**

The resolution of an FCPA investigation can also trigger collateral consequences outside the four corners of the settlement. These consequences are most likely to flow from a guilty plea or acknowledgment of criminal misconduct. For example, a criminal conviction may raise the possibility of suspension and debarment from participating in government

specifying the conditions that will lead to a reduction in penalty. See FCPA Corporate Enforcement Policy, US Attorney's Manual § 9-47-120.

The SEC has not provided formal guidance regarding the amount of a monetary penalty in any given case. In addition, the SEC often seeks disgorgement of ill-gotten gains. See generally SEC Enforcement Manual.

contracts. FCPA settlements may also draw collateral lawsuits (e.g., shareholder lawsuits) relating to the alleged misconduct.

A company considering a resolution of an FCPA investigation should carefully identify and analyze potential collateral consequences prior to entering into the agreement.

## 6. Cooperation, Voluntary Disclosure, and Remediation

In the context of the FCPA (and other corporate crime), DOJ and the SEC view "voluntary disclosure" as meaning a timely disclosure to the government of misconduct. To receive full credit, the government has stressed that a disclosure must both be made soon after the company discovers the wrongdoing and must not be delayed until the government's own discovery of the wrongdoing is otherwise imminent. In such circumstances, DOJ or the SEC may not view the disclosure as voluntary.

DOJ and the SEC encourage companies to come forward with violations of the FCPA and promise leniency in exchange. They write in the *Resource Guide*, for example, that they "place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters." *Resource Guide* at 54.

In recent enforcement actions and other public statements, both DOJ and the SEC emphasized the credit they gave to companies that self-disclosed their misconduct; conversely, they also pointed out that companies that did not self-disclose would receive harsher penalties and, at least with the SEC, may lose the ability to earn any cooperation credit.

Recent DOJ guidance and its Corporate Enforcement Policy, discussed above, reflect an effort to further quantify the potential benefits from cooperation, disclosure, and remediation: if a company meets certain requirements in all three categories, DOJ will either decline prosecution or grant a 50 percent reduction off the bottom-end of DOJ's calculation of the federal sentencing guidelines range. If a company cooperates and remediates but fails to self-disclose, DOJ will grant a 25 percent reduction.

Our analysis of recent FCPA settlements with both DOJ and the SEC confirms that there is an observable reduction in the monetary penalty for corporations that are given full disclosure credit compared to companies engaged in similar conduct that are not given that credit.

Nonetheless, the rewards of voluntary disclosure in the FCPA context are not as clear-cut as those under certain other programs, such as DOJ Antitrust Division's amnesty program, which can confer amnesty on a company that is "first in" to report participation in illegal antitrust activity.

Whether voluntary disclosure is advisable in any given situation is highly fact-specific. As noted above, self-reporting companies likely receive some additional benefit, but often it is not clear how much. A company that makes a voluntary disclosure is more likely to obtain a deferred or non-prosecution agreement than a company that does not disclose.

**FAQ 17****Are there benefits to voluntary disclosure?**

Yes, but the extent of the benefits is highly fact-specific. DOJ and the SEC encourage companies to make voluntary disclosures of wrongdoing and promise that such self-reporting will be rewarded with a lesser penalty. Our analysis of recent settlements reflects that there has been an observable benefit to self-disclosure, though the extent of the benefit is difficult to quantify as many other factors may affect the ultimate size of a penalty and the nature of any resolution.

The benefits to voluntary disclosure must be weighed against the potential downsides to disclosure, including possible public disclosure of an ongoing investigation and the possibility of additional investigation directed by the government following any disclosure.

But there may be many circumstances in which such an agreement will not be afforded even though there has been a disclosure. And, while preferable to a guilty plea, deferred or non-prosecution agreements do not provide ironclad insulation against future criminal prosecution. Indeed, a 2008 FCPA prosecution came about because the company – Aibel Group Ltd. – was found to have violated an earlier FCPA deferred prosecution agreement from 2004. *United States v. Aibel Group Ltd.*, No. H-07-05-S (S.D. Tex. Nov. 12, 2008). Furthermore, voluntary disclosure does not guarantee protection against substantial monetary penalties.

There can also be significant additional downsides to voluntary disclosures. First, they frequently result in potential FCPA violations becoming public before they are resolved, often through SEC filings that are reported in the press. Such publicity can lead to shareholder suits and reputational damage. Second, self-reporting can increase a company's legal costs as a result of the ensuing DOJ or SEC investigation into the disclosed misconduct.

DOJ and the SEC typically require additional investigation in the wake of a disclosure, sometimes encompassing business units or geographic areas well beyond those involved in the potential violations initially identified and disclosed. Indeed, in its 2014 settlement with Bruker Corporation, the SEC specifically cited, as an example of the company's cooperation, the fact that it had expanded the scope of its internal investigation at the agency's request. Because disclosure typically will not be rewarded without cooperation with the following investigation, a decision to voluntarily disclose should be made in light of the potential costs associated with cooperation.

Cooperation, like voluntary disclosure, entails promised benefits along with significant potential costs. As with voluntary disclosure, DOJ and the SEC have extolled the virtues of cooperation and emphasized that it can play an important factor in a favorable resolution. Indeed, many corporate resolutions attribute a modest fine amount in part to the defendant's cooperation. Our analysis of past DOJ resolutions likewise confirms that there is some benefit in that companies who received formal cooperation credit under the federal sentencing guidelines often receive a further "discount" below the recommended fine.

Of course, the potential benefits of cooperation must be weighed against the related drawbacks. First, cooperation can be costly. DOJ and the SEC have set a high bar for cooperation in FCPA cases, frequently citing cooperation as including resource-heavy undertakings, such as creating topical collection of documents, providing translation of foreign language document, making internationally based witnesses available, and providing real-time updates to the government. DOJ's FCPA Corporate Enforcement Policy explicitly recognizes that these expectations exceed the cooperation DOJ ordinarily requires of corporate defendants in order to receive cooperation credit in other matters.

Second, cooperation can enhance the disruptive impact of the investigation. Especially since DOJ announced its focus on individual criminal liability in corporate cases in the 2015 Yates Memo, DOJ (and to a lesser extent the SEC) have made identifying individual wrongdoers and developing evidence against them explicit requirements of cooperation.

**FAQ 18****What counts as “cooperation” with the government investigation?**

There is no magic formula for cooperating, but recent DOJ and SEC pronouncements and resolutions, including the FCPA Corporate Enforcement Policy, identify a number of concrete steps a company under investigation can take for which the government may give cooperation credit:

- Timely self-reporting of misconduct;
- Providing real-time reports about findings of the company’s internal investigation, including making proactive (rather than reactive) disclosures to the government;
- Making overseas witnesses available;
- Attributing facts to specific sources, if consistent with the attorney-client privilege;
- Voluntarily producing relevant documents;
- Translating foreign-language documents;
- Providing topical collections of documents;
- Preparing and producing factual chronologies;
- Conducting voluntary risk assessments or reviews of other areas of the company’s business;

While in some circumstances, a company may feel victimized by a perpetrator of misconduct and be perfectly willing to aggressively assist in her prosecution, there are other circumstances where a company may have legitimate concerns about developing evidence for the prosecution of its employees. Individual employees also may be less willing to cooperate in an internal investigation knowing that it is undertaken in part with the purpose of identifying evidence to prosecute a fellow employee.

Third, cooperation can also entail risk in waiving attorney-client privilege or work product protections over an internal investigation and the materials generated during it. Although both DOJ and the SEC insist that they will not ask companies to waive privilege, both often make requests that could risk a waiver if not handled carefully, such as requests for witness interview downloads or attribution of facts to specific sources. Moreover, the courts, not DOJ or the SEC, will decide whether a company’s cooperation waived privilege in the context of potential collateral litigation.

Notwithstanding the above risks, however, most companies have found that once FCPA-related misconduct comes to the attention of authorities, they have little choice but to attempt to cooperate to the government’s satisfaction. The length of and disruption caused by an investigation conducted entirely by the government without a company’s assistance, along with the draconian penalties available to the government where a resolution is not the product of cooperation or negotiation, are typically more than sufficient motivation for a company to choose the cooperation path instead.

As with cooperation, adequately remediating an FCPA violation can be a difficult endeavor. In settlement papers that have discussed remediation, DOJ and the SEC have each commended companies that have improved their compliance programs and taken appropriate steps to discipline the employees involved in the misconduct. But what constitutes as adequate remediation is highly case-specific.

As DOJ’s 2016 settlement with Embraer shows, DOJ can have very specific actions in mind when the time comes for rewarding remedial measures. In announcing the Embraer settlement, DOJ acknowledged that the company had disciplined several employees but faulted the company for incomplete remediation because it failed to discipline a senior executive who was aware of bribery discussions over email and was responsible for overseeing the employees involved in those discussions. As a result, DOJ gave Embraer only partial credit for remediation.

Although DOJ and the SEC have made clear that an adequate compliance program must be tailored to the company’s specific circumstances and risks, recent statements have further described their expectations as to an effective compliance regime.

The *Resource Guide* identifies seven “hallmarks” of an effective FCPA compliance regime:

- Commitment from senior management and a clearly articulated policy against corruption;
- Code of conduct, policies, and procedures that clearly prohibit corruption;

- Assisting the government in overcoming challenges posed by foreign data privacy laws and blocking statutes;
- Providing evidence regarding the individuals involved in the misconduct; and
- Providing all known facts relevant to potential third-party criminal activity.

See FCPA Corporate Enforcement Policy, US Attorney's Manual § 9-47-120.

The FCPA Corporate Enforcement Policy reflects that these expectations for cooperation exceed the requirements provided for corporate cooperation credit in other criminal matters.

Beyond the FCPA realm, DOJ has also announced a general policy that providing relevant information about all individuals substantially involved in or responsible for misconduct is a prerequisite to receiving any cooperation credit. See Principles of Federal Prosecution of Business Organizations, US Attorney's Manual § 9-28.720.

- Responsibility invested in an executive with adequate "oversight, autonomy, and resources";
- A risk-based approach;
- Training and other communication sufficient to ensure knowledge of the policy;
- Incentives and disciplinary measures to ensure compliance with the policy; and
- Performing third-party due diligence.

See *Resource Guide* at 57-60.

In February 2017, DOJ's Fraud Section, which is the DOJ component responsible for FCPA enforcement, provided further information on how it will evaluate the effectiveness of a compliance program. The Fraud Section released a paper reiterating that the assessment of a corporate compliance program is highly individualized and depends on a company's particular activities and risk profile, but identifying 11 categories of questions that it will ask when evaluating a company's compliance program:

1. Analysis and remediation of underlying conduct, including the company's root cause analysis of the misconduct, prior indications of the misconduct, and remediation;
2. Involvement of senior and middle management in encouraging or discouraging the type of misconduct that occurred and demonstrating commitment to compliance;
3. Autonomy and resources of the compliance department, including the compliance function's stature within the company, the experience and qualifications of compliance personnel, and the funding and resources of the compliance department;
4. Strength of the company's compliance policies and procedures, including the company's process for designing and implementing new policies;
5. Methodology and effectiveness of the company's risk assessment process;
6. Compliance training and communication, including the provision of tailored training for high-risk and control employees, whether or not the training has been offered in the form and language appropriate for the audience, and the resources that are available to employees to provide guidance to employees regarding compliance policies;
7. Effectiveness of the company's reporting mechanism and the scope and effectiveness of compliance-related investigations;
8. Disciplinary actions taken in response to misconduct, including whether managers were held accountable for misconduct that occurred under their supervision, and the way that the company incentivizes compliance;

**FAQ 19****What counts as “remediation” of a violation or potential violation of the FCPA?**

DOJ has identified a number of factors as relevant to its assessment of remedial actions, including many that are focused on ongoing compliance, such as whether the company:

- Demonstrated thorough analysis of the root cause of the misconduct;
- Has an established culture of compliance, including an awareness among employees that criminal conduct is not tolerated;
- Dedicates sufficient resources to compliance, including maintaining experienced and adequately compensated compliance personnel;
- Maintains an independent compliance function;
- Performs an effective risk assessment and tailors its compliance program based on the assessment;
- Performs regular audits of its compliance function;
- Maintains an appropriate reporting structure for compliance personnel within the company;
- Appropriately compensates and promotes compliance personnel within the company as compared to other employees;

9. Continuous improvement, periodic testing, and review, including internal audit work and the company’s use of control testing;
10. Management of third-party risks, including due diligence performed on third parties to identify red flags; and
11. Risks related to M&A activities, including whether misconduct was identified during the pre-M&A due diligence process and how the company’s compliance function has been integrated into the M&A process.

**OTHER FEDERAL STATUTES THAT OFTEN APPLY TO FOREIGN CORRUPTION**

A number of other federal criminal statutes can apply to foreign bribery, including:

- **Money Laundering Statutes.** The federal money laundering statutes make it a felony to conduct a financial transaction knowing that the funds are the proceeds of “specified unlawful activity.” 18 U.S.C. § 1956(a)(1). The term “specified unlawful activity” expressly includes “any felony violation of the Foreign Corrupt Practices Act.” *Id.* at § 1956(c)(7)(D). Accordingly, financial transactions that involve the proceeds of an FCPA violation (e.g., profits derived from an illicit payment) or improper payments to an agent that aid or abet money-laundering activities under 18 U.S.C. § 2, may give rise to criminal liability beyond that imposed by the FCPA itself.
- **Mail and Wire Fraud.** DOJ also has used the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to prosecute foreign bribery. These statutes are extremely broad and can apply in certain circumstances to conduct not reached by the FCPA.
- **The Travel Act.** The Travel Act, 18 U.S.C. § 1952, prohibits the use of foreign travel or the instruments of interstate commerce to further “unlawful activity,” including activity made criminal by the state in which the offense was committed. Because many states prohibit commercial bribery, the Travel Act, unlike the FCPA, often reaches foreign commercial bribery.

Several 2019 developments discussed below reflect the scope of US anti-corruption enforcement relying on statutes other than the FCPA.

- Appropriately disciplines employees for violations and has a disciplinary system that allows for disciplining supervisors who oversee individuals responsible for misconduct;
- Allows for compensation to be altered based on disciplinary infractions or a failure to adequately supervise;
- Considers any additional steps necessary to signal the importance of accepting responsibility for misconduct and measures to reduce misconduct risks; and
- Appropriately maintained business records and prohibited improper destruction of such records.

DOJ highlighted certain of these factors in its 2017 FCPA Corporate Enforcement Policy. See FCPA Corporate Enforcement Policy, US Attorney's Manual § 9-47-120.

## FAQ 20

### **Does cooperation require waiving attorney-client privilege?**

No. Both DOJ and the SEC have policies that they will not compel a company to waive privilege. Principles of Federal Prosecution of Business Organizations, US Attorney's Manual § 9-28.710; SEC Enforcement Manual at 69-71. Nonetheless, cooperation often involves some communication about the findings of the company's internal investigation, which must be handled with care to avoid inadvertent waiver of privilege or work product protections.

## SPEECHES AND POLICIES: A LOOK AT WHAT US REGULATORS ARE SAYING AND DOING

### **New Memorandum and Questionnaire Regarding a Company's Inability to Pay**

In October 2019, AAG Benczkowski issued a memorandum (the Inability to Pay Memorandum) addressing situations in which a company claims that it is unable to pay a criminal fine or monetary penalty. The memorandum was accompanied by a questionnaire for prosecutors to use when assessing such claims.<sup>4</sup> In his speech announcing the new memorandum, AAG Benczkowski remarked that it filled a gap in the US Sentencing Guidelines, explaining that DOJ wanted companies to both "know what we consider to be a legitimate inability to pay argument" and understand "the facts and arguments that won't be given credence."<sup>5</sup>

The Inability to Pay Memorandum instructs Criminal Division lawyers to recommend an adjustment to a monetary penalty if they find that a company is unable to pay an otherwise appropriate amount, but only if the adjustment is necessary "to avoid (1) threatening the continued viability of the organization and/or (2) impairing the organization's ability to make restitution to victims."<sup>6</sup> The memorandum lists four factors for prosecutors to consider in determining whether a company is in fact unable to pay, including the company's current financial condition, alternative ways for the company to pay the penalty, collateral consequences, and victim restitution. Prosecutors' analysis is to be aided by the company's responses to a form questionnaire that is appended to the Inability to Pay Memorandum. The questionnaire makes eleven categories of broad requests of the subject company, including five years of audited financial statements and tax returns, operating budgets and expenditures, acquisition and divestiture plans, and related company transactions. Importantly, the Inability to Pay Memorandum also lists a handful of factors prosecutors should *not* consider, such as adverse impacts on the company's growth, future dividends, and future executive compensation, which may nonetheless be important to a company considering making a claim that a penalty is too high to pay.<sup>7</sup>

### **Updates to the FCPA Corporate Enforcement Policy's Disclosure Requirement**

DOJ again stressed the value of companies' voluntarily disclosing misconduct and announced slight modifications to its existing Corporate Enforcement Policy. Under that policy – which had originally been implemented as a pilot program in April 2016 and was formally adopted in November 2017 – companies can receive specific benefits if they self-disclose misconduct in a timely fashion, cooperate fully with law enforcement, and remediate. Benefits range from a reduction in the applicable sentencing guidelines to a presumption of declination.<sup>8</sup>

In November 2019, DOJ announced three modifications to the self-disclosure requirement.

## FAQ 21

**Can a US company engage in foreign bribery if it does not involve the bribing of a foreign official?**

No. Although that conduct is not prohibited by the FCPA, other federal criminal statutes, including the Travel Act and the mail and wire fraud statutes, likely would apply to it. See 18 U.S.C. §§ 1952, 1341, 1343. The 2015 FIFA indictments for corrupt payments involving the international soccer organization show that US law enforcement can and will use other federal criminal statutes to investigate and prosecute alleged international wrongdoing, such as commercial bribery, outside the reach of the FCPA. Press Release, Dep't of Justice, *Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015)*.

<sup>4</sup> Dep't of Justice Criminal Div., Memorandum from Brian A. Benczkowski, Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty (Oct. 8, 2019), <https://www.justice.gov/opa/speech/file/1207576/download> (hereinafter "Inability to Pay Memorandum").

<sup>5</sup> Dep't of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the Global Investigations Review Live New York (Oct. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations>.

<sup>6</sup> Inability to Pay Memorandum.

<sup>7</sup> Inability to Pay Memorandum.

<sup>8</sup> US Dep't of Justice, Justice Manual § 9-47.120(1).

<sup>9</sup> *Id.* at § 9-47.120(3)(b).

First, DOJ revised previous language requiring that a company alert DOJ to potentially relevant evidence not in the company's possession as soon as it "is or should be aware" of the evidence. The new language eliminates "or should be"; the provision now only requires a company to alert DOJ when it actually becomes aware of opportunities to obtain additional evidence outside the company's control.<sup>9</sup>

Second, DOJ updated language that had required companies to disclose "all relevant facts about all individuals substantially involved in or responsible for the violation of law." The new language eases this obligation, requiring instead that companies disclose "all relevant facts known to it at the time of disclosure," including "as to any individuals substantially involved in or responsible for the misconduct at issue."<sup>10</sup> The change thus specifies that a company's disclosure must include all information known to it at the time; a footnote states that DOJ "recognizes 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."<sup>11</sup> In addition, the new language clarifies that companies need not have made the determination that individuals were responsible for an actual "violation of law;" rather, they should report individuals' involvement in the "misconduct at issue."

Third, DOJ clarified that a presumption of declination is still available to recently merged companies that discover misconduct "by [a] merged or acquired entity," so long as the disclosure is prompt and the other requirements are met. Further, the new policy states in a footnote that, in the case of acquisitions, the acquiring company may receive a presumption of declination even where the acquired company's conduct involves aggravating circumstances.<sup>12</sup>

## Update to the FCPA Corporate Enforcement Policy's Discussion of Messaging Platforms

DOJ also made a slight modification to the guidance relating to the "timely and appropriate" remediation of FCPA violations. An earlier rule had required companies to prohibit employees "from using software that generates but does not appropriately retain business records or communications." The revised policy, announced in March 2019, softens the ban, instead requiring companies to implement "guidance and controls" to limit the use of "ephemeral messaging platforms" that could result in destruction or deletion of business records.<sup>13</sup>

<sup>10</sup> *Id.* at § 9-28.700(A) (emphasis added).

<sup>11</sup> *Id.* at § 9-47.120(4) n.1.

<sup>12</sup> *Id.* at § 9-47.120(4) n.3; see also Dep't of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national>.

<sup>13</sup> US Dep't of Justice, Justice Manual § 9-47.120(3).

<sup>14</sup> Dep't of Justice, Deputy Attorney General Rod J. Rosenstein Delivers Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement> (hereinafter "March 7, 2019 Remarks of DAG Rosenstein").

<sup>15</sup> *Id.*

<sup>16</sup> Dep't of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national> (hereinafter "March 8, 2019 Remarks of AAG Benczkowski").

<sup>17</sup> Dep't of Justice, Deputy Assistant Attorney General Matthew S. Miner Delivers Remarks at the 6th Annual Government Enforcement Institute (Sept. 12, 2019), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-delivers-remarks-6th-annual-government>.

<sup>18</sup> Dep't of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the Global Investigations Review Live New York (Oct. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations>.

## DOJ / SEC Speeches and Remarks

In speeches throughout 2019, DOJ and SEC officials signaled continuity in their approach to enforcing the FCPA, emphasizing many of the same themes about which they spoke in 2018, including:

- An emphasis on accountability for individual wrongdoers;
- The importance of a law enforcement-private sector partnership; and
- The challenges and opportunities of international coordination.

In addition, a recent speech addressed DOJ's approach to agency theory in the wake of the *Hoskins* decision.

### Individual Accountability

In 2020, DOJ officials again touted their emphasis on individual accountability for corporate criminal violations, including FCPA violations. That priority, which had been announced by former Deputy Attorney General (DAG) Sally Yates in 2015, has been reemphasized by DOJ under the new administration. In a March 7, 2019 Keynote Address on FCPA Developments, former DAG Rod Rosenstein stated that DOJ would focus enforcement efforts on the most culpable wrongdoers: those who "devised and authorized criminal schemes."<sup>14</sup> He added that he believed holding individuals accountable is the "most effective deterrent to corporate criminal misconduct,"<sup>15</sup> echoing a statement that had been made by Assistant Attorney General Benczkowski in a speech to the ABA White Collar Crime Conference just one day earlier.<sup>16</sup> Later in the year, Deputy Assistant Attorney General (DAAG) Matthew Miner reiterated that DOJ remained focused on individual accountability, illustrating the point by citing a nearly 37 percent increase in prosecutions of individuals by the Fraud Section, from 309 in 2017 to 422 in 2018.<sup>17</sup> In October 2019, AAG Benczkowski stated that DOJ's Criminal Division was on track to surpass its individual enforcement benchmarks from the previous year.<sup>18</sup>

### Partnership with the Private Sector

DOJ also maintained another theme from 2018, repeatedly calling for a "partnership" approach between law enforcement and corporations. In the same March 2019 speech, former DAG Rosenstein said that "[c]orporate America should regard law enforcement as an ally."<sup>19</sup> Or, as AAG Benczkowski put it in an October 2019 speech at GIR Live New York, "[t]he interests of prosecutors and businesses are inextricably aligned when it comes to rooting out corporate crime."<sup>20</sup>

In part, this reflects DOJ's recognition of its own limitations and the belief that a better relationship with corporate America could deter crime and allow DOJ to focus on the most problematic companies and individuals. As DAG Rosenstein said in his remarks in March 2019, the incentives provided by the Corporate Enforcement Policy allow DOJ to focus its "limited" resources on culpable individuals and corporate scofflaws.<sup>21</sup> Similarly, as

<sup>19</sup> March 7, 2019 Remarks of DAG Rosenstein.

<sup>20</sup> October 8, 2019 Remarks of AAG Benczkowski.

<sup>21</sup> March 7, 2019 Remarks of DAG Rosenstein.

<sup>22</sup> October 8, 2019 Remarks of AAG Benczkowski.

<sup>23</sup> March 7, 2019 Remarks of DAG Rosenstein.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> October 8, 2019 Remarks of AAG Benczkowski.

<sup>27</sup> March 7, 2019 Remarks of DAG Rosenstein.

<sup>28</sup> Dep't of Justice, 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-delivers-remarks-american-bar-association> (hereinafter "June 27, 2019 Remarks of DAAG Miner").

<sup>29</sup> *Id.*

<sup>30</sup> March 7, 2019 Remarks of DAG Rosenstein.

<sup>31</sup> June 27, 2019 Remarks of DAAG Miner.

<sup>32</sup> *Id.*

<sup>33</sup> Securities and Exchange Comm'n, Chairman Jay Clayton Remarks to the Economic Club of New York (Sept. 9, 2019), <https://www.sec.gov/news/speech/speech-clayton-2019-09-09>.

AAG Benczkowski recognized in his October 2019 speech, DOJ's policy updates over the past several years have been aimed "to incentivize companies to prevent on the front end the very problems we would have to prosecute on the back end."<sup>22</sup>

Although many have read such statements as a signal DOJ will take a more lenient approach with corporate offenders, DOJ officials warned against that interpretation. DAG Rosenstein addressed the public perception that DOJ's policy changes early in the current administration had "gone soft" on corporate crime, stating that such critics "miss the point."<sup>23</sup> That said, he contrasted seeking to obtain record settlements as a result of enforcement action with a more "reasonable" approach, designed to "make the punishment proportional to the violation."<sup>24</sup> He reasoned that prior approaches had done little to deter criminality and pushed for an approach that emphasized cooperation, believing that the "safest communities are self-policing" and do not require "continual government enforcement."<sup>25</sup> As AAG Benczkowski explained, in furtherance of that goal, DOJ strives to create "the right incentives for responsible corporate behavior" and to "be as transparent and consistent as possible" about its enforcement criteria so that "rational decision-makers" will engage in responsible corporate behavior.<sup>26</sup>

### International Coordination

DOJ leadership also continued to emphasize the importance of coordinating its investigations with other countries, both in investigations and in resolutions. In numerous instances, DOJ officials celebrated the cooperation received from other countries investigating FCPA violations, including in remarks by DAG Rosenstein which called out cooperation with Switzerland and the Cayman Islands, calling it "essential" to FCPA enforcement efforts.<sup>27</sup> Likewise, in a speech given in June 2019, DAAG Miner referred to a recent investigation involving cooperation from authorities in Brazil, the United Kingdom, Monaco, Italy, Australia, France, and Switzerland and called such international cooperation an "absolute necessity" in fighting corruption.<sup>28</sup> Moreover, when resolving investigations with other regulators and law enforcement agencies, DOJ frequently cited the benefits of its May 2018 Coordination Policy (or "Anti-Piling On" Policy). For example, in his June 2019 speech, DAAG Miner spoke of the certainty the policy provides to executives facing the prospect of resolutions across multiple jurisdictions.<sup>29</sup> And former DAG Rosenstein warned that a lack of coordination among government agencies resulting in multiple penalties for the same conduct is counterproductive, as it "deprives the company of the certainty and finality available through a settlement."<sup>30</sup>

But both DOJ and the SEC recognized that challenges remain. For example, in a speech to the American Bar Association in June 2019, DAAG Miner addressed situations in which companies may want to produce documents to DOJ to obtain cooperation credit, but they cannot do so without violating a data protection law or blocking statute. He explained that DOJ expects a cooperating company to work within applicable laws to find legal ways of transferring data to the United States, but if the company concludes it cannot, DOJ expects the company to "show their work" and provide "a detailed explanation as to why."<sup>31</sup> He recognized that companies may face direct conflicts between the laws in which they do business and the United States and said that "Just as we expect companies and individuals to obey US law, we also will not ask a company to break foreign law."<sup>32</sup>

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<sup>34</sup> Dep't of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act, (Dec. 4, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference>.

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<sup>35</sup> *Id.*

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<sup>36</sup> *Id.*

The SEC, meanwhile, identified a separate challenge for US companies doing business in other countries as a result of the uneven playing field. In remarks to the Economic Club of New York in September 2019, SEC Chairman Jay Clayton lamented the lack of progress in international cooperation in fighting corruption. Although he said he did not intend to change the enforcement approach of the SEC to the FCPA, he recognized that the United States was “acting largely alone,” resulting in other countries’ adopting “strategies that take advantage of our laudable efforts.”<sup>33</sup>

### Agency Theory

On December 4, 2019, AAG Benczkowski announced that DOJ would not take the position that agency could be established by mere corporate ownership. The remarks came in the context of a November 2019 case out of the District of Connecticut, *United States v. Hoskins*, in which an individual was found guilty of FCPA violations committed by his employer’s subsidiary.<sup>34</sup> In his speech, AAG Benczkowski said that DOJ “is not looking to stretch the bounds of agency principles beyond recognition, or even push the FCPA statute towards its outer edges.”<sup>35</sup> Rather, DOJ recognized that not every subsidiary, joint venture, or affiliate of a parent company was necessarily its agent, and DOJ would make individualized determinations about whether the agency principle was appropriate in a given case. However, AAG Benczkowski warned against “the use of corporate structures to shield a parent company from criminal liability, or the use of agents to shield a high-level executive from accountability,” noting that DOJ would favor prosecution in such situations.<sup>36</sup>

## 2019 DECLINATIONS UNDER DOJ'S CORPORATE ENFORCEMENT POLICY

***In 2019, DOJ publicly announced two declinations and a number of non-declination resolutions. Examining these cases together provides insight into what DOJ considers to be acceptable voluntary disclosure and complete cooperation.***

- DOJ continues to make efforts to communicate that companies can enjoy a real benefit from prompt, voluntary self-disclosure and full cooperation, as articulated in the FCPA Corporate Enforcement Policy.
- Comparing the cases DOJ declined to prosecute to the cases that had non-declination resolutions in 2019 provides companies with insight into what DOJ considers to be acceptable voluntary disclosure, cooperation, and remediation.

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DOJ's FCPA Corporate Enforcement Policy (the Policy) lays out four prerequisites for a presumption of declination under the FCPA Corporate Enforcement Policy:

- Reasonably prompt and voluntary self-disclosure;
- Full cooperation with the government's investigation;
- Remediation to address the root causes of the misconduct at issue; and
- Disgorgement of ill-gotten gains.

The Policy further states that the presumption of declination applies only in the absence of "aggravating circumstances," which may include (1) executive management involvement in or knowledge of the misconduct; (2) significant profit resulting from the misconduct; or (3) repeated violations.

DOJ publicly announced two declinations under the policy, and a number of non-declination resolutions, in 2019.

***Cognizant Technology Solutions Corporation.*** The first declination, involving Cognizant Technology Solutions Corporation, was announced on February 13, 2019, by the Fraud Section and the US Attorney's Office for the District of New Jersey. According to DOJ's declination letter, Cognizant authorized its agent, a third-party construction company, to pay approximately \$2 million in bribes to Indian government officials in order to secure and obtain a permit necessary for the development of an office park in Tamil Nadu, India. The declination also refers to other "improper payments in connection with other projects in India," the details of which are unspecified.

In its letter announcing the declination, DOJ explained that, “[d]espite the fact that certain members of senior management participated in and directed the criminal conduct at issue” – an aggravating factor that generally nullifies the presumption of declination – DOJ had elected to decline to prosecute based on the following facts:

- **Self-disclosure:** Cognizant voluntarily self-disclosed the conduct within two weeks of its board’s learning about it, which allowed DOJ to conduct an independent investigation and identify individuals responsible for the misconduct. Indeed, soon after the declination, DOJ announced charges against Cognizant’s former president and former chief legal officer. Assistant Attorney General Brian Benczkowski later noted in public remarks that the promptness of the disclosure was the primary basis for declination, for exactly that reason. See Dep’t of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference (Mar. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national>.
- **Cooperation:** Cognizant cooperated fully and proactively with the government in its investigation, including by conducting its own “thorough and comprehensive” investigation in support of its cooperation. The company provided “all known relevant facts about the misconduct” and agreed to continue to cooperate in DOJ’s ongoing investigation.
- **Remediation:** Cognizant took steps to enhance its compliance program and internal accounting controls; the company also terminated or disciplined employees and contractors involved in the misconduct. The letter also noted that Cognizant had a preexisting compliance program that was effective.
- **Disgorgement:** Cognizant agreed to “disgorge the full amount of its cost savings from the bribery,” which amounted to more than \$19 million. This was in addition to – and separate from – the company’s civil penalty of \$6 million, which it paid to the SEC.

DOJ also highlighted Cognizant’s lack of prior criminal history as a reason for declination.

**Quad/Graphics, Inc.** The second declination in 2019, involving Quad/Graphics Inc., was announced on September 19, 2019, by the Fraud Section and the US Attorney’s Office for the Eastern District of Wisconsin. According to the declination letter, Quad/Graphics’ subsidiaries in Peru and China bribed government officials over the course of about five years (from 2011-2016 and from 2010-2015, respectively). Specifically, Quad/Graphics’ Peruvian subsidiary paid or promised to pay intermediaries over \$1 million, which was then used, at least in part, to bribe government officials in order to secure printing contracts, minimize penalties for delayed execution of prior contracts, and minimize tax payments. In China, Quad/Graphics’ subsidiary bribed employees of state-owned entities to secure printing contracts. In its letter announcing the declination, DOJ emphasized the following facts:

- Self-disclosure: The company voluntarily self-disclosed the misconduct to DOJ soon after learning of it in 2016.
- Cooperation: Quad/Graphics conducted its own “thorough and comprehensive investigation,” fully and proactively cooperated in DOJ’s investigation, and agreed to continue to cooperate in DOJ’s ongoing investigation or any future prosecutions.
- Remediation: The company enhanced its compliance program, terminated employees involved in the misconduct, and discontinued relationships with the third parties in China involved in the misconduct.
- Disgorgement: Quad/Graphics agreed to disgorge the full amount of its illicit profits. Separately, under a settlement with the SEC, the company agreed to pay a civil penalty of \$2 million.

As in *Cognizant Technology Solutions*, DOJ also noted Quad/Graphics’ lack of prior criminal history; it further noted that consideration of the “nature and seriousness of the offense” counseled in favor of declination.

## US NON-DECLINATIONS

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***In 2019, DOJ resolved FCPA cases against nine corporations. Seven of these were done through criminal resolutions in which DOJ recovered over \$1.6 billion (DOJ and the SEC jointly collected approximately \$2.65 billion). Seventy percent of that recovery resulted from two enforcement actions alone – Ericsson (\$1.06 billion) and MTS (\$850 million).***

***DOJ also brought more individual actions than ever before, resulting in charges against 34 individuals. In 2019, there were four jury trials for individuals charged with violating the FCPA, three of which resulted in guilty verdicts (the other resulted in an acquittal).***

***These resolutions covered a broad geographic area – Europe, Latin America, Sub-Saharan Africa, India, North Africa, and Russia – and a wide swath of industries – telecommunications, medical devices, retail sales – although the biggest settlements, by far, were in the telecommunications space.***

- In 2019, most companies entering into settlement agreements with DOJ or the SEC are still see a sentencing discount of approximately 25 percent off of DOJ guidelines.<sup>37</sup>
- In a departure from traditional prosecutions of corporate leadership, DOJ brought more cases against individuals than it has in previous years, including against lower-level employees.
- There was a marked increase in the number of agreements imposing monitorships (four in 2019 compared to one in 2018), despite a similar total number of cases (nine in 2019, eight in 2018).
- DOJ and the SEC continued, and even increased, their cooperation with foreign authorities.<sup>38</sup>

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FCPA enforcement activity was robust in 2019. DOJ brought over forty FCPA actions, nine of which were resolutions with corporate defendants. Of those, seven were resolved via non-prosecution or deferred prosecution agreements, including several high-profile cases – Mobile TeleSystems, PJSC; Fresenius Medical Care AG & Co. KGaA; Walmart, Inc; Microsoft Corporation; and Telefonaktiebolaget LM Ericsson – which together accounted for over \$1.6 billion in payments to DOJ. Of these five non-declinations, four imposed corporate monitorships, which ranged from two to three years.

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<sup>37</sup> For example, in March 2019, Mobile TeleSystems, PJSC entered into a deferred prosecution agreement and received a 25 percent discount, and in June 2019, Walmart entered into a non-prosecution agreement and received a 25 percent discount for their subsidiaries in Brazil, China, and India. However, for their subsidiaries in Mexico, they only received a 20 percent discount because, according to DOJ, they failed to provide documents in a timely manner.

<sup>38</sup> See, e.g., Press Release, Dep't of Justice No. 19-200: 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-teleystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department> (cooperation with Austria, Belgium, Cyprus, France, Ireland, Isle of Man, Latvia, Luxembourg, Norway, the Netherlands, Switzerland, Sweden, and the United Kingdom); Press Release, Dep't of Justice No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019), <https://www.justice.gov/opa/pr/former-senior-alstom-executive-convicted-trial-violating-foreign-corrupt-practices-act-money> (cooperation with Indonesia, Switzerland, the United Kingdom, France, Germany, Italy, Singapore, and Taiwan); SEC Press Release No. 3-19493: SEC Charges Global Oil and Gas Services Company with Violations of the FCPA (Sept. 29, 2019), <https://www.sec.gov/enforce/34-87055-s> (cooperation with the United Kingdom and Monaco).

- Mobile TeleSystems, PJSC (MTS)*: In March 2019, MTS, Russia's biggest mobile phone company, entered into a deferred prosecution agreement with DOJ for FCPA violations in the Uzbekistan. Through various managers and employees, its Uzbek subsidiaries, and other affiliated entities, MTS paid at least \$420 million in bribes to a former Uzbek official in order to secure MTS' entry into the Uzbek telecommunications market. As part of the agreement, DOJ imposed criminal penalties of \$850 million on MTS (along with its wholly owned Uzbek subsidiary) and the SEC imposed fines of \$100 million for violating the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. However, DOJ credited MTS for the \$100 million in penalties paid to the SEC, limiting total FCPA penalties to \$850 million. DOJ also indicted two individuals in connection with the scheme.
- Fresenius Medical Care AG & Co. KGaA (Fresenius)*: Also in March 2019, Germany-based Fresenius, a provider of medical products and services, entered into a non-prosecution agreement with DOJ for violations in at least 17 countries. The company admitted to bribing doctors and public health officials in Angola and Saudi Arabia in order to obtain or retain business and to knowingly and willfully failing to implement reasonable internal accounting controls and failing to maintain accurate books and records. As part of the agreement, Fresenius agreed to pay DOJ and the SEC a total of \$231.7 million (including a nearly \$85 million criminal penalty), retain an independent compliance monitor for two years, and self-report to DOJ for an additional year.
- Walmart, Inc.*: In June 2019, after an eight-year investigation, DOJ and Walmart entered into a three-year non-prosecution agreement in connection with the company's FCPA violations in Brazil, China, India, and Mexico. Specifically, Walmart failed to implement adequate anti-corruption controls as it underwent "exponential" international growth, which led to multiple incidents of improper payments to foreign officials, including bribes aimed at securing construction permits in Brazil. Under the terms of the settlement, Walmart agreed to pay a criminal penalty of approximately \$138 million, retain an independent corporate compliance monitor for two years, and pay approximately \$119.6 million in disgorgement and \$25 million in prejudgment interest to the SEC. In total, Walmart agreed to pay approximately \$282.6 million in penalties to US authorities, which constituted only a fraction of the billion dollars Walmart spent on its own investigation.<sup>39</sup> To date, neither DOJ nor the SEC has brought cases against any individuals in connection with the investigation.
- Microsoft Corporation*: In July 2019, Microsoft and its Hungarian subsidiary (Microsoft Hungary) reached a settlement with the SEC and DOJ, respectively, regarding violations of the FCPA's books and records and internal accounting provisions arising out of subsidiary operations, and related misconduct of third-party intermediaries in Hungary, Saudi Arabia, Thailand, and Turkey. Microsoft agreed to pay a combined \$25.3 million. Microsoft Hungary entered into a three-year non-prosecution agreement with DOJ, under which it paid a criminal penalty of roughly \$8.75 million. The main conduct at issue concerned a bid-rigging and bribery scheme under which employees of Microsoft Hungary falsely represented to Microsoft that it was selling

<sup>39</sup> Tom Schoenberg, "Walmart will pay \$282 million in penalties to resolve 7-year probe into foreign bribes," *Los Angeles Times* (June 20, 2019), <https://www.latimes.com/business/la-fi-walmart-foreign-bribes-penalties-20190620-story.html>

licenses at a deep discount for the benefit of government agencies, when in reality, those customers received no cost savings. Microsoft admitted that the scheme in Hungary resulted in its obtaining nearly \$14 million in business between 2013 and 2015. Microsoft employees in Saudi Arabia, Thailand, and Turkey also engaged in misconduct related to bribing government officials. In Saudi Arabia, for instance, employees at Microsoft's local subsidiary diverted funds intended for marketing and business development to a "slush fund used to pay travel expenses for Saudi government employees and for gifts, furniture, laptops, tablets, and other equipment for government agencies." Microsoft Hungary received a 25 percent reduction off the sentencing guidelines for its full cooperation with DOJ.

- Telefonaktiebolaget LM Ericsson (Ericsson): In December 2019, Ericsson entered into a three-year deferred prosecution agreement, under which it agreed to pay more than \$1 billion in penalties and appoint a three-year independent monitor. The company admitted to using third-party agents and consultants to make payments to government officials in Djibouti, China, Vietnam, Indonesia, and Kuwait. The cost of the settlement – \$520 million in criminal penalties to DOJ and \$540 million in disgorgement and interest to the SEC – was the second-largest FCPA settlement in history. The primary reason for this was that Ericsson did not receive full cooperation credit; according to the agreement, Ericsson failed to self-disclose the misconduct, then did not fully disclose some matters related to bribery and corruption when it did disclose. The company was also said to have failed to take disciplinary actions against executives and employees involved with the violations. As a result, Ericsson only received a 15 percent reduction from the sentencing guidelines.

As noted above, DOJ brought enforcement actions against an unprecedented number of individuals in 2019. While many were associated with the larger corporate enforcement actions, a number were unrelated individual enforcement actions. For example, DOJ brought charges against a government official from the Federated States of Micronesia, Master Halbert, relating to his involvement in an alleged money laundering scheme that involved bribes made to secure government contracts.<sup>40</sup> In April 2019, Halbert agreed to plead guilty to the one-count indictment.

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<sup>40</sup> Press Release, Dep't of Justice 19-821: Micronesian Government Official Sentenced to Prison for Role in Money Laundering Scheme Involving FCPA Violations (Jul. 30, 2019), <https://www.justice.gov/opa/pr/micronesian-government-official-sentenced-prison-role-money-laundering-scheme-involving-fcpa>.

## COMPLIANCE UPDATE

***In 2019, DOJ continued to expand upon the importance of effective corporate compliance programs in preventing and addressing misconduct, and to highlight how effective – and ineffective – programs can impact the resolution of FCPA investigations. DOJ’s focus on compliance programs was most evident in the Criminal Division’s April 2019 release of new formal guidance for its prosecutors, “Evaluation of Corporate Compliance Programs,” which describes the pragmatic steps prosecutors should take to probe a company’s compliance efforts. DOJ also promoted the importance of effective compliance through its new training for prosecutors on assessing compliance programs, its revised policy on cooperation credit for reasonable controls around workplace messaging applications, and public statements from DOJ officials about the importance of data analytics as a tool to monitor compliance. FCPA resolutions this year helped illustrate how DOJ’s views on compliance translate into outcomes: robust compliance programs helped some companies secure declinations, while deficient programs contributed to less favorable outcomes with heftier price tags.***

An effective corporate compliance program can help a company prevent and detect employee misconduct or other legal and policy violations and, importantly, can help mitigate the outcome of a government investigation. According to new formal guidance issued by DOJ, the three key inquiries for prosecutors in assessing a compliance program’s effectiveness are:

- 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 in practice?

In addition to these three key themes, DOJ continues to provide more specific guidance on compliance efforts, signaling approval of companies’ use of data analytics and relaxing its previously strict prohibition on employee use of instant and ephemeral messaging applications for companies seeking cooperation credit.

### New Guidance on Evaluation of Corporate Compliance Programs

In April 2019, the DOJ Criminal Division released a new guidance document (the Guidance) titled “Evaluation of Corporate Compliance Programs,” replacing a 2017 paper of the same name. The Guidance largely reflects a continuity of approach, providing an informal set of questions for prosecutors to ask in evaluating corporate compliance programs. Assistant Attorney General Brian Benczkowski announced the Guidance in a

speech in which he described it as “a framework” for evaluating whether a corporation’s compliance program is effective. He emphasized that it should be applied in a fact-specific, tailored way and not as a “checklist nor a formula.”<sup>41</sup> As compared to the 2017 paper, the Guidance’s scope is broader. Its issuance in April reflects a significant move to formalize and substantiate the 2017 paper, which had been posted to the Fraud Section website with little fanfare. This time, the document was instead published as formal Guidance applicable to the entire Criminal Division, rather than just the prosecutors in the Fraud Section as before. (Because the Fraud Section is responsible for FCPA prosecutions nationwide, the Guidance remains instructive for companies facing FCPA scrutiny.)

Importantly, while it generally reflects the same approach as its predecessor, this new version of the Guidance provides greater context, organizing the analysis of compliance programs around three fundamental inquiries:

- 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 in practice?<sup>42</sup>

After posing each of these questions, the Guidance breaks down each one into more specific inquiries and provides a number of additional questions to help prosecutors assess a corporate compliance program. In general, the broad set of principles set out under these questions look to three key themes that companies can use as a benchmark to evaluate their own compliance efforts. First, the Guidance emphasizes the critical importance of a “culture of compliance” and whether that culture has permeated a corporation’s day-to-day business practices. Second, the Guidance instructs prosecutors to probe how a compliance function interacts with business units and, specifically, whether the compliance function and the revenue-generators live in tension or work together to mitigate risk. Third, the Guidance reinforces that compliance processes cannot be set up “off-the-rack” and left alone; instead, compliance must be tailored to an individual corporation’s commercial market and unique risk footprint.

Alongside the rollout of the Guidance, DOJ initiated a training program for prosecutors assessing compliance programs, the plans for which had been announced in October 2018. The training was planned in part as a result of DOJ’s decision last year to discontinue the position of Corporate Compliance Counsel, a dedicated expert on compliance programs within the Fraud Section that had been first created in 2015, and to replace that role with efforts to spread compliance expertise across the Criminal Division. In a November 2019 speech, AAG Benczkowski reflected on the training, which he said consisted of bringing in experts inside and outside DOJ, including industry professionals, to share their views on how companies are confronting compliance challenges.<sup>43</sup> He specifically mentioned that the training included consideration of a topic important to many companies in today’s world, *i.e.*, the evolution of compliance technology and data tools.<sup>44</sup> In May 2019 remarks to the Compliance Week Annual Conference, Principal Deputy Associate Attorney General Claire McCusker Murray explained that this training benefits the private sector as well, reasoning that, “when you’re presenting your corporate

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<sup>41</sup> Dep’t of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Keynote Address at the Ethics and Compliance Initiative (ECI) 2019 Annual Impact Conference (Apr. 30, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-keynote-address-ethics-and-compliance-initiative-eci-2019-annual-impact-conference>.

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<sup>42</sup> Dep’t of Justice Criminal Div., *Evaluation of Corporate Compliance Programs: Guidance Document* (Apr. 2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

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<sup>43</sup> Dep’t of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 20th Annual Pharmaceutical and Medical Device Compliance Congress (Nov. 6, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-20th-annual-pharmaceutical-and-medical-device-compliance-congress>.

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<sup>44</sup> *Id.*

compliance policies, you want the government's lawyers to be well versed in what's effective, what's practical, and what's not."<sup>45</sup>

### Compliance Efforts Impact Corporate Resolutions

DOJ has not only provided guidance about what it looks for in assessing the effectiveness of a company's compliance program, it has also begun to shed additional light on the impact of compliance efforts on outcomes when a corporation finds itself faced with a DOJ investigation. In February 2019, DOJ issued a declination letter to Cognizant Technology Solutions Corporation, after DOJ's investigation found that Cognizant, through its employees, had authorized its agents to pay an approximately \$2 million bribe to government officials in India in exchange for securing and obtaining a statutorily required planning permit in connection with the development of an office park, as well as other improper payments in connection with other projects in India.<sup>46</sup> DOJ's declination letter noted, among other factors in the declination decision, "the effectiveness of [Cognizant's] preexisting compliance program."<sup>47</sup> Cognizant ultimately paid \$25 million to settle charges of FCPA violations with both the SEC and DOJ.<sup>48</sup>

Insufficient attention to compliance, however, can lead to more painful and costly resolutions for companies. In March 2019, for example, Fresenius Medical Care AG & Co. KGaA (Fresenius) was forced to pay more than \$231 million – \$147 million in disgorgement and interest to the SEC and a criminal fine of \$84.7 million to DOJ – to resolve investigations related to the company's repeated violations of the FCPA.<sup>49</sup> The SEC found that despite obvious signs of corruption since the early 2000s, Fresenius devoted insufficient resources to compliance, including failing to take basic precautions such as providing anti-corruption training or performing due diligence on its agents.<sup>50</sup> And in June 2019, the SEC charged Walmart with violating the FCPA by failing, for more than a decade, to operate a sufficient anti-corruption compliance program.<sup>51</sup> Walmart paid more than \$144 million to the SEC as part of the settlement, and \$138 million to DOJ to resolve parallel criminal charges.<sup>52</sup> Both companies also agreed to retain independent compliance monitors as part of their settlements.

These examples illuminate how having an effective compliance program – or not having one – can significantly impact the ultimate outcome of a government investigation into corporate FCPA violations.

### DOJ Expects Appropriate Guidance and Controls for Messaging App Use

As use of instant messaging and "ephemeral" messaging<sup>53</sup> spreads and begins to compete with email as a widespread mode of communication in the workplace, DOJ has recognized this changing reality and its impact on the government's ability to investigate potential FCPA violations.

Previously, in December 2017, DOJ stated that companies seeking cooperation credit must "prohibit" employees "from using software that generates but does not appropriately retain business records or communications."<sup>54</sup> Calls for clarification followed as businesses and their legal counsel struggled to interpret and implement this seemingly rigid stance,

<sup>45</sup> Dep't of Justice, Remarks of Principal Deputy Associate Attorney General Claire McCusker Murray at the Compliance Week Annual Conference (May 20, 2019), <https://www.justice.gov/opa/speech/remarks-principal-deputy-associate-attorney-general-claire-mccusker-murray-compliance>.

<sup>46</sup> Dep't of Justice, Declination Letter to Cognizant Technology Solutions Corporation, Feb. 13, 2019, <https://www.justice.gov/criminal-fraud/file/1132666/download>.

<sup>47</sup> *Id.*; see also Dep't of Justice, Assistant Attorney General Brian A. Benczkowski Delivers Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference, Mar. 8, 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national>.

<sup>48</sup> Securities & Exchange Comm'n, SEC Charges Cognizant and Two Former Executives With FCPA Violations, Feb. 15, 2019, <https://www.sec.gov/news/press-release/2019-12>.

<sup>49</sup> Dep't of Justice, Fresenius Medical Care Agrees to Pay \$231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges, Mar. 29, 2019, <https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve>.

<sup>50</sup> Securities and Exchange Comm'n, SEC Charges Medical Device Company With FCPA Violations, Mar. 29, 2019, <https://www.sec.gov/news/press-release/2019-48>.

<sup>51</sup> Securities and Exchange Comm'n, Walmart Charged with FCPA Violations, June 20, 2019, <https://www.sec.gov/news/press-release/2019-102>.

particularly as messaging apps become a preferred channel for digital communication both in the United States and abroad. While investigators regard emails as a treasure trove of potential evidence, messaging is quickly replacing email as a method for bad actors in the workplace to communicate about their bad acts.

In updating its FCPA corporate enforcement policy in March 2019, DOJ revised its position on the use of instant and ephemeral messaging by companies. The updated policy removed the word “prohibit” from the policy and instead now requires companies who wish to receive full cooperation credit to 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>55</sup> These revisions continue to underscore the importance that documented communications play in corruption investigations and invite companies to employ risk-based assessments of the use of messaging applications in the workplace. Corporations would be wise to consider the risks that messaging apps can create in their specific environments and to implement measures that address and manage those risks, such as carefully designed policies, procedures and training, and the use of technical controls to limit or restrict the use of messaging apps in the workplace.

### Data Analytics an Increasing “Area of Focus”

As highlighted multiple times this year in speeches and enforcement actions, the SEC is increasingly using data analytics as an important tool in detecting and investigating wrongdoing. DOJ is similarly beginning to consider how the use of data analytics can provide yet another tool for prosecutors in identifying and investigating cases, including in the FCPA context. In September 2019, during remarks at the Government Enforcement Institute, Deputy Assistant Attorney General Matthew Miner called data analytics an “area of focus” for prosecutors, pointing to the use of data analytics by health care fraud prosecutors to identify fraud indicators within Medicare claims data, allowing for greater efficiency in identifying investigation targets, “which expedites case development, saves resources, [and] makes the overall program of enforcement more targeted and effective.”<sup>56</sup> Miner also noted increased use of trading data to identify market manipulation and other fraudulent activity in the securities and commodities arenas.

At a pharmaceutical and medical device conference in early November 2019, Assistant Director of the SEC’s FCPA unit Robert Dodge and Acting Principal Assistant Chief of DOJ’s FCPA unit David Last said in response to questions from the audience that data analytics will soon be used across the board in compliance.<sup>57</sup> Noting that “there’s a real appetite among the industry to better use data analytics to detect corruption and fraud,” an audience member at the conference asked if DOJ and the SEC would second guess what was done with such data and questioned whether companies would truly be better off. Dodge responded that that “from the SEC point of view the answer is pretty clear: it’s absolutely a good thing.” From the DOJ perspective, Last agreed with Dodge, noting that whether or how companies use data analytics will be specific to their size and other factors, but that “it can be helpful.”

<sup>52</sup> *Id.*; Dep’t of Justice, Walmart Inc. and Brazil-Based Subsidiary Agree to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Case, June 20, 2019, <https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt>.

<sup>53</sup> “Ephemeral” messaging applications are communication platforms that are “deliberate ephemeral, with communication self-destructing after 24 hours or even immediately upon receipt.” Felix Salmon, How Snapchat Is Sending #MeToo Down the Memory Hole, *Wired* (February 6, 2018), <https://www.wired.com/story/snapchat-sending-metoo-down-the-memory-hole/>. Perhaps the most well-known ephemeral messaging app is Snapchat, though other popular messaging apps like Signal and WhatsApp have incorporated ephemeral messaging features into their platforms.

<sup>54</sup> Dep’t of Justice, US Attorneys’ Manual § 9-47.120 (2018) (emphasis added).

<sup>55</sup> Dep’t of Justice, US Attorneys’ Manual § 9-47.120 (2019) (emphasis added).

<sup>56</sup> Dep’t of Justice, Deputy Assistant Attorney General Matthew S. Miner Delivers Remarks at the 6th Annual Government Enforcement Institute, Sept. 12, 2019, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-delivers-remarks-6th-annual-government>.

<sup>57</sup> Clara Hudson, SEC, DOJ emphasize importance of data analytics, *Global Investigations Review*, Nov. 7, 2019, <https://globalinvestigationsreview.com/article/jac/1210726/sec-doj-emphasise-importance-of-data-analytics>.

## SEC FCPA ENFORCEMENT TRENDS AND PARTNERSHIPS IN 2019

**The trends in SEC enforcement of the FCPA demonstrate the range of its enforcement priorities. It has pursued a wide variety of SEC cases, involving books and records as well as bribery allegations, and has worked independently, with DOJ, and with foreign governments to investigate and settle these cases.**

- The SEC continued to focus on FCPA violations in 2019 and reported a slight increase in enforcement actions.
- The SEC pursued a wide variety of FCPA investigations and brought a mix of enforcement actions that ranged from actions involving alleged cash bribes, where the agency alleged both violations of the bribery provisions and the books and records provisions, to cases involving less concrete alleged benefits, where the Commission alleged only violations of books and record provisions.
- The SEC continued its traditional cooperation with DOJ and expanded its recent efforts to coordinate with foreign authorities in FCPA investigations.

In 2019, the SEC demonstrated a continued commitment to FCPA enforcement. The Commission brought 18 actions against 15 entities and five individuals, and secured monetary relief of nearly \$515 million. As noted in the SEC's Division of Enforcement's annual report for Fiscal Year 2019, FCPA matters constituted about 3 percent of SEC enforcement actions. See SEC, Division of Enforcement, 2019 Annual Report, available at <https://www.sec.gov/files/enforcement-annual-report-2019.pdf>. The results continued the trend of aggressive enforcement activities: over the past five years, the SEC has brought nearly 80 FCPA cases involving alleged misconduct in more than 60 countries. See SEC, Chairman Jay Clayton, Remarks to the Economic Club of New York (Sept. 9, 2019), available at <https://www.sec.gov/news/speech/speech-clayton-2019-09-09>.

The SEC's enforcement activities extend across the full range of possible FCPA violations, targeting both bribery and books and records violations. In addition to pursuing cases involving well-known crimes like the provision of cash bribes to foreign officials, the SEC

### Enforcement Actions Filed in Fiscal Years 2015 to 2019 <sup>58</sup>

	2019	2018	2017	2016	2015
Standalone Enforcement Actions	526	490	446	548	508
Follow-on Admin Proceedings	210	210	196	195	167
Delinquent Filings	126	121	112	125	132
<b>Total Actions</b>	<b>862</b>	<b>821</b>	<b>754</b>	<b>868</b>	<b>807</b>

<sup>58</sup> SEC, Division of Enforcement, 2019 Annual Report, available at <https://www.sec.gov/files/enforcement-annual-report-2019.pdf>

also brought actions relating to improper hiring of foreign officials' relatives and other forms of improper payments, such as hosting hospitality suites at major sporting events. Although the SEC frequently brings cases in parallel with the criminal authorities, the Commission has also brought cases where the conduct at issue was not sufficiently serious to warrant criminal charges, demonstrating that it is willing to investigate and pursue cases even without clear evidence of bribery. In addition, while the SEC frequently brings cases in parallel with the criminal authorities, it has also brought cases where the conduct at issue was not sufficiently serious to warrant criminal charges. This continuing trend indicates that the SEC takes seriously a whole range of possible violations of the FCPA and is willing to investigate and pursue cases even without clear evidence of bribery.

### Cases Brought by the SEC Only

In 2019, the SEC continued to bring FCPA cases even in the absence of cash bribery or the existence of a parallel criminal case. For instance, the SEC brought two cases against major banks based on the improper hiring of the relatives of foreign officials. See SEC, SEC Charges Barclays with FCPA Violations Related to Its Hiring Practices, Administrative Proceeding No. 3-19537 (Sept. 27, 2019), available at <https://www.sec.gov/enforce/34-87132-s>; SEC, SEC Charges Deutsche Bank with FCPA Violations Related to Its Hiring Practices, Administrative Proceeding No. 3-19373 (Aug. 22, 2019), available at <https://www.sec.gov/enforce/34-86740-s> (SEC Deutsche Action). In both cases, the SEC alleged that the banks circumvented their normal hiring processes to hire individuals for internships and employment because those individuals' family members held influential positions in government entities. Some of the individuals hired for their connections were less qualified than individuals who were hired through the banks' normal processes. Some hires were made at the specific request of foreign officials, and others were made in furtherance of the banks' efforts to win business from foreign state-owned entities. The SEC brought these enforcement actions despite the fact that in many cases, the banks' books and records accurately reflected the individuals' employment, their names, and the payments they received. The books and records violation, according to the SEC, resulted from the banks' failure to maintain records that accurately reflected the true reasons why the candidates were hired. The SEC also alleged violations of the FCPA's internal accounting controls requirements, because the banks' written compliance policies were not implemented adequately to prevent the improper hiring from taking place. Deutsche Bank paid over \$16 million, and Barclays over \$6 million, to settle these charges.

The SEC also pursued other forms of improper attempts to solicit business, such as the provision of gifts and hospitality. For example, in the *Telefônica Brasil S.A.* proceeding, the SEC charged Telefônica with violations of the FCPA relating to the company's provision of soccer tournament tickets and related hospitality to over 100 government officials who were in a position to influence government actions involving Telefônica. See SEC, SEC Charges Telefônica Brasil S.A. with Violating Books and Records and Internal Accounting Controls Provisions of the FCPA, Administrative Proceeding No. 3-19162 (May 9, 2019), available at <https://www.sec.gov/enforce/34-85819-s>. The SEC alleged that the payments for the event tickets were not accurately reflected in the company's records, and that the company failed to adequately enforce its anticorruption policies, in violation of the books and records and internal accounting procedures provisions of the FCPA. The matter was

resolved via a settlement under which Telefônica agreed to pay a civil penalty of over \$4 million but did not admit or deny the SEC's allegations.

### **SEC and DOJ's Continued Partnership in FCPA Matters, Including Books and Records-Only Cases**

Throughout 2019, the SEC also continued its traditional cooperation with DOJ to bring parallel civil and criminal FCPA enforcement actions. These included actions alleging books and records violations against two Fortune 50 Companies, Walmart, and Microsoft. Both sets of cases, like many previous FCPA actions, focused on the role of third-party intermediaries in the company's effort to win business in foreign countries:

- *Walmart*: In the *Walmart* proceeding, the SEC and DOJ charged Walmart with violations of the books and records provisions of the FCPA in connection with alleged payments – made through third-party intermediaries in Mexico, India, China, and Brazil between 2000 and 2011 – to obtain permits and other benefits from foreign governments. According to the SEC's order, Walmart improperly recorded these payments and further violated the FCPA by failing to investigate or mitigate anti-corruption risks, failing to implement and maintain an adequate compliance program, and allowing its subsidiaries to use third-party intermediaries who paid foreign governments without reasonable assurances of FCPA compliance. Under its settlement with the SEC, Walmart agreed to pay \$144 million in disgorgement and prejudgment interest, which came on top of its \$138 million payment to DOJ to resolve criminal charges pursuant to a non-prosecution agreement. See SEC, *Walmart Charged With FCPA Violations*, No. 2019-103 (June 20, 2019), available at <https://www.sec.gov/news/press-release/2019-102>.
- *Microsoft*: The Microsoft enforcement action targeted the company's subsidiaries in Hungary, Saudi Arabia, Thailand, and Turkey, which were allegedly engaged in a practice of using third parties to sell end user licenses of Microsoft software to government customers. According to the SEC Order, the Microsoft subsidiaries, through those third-party intermediaries, gave improper discounts, payments, and gifts to foreign government officials for the purpose of obtaining business. Specifically, the SEC Order contends, Microsoft's Hungary subsidiary made payments through third parties to Hungarian officials, its Turkey subsidiary provided an excessive discount to a third party in order to obtain business from the Turkish government, and the Saudi and Thai subsidiaries used slush funds maintained by third-party vendors to provide travel and gifts to government officials in Saudi Arabia and Thailand, respectively. The SEC alleged that Microsoft incorrectly recorded these payments, in violation of the books and records provisions of the FCPA, and further violated the FCPA's internal accounting provisions by failing to detect or prevent these improper payments. Microsoft and its subsidiaries paid over \$16 million to settle the SEC's charges, and Microsoft's Hungary subsidiary agreed to pay a criminal fine of more than \$8 million pursuant to a non-prosecution agreement with DOJ. See SEC, *SEC Charges Microsoft Corporation with FCPA Violations*, Administrative Proceeding No. 3-19260 (July 22, 2019), available at <https://www.sec.gov/enforce/34-86421-s-0>.

In addition to the *Walmart* and *Microsoft* actions, the SEC and DOJ continue to be focused on bribery violations, bringing seven enforcement actions in 2019 that alleged cash bribes in violation of the FCPA. In three cases, the SEC or DOJ filed charges and/or indictments against individual executives at companies that violated the FCPA, in addition to the actions against companies. See, e.g., SEC, SEC Charges Former Executive with FCPA Violations, Litigation Release No. 24666 (Nov. 15, 2019), available at <https://www.sec.gov/litigation/litreleases/2019/lr24666.htm>; SEC, SEC Settles FCPA Charges Against Former Chief Operating Officer of Cognizant, Administrative Proceeding No. 3-19446 (Sept. 13, 2019), <https://www.sec.gov/enforce/34-86963-s>; SEC, SEC Charges Cognizant and Two Former Executives With FCPA Violations, No. 2019-12 (Feb. 15, 2019), available at <https://www.sec.gov/news/press-release/2019-12>. This included cases against high-level executives at Cognizant Technology Solutions Corporation, which had paid \$25 million under its own settlement with the SEC but received a declination from DOJ, detailed on page 36.

### International Partnerships on FCPA Matters

The SEC also continued to work with a wide range of foreign authorities, even specifically crediting authorities from nine countries in its news bulletins for FCPA actions brought in 2019. As the SEC Division of Enforcement Co-Director Steve Peikin noted in a December 2018 speech, cooperation with international authorities is on the rise. See SEC, Steven Peikin, Co-Director, Division of Enforcement, The Salutary Effects of International Cooperation on SEC Enforcement (Dec. 3, 2018) <https://www.sec.gov/news/speech/speech-peikin-120318>. Peikin noted that in the past two fiscal years, the SEC has been assisted by over 25 different jurisdictions in FCPA matters, including in cases investigated conjunction with Dutch, Brazilian, Swiss, and Swedish regulators that were ultimately resolved through settlements. He said that he expects SEC coordination and cooperation with foreign authorities in FCPA actions to continue to increase in the years to come.

**FAQ 22*****What are the important differences between the FCPA and UKBA?***

Setting aside the differences based on jurisdiction, there are several key differences between the UKBA and the FCPA. First, the UKBA criminalizes bribery of commercial organisations as well as bribery of government officials. Second, liability under the UKBA also extends to the recipient of the bribe and not just the individual or organisation giving the bribe.

Third, the UKBA holds commercial organisations strictly liable for failing to prevent bribery, but also provides an affirmative defence to the crime if the organisation can show that it had adequate procedures in place at the time, designed to prevent bribery.

Finally, whereas the FCPA has a stand-alone offence for accounting violations comprised of either having inadequate books and records or internal controls violations, the UKBA does not have an equivalent offence.

**UNITED KINGDOM****UK BRIBERY ACT****STATUTE AND ELEMENTS OF OFFENCES UNDER THE UK BRIBERY ACT**

The UK Bribery Act (UKBA or the Act) includes four principal offences: (1) bribing another person; (2) being bribed; (3) bribing a foreign public official; and (4) failure to prevent bribery. The statute also places certain limitations on who may be charged and sets forth penalties for violations.

This section first explains the background of the UKBA, then takes the reader through the definitions necessary to understand the statute, and finally describes the elements of the offences under the Act in detail. As with the FCPA, the UKBA is broadly worded, and there continues to be almost no case law interpreting its provisions. In contrast to the FCPA, there remains little enforcement practice or formal guidance to fill out the meaning of the statute. In many cases, there will be little, if any, concrete guidance about the likely application of the UKBA, and companies potentially subject to its jurisdiction must tread carefully to ensure compliance. This section provides companies within UKBA jurisdiction with helpful background and context from which they can assess and better address compliance with the UKBA.

**1. Background**

The UKBA was passed on 8 April 2010. It came into force on 1 July 2011 and applies to conduct that occurred on or after that date. Even though we are now nearly a decade on from the commencement date, there have been only a small number of cases prosecuted under the UKBA, and most of those have not been contested. Guidance from the courts on the interpretation of the UKBA is therefore very scant.

The UKBA is essentially a codifying statute. Most of the offences “created” by the UKBA existed previously, but in disparate and archaic forms. The UKBA was intended to simplify the outdated language and arrange the offences into one statutory location.

The UKBA did, however, create a new offence, the corporate offence of failing to prevent bribery (section 7). This offence is discussed in more detail below.

**2. Definitions**

The UKBA uses a number of specific terms, which it defines and of which it provides examples to assist the reader with understanding how the offences should be construed.

### *Function or activity to which the bribe relates (section 3)*

The offences in the UKBA refer to “relevant functions or activities.” A function or activity is relevant for the purposes of the UKBA if the function or activity is one of the following:

- Public nature;
- Connected with a business;
- Performed in the course of a person's employment; or
- Performed by or on behalf of a body of persons (whether corporate or unincorporated).

A person performing the function or activity must also be:

- Performing the function or activity with the expectation that it is being performed in good faith;
- Performing the function or activity with the expectation that it is being performed impartially; or
- In a position of trust by virtue of performing it.

A function or activity is a relevant function or activity even if it has no connection with the United Kingdom and is performed in a country or territory outside the United Kingdom.

Essentially, all functions or activities of a commercial or public nature are relevant for the purposes of the UKBA. The Act would cover actions of public servants, employees, contractors, agents, and most other types of business or governmental relationships.

### *Improper performance to which bribe relates (section 4)*

A relevant function or activity is performed improperly if it is performed in breach of a relevant expectation, such as the performance of the function in good faith or with impartiality. A relevant function is also to be treated as being performed improperly if there is a failure to perform the function or activity and that failure itself is a breach of a relevant expectation.

### *Expectation test (section 5)*

Where the UKBA refers to “expectations,” the test for that expectation is what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

Where the conduct concerned is to be performed outside of the United Kingdom and is not subject to the law of any part of the United Kingdom, any local custom or practice will be disregarded unless it is permitted or required by the written law applicable to the

country or territory concerned. In this regard, written law means law contained in a written constitution, or provision made by or under legislation, which is applicable to the country or territory concerned. Written law may also mean any judicial decision which is applicable as law and is evidenced in published written sources.

### 3. Offences under the UKBA

There are four main offences under the UKBA:

- Bribing another person (section 1);
- Being bribed (section 2);
- Bribing a Foreign Public Official (FPO) (section 6); and
- Failing to prevent bribery (section 7).

#### *Jurisdictional reach (section 12)*

Any offence committed under section 1, 2, or 6 that occurs within the United Kingdom is subject to the jurisdiction of the UKBA, irrespective of the nationality of the individual committing the offence.

To the extent that acts potentially constituting offences under sections 1, 2, or 6 take place outside of the United Kingdom, the UKBA applies if and to the extent that the individual alleged to have undertaken those acts has a “close connection” with the United Kingdom. This essentially means British citizens or other individuals who have some type of British nationality, or who are ordinarily resident in the United Kingdom. In relation to corporate entities, this means bodies incorporated under the law of any part of the United Kingdom or Scottish partnerships.

In relation to section 7, any organisation that is a “relevant commercial organisation” under the Act, *i.e.*, it is either a British incorporated entity or an overseas incorporated entity that carries out a business or part of a business in the United Kingdom, is subject to section 7 of the UKBA regardless of the location of the alleged bribery. There is no definition of “carrying on a business,” but it is likely that having a branch or office in the United Kingdom, or holding board or management meetings in the United Kingdom, would bring an organisation within the ambit of section 7.

### 4. Elements of Offences

For ease of reading, we use the language of the UKBA when discussing bribers (P) and recipients or intended recipients of bribes (R). In relation to the section 7 offence of failing to prevent bribery, which is a corporate offence, we again use the language of the UKBA when discussing the corporate entity (C) and its associated persons (A).

**FAQ 23*****Is a non-UK company subject to the UKBA?***

Yes, depending on the circumstances. Where the alleged misconduct occurred within the United Kingdom, the conduct is subject to the UKBA.

Further, for the corporate offence of Failure to Prevent Bribery, the UKBA applies to all acts of a “relevant commercial organisation,” which includes both a British incorporated entity and any company that “carries on a business or part of a business” in the United Kingdom.

The Bribery Act 2010 Guidance issued by the Ministry of Justice provides that courts should apply a “common sense approach” when interpreting whether an organisation “carries on a business or part of a business” in the United Kingdom. However, there is no case law addressing the concept, and its broad wording suggests that it may apply to any organisation that does business in the United Kingdom.

Also, the Bribery Act applies to UK nationals or individuals with a “close connection” to the UK, regardless of where they are in the world. As a result, if a person meeting the nationality test under the UKBA commits an offence under the UKBA and he or she is the “directing mind and will of the company” (*i.e.*, sufficiently senior), that company could also be liable under the UKBA.

***Bribing another person (section 1)***

The UKBA provides that bribing another person is an offence. As discussed above, this offence applies to commercial bribery as well as to bribery of government officials. The UKBA details two cases of bribery, which it criminalizes:

- **Case One** is where P offers, promises or gives a financial or other advantage to another person and P intends the advantage either to (1) induce a person to perform improperly a relevant function or activity, or (2) to reward a person for the improper performance of such a function or activity;
- **Case Two** is where P offers, promises or gives a financial or other advantage to another person and P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

In relation to Case One, it is irrelevant whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

In both cases, it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

The offence is deliberately widely drawn and covers both the actual payment of bribes, as well as offers (genuine or otherwise) of payment of bribes. In addition, it covers payment or offers both before and after the corrupt action is contemplated.

The corrupt action does not need to actually occur, nor does the recipient or intended recipient of the bribe have to accept the bribe and/or intend to take the corrupt action that P desires.

This offence can be committed by a commercial organisation as well as by individuals. The general English criminal law of identification would apply in this instance. To establish a commercial organisation's guilt, the prosecution would have to show that the offence had been committed by an individual who can be identified as the directing mind and will of the organisation, and that in committing the offence, he or she had been acting on behalf of the organisation. This onerous requirement is the primary reason for the comparatively low rate of corporate prosecutions in the United Kingdom.

***Being bribed (section 2)***

The UKBA provides four ways in which a person or commercial organisation can be guilty of an offence of being bribed:

- I. Where R requests, agrees to receive or accepts a financial or other advantage intending that, as a consequence, a relevant function or activity should be performed improperly (whether by R or by another person);

2. Where R requests, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity;
3. Where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity; and
4. Where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R or by another person at R's request or with R's assent or acquiescence.

As with the section 1 offence, the section 2 offence is intended to be very wide. The four cases detailed are intended to cover all conceivable permutations of requesting or accepting bribes.

In all cases, it is irrelevant whether R requests, agrees to receive or accept (or is to request, agree to receive, or accept) the advantage directly or through a third party nor whether the advantage is (or is to be) for the benefit of R or another person.

In cases 2 to 4, it is irrelevant whether R knows or believes that the performance of the function or activity is improper.

In case 4, where a person other than R is performing the function or activity, it is irrelevant whether that person knows or believes that the performance of the function or activity is improper.

### ***Bribery of FPOs (section 6)***

Under the UKBA, a person who bribes a foreign public official (FPO) is guilty of an offence if it is P's intention to influence the FPO in his or her capacity as a foreign public official. P must also intend to obtain or retain business, or an advantage in the conduct of business.

P bribes the FPO if, and only if:

A. directly or through a third party, P offers, promises or gives any financial or other advantage;

(i.) to the FPO; or

(ii.) to another person at the FPO's request or with the FPO's assent or acquiescence; and

B. the FPO is neither permitted nor required by the written law applicable to the FPO to be influenced in his or her capacity as a foreign public official by the offer, promise or gift.

**FAQ 24****What is the offence of failure to prevent bribery, and does it differ from a bribery offence under the UKBA?**

The so-called “section 7” offence of failure to prevent bribery applies to “commercial organisations,” *i.e.*, corporations, where a person or other corporation that performs services on behalf of the defendant commercial organisation bribes another person with the intent to obtain or retain business or a commercial advantage for the defendant commercial organisation.

The purpose of the offence is to broaden corporate liability under the UKBA beyond liability for actions taken by people who can be identified as the “directing will or mind of the company,” the traditional test for corporate criminal liability under English common law.

Unlike the substantive bribery offences, the section 7 failure to prevent bribery offence applies only to corporations, and it includes an affirmative defence for maintaining adequate procedures designed to prevent bribery being committed on the corporation’s behalf. But the offences do not differ with respect to penalties, which may consist of unlimited fines, confiscation, and/or compensation.

However, it is important to remember that in order for the authorities to make out a section 7 offence, it must be demonstrated that the associated person is or would be guilty of a substantive offence in section 1 or section 6 of the UKBA.

References in the UKBA to “influencing the FPO in his or her capacity as a foreign public official” mean influencing the FPO in the performance of his or her functions as such an official, which includes:

- any omission to exercise those functions; and
- any use of the FPO’s position as such an official even if not within the FPO’s authority.

**Who is an FPO?**

An FPO is an individual who:

- A. holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside of the United Kingdom (or any sub-division of such a country or a territory);
- B. exercises a public function;
  - (i.) for or on behalf of a country or territory outside of the United Kingdom;
  - (ii.) for any public agency or public enterprise of that country or territory; or
- C. is an official or agent of a public international organisation.

**What is a public international organisation?**

- D. public international organisation is an organisation whose members are any of the following:
  - (i.) countries or territories;
  - (ii.) governments of countries or territories;
  - (iii.) other public international organisations; or
  - (iv.) a mixture of any of the above.

**What written law is applicable?**

The written law applicable to the FPO is:

- E. where the performance of the functions of the FPO which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom;
- F. where paragraph (A) does not apply and the FPO is an official or agent of a public international organisation, the applicable written rules of that organisation; or

**FAQ 25*****Can a corporation be liable for acts of third parties under the UKBA?***

Yes, section 7 of the UKBA applies to the actions of any persons “associated with” a corporation. A person is associated with a corporation if he or she performs services on the corporation’s behalf. However, in order for the company to be liable for the acts of the associated party, the bribe must be paid by the associated person to help the company win or retain business. Thus, suppliers could fall within the scope of the offence to the extent that they are performing services for or on behalf of the company and not simply acting as the seller of goods. Where a supply chain is involved, it is likely that the organisation will only exercise control over its relationship with its contractual counterparty, rather than all of the sub-contractors or entities further down the supply chain. Nonetheless, to mitigate its own risks, the organisation may still consider requesting that its contractual counterparty adopt a similar approach to anti-bribery procedures with the next party in the chain.

G. where paragraphs (A) and (B) do not apply, the law of the country or territory in relation to which the FPO is a foreign public official so far as that law is contained in;

(i.) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned; or

(ii.) any judicial decision which is so applicable and is evidenced in published written sources.

The definition of bribery of an FPO provided by the UKBA is not entirely straightforward. However, as with the other offences under the UKBA, the intention is to create a wide offence that covers what would ordinarily be thought of as bribery of an FPO to induce or reward corrupt behavior.

This offence can be committed by a commercial organisation as well as by individuals.

***Failure of commercial organisations to prevent bribery (section 7)***

The only section of the Act that was truly a new addition to the law of the United Kingdom is the so-called “section 7” offence, which expands the law of corporate criminal responsibility in this sphere.

The offence is drafted as follows:

A “relevant commercial organisation” (C) is guilty of an offence under this section if a person (A) associated with C bribes another person intending:

H. to obtain or retain business for C; or

I. to obtain or retain advantage in the conduct of business for C.

***Who is an “associated person”?***

The UKBA (in section 8) defines an associated person as someone who performs services for or on behalf of C.

The capacity in which A performed services for or on behalf of C is irrelevant, as is the legal nature of the relationship. The UKBA provides three examples of an associated person: an employee, an agent or a subsidiary. The UKBA expressly states that the question of whether or not A is a “person who performs services for or on behalf of C” is to be determined by reference to all the relevant circumstances, not merely by reference to the nature of the legal relationship between A and C.

However, if A is an employee of C, it will be presumed that A is a person performing services for or on behalf of C, unless it can be shown to the contrary.

It is necessary for the authorities to demonstrate that:

**FAQ 26*****Is a corporation liable for the acts of its joint venture partners under section 7 of the UKBA?***

Potentially, yes.

Consider a JV Partnership made up of JV Partner A and JV Partner B. The key question for determining if JV Partner A creates liability for JV Partner B is whether (1) JV Partner A or its employees or agents are performing services for JV Partner B, and (2) the bribe was paid for JV Partner B's benefit. If the employees or agents of JV Partner A paid bribes only for the benefit of JV Partner A and not JV Partner B, then, generally speaking, JV Partner B will not be liable for the acts of JV Partner A or its employees or agents.

- A is or would be guilty under section 1 (bribing another person) or section 6 (bribery of an FPO), whether or not A has been prosecuted for such an offence; or
- A would be guilty of such an offence if the Act were applicable to him or her.

***What is a "relevant commercial organisation"?***

The Act defines a "relevant commercial organisation" to which section 7 applies as:

- a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether within the United Kingdom or elsewhere);
- any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom;
- a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether within the United Kingdom or elsewhere); or
- any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

***Penalties (section 11)***

An individual who is found guilty of an offence under section 1 (bribing another person), section 2 (being bribed), or section 6 (bribing an FPO) is liable to a maximum term of imprisonment of 10 years, an unlimited fine, or both.

A commercial organisation guilty of an offence under sections 1, 2, or 6 is liable to an unlimited fine. Similarly, any commercial organisation guilty of a section 7 offence is liable to an unlimited fine.

Although the maximum fine can be unlimited, to date the fines imposed under the UKBA have typically been much smaller than fines handed out by the US authorities in FCPA matters, with the notable exception of the *Rolls-Royce* case described later.

In practice, fines in the UK follow from the Sentencing Guidelines (Guidelines) that govern punishment of corporate crime. The Sentencing Council for England and Wales publishes these Guidelines for the sentencing of offenders convicted of committing offences of fraud, bribery, and money laundering. The Guidelines identify a number of factors that must be considered by judges when arriving at an appropriate level of fine. These include (but are not limited to):

- The level of culpability;
- The amount of harm done;
- Previous convictions;

**FAQ 27*****Are fines the only penalties that a corporation must consider in assessing exposure under the UKBA?***

No. In addition to unlimited fines, the United Kingdom has strict laws around the confiscation of proceeds of crime as set out in the Proceeds of Crime Act 2002, which may result in the disgorgement of any proceeds that prosecutors can demonstrate are associated with a violation of the UKBA. Further, a court sentencing a corporation for a violation of the UKBA will consider whether it is appropriate to order the payment of compensation to victims under the Powers of Criminal Courts (Sentencing) Act 2000. A corporation will also face mandatory debarment from public contracts across the EU if convicted of an offence under Sections 1, 2 or 6. Debarment is discretionary for a conviction under Section 7.

- Level of cooperation with the authorities;
- Attempts to conceal the wrongdoing; and
- Whether there has been a change in management and/or the compliance programme since the offending was uncovered.

Under the Guidelines, a fine can be adjusted upward to ensure that it removes all gain obtained by the offending; punishes the corporate entity; and ensures the appropriate level of deterrence. The Guidelines are clear that there should be a “real economic impact,” to emphasize to management and shareholders the need to operate within the law. Indeed, if deemed the most appropriate outcome, the fine can be so large as to put the company out of business, as recognised in the DPA entered into by XYZ Ltd., in which the SFO cited the company’s cooperation as a key factor in its decision not to press the court for such a fine.

In addition, the general law on confiscation of the proceeds of crime, as set out in the Proceeds of Crime Act 2002, will also apply, as will the law on compensation of victims, as set out in section 130 of the Powers of Criminal Courts (Sentencing) Act of 2000.

***Liability of senior officers (section 14)***

As set out above, the general English law of corporate identification will apply to determine whether corporate entities committed the offences under sections 1, 2, or 6. In addition, where the prosecution can prove a criminal offence on the part of the company, and a senior officer of the company (who must have a “close connection” to the United Kingdom) has consented or connived in the commission of the offence, that senior officer, as well as the company, is guilty of the offence and liable to be proceeded against and punished accordingly. This is the case even if the senior officer did not himself pay or receive a bribe.

**AFFIRMATIVE DEFENCES**

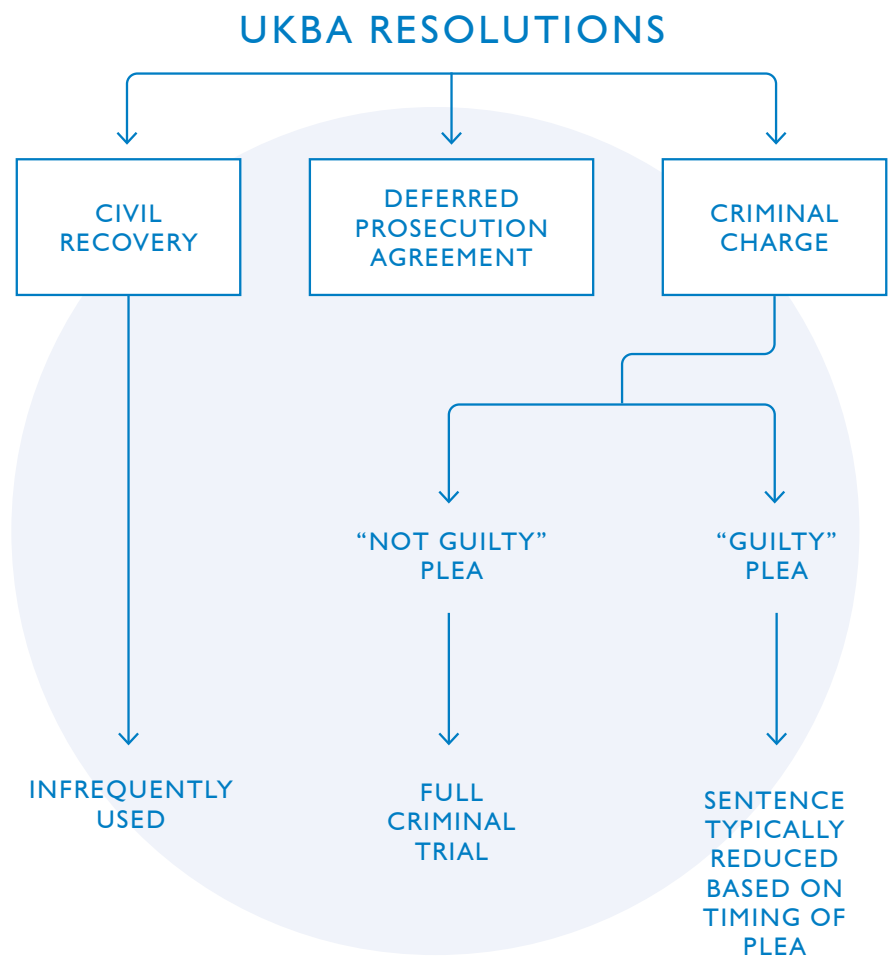
Aside from the defence under section 7, there are very few affirmative defences under the UKBA. Those that do exist (section 13) relate to the proper exercise of any function of a member of the intelligence services or the armed forces when engaged in active service. With the exception of section 7, these defences do not apply to commercial organisations.

Section 7 contains an affirmative defence against a charge of failure to prevent bribery under which a relevant commercial organisation can show that it has adequate procedures in place designed to prevent persons associated with it from committing bribery offences.

The Ministry of Justice has, as required by section 9 of the UKBA, published guidance for commercial organisations as to the procedures that ought to be put in place to prevent persons associated with the commercial organisations from committing bribery. In 2018

Skansen Interiors Ltd. (Skansen), a small interior design company operating within the United Kingdom, was prosecuted for failure to prevent bribery under section 7 of the UKBA and became the first company to assert the adequate procedures defence. But Skansen was ultimately found guilty, as it had only limited policies and procedures in place, and they were geared towards company values rather than specific policies for anti-bribery and corruption compliance; furthermore, none mentioned the UKBA. As this was a jury trial, there was no judgement or judicial comment. Consequently, the case did not provide much by way of additional guidance on the meaning of “adequate procedures” under section 7. However, Camilla de Silva, joint head of Bribery and Corruption at the SFO, has subsequently reminded that although “[t]he starting point is about having bespoke compliance procedures in place...it is more about the substance of the procedures and about them actually working in the first place.” In theory, if a commercial organisation complies with the guidance and has specific and effective anti-bribery and anti-corruption procedures, it ought to have a defence to any allegation of a section 7 offence.

## RESOLUTION OF UKBA INVESTIGATIONS



**FAQ 28****Who enforces the UKBA?**

The United Kingdom's Serious Fraud Office enforces the UKBA. In 2014, the United Kingdom adopted a new framework for corporate bribery prosecutions and, in 2014, the SFO secured its first corporate conviction for a UKBA violation. In 2015 and 2016, the SFO reached its first two deferred prosecution agreements with corporate defendants. Since then, only three other DPAs have been reached.

**FAQ 29****What are the maximum fines that can be assessed for violations of the UKBA?**

The fines for violations of the UKBA are unlimited.

There are a number of ways in which criminal investigations, including those relating to allegations of infringements of the UKBA, can be resolved.

**1. Charge**

A criminal charge begins the legal process. The Code for Crown Prosecutors provides a two-stage test for whether an accused should be charged with a criminal offence. First, a prosecutor must be satisfied that there is sufficient evidence against the accused for there to be a realistic prospect of conviction. Second, the prosecutor must also be satisfied that the prosecution is in the public interest. There are a number of factors that are listed in the Code to determine the public interest.

Once charged, the accused must decide whether to plead guilty or not.

**2. Guilty plea**

If a defendant pleads guilty at the earliest available opportunity, he or she will, according to the Sentencing Guidelines, receive a reduction in any sentence of one third. A sliding scale is then applied to the reduction given, reducing to a one tenth discount if the defendant pleads guilty at the door of the court or after the trial has begun.

**3. Not guilty plea**

If a defendant pleads not guilty, a full criminal trial will ensue. The offences under sections 1, 2, and 6 of the UKBA can be tried in either the Magistrates' Court or the Crown Court, depending on the severity of the offence. The Crown Court has greater sentencing powers than the Magistrates' Court, but it is possible to be convicted by magistrates and referred to the Crown Court for sentencing, if the magistrates consider that their powers are insufficient. A section 7 offence can only be tried in the Crown Court.

**4. Deferred prosecution agreement (DPA)**

DPAs were introduced in February 2014 through Schedule 17 of the Crime and Courts Act 2013. They are intended to allow a corporate offender to make reparations for criminal conduct, without a criminal conviction (and its attendant consequences) being imposed. DPAs are concluded subject to the supervision of a judge, who must be satisfied that the DPA is in the interests of justices and its terms are fair, reasonable, and proportionate.

The DPA Code of Practice (the Code) sets out when and how prosecutors will use DPAs. The SFO has so far concluded five such agreements – Rolls-Royce, Standard Bank, and XYZ Ltd. (corruption matters); Tesco Stores Ltd. (an accounting matter); and Serco Geografix Ltd. (a matter involving both fraud and false accounting) – and the jurisprudence is still developing.

**FAQ 30*****How is corporate criminal liability treated under the UKBA?***

Under general principles of English criminal law, corporate criminal liability is more limited than under US criminal law. Corporate criminal liability requires that:

- A person who can be identified as the directing mind and will of the organisation committed the offence; and
- That person was acting on behalf of the corporation when committing the offence.

Therefore, a corporation can be criminally liable for individuals within the organisation who bribe or are bribed so long as the two requirements noted above are met.

Under Section 7, a corporation can also be criminally liable if any person associated with the corporation and acting on its behalf, regardless of seniority, bribes to benefit the company. If that occurs, the company will be held strictly liable for those acts absent demonstrating that it had adequate procedures in place. Employees of a company are assumed to be associated persons of the company.

It is a discretionary matter as to whether a corporate offender will be invited to negotiate a DPA with the prosecutor – and it is for the prosecutor, not the company, to seek to initiate those discussions. However, the code of practice does provide some guidance on what factors the prosecutor will consider when deciding whether to initiate DPA discussions.

Generally, to be eligible for a DPA, the corporate offender will need to have self-reported the alleged criminal conduct and will need to cooperate fully with the investigation. The SFO's Operational Handbook includes Corporate Co-operation Guidance, which provides indicators of good practice to assist SFO staff in assessing the cooperation of a corporate entity. The Code also provides some guidance on cooperation. Further, a DPA will be more likely if a company has no previous convictions, has already implemented a full compliance programme, or if the criminal conduct occurred long in the past and/or was the result of rogue activities by employees.

It is noteworthy that the 2017 Rolls-Royce DPA did not stem from a self-disclosure of misconduct. However, officials stated that the company's extraordinary co-operation with the government's investigation played a part in the nature of the resolution. Similarly, a key component of the 2019 Serco Geografix Ltd. (SGL) DPA was the undertakings provided by Serco Group PLC, the parent company, which "mirror the requirements imposed on SGL by the DPA." In approving the DPA, the court noted that without the undertakings, it was unlikely that the goals of the DPA would have been achieved, because SGL itself was a dormant company.

**5. Civil recovery**

Prosecuting authorities have the power under the Proceeds of Crime Act 2002 to decline to bring criminal charges, and instead bring an action in the civil courts to recover the proceeds of alleged criminal activity. The previous director of the SFO made use of these powers on occasion, most notably in 2012 against the parent company of Mabey & Johnson Ltd.

The SFO's current public position is that it will continue to make use of civil recovery orders as an alternative to criminal charges under the right circumstances. Although the SFO has mainly focused on bringing criminal charges, in 2018, it sought civil recovery in the Griffiths Energy International and the Corrupt Uzbek Deal matters.

## SFO CORPORATE COOPERATION GUIDANCE

*In August 2019, the UK's Serious Fraud Office published new guidance on how companies can go about securing cooperation credit (the New Guidance). Much of the New Guidance's focus is on the preservation and provision of evidence, in particular digital material, but it also sets out the SFO's expectations with regard to the provision of interview notes, a contentious subject in recent years. The New Guidance differs in some respects from the Department of Justice's Corporate Enforcement Policy.*

- Companies seeking cooperation credit in the UK need to understand the SFO's expectations.
- Cooperation credit will be a factor in a company's favor both at the charging decision stage, and when the SFO is deciding whether to initiate DPA negotiations.
- The Guidance explains in practical terms how companies can meet the SFO's expectations.

### The SFO's Corporate Cooperation Guidance

Cooperation is a key consideration for the SFO when deciding (a) whether to charge a company with an offence, and (b) whether to invite a company to enter into negotiations for a deferred prosecution agreement (DPA). The New Guidance indicates that cooperation means providing assistance to the SFO that goes beyond what is required by law. It explains that cooperation is case-specific, and there is no checklist which will cover every case, but the New Guidance lists the following as:

<b>Examples of Cooperation</b>	<b>Inconsistent with Genuine Cooperation</b>
<ul style="list-style-type: none"> <li>✓ Identifying suspected wrongdoing, along with those responsible for it</li> <li>✓ Reporting these findings to the SFO promptly</li> <li>✓ Preserving evidence and providing it to the SFO in an evidentially sound format</li> </ul>	<ul style="list-style-type: none"> <li>✗ Protecting some individuals or unjustifiably blaming others (so-called "hanging out to dry")</li> <li>✗ Putting suspects on notice of an investigation, thereby causing a risk of evidence destruction</li> <li>✗ Companies remaining silent on "selected issues"</li> <li>✗ Tactical delay in dealing with the SFO, or overloading the SFO with information</li> </ul>

Much of the New Guidance is devoted to recommendations on the preservation and provision of digital and hard-copy material. Cooperative companies will obtain material quickly, preserve its digital integrity, and provide it to the SFO when requested. They will tell the SFO without delay where any data may have been compromised or destroyed. They will create an audit trail covering the handling of digital material and preserve the chain of continuity. Where data cannot be accessed (for example social media messages), they will alert the SFO to its existence. Many of the guidelines on data preservation do not go substantially beyond basic good practice in internal investigations, and so are unlikely to present any great challenge to companies.

The New Guidance also urges companies to think, in effect, about how they can make the SFO's job easier. It recommends that materials be provided to the SFO on a rolling basis (when agreed) and that companies should consider how best to "package" information, for example arranging it according to individual or specific issue. Financial data should be presented "in a structured way," with records showing relevant money flows, and companies are encouraged to do calculations on profit, disgorgement, and financial penalty. Much of these guidelines seem intended to assist the SFO in being ready as early as possible to make a decision on whether to charge or offer a DPA.

Perhaps more challenging are the guidelines on making various parties "available" to the SFO. These include accountants who can explain relevant financial information, agents of the company who may have been involved in the conduct under investigation, as well as current employees of the company. Companies may be asked to "facilitate" the production of material that is in the possession of third parties, which on the face of it could cover entities within the same group as the company under investigation, as well as unconnected third parties.

It is clear that the SFO is concerned about ensuring that it can discharge its disclosure obligations in any criminal proceedings that may arise from the investigation. Thus companies are expected to assist in identifying material which may assist future defendants or undermine the SFO's own case.

Cooperative companies are expected to be sensitive to the SFO's wishes with respect to their interaction with individuals and to consult the SFO before conducting any interviews or "taking any personnel/HR actions," which presumably includes suspension. Particular care should be taken not to taint witnesses' recollections by sharing with them accounts given by others or documents which they have not previously seen.

Perhaps the most far-reaching aspect of the New Guidance relates to the treatment of legally privileged material. In many cases where the company is itself under investigation, this will include notes, transcripts or recordings of interviews conducted by a company. The New Guidance stresses that companies cannot be formally required to waive privilege over such material and that companies will not be penalized for failing to do so; other forms of cooperation credit will remain available to the company. But a company which declines to share the output of interviews with the SFO will not be able to take advantage of that particular aspect of cooperation credit. On a different aspect of legal privilege, the New Guidance indicates that companies withholding material from

the SFO on the grounds of privilege are expected to obtain from independent counsel a certification that the assertion of privilege is properly founded. This introduces a new burden on cooperating companies and could be cumbersome in cases involving substantial quantities of privileged material, given the need to involve a separate team of external lawyers.

Although there are many parallels between the New Guidance and DOJ's Corporate Enforcement Policy, there are some noteworthy differences. The Corporate Enforcement Policy is clear that eligibility for cooperation credit is not "in any way" predicated on a waiver of privilege. This provides more comfort to companies than the New Guidance's assurance that companies will "not be penalized" for declining to waive privilege. Similarly, the Corporate Enforcement Policy does not require the use of independent counsel to approve assertions of privilege. The Corporate Enforcement Policy also provides a presumption of non-prosecution in cases where companies voluntarily self-disclose wrongdoing, whereas the New Guidance makes it clear that even a voluntary self-report "does not guarantee any particular outcome." Companies subject to joint DOJ and SFO investigations will therefore want to bear in mind the differences between the New Guidance and the Corporate Enforcement Policy in their interactions with the two authorities.

## UK PRIVILEGE IN INTERNAL INVESTIGATIONS:

***The 2018 Court of Appeal decision in SFO v. ENRC provides certain assurances that businesses can invoke the litigation privilege when conducting an internal investigation where civil litigation or criminal prosecution is reasonably contemplated. However, care should still be taken, as the contemplation of a criminal investigation may not be sufficient to ensure materials will be afforded privilege protections.***

- *SFO v. ENRC* confirmed that companies can maintain litigation privilege over documents prepared in the course of an internal investigation.
- The decision, however, was highly fact-specific, suggesting that the Court's findings may be limited to similar cases where there is a real prospect of criminal investigation.
- Although the Court declined to reach the question of the applicability of legal advice privilege in this case, it commented that English law on the issue appeared to be "out of step" with that of other countries, even though it was "undoubtedly desirable" for countries to remain aligned in this regard.

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The appeal in *SFO v. ENRC* [2018] EWCA Civ 2006 reflected an important development in defining the scope of legal professional privilege in the context of internal investigations. The case involved the Eurasian Natural Resources Corporation Limited (ENRC), which had conducted an internal investigation into alleged corruption and fraud in its operations in Kazakhstan and multiple African countries. After the SFO initiated a criminal investigation in April 2013, it sought disclosure of various documents prepared by ENRC's lawyers and accountants in the course of the internal investigation, including verbatim transcripts of witness interviews, books and accounts, lawyer work product, and presentations. ENRC asserted both litigation privilege and legal advice privilege over the documents.

The High Court rejected ENRC's claims, finding that none of the documents was covered by either privilege. The Court held that the litigation privilege did not apply because the documents had been created at a stage of the investigation when litigation was not yet contemplated and that the legal advice privilege did not apply because the communications in the documents were not for the dominant purpose of obtaining legal advice.

On appeal, however, the Court of Appeal overturned this judgment, holding that the vast majority of the documents were indeed protected by litigation privilege. The Court based its decision on having found clear evidence in the contemporaneous documents that a criminal prosecution was in reasonable contemplation and that the documents in dispute had been created for the "dominant purpose" of resisting contemplated criminal

proceedings. Whilst the decision provided some reassurance for companies conducting internal investigations going forward, care will still need to be taken. It was apparent that the Court was persuaded by the particular facts in this case and the context of the contemporaneous relationship between ENRC's and the SFO's investigations, which made clear that criminal proceedings were likely unless the matter was settled. In other words, unless there is a realistic prospect of a criminal investigation, litigation privilege may not apply to documents created during the course of an internal investigation.

Importantly, the Court's decision rested solely on the litigation privilege; the Court did not reach the question of whether the legal advice privilege applied. The Court noted, however, that English law on this point appeared to be at odds with international common law and should be clarified in the future, commenting that consistent interpretations of legal advice privilege seemed particularly important given the number of multinational companies with cross-border operations and international subsidiaries. Further commentary from Jenner & Block on the case can be found ([here](#)).

The SFO announced that it would not be appealing the decision to the Supreme Court.

Although the ENRC decision provides important insight into the degree to which corporations may successfully assert litigation privilege, it is also necessary to consider whether such assertions are good strategy, especially for corporations wishing to cooperate with the SFO. The "SFO Corporate Cooperation Guidance," which discusses the SFO's expectations for the treatment of legally privileged material in the context of securing cooperation credit, states that "considerable weight" will be given to a cooperative approach that includes "providing a report in respect of any internal investigation including source documents," among other things. The SFO's Corporate Cooperation Guidance can be located here [<https://www.sfo.gov.uk/download/corporate-co-operation-guidance/>].

Finally, it is worth remembering that, under UK law, legal professional privilege is a fundamental human right; not just an issue that arises when arguments over disclosure of privileged material exist. This principle was reiterated this year in *Addlesee v. Dentons Europe LLP* [2019] EWCA Civ 1600, where the Court of Appeal held that legal advice privilege attaching to communications and documents between a company and its lawyer remains intact unless and until waived by the company or overridden by statute, even after the company is dissolved. Once established, the privilege is absolute and an exception would effectively undermine the very purpose the privilege seeks to protect.

## THE UK MINISTRY OF JUSTICE GUIDANCE ON UKBA COMPLIANCE

***The UK Ministry of Justice has provided guidance in accordance with section 9 of the UKBA (the Guidance), which sets out the principles on which it bases consideration of what constitutes “adequate procedures” designed to prevent bribery. Our own experiences provide some assistance to organisations designing, implementing, or reviewing their anti-bribery compliance programme.***

- As detailed on page 56, section 7 of the UKBA provides for a strict liability offence on the part of commercial organisations of failure to prevent bribery. The only defence to this charge is that the commercial organisation had “adequate procedures” in place to prevent bribery.
- It is therefore imperative that commercial organisations subject to the UKBA understand what “adequate procedures” are if they are to avail themselves of a defence if there is an instance of bribery within their organisation or which is carried out on the organisation’s behalf.
- The question of “adequate procedures” is almost entirely untested in the English courts, meaning that the content of any guidance on this issue is key to understanding what must be done.

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The UK Ministry of Justice has provided guidance in accordance with the Guidance, which sets out the principles on which it considers “adequate procedures” designed to prevent bribery are based. The Guidance was first published in March 2011 and has not been updated. It is based on principles, and is deliberately designed not to be prescriptive. Although this can be difficult when organisations are attempting to benchmark their compliance programmes, it does allow (and indeed encourages) latitude to ensure that the compliance programme is genuinely fit for purpose, relevant, and functional within the organisation.

The six principles on which the Guidance is based are:

1. Proportionate procedures;
2. Top-level commitment;
3. Risk assessment;
4. Due diligence;
5. Communication (including training); and
6. Monitoring and review.

For organisations that are familiar with the various pieces of guidance on compliance programmes that have been issued by the US Department of Justice, the above will appear familiar. There are a number of similarities between the expectations of prosecutors and regulators in both jurisdictions. However, there are a number of substantive differences between the FCPA and the UKBA, and for that reason it is important that organisations ensure that their compliance programmes meet both sets of standards.

### **Proportionate procedures**

The commentary around the “proportionate procedures” principle concerns not only policies but also the procedures that an organisation has in place to ensure those policies are implemented into the business. As the principle’s name suggests, the emphasis is on the development and implementation of policies and procedures that are proportionate to the risks faced by the organisation. This clearly links to the third principle of risk assessment.

The Guidance provides a list of areas in relation to which policies and procedures are expected if they are to be adequate. These include gifts and hospitality, third parties and agents, whistleblowing, financial controls, and decision-making/authority procedures.

### **Top-level commitment**

The Guidance suggests that organisations ought to provide statements and messages from their senior leadership detailing the organisation’s commitment to a culture in which bribery is not acceptable. These statements should be tailored appropriately for the relevant audience and be easily accessible and periodically publicized.

In addition, the Guidance recommends that the board should have ultimate responsibility for anti-bribery compliance, and should be active in reviewing, monitoring, and updating policies and procedures.

### **Risk assessment**

Risk assessments vary markedly depending on the size of the organisation, its sector, geographical reach, use of agents, and other factors. However, the Guidance suggests that there are a number of markers that would be expected in each: oversight by senior management; resource for the project appropriate to the task; identification of internal and external information sources; due diligence enquiries; and proper documentation.

The Guidance also lists five broad groups of external risk that it considers should be covered: country risk, sectoral risk, transaction risk, business opportunity risk, and business partnership risk.

## Due diligence

The Guidance is not prescriptive as to the steps that should be taken when carrying out due diligence, but it notes that the exercise should be risk-based and proportionate. This reflects the nature of the UKBA, which provides that the violation can be found not only in the actions of the organisation's executives and the organisation itself, but also in the conduct of associated persons. The concept of "associated person" is very wide under the UKBA and includes any person performing services for the organisation. Because this covers a wide range of entities and individuals, it is not possible to prescribe precisely the scope of due diligence that should be carried out in any given situation. If the organisation has successfully completed a risk assessment, however, it ought to have a good understanding of the level of risk posed and the degree of diligence necessary to ensure effective anti-bribery compliance.

## Communication (including training)

Training is a common feature of all compliance programmes, regardless of subject matter. The Guidance is not prescriptive on this point, but it does recommend that some training be required on an organisation's anti-bribery compliance programme. This training should be for staff members, but also potentially for the organisation's associated persons. The Guidance is agnostic as to the format of the training, so long as it is effective in achieving its aims.

Within this principle the Guidance also addresses whistleblowing. It recommends that organisations create communication channels through which concerns can be raised and violations reported and that those using these channels be protected from reprisal.

## Monitoring and review

The Guidance notes that there are many ways to monitor the effectiveness of an anti-bribery compliance programme, including financial controls, staff surveys, internal audit reports, and externally provided reviews. It also notes that in many instances there are industry bodies or regulators that might provide formal or informal guidance to organisations on good or bad practices.

## Conclusion

As is apparent from the foregoing, the Guidance is not definitive and allows organisations significant latitude to design and implement their programmes. This means that benchmarking a programme against expectations is difficult, but it also means that organisations can truly tailor their programmes to take into account the specific needs of the business.

## INTERNATIONAL

In 2019, countries around the world continued their anti-corruption efforts. Several countries adopted new anti-corruption laws, while others took steps towards the same. In addition, intergovernmental organizations, such as the OECD and IMF, have also influenced or taken steps to influence countries' anti-corruption efforts. Together, these actions reinforce a global trend to combat corruption. This growing trend also suggests that cooperation between various international enforcement agencies will likely continue to become more commonplace.

A selection of newly enhanced anti-corruption laws are summarized here.

### ITALY

Italy's new anti-corruption law went into effect on January 1, 2019. Among other things, it increased criminal penalties for corruption offenses such as bribery, introduced potential lifelong bans in government participation for those convicted of corruption, and extended the statute of limitations in criminal actions. In addition, the new law also allowed those engaged in corrupt activities to self-report and, by cooperating, to reduce or eliminate their potential punishment.

### ARGENTINA

In April 2019, Argentina's "National Anticorruption Plan (2019-2023)" was approved. In doing so, Argentina launched various five-year priorities that are consistent with several international conventions against corruption, organized crime, and money laundering. Argentina also paved the way for the creation of public monitoring mechanisms.

### GREECE

On July 1, 2019, Greece's new penal code came into effect. Bribery was downgraded from a felony to a misdemeanor, and now carries a maximum sentence of fifteen years, as opposed to life in prison. That said, as a result of the change, the OECD has expressed concern that Greece may now be in breach of the OECD's Anti-Bribery Convention, and is now conducting a review of the country. The OECD was expected to publish a report in December 2019.



## GERMANY

The German Ministry of Justice and Consumer Protection presented a draft of its Corporate Sanctions Act on August 22, 2019. The new law would allow for corporate criminal liability, instead of simply individual punishment. For some companies, it would permit fines of up to 10% of groupwide annual sales for a single offense. Companies could reduce potential fines by 50% by conducting an internal investigation satisfying certain criteria. However, the draft law would require that companies retain separate counsel to handle the internal investigation and the company's defense.

## UKRAINE

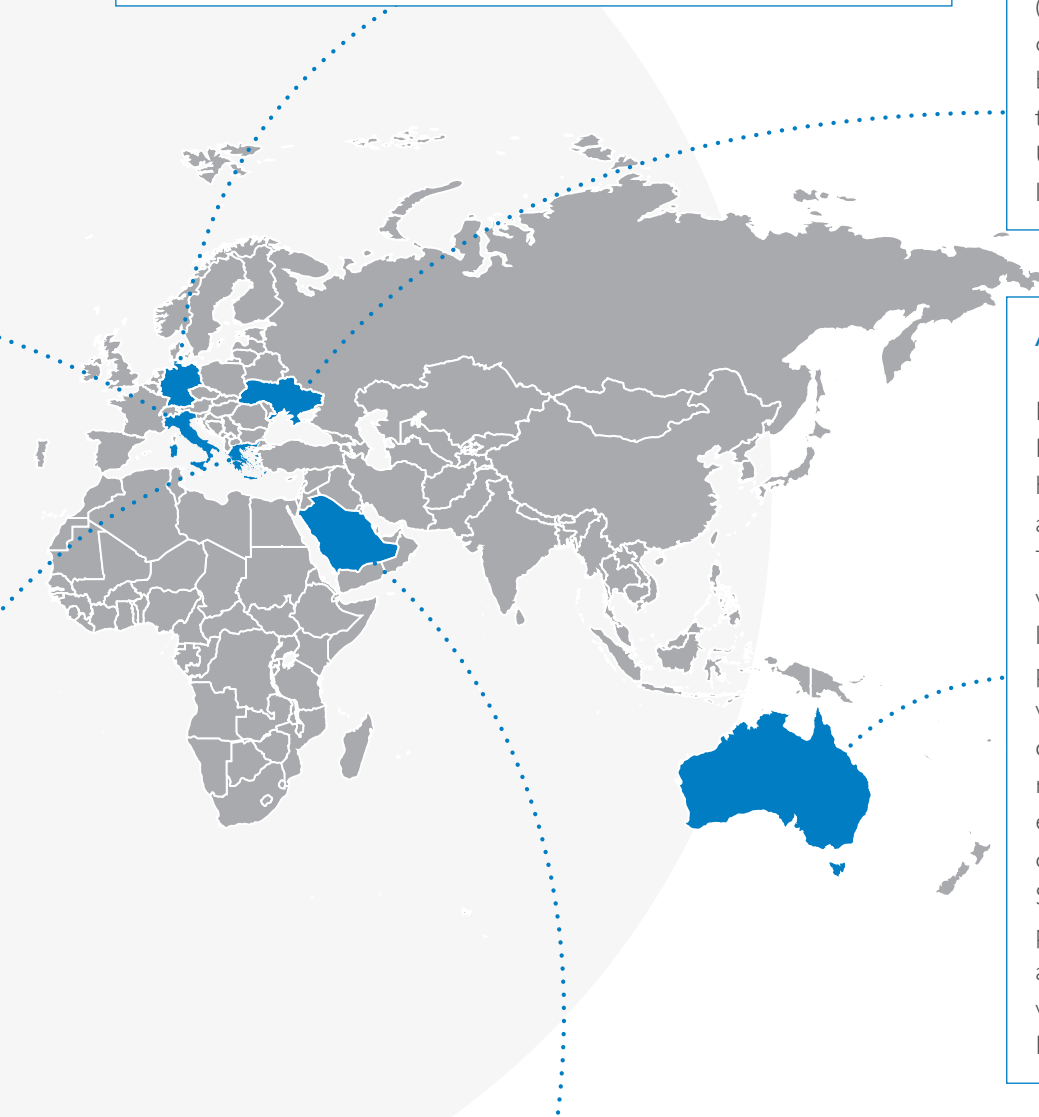
In October 2019, Ukraine adopted anti-corruption legislation mandating criminal punishment for unjust enrichment. This legislation was expected to assist Ukraine in its request to obtain approximately \$5 billion in financial assistance from the International Monetary Fund (IMF). The previous Ukrainian law criminalizing unjust enrichment had been declared unconstitutional by the Constitutional Criminal Court of Ukraine in February 2019, and all cases linked to it had been closed.

## AUSTRALIA

In December 2018, Australian Prime Minister Scott Morrison announced he would move to establish a federal anti-corruption commission in 2019. The proposed commission, which was criticized by some opponents for lacking transparency, would operate in private, make no public findings, and would refer any recommendations directly to prosecutors. More recently, in September 2019, a bill to establish such a federal anti-corruption commission passed in the Australian Senate. Debate regarding the proposed anti-corruption commission and the potential scope of its powers was continuing as recently as November 2019.

## SAUDI ARABIA

In early 2019, Saudi Arabia approved a new anti-bribery law to go into effect before the end of the year. Among other changes, the new law would make private sector bribery a crime, thereby vastly expanding the scope of the country's anti-bribery laws.



## SELECTED EUROPEAN ENFORCEMENT ACTIONS

***European enforcement authorities continue to investigate and prosecute corrupt conduct around the world. This has resulted in individual convictions and numerous corporate fines.***

- Corruption enforcement continues across Europe.
- There is no European-wide enforcement push; cases are taken on an ad-hoc basis.

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### ***Iceland – a Fishrots at the head?***

In early November, a report published by *Stundin*, an Icelandic investigative publication, in conjunction with WikiLeaks, exposed what it claimed to be a bribery scheme by Samherji, Iceland's largest fishing company. The bribery scheme reportedly used a series of offshore vehicles to pay bribes to several Namibian state officials, in order to obtain valuable fishing rights off the Namibian coast. Allegedly, Samherji's CEO authorized the payments. The \$10 million in bribes, which were reportedly directed via Norway, Cyprus and the Marshall Islands, were purportedly used to secure valuable fishing rights off the coast of Namibia.

Interestingly, the initial reports claimed that DNB NOR (one of the banks through which payments flowed up until 2018) ended its relationship with Cape Cod FS, the Marshall Islands entity at the center of the scandal, after undertaking a risk analysis and concluding that, because of inadequacies in its understanding of the entity's ownership, the relationship was too risky. It is reported that the bribes continued after the de-banking occurred, through another route. Despite the investigation, it is still unclear who, in fact, actually owned Cape Cod FS.

Whilst it is as yet uncertain how the case will unfold, the impact on the individuals at the center of the scheme can already be seen. Two Namibian government officials have reportedly resigned over the report, and Samherji's CEO is to take a leave of absence whilst an investigation is carried out.

We will be watching this case with interest because it:

- (i) provides further evidence of Nordic issues with corruption and money laundering, this time with two jurisdictions relatively untouched by the Baltic money-laundering scandal; and
- (ii) provides an interesting example where (albeit delayed) corrective action was taken by one of the financial institutions involved.

### *Spain – Real Steel?*

Fomento de Construcciones y Contratas, S.A. (FCC) one of Spain's leading construction companies has been charged with corruption and money laundering in connection with making \$91 million payments made in Panama, allegedly to obtain hospital and metropolitan transport contracts between 2010 and 2014.

The scheme appears to have come to light because the funds for the scheme were created by FCC overcharging for steel in construction projects, in a joint venture with Odebrecht. Those funds were then reportedly used to bribe Panamanian officials.

It is reported that senior executives at FCC authorized the payments and that FCC, at a corporate level, did not have any mechanisms in place to prevent bribery at the company. The money itself was allegedly channeled through various offshore vehicles and accounts in Switzerland and Andorra.

According to reports, FCC has declined to comment, but a spokesperson for Carlos Slim, who owns 25 percent of the entity, stated that the case relates to a period before he took an ownership stake in the company.

This case shows the continued reverberations of the Odebrecht corruption scandal and indicates that secondary scandals are now filtering through the enforcement mechanisms of other jurisdictions. In 2016, Odebrecht agreed to the world's largest ever corruption related fine in a corruption scandal that spread across Latin and South America.

It is likely that, as secondary schemes are now being investigated, we will see more Odebrecht-related cases coming to court in the near-future.

### *Greece – Beware an SFO bearing gifts*

In July of 2019 a court in Athens found, three UK nationals guilty of bribery. The individuals – three ex-employees of Johnson & Johnson (J&J) – were charged with making illicit payments to obtain sale contracts for medical devices between 2000 and 2006.

The bribery scheme reportedly involved then-employees of J&J kicking back a percentage of the sales funds they received to orthopedic surgeons, thereby illicitly incentivizing the purchase of their medical devices to the detriment of competitors. There was also an alleged overpricing element to the scheme, which further enabled the payment of bribes.

Interestingly, one of the British defendants, John Dougall, was acquitted on double jeopardy grounds. Dougall was a cooperating offender with the UK Serious Fraud Office (SFO) and DOJ when the scheme was first investigated by UK and US authorities in 2011. Dougall pleaded guilty to charges in the UK relating to the scheme in 2010.

Both the SFO and DOJ intervened in his case. The SFO wrote to the court, setting out how Dougall had provided “key evidence” when the case was dealt with in 2010. DOJ wrote to the court endorsing the SFO’s position, calling Dougall’s cooperation “extraordinary”.

In addition to the double jeopardy argument, reporting from around the time of the trial indicates that the SFO had not provided permission for case materials provided from the UK to be used against Dougall. According to the SFO, these case materials provided by way of mutual legal assistance to the Greek authorities had been provided on the understanding that they would not be used to prosecute Dougall. The Greek authorities maintained that they were free to use the material provided by the UK for any lawful purpose; therefore Dougall was required to stand trial along with the other defendants. The SFO attended the trial to provide evidence in support of Dougall on public policy grounds.

It is unclear to what extent the court considered the interventions made by the SFO or DOJ. However, acquittal on these grounds is likely to have been a welcome relief for Lisa Osofsky, who has stated that the use of cooperating individuals is an avenue that the SFO wishes to use as it attempts to speed up the process of concluding investigations and prosecutions.

### *France – Egis Avia*

On December 10, 2019, the French National Financial Prosecutor’s Office (PNF) confirmed that it had provisionally entered into a deferred prosecution agreement (DPA) with the construction company Egis Avia. If this DPA is affirmed by Egis Avia, (under French law a company has ten days to withdraw from the agreement before it is finalised) it will be the eighth DPA entered into under France’s 2017 anti-corruption law, widely referred to as Sapin II.

The alleged corruption relates to allegations that at some point in 2008, Egis Avia paid bribes to public officials to win €4 million worth of contracts relating to the construction and equipment of an airport in Oran, Algeria. The payments were reportedly passed through a BVI-headquartered consultancy, which entered into a contract worth €390,000 with Egis Avia.

The company noted in a press release that the DPA agreement did not constitute an admission of guilt, and that as it had substantially revised its “ethical processes” and therefore the company did not need to be monitored by the French authorities. Under French law any monitorship due to be imposed following a cross-border settlement involving a French prosecuting authority would need to be conducted by the French authorities and not, as is commonplace in the United States and the United Kingdom, an external third party.

This agreement is evidence of France’s developing DPA regime. However, when compared to the DPAs entered into with Google (for €500 million) and HSBC (for €190 million), both relating to tax evasion offences, Egis Avia’s DPA for €2.6 million appears to

be significantly lighter. Time will tell if tax evasion, and not foreign bribery, becomes the principle focus of the PNF. It is also of interest that, according to online reports, the PNF had reportedly been investigating the company since 2011.

### *Denmark – Hempel*

In 2019, Hempel A/S and Hempel (Germany) GmbH agreed to pay a total settlement of DKK 220 million (approximately \$33.3 million), DKK 197.5 million (approximately \$30 million) of which was to be paid to the Danish State Prosecutor for Serious Economic and International Crime (SØIK), and €3 million (approximately \$3.3 million) of which was to be paid to the Prosecution Authority in Kiel, Germany.

The fines bring to an end the multi-year investigation into illegal conduct at Hempel. The Hempel investigation first gained public attention in August 2016 when German police executed a search warrant at Hempel's German headquarters. In a statement made shortly after, Hempel explained that the German authorities were investigating whether Hempel employees had paid bribes to ship managers in Germany.

By October 2016, Hempel had engaged an external law firm to conduct an internal investigation of Hempel Germany and had already terminated four employees in Germany. Shortly after, Hempel expanded its investigation to other jurisdictions. As a result of the expanded investigation, Hempel reorganized its operations in other jurisdictions and three senior executives left the company.

In April 2017, following an internal investigation, Hempel self-reported to SØIK a number of illegal practices it uncovered in Germany, in other European countries, and in Asia. To prevent similar issues in the future, Hempel has also stated that it has upgraded its whistleblower systems, completed internal remediation, and established a robust compliance framework.

### *UK – Alstom Network UK Ltd.*

On November 25, 2019, Alstom Network UK Ltd (Alstom Network) was ordered to pay £16.4 million, having been convicted of conspiracy to corrupt in April 2018 for having paid €2.4 million to an intermediary to secure an €79.9 million contract with the company responsible for running the Tunis Metro. Although the intermediary was simply a conduit for bribes, Alstom Network helped to produce paperwork as “evidence” of services rendered in order to satisfy internal compliance checks and make the agreement appear legitimate.

In addition to Alstom Network's conviction, the SFO's wide-reaching, decade-long investigation into misconduct at Alstom group entities has resulted in several other convictions. John Venskus, Göran Wikström, and Alstom Power Ltd all pleaded guilty to conspiracy to corrupt for bribing senior Lithuanian persons in order to win €240 million in contracts to upgrade and refit a power station, the Lithuanian Power Plant (LPP). John Venskus received a three-year and six-month sentence, Göran Wikström received two years and seven months' imprisonment, and Alstom Power Ltd was fined more than

£6 million and required to pay nearly £11 million in compensation. Another individual, Nicholas Reynolds, was found guilty of the same misconduct in December 2018 and sentenced to four years and six months' imprisonment.

However, the SFO has also failed to secure several convictions. In the same trial that resulted in Alstom Network's conviction, three others – Graham Hill, Robert Hallett and Alstom Network UK – were acquitted of charges involving alleged corruption connected with transport contracts in India and Poland. In addition, another three individuals who were charged with bribery related to a €229 million contract in Budapest – Michael Anderson, Jean-Daniel Lainé and Terrence Watson – were also acquitted by a jury in November 2018.

Despite these different outcomes, the SFO's investigation into Alstom group entities was still notable because it involved conduct in numerous countries and involved cooperation from over 30 countries around the world, including France, Canada, the United States, Hungary, Denmark, Austria, Slovakia, the Czech Republic, Liechtenstein, India, Sweden, Lithuania, Switzerland, and Tunisia. We expect that the SFO will continue to cooperate with the relevant enforcement authorities worldwide in pursuit of international misconduct involving UK individuals and companies.



## MAP OF OUR WORLDWIDE ANTI-CORRUPTION REPRESENTATIONS



Jenner & Block has one of the nation's leading FCPA practices, representing global companies in defense of FCPA claims and in all phases of compliance with the FCPA and other anti-corruption laws, from training and development of internal controls, compliance counseling and internal investigations, to representation before and negotiations with the United States and other governments.

The hallmark of a strong FCPA practice is keeping clients out of trouble in the first place: by working with in-house lawyers and business people to develop appropriate internal controls that meet the specific needs of the company and that detect and prevent violations; by designing and/or conducting regular training of company personnel; by structuring, advising on and conducting anti-corruption due diligence, whether for third-party service providers or in the context of acquisitions; and by counseling on the resolution of specific compliance issues as they arise in day-to-day business operations.

Our lawyers have developed compliance programs for major multi-national companies across numerous sectors of the economy, including defense industries, financial institutions,

oil and gas, media companies, government contractors of all kinds, and retail establishments, among others, and provided training to literally tens of thousands of corporate personnel as well as for smaller businesses with fewer than 500 employees. Our FCPA team also brings a nuanced understanding of the intersections between the FCPA and federal securities laws, Sarbanes-Oxley, Dodd-Frank, export control laws and regulations, and other anti-corruption laws, including the UK Bribery Act.

When issues arise, our clients benefit from Jenner & Block's world-class reputation and skill in conducting internal investigations. Our range and depth of experience enables us to conduct internal investigations with care and rigor, ensuring that our clients have obtained the facts they need and that the investigation will withstand the strictest of scrutiny by regulators. At the same time, we understand how to operate flexibly and expeditiously and the need to conduct investigations efficiently and with sensitivity to the needs of our clients' business operations. Jenner & Block also provides our clients with seasoned judgment to assess the veracity and gravity of the allegations and to make informed decisions under difficult, often time-sensitive circumstances. We advise clients on the most effective methods to mitigate the impact of any alleged misconduct, including the potential benefits and risks of voluntary disclosure when appropriate.

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