Update to Anti-Corruption Enforcement 2018 – 2019

A Guide to the FCPA and the UK Bribery Act

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INTRODUCTION TO THE GUIDE

The Foreign Corrupt Practices Act (FCPA) has entered its fifth decade, and DOJ continued to develop policies and priorities for FCPA enforcement throughout 2018. At least at first glance, some of 2018's policies appear favorable for corporate defendants. In spring 2018, DOJ unveiled its new Coordination Policy, or "Anti-Piling On Policy." This new policy directs DOJ lawyers to coordinate to avoid "the unnecessary imposition of duplicative fines, penalties, and/or forfeiture" on companies. Lawyers are also directed to cooperate with other federal, state, local, or foreign enforcement authorities. The policy has been incorporated into a new section of Title 1 of the Justice Manual, the Department's new title for the former US Attorney's Manual.

In fall 2018, DOJ issued additional guidance with direct relevance to anti-corruption enforcement. On October 11, 2018 Assistant Attorney General for the DOJ's Criminal Division Brian Benczkowski issued a memorandum on the use of corporate monitors in criminal cases (the Benczkowski Memorandum). The memorandum suggests that, in the future, DOJ may impose corporate monitors in fewer cases and that such monitors may have more limited mandates when appointed. The memorandum also provides guidance on considerations for determining whether to impose a monitor and how to assess the cost of a monitor, and it makes changes to the monitor-selection process. Meanwhile, DOJ formalized its decision not to renew the compliance counsel position created by the Criminal Division's Fraud Section in 2015.

As the year drew to a close, DOJ further emphasized the shared interests of DOJ and private industry in combating cybersecurity threats and fostering a "culture of compliance with the rule of law." DOJ also underlined the now year-old FCPA Corporate Enforcement Policy, which promises that a company that voluntarily and promptly self-discloses misconduct, fully cooperates, and implements "timely and appropriate remedies" will presumptively receive a declination. The Policy's non-binding guidance has even been extended to corporate criminal cases outside the FCPA context, at least where handled by the Criminal Division. And DOJ indicated that its topical focus on cybersecurity is linked to its recently announced "China Initiative" focused on intellectual property theft and economic espionage cases. Both DOJ and the SEC continued to bring FCPA enforcement actions, which we summarize in the *Guide*.

Meanwhile, across the Atlantic, 2018 saw the appointment of a new director of the Serious Fraud Office (SFO), Lisa Osofsky. We provide an overview of Osofsky's stated enforcement priorities and the possibility of additional guidance to companies on the SFO's definition of cooperation. We also consider the potential effects of the United Kingdom's departure from the European Union, which as at time of printing was still slated for March 29, 2019.

A number of countries throughout the world have continued to revise and strengthen anti-corruption and anti-fraud statutes, particularly with regard to bribery. We provide an overview of global efforts in this area, including new amendments to India's anti-corruption law and expanded anti-corruption laws in the United Arab Emirates. However, a report published by Transparency International this fall concluded that only seven of 44 signatory countries actively enforced the Organisation for Economic Cooperation and Development's Anti-Bribery Convention.

This *Guide* analyzes these and other significant anti-corruption enforcement and compliance topics. It offers an overview of the FCPA and UKBA and addresses common questions that a company operating in the international marketplace may have about these laws. Naturally, the information presented here is not intended to be legal advice for any specific situation.

If you have any questions about this *Guide*, or anti-corruption laws generally, please contact any of the lawyers listed in this publication or in our Investigations, Compliance, and Defense practice group.

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FCPA RECENT DEVELOPMENTS AND TRENDS

RECENT DECLINATIONS AND RESOLUTIONS SHED LIGHT AND DOJ'S CORPORATE ENFORCEMENT POLICY

The FCPA Corporate Enforcement Policy announced in November 2017 remains largely unchanged in the newly revised Justice Manual (formerly the US Attorney's Manual) at Section 9-47.120.[1] The Policy continues to highlight the four now familiar prerequisites for a presumption of declination to arise:

(1) reasonably prompt and voluntary self-disclosure;

(2) full cooperation with the government's investigation;

(3) remediation to address the root causes of the misconduct at issue; and

(4) disgorgement of ill-gotten gains.

But the past year has provided substantial additional evidence by which to judge DOJ's ongoing commitment to the principles of the policy.

Declinations

DOJ publicly announced three declinations in 2018. By the Policy's own terms, a declination "under the policy" is always made public, unlike declinations made in the ordinary course based on insufficient evidence or other factors in the Principles of Federal Prosecution of Business Organizations, Justice Manual § 9-28.000. These three cases underline the separate importance of each of the four factors, as well as the value DOJ appears to place on a company's cooperation when it enhances DOJ's ability to prosecute individuals. DOJ also announced non-declination resolutions in several corporate enforcement actions, which provide a window into the implementation of the Policy's guidelines for non-voluntary disclosure and less-than-complete cooperation. Considered together, the declinations and other resolutions highlight DOJ's efforts to communicate that the Policy provides real incentives to self-disclose and cooperate.

In re Dun & Bradstreet Corporation. The first of those cases, *In re Dun & Bradstreet Corporation*, was announced on April 23, 2018, by DOJ's Fraud Section and the US Attorney's Office for the District of New Jersey. In *Dun & Bradstreet*, DOJ declined prosecution despite evidence of bribery by the corporation's subsidiaries in China. In its letter announcing the declination, DOJ emphasized the following facts that align with the Policy's four requirements:

- **Self-disclosure:** The company identified and promptly disclosed the misconduct.
- **Cooperation:** The company conducted a "thorough" internal investigation and "full[y]" cooperated with the government, including by identifying individuals involved in and responsible for the misconduct, providing all related facts, translating documents, and making employees (including former employees) available for interviews.
- **Remediation:** The company enhanced its compliance program and internal accounting controls; the company also terminated 11

[1] Though the policy is largely unchanged, in a speech on March 8, 2019, Assistant Attorney General Brian A. Benczkowski announced that DOJ would extend its Corporate Enforcement Policy to "situations where misconduct is uncovered through due diligence in the context of a merger or acquisition, or, in appropriate instances, through post-acquisition audits or compliance integration efforts" in order to avoid "chilling acquisition efforts."

involved employees and disciplined others (including by reducing bonuses and salaries).

- **Disgorgement:** The company agreed to disgorge "the full amount . . . as determined by the SEC."

In re Guralp Systems Limited. The second declination of 2018 was announced on August 20, 2018, by the Fraud Section and the US Attorney's Office for the Central District of California. *In re Guralp Systems Limited* involved payments made by Guralp Systems to the director of the Earthquake Research Center (ERC) at the Korea Institute of Geoscience and Mineral Resources. DOJ declined prosecution of Guralp Systems despite that misconduct, emphasizing the following facts:

- **Self-disclosure:** The company voluntarily disclosed possible violations of the FCPA and US money laundering statutes.
- **Cooperation:** The company's "substantial cooperation" included the voluntary production of relevant documents and information.
- **Remediation:** The company undertook "significant remedial efforts," although DOJ did not specify the substance of those efforts.
- **Disgorgement:** No specific details were noted, but the company (which is based in the United Kingdom) "committed to accepting responsibility" in an ongoing parallel investigation being run by the UK's Serious Fraud Office.

Notably, DOJ also stressed that the company's disclosure and cooperation assisted DOJ in prosecuting the director of the ERC for money laundering.

In re Insurance Corporation of Barbados Limited. The third and final declination announced in 2018 arose out of an investigation handled by the Fraud Section and the US Attorney's Office for the Eastern District of New York. Announced on August 23, 2018, *In re Insurance Corporation of Barbados Limited* concerned bribes paid by the company to a Barbadian government official in exchange for government insurance contracts. DOJ's declination letter in this matter included more detail than usual. Of particular interest may be the relatively small dollar figures involved, namely approximately $36,000 in bribes resulting in approximately $94,000 in net profits for the corporation. DOJ also noted that the bribed official was a member of the Parliament of Barbados who was a US legal permanent resident and who took various steps to conceal the money trail, including involving a US company and banks in multiple states. Furthermore, DOJ specifically noted that it was declining prosecution "despite the high-level involvement of corporate officers in the misconduct" and laid out its reasoning as follows:

- **Self-disclosure:** The company made a timely and voluntary disclosure of the misconduct.
- **Cooperation:** The company conducted a "thorough and comprehensive" internal investigation, and its cooperation included providing all known relevant facts to the government and agreeing to continue to cooperate in ongoing investigations and prosecutions.
- **Remediation:** The company enhanced its compliance program and internal accounting controls; the company also terminated all executives and employees involved in the misconduct.
- **Disgorgement:** The company agreed to disgorge all profits from the illegal conduct.

DOJ also highlighted as a separate factor in its decision that DOJ was able to identify and charge the culpable individuals involved in the misconduct.

Non-Declination Resolutions

In six additional 2018 cases, defendant corporations and DOJ reached non-declination resolutions in line with the guidelines of the Policy related to both full cooperation without self-disclosure (Section 9-47.120(2)) and incomplete cooperation (Sections 9-28.700 and 9-47.120(4)). The six cases are *United States v. Panasonic Avionics Corporation* (April 30, 2018); *In re Legg Mason* (June 4, 2018); *United States v. Société Générale S.A.* and *United States v. SGA Société Générale Acceptance, N.V.* (June 4, 2018); *In re Credit Suisse* (July 5, 2018); and *In re Petróleo Brasileiro S.A.* (September 26, 2018). In two of those cases, companies resolved investigations with non-prosecution agreements and received the full 25 percent discount off the low end of the US Sentencing Guidelines fine range available to corporations that fully cooperate and

remediate but fail to self-disclose misconduct (*see* Section 9-47.120(2)). The other four corporate defendants—each of which also did not self-disclose the misconduct at issue—received 15 to 20 percent discounts from the applicable penalty ranges due to various forms of incomplete cooperation and/or remediation. For example, Credit Suisse (15 percent discount) received only partial credit for cooperation and remediation because DOJ deemed its cooperation reactive rather than proactive and stated that it insufficiently disciplined involved employees. The other three corporations (20 percent discounts) were docked for untimeliness and delays in cooperation or remediation. Notably, however, Credit Suisse resolved its investigation with a non-prosecution agreement, while the other three matters were resolved via deferred prosecution agreements (two of the cases) or guilty plea (one case). On the whole, these resolutions suggest that while resolutions generally track the incentive structure outlined in the Policy, there is still room for substantial negotiation when it comes to the various elements (monetary penalty, disgorgement, resolution mechanism, etc.) of any given resolution.

UPDATE ON "PILING ON" POLICY AND USE OF FCPA CORPORATE ENFORCEMENT POLICY IN OTHER AREAS

In May 2018, DOJ unveiled its Coordination Policy, which has come to be known as the "Anti-Piling On Policy." The change responds to concerns about the effects of overlapping corporate investigations by DOJ units and/or other law enforcement authorities. Specifically, because multiple law enforcement entities may investigate companies for the same conduct, companies may be subjected to duplicative or disproportionate penalties. To avoid such unfair outcomes, the new policy directs DOJ lawyers to "coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture," including by considering an appropriate overall amount and how it should be equitably apportioned between the various entities. Lawyers are also directed to "endeavor, as appropriate, to coordinate with . . . other federal, state, local, or foreign enforcement authorities." The policy has been incorporated into a new section in Title 1 of the US Attorney's Manual Title. *See* 1-12.100, https://www.justice.gov/opa/speech/file/1061186/download.

According to remarks Deputy Attorney General Rod Rosenstein made in May 2018 to the New York City Bar White Collar Crime Institute, the policy is intended to mitigate the risk that joint or parallel investigations will result in penalties that go beyond what is actually necessary to rectify the harm and deter future misconduct. In this way, it implements the principle set forth in Title 9 of the US Attorney's Manual noting that DOJ lawyers should consider "whether non-criminal alternatives would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct."

In coordinating with other DOJ units or other law enforcement entities and considering equitable apportionment of fines or other penalties, DOJ lawyers must consider the following four factors:

(1) The egregiousness of a company's misconduct;

(2) Statutory mandates regarding penalties, fines, and/or forfeitures;

(3) The risk of unwarranted delay in achieving a final resolution; and

(4) The adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities.

The fourth factor has a familiar ring to FCPA practitioners: its emphasis on corporate conduct *after* the discovery of malfeasance echoes the FCPA Corporate Enforcement Policy. As in that policy, the new Anti-Piling On Policy encourages companies to make complete and prompt disclosures and to cooperate with the government's investigation. But in the "piling on" context, there is an additional consideration—the company must disclose to and cooperate with *multiple* law enforcement entities to see a benefit. As Deputy Attorney General Rod Rosenstein put it in his May 2018 remarks:

"Cooperating with a different agency or a foreign government is not a substitute for cooperating with the Department of Justice. And we will not look kindly on companies that come to the Department of Justice only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States."

The Anti-Piling On Policy was put into action in at least three enforcement matters in 2018.

- In August 2018, DOJ issued a declination in an FCPA and money laundering investigation into Guralp Systems Limited. The decision relied in part on the company's voluntary disclosure, remediation, and cooperation with DOJ. But, in accordance with the Anti-Piling On Policy, it also took into account the fact that Guralp was already subject to an ongoing investigation by the UK's Serious Fraud Office (SFO) for violations related to the same conduct, and that the company was also cooperating with the SFO.

- In June 2018, DOJ coordinated with French authorities to resolve an FCPA and currency manipulation matter involving Société Générale, including by crediting the company's $300 million penalty paid to French authorities against its fines owed to the United States.

- And in September 2018, DOJ joined with the SEC and Brazilian law enforcement to reach a global settlement resolving FCPA and other violations against Brazilian energy company Petróleo Brasileiro S.A. (Petrobras). As part of the global settlement, DOJ signed a non-prosecution agreement that, according to Deputy Assistant Attorney General Matthew Miner, took into account Petrobras's separate settlements with the SEC and the Brazilian Ministerio Publico Federal, and also adjusted its penalty accordingly.

NEW CRIMINAL DIVISION GUIDANCE ON THE USE AND SELECTION OF CORPORATE MONITORS

On October 11, 2018, the assistant attorney general for DOJ's Criminal Division, Brian Benczkowski, issued a new memorandum on the use and selection of corporate monitors in resolutions of criminal cases (the Benczkowski Memorandum). Largely building off of prior DOJ guidance, the Benczkowski Memorandum details additional considerations for determining whether a monitor is needed, lists terms that monitorship agreements must include, and provides updated procedures for monitor selection. Although it does not make significant changes to the existing framework, the memo suggests that corporate monitors may be imposed in fewer cases going forward and given a more limited mandate when they are imposed.

The Benczkowski Memorandum largely expands upon existing DOJ guidance. Although it supersedes a June 24, 2009 memorandum that previously governed monitor selection (the Breuer Memorandum), it generally adopts the Breuer Memorandum's approach. It also leaves in effect and merely supplements a March 7, 2008, memorandum regarding the use and selection of monitors (the Morford Memorandum).

Most notably, the Benczkowski Memorandum provides more detailed guidance on the considerations for determining whether a monitor should be imposed, provides guidance on circumstances where a monitor may be unwarranted, addresses how to assess the cost of a monitor, and notes changes to the process of monitor selection.

The Morford Memorandum set forth certain criteria to assess the need for a monitor: (1) the potential benefits that a monitor may have for the corporation and the public; (2) the cost of the monitor; and (3) its impact on the operations of the corporation. The Benczkowski Memorandum elaborates on the first of these criteria, specifying four factors that prosecutors should examine when assessing the "potential benefits" of a monitor:

A. Whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control system;

B. Whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;

C. Whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and

D. Whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.

The Benczkowski Memorandum also provides guidance to corporate defendants on situations where a monitor may not be necessary. *First*, it states that a monitor may not be warranted in cases where the risk of recurring misconduct has been diminished by changes in corporate leadership or the compliance environment. *Second*, it observes that there is less need for a monitor where adequate remedial measures have been taken to address problematic behavior by employees, management, or third-party agents, including, where appropriate, the termination of business relationships and practices that contributed to misconduct. In light of this guidance, corporations under criminal investigation may want to consider making management changes, strengthening their compliance programs, and removing wrongdoers in order to avoid a costly monitor.

In addition, the Benczkowski Memorandum sheds light on how to assess the cost of imposing a monitor. Specifically, Criminal Division lawyers should consider not only the projected monetary cost to the business, but also whether the proposed scope of the monitor's role is "appropriately tailored" to avoid unnecessary burdens to the business. Although the Benczkowski Memorandum reiterates the usefulness of monitors in assessing compliance and reducing the risk of recurring misconduct, it emphasizes that "the imposition of a monitor will not be necessary in many corporate criminal resolutions, and the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for a monitor." In other words, it suggests that monitors will be employed in fewer cases, and in the cases where they are imposed, their scope should be sufficiently tailored to the needs at hand.

Finally, although the memorandum generally maintains the same process for selecting monitors, it makes a few changes to that process. *First*, it requires that any agreement imposing a monitorship must describe the monitor selection process and the process for selecting a replacement in the event that the appointed monitor can no longer serve. *Second*, it requires that the agreement identify not only the monitor's responsibilities, but also the "scope" of the monitorship. *Third*, it reduces the size of the Criminal Division Standing Committee that must approve all monitor selections from four to three members, removing the slot that had been designated for the Chief of the pertinent section. *Fourth*, the company proposal identifying monitor candidates must include two additional components: (1) a written certification by each candidate confirming that the candidate has obtained a waiver from, or ceased representation of, any clients with matters involving the Department, and (2) a statement identifying which of the three candidates is the company's first choice to serve as monitor. *Fifth*, in the Monitor Selection Memorandum prepared by Criminal Division lawyers for the Standing Committee's consideration, they must include not only a description of the reasons for choosing the selected candidate, but also a description of the other candidates that had been put forth for consideration by the company.

Though these changes do not significantly alter the existing framework for imposing and selecting a monitor, the Benczkowski Memorandum clearly suggests that corporate monitors may be imposed in fewer cases going forward and, when imposed, given a more limited mandate.

CORPORATE COMPLIANCE COUNSEL POSITION NOT RENEWED

In 2015, DOJ's Fraud Section created a Corporate Compliance Counsel position to provide expert guidance to prosecutors evaluating corporate compliance programs. That role was filled for nearly two years, but has been vacant since 2017. DOJ has announced that the Corporate Compliance Counsel position will not be renewed. At a speech at New York University on October 12, 2018, Assistant Attorney General (AAG) Brian Benczkowki explained that DOJ had decided against continuing the Corporate Compliance Counsel position for three reasons.

- *First*, a compliance counsel will not know as much about a case as the lawyers who work on it day-in and day-out. As AAG Benczkowski explained in his October remarks, "[e]ven when fully briefed on a matter, a single compliance professional who has not been involved in a case throughout an investigation is not likely to have the same depth of factual knowledge as the attorneys who make up the case team."

- *Second*, one person serving as compliance counsel cannot be a "true compliance expert in every industry [DOJ] encounter[s]."

- *Third*, entrusting DOJ's knowledge about compliance to a single person is "shortsighted from a management perspective" because eventually, AAG Benczkowski said, that person will leave the role, and leave the Department without important institutional knowledge.

Though the Corporate Compliance Counsel role is not being renewed, AAG Benczkowski said that DOJ would take steps to build Department attorneys' skills in compliance. Namely, DOJ will focus on hiring lawyers with "diverse skillsets," including "those who bring compliance experience to the table." In addition, AAG Benczkowski noted that the Criminal Division expects to "develop a training program that addresses compliance programs generally, as well as issues specific to each section and unit." The goal, he said, is to "ensure a balance of experience across the Division and to enhance the expertise of our trial attorney workforce," so that capacity to address compliance exists even as people leave the Department.

The implications of this decision are not yet fully clear. Eliminating the Corporate Compliance Counsel position may simply signal a recognition that vesting responsibility for compliance expertise and review in a single person has proven less effective and efficient than anticipated. In addition, companies dealing with DOJ on FCPA matters may find it easier to communicate about relevant compliance programs and remediation efforts with line assistants who possess greater compliance knowledge, as suggested by AAG Benczkowski.

DOJ EMPHASIZES PARTNERSHIP WITH THE PRIVATE SECTOR & CHINA INITIATIVE IN 2018 REMARKS

Over the past year, speeches by DOJ officials related to FCPA enforcement have emphasized the common ground of the Department—and law enforcement generally—with the private sector. Top DOJ officials have identified in-house counsel as being on the "front lines" with law enforcement in preventing and identifying violations of the FCPA, along with other US criminal statutes. Meanwhile, DOJ's Criminal Division has extended the reach of the FCPA Corporate Enforcement Policy, stating that it will constitute "nonbinding guidance" even in non-FCPA cases. DOJ has further clarified that it will pursue a coordination policy with other agencies to avoid "piling on" of various penalties for the same instances of corporate misconduct. *Discussed above at __*. And while the SEC in 2018 has been relatively silent on its high-level plans for FCPA enforcement, DOJ very recently announced a "China Initiative" in which it will specifically target Chinese companies (along with relevant individuals) which have bribed foreign officials to win targets. This stated geographic focus, along with DOJ official's continued statements that they are committed to enforcing the FCPA, provide a roadmap for the year in enforcement ahead.

Role of the Private Sector

The common interests of DOJ and corporate counsel were a common theme among high-ranking DOJ officials' remarks in late 2018. At the end of November 2018, Principal Deputy Assistant Attorney General John P. Cronan spoke at a Practising Law Institute event in Washington, DC and emphasized the shared "overwhelming interest" of DOJ and private industry "in combatting cyber intrusions and attacks on US companies," as well as protecting businesses from theft of trade secrets and in fostering a "culture of compliance with the rule of law." Speaking particularly to in-house counsel, whom he described as being on "the front lines of efforts to promote lawful business practices"—presumably along with law enforcement officials—Cronan stated that DOJ has sought to bring clarity to the "rules of the road" that guide prosecutors in exercising prosecutorial discretion. These statements echoed similar remarks Cronan presented just a month earlier at the Latin Lawyer / Global Investigations Review (GIR) Anti-Corruption and Investigations Conference in São Paulo, Brazil, in October 2018.

In his November 2018 remarks, Cronan also identified the "key takeaway" of the year-old FCPA Corporate Enforcement Policy [2017 FCPA Year-End Update] as being that a company that voluntarily and promptly self-discloses misconduct, fully cooperates, and "engages in timely and appropriate remedies" will presumptively receive a declination. He stressed the Policy's definitions of voluntary self-disclosure, full cooperation, and appropriate remediation. Deputy Assistant Attorney General Matthew S. Miner addressed similar themes at a GIR New York Live event on September 27, 2018. According to Miner, the defined principles of the FCPA Corporate Enforcement Policy "are based on sound policy considerations" that benefit both DOJ and private industry through the creation of a "stable legal environment." Miner further stated that, "[i]f you believe, as I do, that corporations are rational actors that react to clearly-defined economic stimuli, then it follows that the Department's more concrete guidance will have a positive effect." In his speech, Miner encouraged attendees, whom he also characterized as being "on the front lines of detecting and preventing misconduct," to think of DOJ as "partners, not adversaries."

Also in 2018, it became clear that the criteria of the Corporate Enforcement Policy will have implications far broader than in the FCPA context. In March, DOJ's Criminal Division issued a clarification noting that the Policy will serve as "nonbinding guidance" for corporate criminal cases beyond the FCPA context. And in July 2018, Miner announced that the Policy would also apply to mergers and acquisitions which uncover potential FCPA violations. This was followed by Miner's announcement at the GIR event in September 2018 that the Criminal Division prosecutors would consider this guidance even in the context of mergers and acquisitions which "uncover other types of criminal wrongdoing."

Another recent DOJ policy of particular relevance to companies facing FCPA charges is the Coordination Policy, or Anti-Piling On Policy, which was implemented in May 2018. *See discussion at* pp. 7-8. This policy, announced by Deputy Attorney General Rod Rosenstein at the New York City Bar White Collar Crime Institute, formalizes prior efforts to coordinate resolutions. According to Rosenstein, the policy discourages "disproportionate enforcement of laws by multiple authorities" by "instructing Department components to appropriate coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company in relation to investigations of the same misconduct." The stated goals of this policy include not only the maintenance of DOJ's reputation and "brand," but also providing companies with "the benefits of certainty and finality ordinarily available through a full and final settlement."

China Initiative

DOJ also demonstrated a clear interest in using Department Policy to further economic and security goals, specifically related to China. In his November 28 speech, Cronan encouraged companies to report cyberattacks or similar intrusions to the government, referencing guidance from the Criminal Division's Computer Crime and Intellectual Property Section (CCIPS), as well as from the FTC and SEC, regarding cybersecurity-related risks. Cronan tied DOJ's focus on cybersecurity—along with its focus on intellectual property theft and economic espionage—to an initiative which DOJ announced in November 2018 "to counter Chinese economic aggression." This "China Initiative" was announced by former Attorney General Jeff Sessions on November 1, 2018. According to the then-Attorney General's statement, the initiative will "identify priority Chinese trade theft cases," ensure that these cases have sufficient resources, and are brought to "appropriate conclusion[s] quickly and effectively."

The Initiative is to be led by Assistant Attorney General John Demers, Assistant Attorney General Brian Benczkowski, FBI Director Christopher Wray, and five US Attorneys (from the District of Massachusetts, Northern District of Alabama, Northern District of California, Eastern District of New York, and Northern District of Texas). The goals for the Initiative, as set by the Attorney General, involve various statutes and workstreams, but include the identification of FCPA cases "involving Chinese companies that compete with American businesses." In remarks delivered on the same day as the announcement of the Initiative, Benczkowski stated: "We know that Chinese companies and individuals . . . have bribed government officials in other countries in order to win contracts. The Criminal Division is committed to fully enforcing the Foreign Corrupt Practices Act. Bringing these offenders to justice will help create a level playing field for American companies in foreign markets."

THE FOREIGN CORRUPT PRACTICES ACT

The FCPA includes both direct prohibitions on bribery, known as the "anti-bribery provisions," and prohibitions on the failure 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 accurately account for the disposition of assets, and maintain controls to assure 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 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.

1. Jurisdiction

FCPA jurisdiction is broad. It extends to all US companies or persons, 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 of such issuer or 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).[2] An "issuer" is any company – American or foreign – that 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).

[2] 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).

FAQ 1: 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 company that issues securities within the United States or files reports with the SEC. 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. 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.

Liability under the books and records and internal controls provisions is limited to issuers, although individuals can be held liable under traditional vicarious liability principles for violations of the books and records provisions.

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 they 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 Department of Justice 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 situation 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 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). Rather, 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

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. 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. DOJ has advanced aggressive theories to support jurisdiction over such defendants. For example, in the 2003 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." But in 2011, a federal court rejected an even more 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. Finding no conduct within the United States under these circumstances, the court dismissed a substantive FCPA count against the British defendant. See *United States v. Patel*, No. 1:09-cr-00335 (D.D.C. July 7, 2011). Likewise, in 2018, the Second Circuit affirmed a federal district court's 2015 holding that a foreign defendant not otherwise subject to the FCPA cannot be charged with conspiracy to violate the FCPA. See *United States v. Hoskins*, No. 16-1010, 902 F.3d 69 (2d Cir. 2018) (affirming in part and reversing in part *United States v. Hoskins*, No. 12CR238 (JBA), 123 F. Supp. 3d 316 (D. Conn. 2015).

result of a merger. In a 2014 Opinion Release,[3] DOJ made clear that a mere act of acquisition cannot create liability where none existed before. 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. See Opinion Release14-02. 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 or 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 (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 *Resource Guide* at 28. February 2017 Guidance from DOJ echoed this recommendation. Fraud Section, Department of Justice, *Evaluation of Corporate Compliance Programs*, Feb. 2017. 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 which 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).

A conspiracy charge may also provide for means of expanding FCPA jurisdiction. In an August 2015 decision, the district court in *United States v. Hoskins*, No. 12CR238 (JBA), 123 F. Supp. 3d 316 (D. Conn. 2015), held that a person who is not himself subject to the FCPA cannot 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

[3] 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.

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. 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*, No. 16-1010, 902 F.3d 69 (2d Cir. 2018). In relevant part, 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. The Second Circuit, however, reversed the district court's ruling that 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 suggests that there is a limit on the use of federal conspiracy charges to expand the scope of FCPA prosecutions.

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 8 (1977). "An act is 'corruptly' done if done voluntarily 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 this element).

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. 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.

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. As a result of the ensuing investigation and remediation, Latin Node's viability was weakened, and the company was eventually wound down. 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.

In Opinion Release 08-02, DOJ advised a company regarding the post-acquisition due diligence required on a target company when pre-acquisition due diligence could not be undertaken. DOJ permitted a "grace period" for the acquiring company to identify and disclose potential risk areas and required a complex and far-reaching internal investigation. DOJ also indicated that it still would hold the company liable for both ongoing violations by the target company not uncovered during the first 180 days of due diligence and for prior violations by the target company disclosed to DOJ to the extent that such violations were not "investigated to conclusion within one year of closing."

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. 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. 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' . . . ." *Kozeny*, 582 F. Supp. 2d at 539.

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 (including the 2016 *Nu Skin Enterprises* matter) have relied on such contributions as evidence of an improper payment. Still, DOJ and the SEC have recognized that bona fide charitable contributions are permissible.

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.

3. Anything of Value

In analyzing whether something of value has been offered to a foreign official, the courts have looked not only to objective value but also to "the value the [official] subjectively attaches to the items received." *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986). Things of value under the statute include both tangible and intangible objects. See, *e.g.*, *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979). 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); and 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.

In 2015, the SEC's then-director of enforcement, Andrew Ceresney, emphasized that the SEC interprets the phrase "anything of value" broadly, viewing it as reaching any action taken with the intent to influence a foreign official in his or her official actions or obtain an improper benefit from the official.

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.

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 facilitating 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.

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.

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. 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.

5. Knowing

In addition to prohibiting "authorizing" payments by a third party, the FCPA prohibits the provision of 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.

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.

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;
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 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.

6. Offers or Promises

The Act prohibits not only improper payments but 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. The FCPA also defines "foreign official" as including "any person acting in an official capacity" on behalf of a foreign government. Finally, the FCPA's anti-bribery provision also extends to foreign political parties and candidates for foreign political office.

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.

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.

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. 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.

The Eleventh Circuit's holding in *Esquenazi* closely tracks 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*, 2011 WL 5101701, No. 09-cr-00077 (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.

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.

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.

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) and Opinion Release 97-02 (permitting $100,000 donation to a government entity to build a school) with Opinion Release 98-01 (stating DOJ's intention to initiate a criminal investigation if proposed payments of "fines" 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 necessary 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. 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.

8. Improper Purpose

A promise, payment, or offer to a foreign official must be given for one of four purposes in order to violate the FCPA: (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 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." *Kay I*, 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.[4] 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

[4] 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.

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.
- **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.

1. Facilitating Payments

The FCPA does not apply "to any facilitating payment 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

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." This prohibition is not limited to commercial transactions between a US company and a foreign government, such as the award or renewal of contracts. After a lengthy analysis of the statute's legislative history, the Fifth Circuit reasoned in *Kay I*, 359 F.3d at 748, that the FCPA prohibits payments "intended to assist the payor" either directly or indirectly in obtaining or retaining business, and that it "encompass[es] the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states." The court thus concluded that payments to Haitian officials to understate quantities of imported grain so as reduce import taxes violated the FCPA. See *id*.

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 their *Resource Guide*, DOJ and the SEC emphasize that the size of a payment is not determinative of 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. *Resource Guide* at 25.

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 "honoraries," "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.

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 making provision in the tax code for how to treat them – this defense requires something much more: 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.

FAQ 11: 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.

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.

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 also 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. 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.

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.

While there is no formal defense for having an adequate (or superlative) compliance program (as there is under the UK Bribery Act, see below), 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.

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

1. 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. 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 J.P. 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.

Three years later, 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.

Goodyear and *FalconStor* 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.

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.

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.

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. But natural persons can be subject to criminal or civil liability as aiders and abettors; for causing an issuer's books and records violations; and for knowingly falsifying books and records or circumventing or failing to implement adequate internal controls. 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.

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*, 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.*, 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. 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, 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 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. 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. 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.

FAQ 14: Who enforces the FCPA?

DOJ and the SEC have joint enforcement responsibility.

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

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.

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 has formally adopted principles related to such mitigation credit in its November 2017 FCPA Enforcement Policy.

1. 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 ranges form the basis of any federal criminal fine from which a reduction under the enforcement policy will be calculated. The guidelines ranges are 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 new 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 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 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.

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.

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. The DOJ's corporate FCPA 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.

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.

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, is 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.[5] See 15 U.S.C. §§ 78ff(c)(1), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571.

Violations of the FCPA's provisions also can result in significant monetary penalties for both corporations and individuals. In particular, 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 typically range from the tens of millions to hundreds of millions of dollars, with the largest criminal fine ever paid to US authorities topping out at more than $700 million in the 2013 *Alstom* settlement. The year 2016 set a new record for the largest global settlement, with Brazilian company Odebrecht agreeing to pay a criminal fine expected to amount to $2.6 billion, split among US, Brazilian, and Swiss authorities.

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. For individuals, the maximum criminal fine per violation is $250,000, and the maximum civil penalty per violation is $16,000. Because these fine amounts are per violation and many payment schemes can involve multiple technical violations, in practice the government

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. In addition, a criminal fine of up to twice the gross pecuniary gain may be levied under the Alternative Fines Statute.

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.

In many cases, following negotiation, a settling defendant will receive a "discount" off DOJ's calculation of the recommended guidelines range. DOJ's corporate enforcement policy is intended to make this discount process transparent and predictable by specifying the conditions that will lead to a reduction in penalty.

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.

[5] This penalty requires a "willful" violation. The Fifth Circuit has held that this element requires only that the defendant "acted intentionally, and not by accident or mistake" and "with the knowledge that he was doing a 'bad' act under the general rules of law." *United States v. Kay*, 513 F.3d 432, 447-48 (5th Cir. 2007).

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 (these were adjusted for inflation in 2013) 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.[6] 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 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 corporate enforcement policy appear to reflect an effort to further quantify the potential benefits in cooperation, disclosure, and remediation: if a company meets certain requirements in all three categories, DOJ will 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 confirm 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. But there may be many circumstances in which such an agreement will not be

[6] The values of all SEC penalties are subject to periodic adjustments to the civil penalties became effective March 5, 2013. See Securities & Exchange Comm'n, Adjustments to Civil Monetary Penalty Amounts, 78 Fed. Reg. 14179 (Mar. 5, 2013).

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. 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 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 disclosure 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

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.

internationally based witnesses available, and providing real-time updates to the government. DOJ's new 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 the Yates Memo re-emphasized DOJ's focus on individual criminal liability, DOJ (and to a lesser extent the SEC) have made identifying individual wrongdoers and developing evidence against them explicit requirements of cooperation. 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, it is the courts, not DOJ or the SEC, that will decide whether a

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 DOJ FCPA corporate enforcement program, 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;
- 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.

DOJ's 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 the DOJ has also announced a general policy that providing relevant information about the individuals involved in misconduct is a prerequisite to receiving any cooperation credit.

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.

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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 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 has further described their expectations as to an effective compliance regime.

The *Resource Guide* identifies five "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;
- Responsibility invested in an executive with adequate "oversight, autonomy, and resources";
- A risk-based approach; and
- Training and other communication sufficient to ensure knowledge of the policy.

In February 2017, DOJ's Fraud Section, which is 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 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;

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, including 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;
- 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.

The DOJ highlighted certain of these factors in its 2017 corporate enforcement policy.

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;

9. Continuous improvement, periodic testing, and review, including internal audit's 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.

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. 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.

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. 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.

OTHER FEDERAL STATUTES THAT APPLY TO FOREIGN CORRUPTION

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

- **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*. § 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 2018 developments discussed below reflect the scope of US anti-corruption enforcement relying on statutes other than the FCPA.

RECENT FCPA ENFORCEMENT ACTIONS

JOSEPH BAPTISTE
ROGER RICHARD BONCY

Department of Justice
Superseding Indictment
October 30, 2018

Nature of Conduct: DOJ charged Joseph Baptiste and Roger Richard Boncy with one count of conspiracy to violate the FCPA and the Travel Act, one count of violating the Travel Act, and one count of conspiracy to commit money laundering. According to the indictment, Baptiste and Boncy allegedly solicited $50,000 in bribes from undercover FBI agents, who were posing as potential investors in a proposed $84 million project to develop a port in Haiti (the "port project"). Baptiste and Boncy allegedly told the agents that, to ensure approval of the port project, they would funnel the bribes to Haitian officials through a nonprofit entity that Baptiste controlled in Maryland, purportedly to help impoverished residents of Haiti. Allegedly, the $50,000 was never laundered through Baptiste's nonprofit entity, but was instead used by Baptiste for his personal benefit. However, Baptiste allegedly intended to use future payments from the potential investors to make bribe payments to Haitian officials. Baptiste and Boncy also are alleged to have discussed bribing an aide to a high-level elected official in Haiti with a job on the port project, in exchange for the aide's assistance in ensuring the elected official's support for the project.

Amount of Alleged Improper Payments: $50,000

Benefit Obtained: Baptiste and Boncy hoped to obtain and retain business in connection with the port project.

Type of Resolution and Sanction: Unresolved. Trial scheduled for Baptiste and Boncy on June 3, 2019.

Of Note: Though DOJ's FCPA focus typically is on large corporations operating in foreign countries and their employees, this case demonstrates DOJ's willingness to use traditional investigative techniques to proactively ferret out foreign corruption by individuals who operate on their own or on behalf of their small businesses.

BEAM SUNTORY INC.

Securities and Exchange Commission
Cease-And-Desist Order
July 2, 2018

Nature of Conduct: According to the SEC's cease-and-desist order, an Indian subsidiary of Beam Suntory Inc. (Beam)—the Chicago-based spirits maker—used third-party sales promoters and distributors to make illicit payments to government employees from 2006 through 2012. The payments were allegedly to increase sales orders, process license and label registrations, and facilitate the distribution of Beam's distilled spirit products. The SEC contends that the Indian subsidiary reimbursed the third-party sales promoters for the illicit payments through fabricated or inflated invoices, then falsely recorded the expenses at the subsidiary level, and finally consolidated the expenses into Beam's books and records. The SEC's order also asserts that, during this time period, Beam failed to devise and maintain a sufficient system of internal accounting controls.

Amount of Alleged Improper Payments: Unknown.

Benefit Obtained: The SEC did not specify an exact dollar amount.

Type of Resolution: Settled administrative proceeding. The SEC's cease-and-desist order concluded that Beam violated the FCPA's books and records and internal accounting provisions. Without admitting or denying the allegations, Beam agreed to pay disgorgement of $5.3 million, prejudgment interest of $917,498, and a civil penalty of $2 million for total sanctions of more than $8 million.

Of Note: The SEC's enforcement action against Beam follows the Commission's earlier settlements relating to allegedly similar misconduct in India by alcoholic beverage companies, including Anheuser-Busch InBev in 2016 (settlement of approximately $6 million) and Diageo in 2011 (settlement of approximately $16.4 million).

PETROS CONTOGURIS
VITAL LESHKOV
AZAT MATIROSSIAN

Department of Justice
Superseding Indictment
May 24, 2018

Nature of Conduct: According to DOJ's superseding indictment, Rolls-Royce Energy Systems, Inc. (RRESI), a US-based subsidiary of Rolls-Royce, sought contracts with Asia Gas Pipeline (AGP), a joint venture of the Kazakh and Chinese governments, to build a gas pipeline between the two countries. The superseding indictment alleges that RRESI retained Petros Contoguris to pay bribes to help RRESI and Rolls-Royce secure and maintain these contracts. Contoguris, working with employees of a German engineering and consulting firm advising AGP, including Azat Martirossian and Vitaly Leshkov, is said to have devised and executed a scheme whereby RRESI would pay kickbacks to Contoguris, which would be divided among Martirossian, Leshkov, and a high ranking Kazakh official with authority to influence AGP's purchasing decisions. These kickbacks allegedly were disguised as legitimate commissions to Contoguris's company.

Martirossian and Leshkov were charged with one count of conspiracy to launder money and ten counts of money laundering. Contoguris was also charged on these counts, as well as a count of conspiracy to violate the FCPA and seven counts of violating the FCPA. Contoguris had previously been charged on all of these counts in an October 2017 indictment that was unsealed in November 2017.

Amount of Alleged Improper Payments: Over $1.8 million dollars in alleged "corrupt commission payments."

Benefit Obtained: The superseding indictment alleges that AGP awarded RRESI a contract worth approximately $145 million.

Type of Resolution: The charges against Contoguris, Martirossian, and Leshkov are unresolved. Four others—three Rolls Royce employees and one employee at the engineering and consulting firm—previously pleaded guilty for their own roles in the scheme.

Of Note: This case relates to the far-reaching investigation by US, UK, and Brazilian authorities into corrupt conduct by Rolls-Royce. In January 2017, Rolls-Royce entered into a deferred prosecution agreement, wherein the Company admitted to paying more than $35 million in bribes from 2000 to 2013 to secure government contracts around the world. Rolls-Royce paid a total penalty of more than $800 million, of which the US received nearly $170 million.

Before working with the German engineering and consulting firm advising AGP, Martirossian was formerly Armenia's ambassador to China. According to the US government, as of July 2018, Martirossian was residing in China, which has no extradition treaty with the US, and he has deliberately avoided US jurisdiction.

IN RE PETRÓLEO BRASILEIRO

Department of Justice
Non-Prosecution Agreement
September 26, 2018

Securities and Exchange Commission
Settlement
September 27, 2018

Nature of Conduct: Petróleo Brasileiro S.A. (Petrobras), a Brazilian state-owned and state-controlled energy company, entered into a non-prosecution agreement with DOJ to resolve an investigation into FCPA violations. The violations stemmed from the company's role in receiving and facilitating the payment of hundreds of millions of dollars in bribes to company executives, Brazilian politicians, Brazilian political parties and other individuals, which the company concealed within its books and public filings. For example, in one instance noted by DOJ, Petrobras executives directed the payment of illicit funds to stop a Parliamentary inquiry into Petrobras' contracts. In addition, according to the non-prosecution agreement, Petrobras executives facilitated "massive" bid-rigging and bribery schemes that allowed contractors to obtain contracts from Petrobras through non-competitive means and caused Petrobras to remain in favor of many of Brazil's politicians and political parties. These bribes were often concealed as fictitious costs, such as consultancy agreements, incurred by contractors in connection with Petrobras projects.

In a related case, Petrobras reached a settlement with the SEC to resolve an investigation into the company for filing false financial statements that misled investors by concealing bid-rigging and bribery schemes. According to the SEC, Petrobras' senior executives coordinated with Petrobras' largest contractors and suppliers to inflate the cost of Petrobras' infrastructure projects by billions of dollars, money that was then kicked back to Petrobras executives and then given to the Brazilian politicians who helped these executives secure their positions at Petrobras. The SEC's order found that Petrobras erroneously recorded these payments as money spent to acquire and improve assets. In another example, the SEC found that a Petrobras executive recommended that Petrobras purchase a Texas oil refinery, despite knowing the oil it produced did not suit Petrobras' needs and that the refinery's equipment and structure had deteriorated and would require a massive overhaul, in exchange for a $2.5 million bribe that the executive used for personal benefit and to pay his political patron. Despite the bribes and kickbacks, Petrobras' SEC disclosures during relevant years stated that its executives were disinterested in Petrobras transactions.

Amount of Alleged Improper Payments: Corrupt payments estimated at more than $2 billion, including more than $1 billion which was directed to politicians and political parties.

Benefit Obtained: Favorable treatment from Brazilian politicians, including the termination of a parliamentary inquiry, and millions of dollars in executive kickbacks.

Type of Resolution: Non-prosecution agreement, which included an agreement to pay an $853.2 million criminal penalty, which would be split between DOJ, the SEC, and Brazil, such that DOJ and the SEC will each receive 10 percent, or $85,320,000, and Brazil will receive the remaining 80 percent to resolve Brazilian law violations, or $682,560,000. In the related SEC matter, Petrobras also agreed to pay $933,473,797 in disgorgement and prejudgment interest, although the SEC agreed to reduce that amount to reflect any payment the company makes in connection with a separate civil case.

Of Note: The Petrobras case differs from the typical fact pattern because the gravamen of the scheme as described in the non-prosecution agreement was not that Petrobras paid bribes to other Brazilian officials to benefit Petrobras, but rather that Petrobras officials were foreign officials, and that those officials, together with Brazilian politicians, used the company to extract bribe payments from private contractors. Although the Petrobras officials also helped facilitate payments from the contractors to other Brazilian officials, the non-prosecution agreement did not directly allege that they did so to benefit the company. It suggested that this was a possibility—asserting, as noted above, that some payments were directed to officials "with oversight" over Petrobras or the locations where Petrobras did business. But it also noted that the Petrobras officials were engaged in an embezzlement scheme that victimized the company. Interestingly, Petrobras' resolution with DOJ and the SEC was reached under the FCPA's books-and-records and internal controls provisions, rather than the statute's anti-bribery provisions, and with a non-prosecution agreement rather than a deferred prosecution agreement or criminal conviction that might have been more consistent with prior resolutions of this size and reflecting the same culpability.

The resolution with DOJ and the SEC also highlights the myriad ways in which Petrobras failed to implement a robust anti-corruption compliance program—from the highest levels of management to the effective implementation and monitoring of its procurement process—particularly in a "country with a well-known history of corruption in its business and politics." Rather than a Board with informed, independent directors capable of meaningful oversight, the Petrobras Board contained a super-majority of directors appointed by the Brazilian government who lacked anti-corruption and general compliance training. Petrobras did not have a chief compliance officer, or a typical compliance function, until late in 2014, long after the bribery and embezzlement schemes were well underway. Petrobras also lacked the basic control framework of checks and balances that could be capable of detecting and preventing misconduct.

For a more detailed analysis of Petrobras' resolution with DOJ and the SEC, see the following Client Alert by Partners Gayle Littleton, Coral Negron, Erin Schrantz, and Associate Jing Xun Quek.

IN RE CREDIT SUISSE

Department of Justice
Non-Prosecution Agreement
July 5, 2018

Securities and Exchange Commission
Settlement
July 5, 2018

Nature of Conduct: Credit Suisse (Hong Kong) Limited (Credit Suisse Hong Kong), a subsidiary of Credit Suisse AG, entered into a non-prosecution agreement to resolve an investigation into its hiring and promoting of employees referred by or connected to Chinese government officials. According to the Statement of Facts agreed upon by Credit Suisse Hong Kong and the government, the employees were hired, promoted, and paid additional benefits in an effort to secure business from Chinese state-owned entities. In a related case, Credit Suisse AG reached a settlement with the SEC to resolve its investigation into the same conduct.

Amount of Alleged Improper Payments: No exact figure provided.

Benefit obtained: According to the stipulated Statement of Facts, Credit Suisse AG earned over $46 million in profits from business with Chinese state-owned entities.

Type of Resolution: Non-prosecution agreement with DOJ and settled administrative proceeding with the SEC. Credit Suisse Hong Kong entered into a non-prosecution agreement with DOJ based on an agreed-upon Statement of Facts, which included payment of a $47,029,916 criminal penalty. In the related SEC matter, Credit Suisse AG agreed to pay a total of $24,989,843 in disgorgement of profits and $4,833,961 in prejudgment interest.

Of Note: The $47 million criminal penalty to be paid by Credit Suisse Hong Kong reflects a 15% discount off the bottom of the US Sentencing Guidelines fine range. In setting forth its rationale for the resolution, DOJ stated that although the Bank did not receive voluntary disclosure credit, the Bank received partial credit for its and its parent company Credit Suisse AG's cooperation with the criminal investigation, including by making foreign-based employees available for interviews in the United States and producing documents to the government. DOJ stated that the Bank received only partial cooperation credit because its cooperation was "reactive and not proactive." DOJ also noted that Credit Suisse Hong Kong and Credit Suisse AG had enhanced their compliance programs and internal controls, making an independent compliance monitor unnecessary. However, DOJ further noted that the Bank did not receive full remediation credit because it did not discipline all of the employees involved in the conduct.

IN THE MATTER OF JOOHYUN BAHN, A/K/A DENNIS BAHN

Securities and Exchange Commission
Department of Justice
Cease-and-Desist Order; Plea Agreement
September 6, 2018

Nature of Conduct: The SEC found that Joohyun (Dennis) Bahn, a real estate broker and US permanent resident, attempted to bribe a foreign official in the Middle East in an effort to broker the sale of a high rise commercial building in Vietnam on behalf of Colliers International Group, Inc. (Colliers). The SEC order alleges that Bahn gave the bribe to an accomplice, with the expectation that it would be passed along to the foreign official, who could influence a wealth fund to acquire the building. The SEC found, however, that the accomplice misrepresented the official's involvement in the scheme and ultimately kept the money for himself such that the official was initially unaware of the attempted bribe. According to the SEC, when Bahn contacted the foreign official he thought he had bribed to inquire about the status of the deal, the foreign official did not respond. Instead, the foreign official forwarded the message to the wealth fund's chief compliance officer. The wealth fund delivered a cease-and-desist letter to Bahn and Colliers stating that the wealth fund was not interested in and had never attempted to buy the building in Vietnam. Colliers terminated Bahn's employment with the company the following day.

The SEC also found that Bahn circumvented Colliers' internal accounting controls, fabricated documents, created fictitious email messages and lied to Colliers' executives. In addition, Bahn was found to have falsely represented to Colliers that a buyer had committed to acquire the high rise building, thus causing Colliers to improperly record commission revenue that it never received.

Amount of Alleged Improper Payments: $500,000

Benefit Obtained: Unknown.

Type of Resolution: Settled administrative proceeding; plea agreement in criminal case. The SEC's cease-and-desist order found that Bahn violated the FCPA's anti-bribery provisions, caused violations of the books and records provisions, intentionally circumvented Colliers'

internal accounting controls, and falsified its corporate books and records. Bahn also agreed to pay $225,000 in disgorgement, which was deemed satisfied by the forfeiture and restitution ordered at his sentencing for the related criminal proceeding. In January 2018, Bahn pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA in the related criminal case, United States v. Bahn, Crim. No. 16 CR 00831-ER-1 (S.D.N.Y. 2016). In November 2018, he was sentenced to a total term of six months of imprisonment and three years of supervised release, both to run concurrently, and was ordered to pay $500,000 in restitution and to forfeit $225,000.

Of Note: The SEC noted that the fact pattern in this matter was atypical, but that the underlying violations were straightforward. Specifically, the foreign official was completely unaware of an attempted bribe and no money was ever directed to the official because Bahn's accomplice kept the money for himself and misrepresented the official's involvement. However, despite the unusual fact pattern, the SEC portrayed the bribery scheme as "egregious."

SOCIÉTÉ GÉNÉRALE S.A.
LEGG MASON, INC. / PERMAL GROUP LTD.

Securities and Exchange Commission
Settled Administrative Proceeding
August 27, 2018

Nature of Conduct: According to the SEC's cease-and-desist order, Permal Group Inc. (Permal)—a former asset management subsidiary of the investment management firm Legg Mason, Inc. (Legg Mason)—partnered with Société Générale S.A. (Société Générale), a French financial services company, to solicit investment business from Libyan state-owned financial institutions between 2004 and 2010. The SEC order alleges that Permal and Société Générale engaged in a scheme to pay bribes through a Libyan middleman to secure investments from state-owned financial institutions. As part of the scheme, Société Générale, on behalf of itself and Permal, paid a commission of 1.5 to 3 percent of the nominal amount of the investments made by the state-owned financial institutions to a broker. A portion of the commission was passed on to Libyan officials as bribes in exchange for steering the opportunity to Société Générale. These bribes paid by Société Générale led Libyan financial institutions to purchase seven notes linked to funds managed in whole or in part by Permal. The SEC's order estimates the investments were worth approximately $950 million, resulting in commission payments of approximately $26.25 million for alleged introductory services.

The order also alleges that two Permal employees were aware that the Libyan middleman was paying bribes and other improper financial benefits to Libyan government officials for that purpose. Based on these findings, the SEC determined that Legg Mason lacked appropriate internal accounting controls related to the use and payment of introducing brokers and other intermediaries in emerging markets like Libya.

Amount of Alleged Improper Payments: $26.25 million paid, between approximately 2005 and 2008, by Société Générale S.A. to the Libyan middleman for introductory services to secure investments. According to the SEC's order, Permal never paid the intermediary directly because Permal and Société Générale jointly decided that Société Générale should make the commission payments.

Type of Resolution: Unresolved. Firtash's extradition to the United States was approved by an Austrian court in February 2017. In August, another Austrian court declined a competing extradition request from Spain, clearing the way for extradition to the United States.

Benefit Obtained: Société Générale allegedly made profits of approximately $523 million. Legg Mason, through its Permal subsidiary, allegedly was awarded business tied to $1 billion of investments for the Libyan financial institutions, earning net revenues of approximately $31.6 million.

Type of Resolution: Settled administrative proceeding. The SEC's order found that Legg Mason violated the FCPA's internal accounting controls provision. Legg Mason agreed to disgorge approximately $27.6 million of ill-gotten gains plus $6.9 million in prejudgment interest for a total of $34.5 million to settle the SEC's case. Société Générale separately settled with DOJ in June 2018, agreeing to pay a combined total penalty of more than $860 million. That settlement is discussed in our 2018 Mid-Year Update.

Of Note: The SEC settlement followed a June 4, 2018 non-prosecution agreement (discussed in our 2018 Mid-Year Update) between Legg Mason and DOJ regarding the same conduct. Under the non-prosecution agreement, Legg Mason admitted to the facts related to the alleged conduct and agreed to pay a monetary penalty of more than $32 million and disgorgement of more than $31 million. The stated disgorgement amount was to be credited against disgorgement paid to other law enforcement authorities within the agreement's first year, effectively resulting in only an additional $2.4 million paid

in disgorgement to the SEC. The SEC did not impose a civil penalty against Legg Mason in light of the criminal fine Legg Mason has already paid as part of non-prosecution agreement with DOJ. The credit by DOJ of disgorgement payments to other regulators and the lack of a civil penalty appears indicative of DOJ's and the SEC's announced commitment to avoid piling on penalties where multiple enforcement authorities seek to resolve investigations into the same improper conduct.

SANOFI S.A.

Securities and Exchange Commission
Settled Administrative Proceeding;
Cease-and-Desist Order
September 4, 2018

Nature of Conduct: According to the SEC's order, subsidiaries of the Paris-based pharmaceutical company Sanofi S.A. engaged in schemes spanning multiple countries and involving bribe payments to government procurement officials and healthcare providers to obtain contracts with public institutions and increase prescriptions of Sanofi products.

The SEC order notes that, between 2007 and 2011, senior managers at Sanofi's Kazakhstan subsidiary (Sanofi KZ) bribed foreign officials with funds derived from discounts and credits factored into the sales prices paid by local distributors for the purpose of ensuring that public contracts would be awarded to Sanofi KZ.

In the Middle East, Sanofi subsidiaries in Lebanon (Sanofi Levant) and the UAE (Sanofi Gulf) engaged in various pay-to-prescribe schemes between 2011 and 2015 that allegedly were designed to induce healthcare providers to increase their prescriptions of Sanofi products. The Sanofi Levant scheme allegedly involved sponsorships, gifts, donations, product samples, consulting agreements, peer-to-peer meetings, clinical studies, and grants to pay foreign officials to boost sales of Sanofi products through increased prescriptions; these instances of improper conduct spanned government agencies as well as private institutions. The Sanofi Gulf scheme allegedly involved submitting false travel and entertainment reimbursement claims, then pooling the illicit proceeds of the fraudulent reimbursements, and distributing the illicit proceeds to healthcare providers in the private sector to increase prescriptions of Sanofi products.

Amount of Alleged Improper Payments: Unknown.

Benefit Obtained: According to the SEC's order, Sanofi's profits from the sales associated with the various schemes totaled approximately $17.5 million across its subsidiaries in Kazakhstan, the Levant and the Gulf.

Type of Resolution and Sanction: Settled administrative proceeding. The SEC's cease-and-desist order found that Sanofi violated the books and records and internal accounting controls provisions of the federal securities laws. Without admitting or denying the SEC's findings, Sanofi agreed to the cease-and-desist order and to pay $17.5 million in disgorgement, $2.7 million in prejudgment interest, and a $5 million civil penalty.

Of Note: In announcing the Sanofi settlement, the SEC signaled its intention to focus further on the bribery risks particularly prevalent in the pharmaceutical industry, as the Sanofi resolution follows FCPA resolutions with Teva Pharmaceutical Industries, GlaxoSmithKline, and AstraZeneca, among others. The SEC's order also recognized Sanofi's cooperation in the Commission's investigation, including regular and timely briefings to the SEC regarding the facts developed in Sanofi's internal investigation. Because of that cooperation, the SEC limited Sanofi's civil penalty to $5 million.

IN THE MATTER OF THE UNITED TECHNOLOGIES CORPORATION

Securities and Exchange Commission
Cease-and-Desist Order
September 12, 2018

Nature of Conduct: United Technologies Corporation (UTC) is a building systems and aerospace company with operations around the world. Otis Elevator Company (Otis) is a wholly-owned subsidiary of UTC. Pratt & Whitney (Pratt) is an operating division of UTC with its financials consolidated with those of UTC. International Aero Engines (IAE) is a joint venture with a majority interest of its shares owned by Pratt. IAE's books and records were consolidated with UTC's books and records.

According to the SEC's cease-and-desist order, from 2009 to 2015, UTC—through Otis, Pratt, and IAE—engaged in a series of schemes to improperly compensate foreign officials to obtain business for the company in various countries. In particular, the SEC contends that UTC, through Pratt and Otis, improperly provided leisure trips and gifts to foreign officials in China, Indonesia, Kuwait, Pakistan, South Korea, and Thailand in order to obtain business. The SEC also alleges that, between 2009 and 2013, UTC, through IAE, made payments to an agent to obtain confidential information to facilitate the sale of aircraft engines to a Chinese state-owned airline, despite the high likelihood that some of the

money would be used to pay a Chinese official. Further, the SEC alleges that, between 2012 and 2014, UTC, through Otis, made unlawful payments to Azerbaijani officials to facilitate elevator equipment sales for public housing and as part of a kickback scheme to sell elevators in China.

Amount of Alleged Improper Payments: Unknown.

Benefit Obtained: The SEC alleges that UTC obtained $9,067,142 in elevator equipment and airplane engine sales.

Type of Resolution: Settled administrative proceeding. SEC issued a cease-and-desist order against UTC, which UTC consented to without admitting or denying findings that the company violated the anti-bribery, books and records, and internal accounting control provisions of the Securities and Exchange Act of 1934. UTC agreed to pay disgorgement of $9,067,142 plus interest of $919,392 and a penalty of $4 million. In total, the company paid $13.9 million to resolve charges that it violated FCPA.

Of Note: In the cease-and-desist order, the SEC noted that it considered the remedial acts promptly undertaken by UTC and the cooperation afforded to the Commission. The company self-reported the misconduct and provided facts developed during its internal investigation in a timely fashion. UTC also provided updates regarding its remedial efforts, including termination of employees and third parties responsible for the misconduct and enhancement to its internal accounting controls. The SEC noted that the company also undertook several actions: it strengthened its global compliance organizations; enhanced its policies and procedures regarding travel, the due diligence process, and the use of third parties; created positions to address potential risks; and increased training of employees on anti-bribery issues.

DONVILLE INNISS

Department of Justice
Superseding Indictment
August 23, 2018

Nature of Conduct: DOJ charged Donville Inniss, a US permanent resident and former member of the Barbados parliament and Minister of Industry, with money laundering and conspiracy to launder money he allegedly received from an insurance company in Barbados. According to the indictment, from August 2015 to April 2016 Inniss accepted approximately $36,000 in bribes from Insurance Corporation of Barbados Ltd. (ICBL) in return for renewing ICBL's contracts with the Barbados Investment and Development Corporation. The charged conduct includes conspiracy to launder money and two counts of money laundering, all in violation of the FCPA. In the superseding indictment, DOJ also indicted the CEO of ICBL as Inniss's codefendant for the same three counts.

Amount of Alleged Improper Payments: Approximately $36,000

Benefit Obtained: The superseding indictment alleges that Innis accepted approximately $36,537 in bribes.

Type of Resolution: The superseding indictment alleges that Innis accepted approximately $36,537 in bribes.

Of Note: Although the indictment alleges that the co-conspirators intended to violate the FCPA, they are charged with conspiracy to launder money and money laundering. The bribes were routed by ICBL's parent company through an account in a New York bank in the name of a dental company and then to Inniss. In addition, in a related action, DOJ declined to prosecute ICBL for FCPA violations in return for ICBL disgorging its net profits of $93,940.19 from the contracts, citing ICBL's "timely, voluntary self-disclosure," and its internal investigation and cooperation.

PATRICIO CONTESSE GONZÁLEZ

Securities and Exchange Commission
Settlement
September 25, 2018

Nature of Conduct: Patricio Contesse González agreed to a settlement in connection with an SEC FCPA investigation which concluded that, between 2008 and 2015 when Contesse González was the CEO of Chilean chemical and mining company Sociedad Química Minera de Chile, S.A. (SQM), he caused SQM to make nearly $15 million in improper payments to Chilean political figures and others connected to them. The SEC's order also states that Contesse González caused fictitious contracts to be created and then approved them, knowing the improper payments would be recorded as legitimate business expenses and knowing this would circumvent SQM's internal accounting controls. As an example, according to the SEC, Contesse González caused SQM to pay funds on an invoice for purported "financial services" submitted by a Chilean official's relative, even though the relative had not provided any services to SQM, but submitted the invoice to conceal SQM's payment to a Chilean political campaign. The SEC's order further found that Contesse González made payments to several Chilean officials' relatives' not-for-profit foundations without regard for whether the payments were in accordance with SQM's policies.

Amount of Alleged Improper Payments: Approximately $15 million

Benefit Obtained: Unknown. It is not clear that Contesse González received any direct kickbacks stemming from the alleged improper payments, and the SEC order notes no specific benefit to the company.

Type of Resolution: Settled administrative proceedings. Contesse González agreed to pay $125,000 without admitting or denying the SEC's findings. In addition, SQM previously, in a separate settlement, agreed to pay $30 million to settle parallel criminal and civil charges against the company in connection with the same conduct.

Of Note: Despite not mentioning any personal benefit Contesse González received from the alleged corrupt schemes, both SQM and the SEC still held him personally liable. Specifically, SQM terminated Contesse González following an internal investigation into SQM's suspicious payments to Chilean authorities. Likewise, in settling Contesse González's case, the SEC highlighted the significance of holding corporate executives personally accountable for illicit payments they facilitate, stating that "[c]orporate culture starts at the top" and that "when misconduct is directed by the highest level of management it is critical that they are held accountable for their conduct."

JUAN CARLOS CASTILLO RINCON
JOSE ORLANDO CAMACHO
JOSE MANUEL GONZALEZ TESTINO
IVAN ANTHONY GUEDEZ

Department of Justice
Arrested and Charged by Criminal Complaint
July 31, 2018 (Gonzalez Testino)

Guilty Plea
July 5, 2017, unsealed on
September 13, 2018 (Camacho)
September 13, 2018 (Castillo Rincon)
October 30, 2018 (Guedez)

Nature of Conduct: Jose Orlando Camacho, Juan Carlos Castillo Rincon, Jose Manuel Gonzalez Testino, and Ivan Anthony Guedez were each charged as part of an FCPA investigation in the Southern District of Texas involving Petroleos de Venezuela S.A. (PDVSA), the state-owned and state-controlled oil company in Venezuela.

According to a July 2017 indictment, unsealed in September 2018 on the same day that Castillo Rincon's guilty plea (see below) was announced, Camacho was a procurement official for a PDVSA subsidiary in Houston responsible for overseeing the shipping of goods to Venezuela for PDVSA's operations. From 2009 to 2013, the owner and executive of a Texas-based logistics and freight-forwarding company paid Camacho bribes in exchange for providing the company with confidential bidding information, recommendations for the award of business, and assistance in processing lucrative modifications of contract terms.

According to an April 2018 indictment, Castillo Rincon, a US citizen, was the manager of a Texas company. From 2011 to 2013, Castillo Rincon and a relative allegedly paid bribes to a PDVSA procurement official in exchange for obtaining and retaining lucrative logistics contracts with PDVSA.

According to a July 2018 criminal complaint, Gonzalez Testino is an American citizen who controlled a number of energy companies that supplied equipment and services to PDVSA. PDVSA had a wholly-owned subsidiary – Bariven S.A., which was responsible for procuring goods and services on its behalf. From 2012 to 2013, Gonzalez Testino allegedly paid bribes to a high-ranking Bariven official in exchange for the official

directing contracts to Gonzalez Testino's companies, prioritizing payment of Gonzalez Testino's companies over other vendors, and awarding contracts to his companies in US dollars instead of Venezuelan currency.

According to an October 2018 criminal information to which he pled guilty, from 2006 to 2011, Ivan Anthony Guedez, a US citizen and resident of Texas, was a PDVSA official. The information alleged that Guedez held a number of positions related to procurement, including serving as a purchasing manager for a PDVSA procurement subsidiary in Houston. Between 2009 and at least 2013, Guedez, two other PDVSA employees, and two sales employees of a Miami-based industrial equipment supplier allegedly agreed that 3% of every payment made by PDVSA to that supplier would be split as bribe payments and kickbacks between the five members of the conspiracy. The information alleged that Guedez would send a false invoice in the 3% amount to the sales employees, who would cause the industrial equipment supplier to pay the invoice. According to the information, that money would be deposited into a Swiss bank account and then divided between the conspirators. In exchange, Guedez and the other PDVSA employees allegedly steered business to the industrial equipment supplier and worked to ensure that PDVSA paid the supplier's outstanding invoices. .

Amount of Alleged Improper Payments: The amount of alleged improper payments varied among the defendants. For example, the indictment to which Camacho pled guilty, alleged that the owner and executive of the Texas-based company directed at least $175,720 in bribes to Camacho. Conversely, the criminal indictment to which Castillo Rincon pled guilty discussed at least $187,648.87 in bribes which were paid to the PDVSA official. In addition, the criminal information to which Guedez pled guilty discussed at least $145,098.12 in bribes and kickbacks which were split between members of the conspiracy. Lastly, according to the criminal complaint, Gonzalez Testino paid the Bariven official at least $629,000 in bribes.

Benefit obtained: Camacho pleaded to passing confidential bidding information to the Texas-based company, recommending the company for awards of business, and assisting in processing lucrative modifications of contract terms between the company and PDVSA. In exchange for the bribes, Castillo Rincon's company obtained and retained lucrative logistics contracts with PDVSA. Gonzalez Testino's companies allegedly received PDVSA contracts, priority over other vendors in being paid, and payment in US dollars instead of Venezuelan currency. Guedez and other PDVSA employees steered business to the Miami-based industrial equipment supplier and worked to ensure that PDVSA paid the supplier's outstanding invoices.

Type of Resolution: Camacho and Guedez each pleaded guilty to one count of conspiracy to commit money laundering. They are due to be sentenced on February 21, 2019 and February 20, 2019, respectively. Castillo Rincon pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA on September 13, 2018. He is due to be sentenced on February 21, 2019.

Gonzalez Testino was arrested on July 31, 2018 at the Miami International Airport and charged with conspiracy to violate the FCPA and one count of violating the anti-bribery provisions of the FCPA.

Of Note: According to a Texas magistrate judge's pre-trial detention order, Gonzalez Testino was arrested at the Miami airport, bound for Venezuela, after learning he was under investigation and telling witnesses to destroy evidence and that he was fleeing the United States. At his initial appearance, Gonzalez Testino failed to disclose substantial assets and property he owned outside the United States, prompting the Texas magistrate to accuse him of making a false statement in open court.

STRYKER CORPORATION

Securities and Exchange Commission
Cease-and-Desist Order
September 28, 2018

Nature of Conduct: The SEC charged Stryker Corporation, a Michigan-based medical device manufacturer, with violating the FCPA's accounting and record keeping provisions. According to the SEC order, Stryker failed to devise and maintain internal accounting controls to enforce its own FCPA compliance policies at its wholly-owned subsidiaries in India, China, and Kuwait. In India, forensic review allegedly found missing or inaccurate documentation relating to benefits paid or given to health-care professionals and that certain Stryker India dealers regularly issued inflated invoices to certain hospitals that then passed those higher prices on to patients or insurers. In China, Stryker's subsidiary allegedly used unauthorized sub-distributors of its medical devices. In Kuwait, Stryker's subsidiary's distributor made improper per diem payments to health care professionals attending Stryker events.

Amount of Alleged Improper Payments: Unknown.

Benefit Obtained: Unknown.

Type of Resolution: Settled administrative proceeding. Stryker Corporation agreed to payment of a $7.8 million civil penalty and retention for 18 months of an independent consultant to review and evaluate the company's internal controls, record keeping, and anti-corruption policies and procedures.

Of Note: The alleged improper payments, on which the SEC focused in its cease-and-desist order, were made to private entities and health care professionals, not to foreign officials. In 2013, however, Stryker settled cease-and-desist proceedings with the SEC relating to an alleged $2.2 million in unlawful payments by five of its wholly-owned subsidiaries to foreign government employees and paid nearly $10 million in disgorgement and interest, as well as a $3.5 million civil penalty. The current action represents the second time the SEC brought an FCPA action against Stryker.

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. However, though there is no concrete guidance, this section provides companies within UKBA jurisdiction with helpful background and context from which they can assess and better address compliance.

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 nine years on from the commencement date, there have been only a small number of cases brought 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.

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

Setting aside the differences based on jurisdiction, there are two critical differences between the UKBA and the FCPA. First, the UKBA criminalises commercial bribery as well as bribery of government officials. Second, under the UKBA, an adequate compliance programme is an affirmative defence against the crime of failure to prevent bribery.

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 UK, or holding board or management meetings in the UK 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 use "C" as shorthand for the corporate entity, and "A" for its associated persons, as does the UKBA.

Under general principles of English criminal law, corporate criminal liability is more limited than under US criminal law. Corporate liability for bribing, being bribed, and bribing a Foreign Public Official under the UKBA requires two elements:

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

Section 7 of the UKBA expands corporate liability for bribery offences with the crime of Failing to Prevent Bribery, which applies when any person associated with a corporation commits bribery on behalf of the corporation, regardless of whether the associated person can be identified as directing the mind and will of the organisation.

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 induce a person to perform improperly a relevant function or activity or 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. It covers payment or offers both before and after the corrupt action contemplated.

The corrupt action never needs to take place, 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. The prosecution would have to show that an individual who can be identified as the directing mind and will of the organisation had committed the offence, and that in committing the offence, he or she had been acting on behalf of the organisation. It is this requirement to prove guilt on the part of a senior individual within the organisation that is the primary reason for the comparatively low rate of corporate prosecutions in the United Kingdom.

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.

There is no case law that interprets "carries on a business" and its broad wording suggests that it may apply to any organisation that does business in the United Kingdom.

Being bribed (section 2)

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

1) 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.

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

Bribery of FPOs (section 6)

Under the UKBA, a person who bribes an FPO is guilty of an offence if it is P's intention to influence the FPO in the FPO's 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; andto 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.

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; or

   (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?

A. 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

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 intending 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 includes an affirmative defence for maintaining adequate procedures designed to prevent bribery being committed on the corporation's behalf. The offences do not differ with respect to penalties, which are unlimited fines, confiscation, and compensation.

Written law applicable

The written law applicable to the FPO is:

A. 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;

B. 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

C. 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:

A. to obtain or retain business for C; or

B. 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 and not merely by reference to the nature of the 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:

- 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 was 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

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, including any third party that acts on behalf of the corporation. Under the Act, the third party could include an individual or another corporation performing services on behalf of the company.

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. He or she may also face an unlimited fine, or both imprisonment and a fine.

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.

The fines for violations of the UKBA are unlimited.

In practice, fines in the UK follow from the Sentencing 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. These 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;
- 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 bring home to management and shareholders the need to operate within the law. The fine can be so large as to put the company out of business if that is deemed the most appropriate outcome, as recognised in the DPA entered into by XYZ Ltd., in which the SFO cited the company's cooperation as a key factor for 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 we 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 him or herself pay or receive a bribe.

AFFIRMATIVE DEFENCES

It is a defence to a charge of failure to prevent bribery under section 7 for a relevant commercial organisation to 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. It has yet to be tested, but in theory, if a commercial organisation complies with the guidance, it ought to have a defence to any allegation of a section 7 offence.

Aside from the defence under section 7, i.e., that the relevant commercial organisation had in place adequate procedures designed to prevent bribery, 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. These defences do not apply to commercial organisations.

FAQ 26: Are fines the only penalties that a corporation must consider in assessing exposure under the UKBA?

No. 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. In addition, 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.

RESOLUTION OF UKBA INVESTIGATIONS

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. The 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 jurisprudence is still developing a code of practice setting out when and how prosecutors will use DPAs. Only four have so far been concluded (Rolls-Royce, Standard Bank, and XYZ Ltd. in corruption matters and Tesco Stores Ltd., an accounting matter).

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, the corporate offender will need to have self-reported the alleged criminal conduct and will need to cooperate fully with the investigation. A DPA will be more likely if a company has no previous convictions, has already implemented a full compliance programme, or the criminal conduct occurred long in the past and/or was the result of rogue activities by employees.

The 2017 Rolls-Royce DPA did not stem from a self-disclosure of misconduct, but officials stated that the company's extraordinary cooperation with the government's investigation played a part in the nature of the resolution.

5. Civil recovery

Prosecuting authorities have the power under the Proceeds of Crime Act 2002 to decline to bring criminal charges, but instead to 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, it recently sought civil recovery in the Griffiths Energy International and the Corrupt Uzbek Deal matters (described below).

FAQ 27: Who enforces the UKBA?

The United Kingdom's Serious Fraud Office (SFO) 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.

UK ANTI-CORRUPTION DEVELOPMENTS

UPDATE ON THE UNITED KINGDOM'S VOTE TO LEAVE THE EUROPEAN UNION

There continues to be uncertainty around the terms on which the United Kingdom will leave the European Union (EU). In November 2018, the UK government and the EU negotiating team had agreed to a draft withdrawal agreement, which set out how the United Kingdom and the EU would work together, and which laws would apply, from the date on which the United Kingdom leaves the EU (currently set to be 31 October 2019) until the end of the transition period on 31 December 2020.

In terms of cooperation in criminal matters, the draft agreement provides for mutual legal assistance between the United Kingdom and EU, continuation of the European Arrest Warrant scheme, recognition of restraint and confiscation orders, mutual recognition and enforcement of custodial sentences, and requests for European Investigation Orders (see below). In short, the status quo regarding EU cooperation in and with criminal investigations and proceedings would be maintained until the end of the transition period, following which new arrangements would hopefully be put in place.

However, in the period since the draft withdrawal agreement was made, it has become clear that there is insufficient support in the UK parliament for the deal as a whole to pass the necessary statute to approve it and incorporate it into UK law. The draft withdrawal agreement was rejected thrice by the UK parliament, on 15 January 2019, 12 March 2019, and 29 March 2019. As of the time of this writing, the UK parliament has cast a number of "indicative" votes on possible ways forward, including leaving without a deal, negotiating a customs union with the EU, and a second referendum. None of the options put before the UK parliament received a majority backing. The EU has granted the United Kingdom an extension until 31 October 2019 to agree a deal that both the EU and the UK Parliament can approve, but at the time of writing it is not clear how this will be achieved. Absent a breakthrough, the default position is that the United Kingdom will leave the EU without a deal on 31 October 2019, unless a clearly defined path – which may well need agreement from the remaining 27 EU Member States – is formulated.

OSOFSKY BEGINS ROLE AS NEW SFO DIRECTOR

Lisa Osofsky began her role as the director of the Serious Fraud Office (SFO) on 3 September 2018, having been appointed to a renewable term of five years by the United Kingdom's attorney general on 4 June 2018. She replaced David Green QC CB who had led the organisation for six years until April 2018. During Green's tenure, he oversaw the introduction and implementation of Deferred Prosecution Agreements (DPA).

Osofsky is a dual-qualified US attorney and UK barrister, as well as a dual American and British national. Her career has spanned both the public and private sector. In the public sector, Osofsky held the position of deputy general counsel and ethics officer for the FBI; she also previously served in the Fraud Section of DOJ's Criminal Division where, among other things, she worked on FCPA prosecutions and spent a period of time on secondment to the SFO in London. After moving into private practice, Osofsky's roles included acting as a regulatory advisor at Control Risks and as the money laundering reporting officer for Goldman Sachs International. Before taking up the directorship of the SFO, Osofsky was managing director and European head of Investigations at Exiger, a firm set up by the monitor of HSBC Bank, Michael Cherkasky. Osofsky handled the European arm of that monitorship during her time at Exiger.

Since taking office, Osofsky has given a number of speeches, which have emphasised the need for coordination between enforcement agencies as well as

the need for companies to engage in substantial reforms and be seen to fully cooperate with the SFO to be offered a DPA.

In terms of SFO priorities, Osofsky has stated that she wants the SFO to focus on: (i) developing cross-agency cooperation both with international bodies like DOJ and national bodies like the National Crime Agency; (ii) improving technological solutions, including the SFO's use of artificial intelligence and e discovery technology in investigations; (iii) prioritising the recovery of criminal proceeds; (iv) entering DPAs where the company has shown no risk of recidivism and has engaged in proactive reform efforts; and (v) partnering with the private sector and legal academics, not only to tackle specific challenges like data encryption but also to help the SFO build strong cases.

Osofsky, and others within the SFO, have also spoken about the possibility of providing additional guidance to companies about what the SFO considers cooperation. She indicated that a key benchmark would be whether a company is forthcoming with providing new information to the SFO of which the SFO was previously unaware. If the SFO does issue specific benchmarks and guidance detailing what constitutes full cooperation, this would be a welcome departure from its previous approach of declining to provide much in the way of guidance. It remains to be seen what Osofsky will require as significant evidence of reform. Her repeated use of the word "recidivism" when describing the evidence of reform required for a company to be offered a DPA is reminiscent of the terminology used in the context of US DPAs, which suggests that US enforcement matters may offer a roadmap.

UK LEGAL DEVELOPMENTS

Privilege in internal investigations: The appeal in *SFO v ENRC* [2018] EWCA Civ 2006 reflects an important development in understanding the scope of legal professional privilege in the context of internal investigations. The appeal concerned whether legal professional privilege (whether through litigation privilege or legal advice privilege) would attach to documents resulting from an internal investigation by ENRC into allegations of corruption at the company's Kazakh and African operations. ENRC originally claimed privilege over documents generated during its internal investigation into the matter. The SFO's request encompassed a wide range of documents, including verbatim transcripts of witness interviews, books and accounts, lawyer work product, and presentations.

At first instance, the High Court found that the documents were not privileged and ought to have been disclosed to the SFO, a decision that caused consternation within the legal profession. The Court of Appeal has now overturned this judgment, holding that the vast majority of the documents were indeed protected by litigation privilege. The Court 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 this decision provides some assurance when 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 and the SFO, which made clear that criminal proceedings were likely unless the matter was settled. The SFO has decided not to appeal this decision to the Supreme Court.

Owing to the Court's decision on litigation privilege, it did not have to rule on the legal advice privilege arguments, but suggested that the law on this point was potentially at odds with international common law and ought to be clarified in the future. Further commentary from Jenner & Block on the case can be found here.

Obtaining of evidence internationally: There have been two developments in English law over the last year of relevance to the issue of obtaining evidence internationally: the first is the KBR Inc. case; and the second is the introduction of European Investigation Orders.

The case of *R (KBR Inc.) v Serious Fraud Office* [2018] EWHC 2012 (Admin) held that where there is a "sufficient connection" to the United Kingdom, the SFO can compel the production of documents held overseas by a non-UK company. Document productions can be compelled by means of a Notice served pursuant to Section 2(3) of the Criminal Justice Act 1987, provided that the SFO can effectively serve the company with the Notice.

The Court in *KBR Inc.* held that although Section 2(3) did not expressly apply outside of the jurisdiction, it did in fact have extraterritorial effect where there was a "sufficient connection" to the United Kingdom. What would constitute a "sufficient connection" will be a fact-specific issue. According to the Court, to deny Section 2(3) any extraterritorial effect would be to stymie the SFO's ability to fulfil its purpose, which, in the SFO's own words, is to deal with "top end, well-heeled, well-lawyered crime." It is clear that there was already some element of extraterritorial application of Section 2(3); a UK company could not refuse

to comply with a Notice if the documents sought were held by it outside of the United Kingdom. The Court held that a Notice could equally well require the production of documents held outside of the United Kingdom by a non-UK company in certain circumstances. Consequently, the *KBR Inc*. case has made it easier for the SFO to obtain evidence from companies based overseas.

Further commentary from Jenner & Block on the case can be found here.

The implementation of the new European Investigation Order scheme has also increased the SFO's ability to obtain evidence from companies outside the United Kingdom. The new scheme essentially allows the Courts of EU jurisdictions to order the production of evidence relevant to an investigation by individuals and entities in another EU Member State. The timetable for responding to these orders is much shorter than timeframes expected under mutual legal assistance treaties, and as such are of considerable use to investigating authorities. We understand that large numbers of European Investigation Orders have already been received in the United Kingdom – and made in respect of outgoing requests – and we expect that this will continue throughout the EU (if not the United Kingdom) as authorities become more familiar with the scheme.

BARCLAYS CHARGES DISMISSED; DIRECTORS' TRIAL ONGOING

The SFO was dealt a high-profile setback on 21 May 2018 when the UK Crown Court dismissed all charges brought against Barclays PLC and Barclays Bank PLC (together, "Barclays") in connection with Barclays' emergency capital raising arrangements with Qatar Holding LLC ("Qatar") during the 2008 financial crisis. The SFO confirmed on 23 July 2018 that it had made an application to the High Court to reinstate the charges; that application was denied by the UK High Court on 26 October 2018.

The investigation concerned Advisory Service Agreements (ASA) Barclays had entered into with Qatar during its capital raisings in June and October 2008, as well as a loan Barclays made to the State of Qatar. Under the ASAs, Qatar would be paid £322 million as consideration for its help with expanding Barclays' services in the region. Separately, in October 2008, Barclays loaned the State of Qatar £2.2 billion, which matched previous investments in Barclays by the state of Qatar. The SFO alleged that the loaned amounts were inducements, directly or indirectly, for the State of Qatar to reinvest that amount by purchasing shares in Barclays – such reinvestment would be unlawful financial assistance in breach of the UK Companies Act. In addition, neither the October 2008 ASA nor the loan had been publicly disclosed.

Following a five-year investigation, the SFO charged Barclays with conspiracy to commit fraud by false representation, contrary to Sections 1-2 of the Fraud Act 2006 and Section 1(1) of the Criminal Law Act 1977 and unlawful financial assistance, contrary to section 151(1) and (3) of the Companies Act 1985.

The charges attracted considerable press attention as they were the first charges made in the United Kingdom against a bank for its actions during the financial crisis. Moreover, the SFO's decision to include Barclays Bank PLC in the charges was of serious consequence: Barclays Bank PLC is the operating entity which holds Barclays' banking license in various countries, so a finding of guilt could have led to a loss of its license and a consequent cessation of banking operations in many jurisdictions. Because of the current trial of the individuals who were charged alongside Barclays, the reasons for the dismissal of the charges have not been made public. However, what the dismissal does show is the difficulties that the SFO faces in trying to prosecute companies, particularly large multinationals. The dismissal will not be helpful to the SFO's public mantra that companies must cooperate with it, lest they face a criminal conviction. The Barclays decision shows that the latter is not a foregone conclusion and that – in some instances – it may in fact be in the company's best interests to take on the SFO.

2018 UK ENFORCEMENT ACTIVITY

ALSTOM POWER LTD.

Serious Fraud Office
Criminal convictions
19 and 21 December 2018

Nature of Conduct: Nicholas Reynolds, the former global sales director for Alstom Power Ltd's Boiler Retrofits unit, was convicted of conspiracy to corrupt on 19 December 2018. This was the fourth conviction relating to Alstom's conspiracy to bribe officials at a power station in Lithuania, as well as senior Lithuanian politicians. The convicted individuals falsified records to circumvent anti-bribery checks in order to secure two contracts.

Reynolds' conviction followed the convictions of John Venskus (the former business development manager at Alstom Power Ltd) in October 2017 and Göran Wikström (the former regional sales director at Alstom Power Sweden AB) in June 2018 on the same charge. Alstom Power Ltd also pleaded guilty to conspiracy to corrupt on 10 May 2016.

Amount of Alleged Improper Payment: More than €5 million.

Benefit Obtained: Two contracts worth €240 million.

Type of Resolution: Criminal convictions under the Criminal Law Act 1977 and the Prevention of Corruption Act 1906. Reynolds, Venskus, and Wikström received custodial sentences this year for their part in the corruption. Reynolds and Wikström were also ordered to pay £50,000 and £40,000 in costs, respectively.

Alstom Power Ltd was ordered to pay a total of £18,038,000, which included: (i) a fine of £6,375,000; (ii) compensation to the Lithuanian government of £10,963,000; and (iii) prosecution costs of £700,000.

Of Note: The investigation by the SFO into these charges involved significant international cooperation, with more than 30 countries being involved.

There have also been other investigations linked to this case involving other Alstom companies, including the criminal conviction of Alstom Network UK Ltd for conspiracy to corrupt on 10 April 2018, as a result of its making more than €2 million of corrupt payments to obtain a Tunisian infrastructure contract worth €85 million.

Alstom Network UK Ltd and other individuals have been acquitted of other charges in the case relating to alleged corrupt payments to secure transport contracts in India and Poland, as well as of charges of corruption in a linked investigation concerning a Budapest Metro rolling stock contract.

CORRUPT UZBEK DEALS

Serious Fraud Office
Civil recovery claim
3 October 2018

Nature of Conduct: The civil recovery claim relates to a number of assets, including three properties within the United Kingdom, which were allegedly obtained using the proceeds of corrupt deals in Uzbekistan involving Gulnara Karimova (the daughter of Uzbekistan's former president) and Rustam Madumarov (a close friend of Karimova).

Amount of Alleged Improper Payment: Unknown.

Benefit Obtained: Contracts in a number of foreign jurisdictions.

Type of Resolution: Unresolved. The SFO has issued a claim for civil recovery in the English High Court under Part 5 of the Proceeds of Crime Act 2002.

Of Note: This case represents one of the latest developments in the far-reaching, cross-border investigations into corrupt telecommunication deals in Uzbekistan. In 2016, VimpelCom Limited paid $795 million to resolve bribery charges with US and Dutch enforcement authorities. The following year, in 2017,

Telia Company AB paid $965 million to settle corruption charges with US, Dutch, and Swedish authorities.

FH BERTLING GROUP EXECUTIVES

Serious Fraud Office
Criminal convictions
27 November 2018

Nature of Conduct: Several former executives of FH Bertling Group (Stephen Emler, Giuseppe Morreale, and Colin Bagwell) and one former employee of ConocoPhillips (Christopher Lane) were convicted of conspiring to make corrupt payments in relation to two corrupt schemes.

Emler and Morraele pleaded guilty to two counts of conspiracy to make corrupt payments by paying bribes and facilitation payments to ensure that FH Bertling's bid for a freight forwarding contract with ConocoPhillips as part of the 'Jasmine' North Sea oil exploration project was successful.

Christopher Lane pleaded guilty to one count of conspiracy to make corrupt payments in relation to a separate bribery scheme involving overcharging. Colin Bagwell was convicted by the jury of the same offence. The bribes were paid to ensure that inflated prices charged by FH Bertling for additional services were permitted by staff at ConocoPhillips.

Amount of Alleged Improper Payment: More than £350,000.

Benefit Obtained: Freight forwarding contract with ConocoPhillips worth more than £16 million.

Type of Resolution: Criminal convictions under the Prevention of Corruption Act 1906 against four individuals.

Of Note: On 27 November 2018, three individuals – Georgina Ayres, Robert McNally, and Peter Smith – were acquitted of charges concerning the 'Jasmine' project in related proceedings. In addition to the 'Jasmine' case, the SFO has also secured seven convictions against former senior executives of FH Bertling (including Emler and Morreale) and the company itself, concerning a different bribery scheme in Angola. Although FH Bertling was convicted in this prior case relating to Angola, there were no charges brought against the company (or ConocoPhillips) in connection with the 'Jasmine' case.

GRIFFITHS ENERGY INTERNATIONAL

Serious Fraud Office
Recovery of proceeds
22 March 2018

Nature of Conduct: Griffiths Energy International pleaded guilty to Canadian charges related to the use of a vehicle named 'Chad Oil' to bribe Chadian diplomats in the United States and Canada with discounted share deals and 'consultancy fees.' The bribes were made to secure oil contracts in Chad and were among those which Griffiths Energy self-reported to the Canadian authorities in 2013. The proceeds of the corruption entered the United Kingdom's jurisdiction after Griffiths Energy was taken over by a UK company, with the shares being sold via a UK broker. The SFO subsequently began civil recovery proceedings to recover a total of £4.4 million, which comprised the profits of a corrupt discounted share sale by the wife of the Chadian ambassador to the United States.

Amount of Alleged Improper Payment: £4.4 million (amount of the SFO's recovery).

Benefit Obtained: Chadian oil contracts.

Type of Resolution: Following a three-day trial in the English High Court, the Court granted the SFO an order for the civil recovery of £4.4 million.

Of Note: This was the first civil recovery case in the United Kingdom where money has been returned to overseas victims of corruption.

GÜRALP SYSTEMS LIMITED

Serious Fraud Office
Criminal charges
17 August and 28 September 2018

Nature of Conduct: Three former employees of engineering company Güralp Systems Limited – Dr. Cansun Güralp (founder), Andrew Bell (managing director) and Natalie Pearce – allegedly conspired to make corrupt payments to a public official and employee of the Korea Institute of Geoscience and Mineral Resources (KIGAM) between April 2002 and September 2015.

Amount of Alleged Improper Payment: Unknown.

Benefit Obtained: Unknown.

Type of Resolution: Unresolved. The individuals were charged with conspiracy to make corrupt payments contrary to the Criminal Law Act 1977 and the Prevention of Corruption Act 1906.

Of Note: These charges follow a criminal investigation by the SFO into conduct at Güralp that commenced in December 2015, which had not previously been announced. In the United States, DOJ declined to prosecute Güralp Systems Limited, noting the company's substantial cooperation, significant remedial efforts, and commitment to accepting responsibility in the parallel UK investigation. DOJ's declination is discussed above at p. 6.

UNAOIL MONACO SAM, UNAOIL LTD & INDIVIDUALS

Serious Fraud Office
Criminal charges
22 May, 26 June, and 21 December 2018

Nature of Conduct: According to the allegations, Unaoil Monaco SAM, Unaoil Ltd and a number of individuals (including Basil Al Jarah, Ziad Akle, and Stephen Whiteley) conspired to give corrupt payments to secure the award of a contract worth £545 million to Leighton Contractors Singapore PTE Ltd for a project to build two oil pipelines in southern Iraq.

Amount of Alleged Improper Payment: Unknown.

Benefit Obtained: A contract worth £545 million to Leighton Contractors Singapore PTE Ltd.

Type of Resolution: Unresolved. Both companies and all the individuals were charged with conspiracy to make corrupt payments contrary to the Criminal Law Act 1977.

Of Note: Basil Al Jarah and Ziad Akle faced similar charges in November 2017 with respect to contracts with SBM Offshore (*see* January 2018 edition of this *Guide*). The Australian Federal Police provided assistance to the SFO in connection with its investigation.

INTERNATIONAL DEVELOPMENTS

Recent Global Trend of Improving & Adopting Anti-Corruption Laws

2018 witnessed the continued development and enhancement of anti-corruption laws around the globe. Several countries adopted new anti-corruption laws and others reinforced existing laws to create more robust anti-corruption regimes. This trend suggests a growing international consensus toward ferreting out corruption and bribery involving public officials. In addition, these enhancements to anti-corruption laws may pave the way for increased enforcement of international anti-corruption laws, as well as cross-border cooperation among international enforcement agencies.

A selection of newly enacted anti-corruption laws are highlighted below.

INDIA

On July 26, 2018, India's new amendments to its anti-corruption law went into effect. The revised anti-corruption law includes commercial organizations as entities that may be charged with bribery and increases the minimum penalty for taking a bribe to three years' imprisonment, with a maximum term of seven years. Although many of the amendments strengthen anti-corruption efforts, certain amendments make it more difficult for police officers to investigate public officials for corruption. For example, the amendments require that investigating agencies obtain prior approval from a competent authority before conducting an inquiry into any alleged offense related to a recommendation or decision made by the official in the discharge of his official functions or duties. This amendment applies to both active and retired public officials.

IRELAND

New anti-corruption laws went into effect in Ireland on July 30, 2018. The new laws represent an overhaul of prior anti-corruption legislation and significantly increase the penalties for corruption-related offenses, in particular bribery and influence trading. The new laws are global in scope and affect all citizens, companies, or other corporate entities registered in Ireland, regardless of where the corrupt act is committed.

ITALY

In December 2018, the Italian parliament passed a package of anti-corruption measures targeted at the public sector. The new rules increase the criminal penalties for bribery, limit the participation in government of those convicted of corruption, and grant greater abilities to the police to engage in undercover operations. There are also several measures that seek to increase transparency, including lowering the threshold for public disclosure of donations by parliamentarians.

RUSSIA

Amendments to Russia's anti-corruption law went into effect on August 14, 2018. The new amendments exempt certain corporations from liability for bribery, provided that those corporations enable authorities to uncover wrongful conduct, conduct an administrative investigation, or uncover, disclose, or investigate additional misconduct. For a corporation to avail itself to the immunity provisions, it must self-report the alleged bribery. However, potential immunity based on self-reporting does not apply to bribery of foreign public officials, in keeping with Russia's obligations under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions. The new amendments also allow courts to freeze the assets of companies under investigation for bribery.

THAILAND

In July 2018, a new anti-corruption law took effect in Thailand. The Act Supplementing the Constitution Relating to the Prevention and Suppression of Corruption B.E. 2561 (2018) repeals and replaces the 1999 Organic Act on Counter Corruption. Among other changes, the new law broadens the reach of Thailand's existing anti-corruption law, which now extends to cover foreign entities that are registered abroad but operating in Thailand. Corporations now also face criminal liability for bribes given to Thai state officials, foreign state officials, and officials with intergovernmental organizations. In addition, corporate criminal liability can be incurred when a bribe is provided by an "associated person," which can include employees, joint venture partners, and agents.

UNITED ARAB EMIRATES

The United Arab Emirates (UAE) expanded its anti-corruption laws in early December 2018. The UAE's anti-corruption rules now apply outside of the UAE's borders to any person who commits bribery in cases where the criminal or victim is employed in or a national of the UAE, or if the bribery involves public property.

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 & 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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