Market Intelligence

ANTI-CORRUPTION 2019

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Anti-Corruption 2019

United States

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In 2017, Mr Davis was appointed to serve as an independent compliance monitor pursuant to an FCPA disposition following extensive vetting by the DOJ and SEC. This multi-year project recently concluded.

Mr Davis is a frequent speaker and trainer on FCPA issues and has written various articles and been quoted in media publications ranging from *Compliance Week* to *The Daily Beast* to *The Wall Street Journal* on FCPA compliance and related topics.

Mr Davis has worked extensively with clients in developing and implementing internal compliance and ethics programmes and related internal controls, conducting due diligence on third parties, assessing compliance risks in merger and acquisition contexts, and auditing and evaluating the effectiveness of compliance processes. Additionally, Mr Davis focuses his practice on a range of other issues relating to structuring and regulating international trade and investment transactions.

1 What are the key developments related to anti-corruption regulation and investigations in the past year in your jurisdiction, and what lessons can compliance professionals learn from them?

The United States remains the most active country in the world in enforcing laws prohibiting foreign bribery against both corporations and individuals, primarily through the US Foreign Corrupt Practices Act (FCPA) and laws against money laundering and certain types of fraud. As has been the case historically, US government investigations against companies continue to be resolved almost exclusively through negotiated settlements and many actions against individuals also are concluded prior to any trial. These results are driven by the substantial leverage that the US agencies enforcing the FCPA (the US Department of Justice (DOJ) and US Securities and Exchange Commission (SEC)) can bring against both companies and individuals.

After over two years of enforcement under the Trump Administration, it is clear that the DOJ and the SEC remain committed to an assertive anti-corruption enforcement programme under the FCPA, despite early concerns. In April 2017, the Attorney General observed in a speech that public corruption 'increases the cost of doing business, and hurts honest companies that don't pay these bribes', in addition to 'harm[ing] free competition, distort[ing] prices, and often lead[ing] to substandard products and services coming into this country'. He further emphasised that the DOJ 'will continue to strongly enforce the FCPA and other anti-corruption laws'. Since that time, DOJ officials have repeatedly reinforced these messages. For example, in late March 2019, the DOJ official overseeing FCPA enforcement affirmed that '[e]ffective white-collar enforcement promotes market integrity and fairness, as well as fundamental values of democratic accountability' and that '[DOJ]'s commitment to white-collar criminal enforcement and the promotion of ethical business practices remain as strong as ever'. Similarly, the SEC's enforcement co-chair, in a speech marking the FCPA's 40th anniversary in November 2017, stated bluntly: 'Will the SEC continue to be committed to robust FCPA enforcement? My answer to that question is simple: Yes.' Though he was critical of enforcement efforts by other countries, the SEC's chairman stated in a September 2019 speech: 'To be clear, I do not intend to change the FCPA enforcement posture of the SEC.'

FCPA enforcement numbers through mid-2019 largely support these officials' rhetoric. The rate of dispositions brought by US authorities against companies continues to largely track the averages over the past 10 years (with a brief slowdown in early 2019 perhaps partially attributable to the US government shutdown in January). The US authorities in the past year have imposed substantial penalties and disgorgement for FCPA-related violations against major corporations such as Walmart (US$282 million in June 2019); telecom company MTS (US$850 million


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in March 2019); Microsoft (US$25 million in July 2019); Fresenius Medical Care (US$232 million in March 2019); and Petrobras (US$1.787 billion in total penalties and disgorgement to US and Brazilian authorities in September 2018). Data on new FCPA investigations publicly disclosed by companies for 2018 and early 2019 has shown some fall-off in reported numbers, though various unrelated factors, including incomplete public information, likely affect these numbers to some degree.

While I will note some more recent developments below, FCPA cases managed by the DOJ remain subject to the FCPA Corporate Enforcement Policy, which has been 'codified' in the DOJ's Justice Manual (section 9-47.120). The policy promises a 'presumption' of declination of enforcement for all companies that meet certain conditions – a presumption that may be overcome only if there are 'aggravating circumstances' that include involvement by executive management, significant profit earned from the misconduct, pervasiveness of misconduct within the company and criminal recidivism. The policy sets forth three conditions that companies must satisfy to be eligible for declination: voluntary self-disclosure, full cooperation with any government investigation and timely and appropriate remediation. The policy contains detailed criteria for evaluating each of these three conditions. For the

"Qualifying for a declination under the DOJ's policy does not necessarily allow a company to walk away from an FCPA investigation without consequences."

self-disclosure to be truly voluntary, it must be made 'within a reasonably prompt time after becoming aware of the offence' and 'prior to an imminent threat of disclosure or government investigation'. Similarly, full cooperation requires timely disclosure of all facts relevant to the wrongdoing – including all facts gathered during any independent corporate investigation – as well as timely preservation of all relevant documents and data. True remediation requires the implementation of an effective compliance and ethics programme throughout the company and appropriate discipline of employees.

Qualifying for a declination under the DOJ's policy does not necessarily allow a company to walk away from an FCPA investigation without consequences. First, the policy makes clear that a company will be required to pay 'all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue', which could result in significant penalties even if no criminal fines are imposed. Declinations decided pursuant to the policy are made public, which means that a company may still face public scrutiny into its conduct – though most public companies announce FCPA investigations when they disclose potential issues to the US agencies. Finally, a DOJ declination does not apply to any SEC case, if that agency has jurisdiction. Recent examples of cases in which the DOJ issued formal declinations under the policy include the February 2019 *Cognizant* and December 2018 *Polycom* matters. Both cases involved parallel SEC settlements and requirements for disgorgement of illicit profits.

In March 2019, the DOJ updated the FCPA Corporate Enforcement Policy to provide further detail on the practices that companies are expected to adopt when managing business records. Specifically, the update relaxed some of the conditions the DOJ imposes on companies seeking full remediation credit in the event of an FCPA investigation in connection with employees' use of ephemeral messaging platforms, such as WhatsApp. While the original version of the policy could have been read as requiring companies to prohibit the use of such technologies if they wanted full credit, the revised version and related public statements clarify that the DOJ expects companies to design and implement risk-based controls over ephemeral messaging platforms that are tailored to a company's specific operations – before any FCPA investigation arises.

The DOJ announced another FCPA-related policy in October 2018 – this one involving the selection and use of corporate monitors in FCPA resolutions. The policy reiterates the requirement that DOJ prosecutors balance the potential benefits the imposition of a monitor may have for a company and the public interest against the potential costs and impact on the company's operations. The monitor policy details the various factors that should guide DOJ personnel in performing this cost-benefit analysis, including: '(a) [whether] the underlying misconduct involved the manipulation

of corporate books and records; (b) [whether] the misconduct was pervasive across the business organisation or approved or facilitated by senior management'; and (c) whether the corporation has invested in and improved its compliance programme. In evaluating the costs, the policy advises DOJ prosecutors to consider not only monetary costs but also whether the 'proposed scope of a monitor's role is appropriately tailored to avoid unnecessary burdens to the business's operations'. The policy also requires that the selection of a monitor be based on the unique 'facts and circumstances of each matter and the merits of the individual candidate' by requiring that the selection process 'instil public confidence' and result in the selection of a highly qualified person . . . free from any actual or potential conflict of interest . . .'. To achieve this end, the policy sets out detailed procedures for the nomination, review and selection of monitor candidates.

The monitor policy codifies long-standing DOJ practice in many respects – the policy's main intent is to publicly affirm the DOJ's view that the imposition of a monitor is only appropriate when facts and circumstances dictate such a result and the imposition of a monitor is not unduly burdensome or punitive. While the policy's full effect on companies remains to be seen, the June 2019 *Walmart* case may provide an example of the DOJ's current approach on monitors. As part of its resolution with the DOJ, Walmart agreed to engage an independent compliance monitor for a period of two years. The DOJ decision to impose a compliance monitor at all is noteworthy given the public case documents' detailed discussion of Walmart's upgrades to its compliance programme and related controls, which reportedly cost hundreds of millions of dollars to implement. The monitor requirement suggests that the DOJ did not consider Walmart's extensive remediation efforts to completely address future compliance risks. However, the DOJ did take the unusual step of narrowing the scope of the monitor's mandate – the Walmart monitor will focus only on the company's internal accounting controls as they relate to certain types of transactions in four specific 'monitor countries' in which allegedly illegal conduct was observed. This limited mandate suggests that DOJ tried to account for monitor costs in light of what Walmart had done.

For compliance personnel, it is noteworthy that the new monitor policy emphasises the importance of effective corporate compliance programmes and specifically includes a company's investment in its compliance programme as a guiding factor. Thus, it is clear that a key strategy for avoiding a monitorship continues to be investment in and maintenance of an effective compliance programme and related internal accounting controls.

In late November 2018, the DOJ announced changes to the Justice Manual to reflect DOJ's updated polices on corporate enforcement and individual accountability. The changes reflected a continued emphasis on individual accountability as

established by the 2015 Yates Memorandum, but relaxed some of that memorandum's requirements. Specifically, the DOJ will no longer condition cooperation credit for companies on the disclosure of 'all relevant facts' about all individuals involved in the alleged misconduct. Instead, companies need only identify individuals who are 'substantially involved in or responsible for the criminal conduct'.

In theory, this change will allow DOJ prosecutors to grant companies cooperation credit in circumstances where such credit previously would have been unavailable. Accordingly, companies may now potentially avoid some of the expensive time and effort necessary to track down information about every individual involved in issues under investigation – which, in the FCPA context, can often mean individuals located outside the United States. Of course, the DOJ still enjoys significant bargaining power with regard to what information is deemed satisfactory in specific investigations and can deny cooperation credit if the DOJ determines that a company is not being forthright in identifying individuals involved in FCPA-related conduct.

Turning to the SEC, the agency did not undertake any significant changes in policy or processes regarding FCPA investigations in the past year. The SEC is still feeling the effects of the June 2017 US Supreme Court case *Kokesh v SEC*, which held

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that the applicable five-year statute of limitations applies not only to civil penalties imposed under the FCPA, but also to the disgorgement of profits gained from such illegal activities. An SEC enforcement official stated in October 2018 that:

> [t]*he impact of Kokesh has been felt across our enforcement program. A few months ago, we calculated that Kokesh led us to forego seeking approximately $800 million in potential disgorgement in filed and settled cases* [a figure that covers a broader spectrum of SEC cases than those dealing with public corruption]. *That number continues to rise.*

Along with other factors, the *Kokesh* case is likely driving the SEC's continuing efforts to speed up FCPA investigations and consider non-monetary relief in more cases. The SEC maintains the view that *Kokesh* does not extend to claims for injunctive relief and thus that the agency still has tools to address corrupt and other improper conduct that is more than five years old.

The SEC manages a programme established by the US Sarbanes–Oxley law that potentially rewards whistle-blowers for reporting possible violations of securities laws. A US appeals court case decided in late February 2019 limits the application of this whistle-blower programme as regards the FCPA. Specifically, the court in the case *Wadler v Bio-Rad Laboratories, Inc* ruled that the statutory provisions of the FCPA do not constitute 'rules or regulations of the SEC' as defined by Sarbanes–Oxley and thus that a company employee who reports statutory violations of the FCPA, rather than violations of an SEC administrative rule or regulation, is not protected from retaliation by the whistle-blower programme. The court noted that certain SEC regulations prohibit falsification of books and records – in a manner similar to the FCPA statutory provisions – but the case result means that unsophisticated whistle--blowers without knowledge of these regulation details risk retaliation when they report general FCPA concerns. The SEC is still evaluating options and the extent of the potential effects of this ruling remain unclear at present.

With regard to anti-corruption laws applicable to US federal and state officials, the 2016 US Supreme Court decision that overturned the corruption-related conviction of former Virginia governor Robert McDonnell continues to have significant effects. That case makes it more difficult for prosecutors to build and win cases that do not have evidence of an explicit agreement by the official to use his or her position in return for benefits. The court's decision has been criticised as having the effect of undermining public confidence in the accountability of elected officials – a concern that has been heightened by multiple instances of courts overturning previous corruption-related convictions of public officials in response to the *McDonnell* holding.

"Prosecutors have continued to have successes in cases of public corruption by US federal and state officials."

The challenges of pursuing public corruption cases under the court's announced standards were further illustrated at the trial of US Senator Robert Menendez of New Jersey on 14 corruption-related counts related to gifts, travel and donations from a Florida physician allegedly in return for intervening on behalf of the donor's business and personal interests. The trial, which began in September 2017, ended on 16 November 2017 when the judge declared a mistrial after the jurors announced they were unable to reach a unanimous decision. In January 2018, prosecutors decided not to bring a new case.

Prosecutors have continued to have successes in cases of public corruption by US federal and state officials, including in dozens of local or regional cases. One stand-out case in 2018 involved a former top aide to Governor Andrew Cuomo of New York, Joseph Percoco, who in March 2018 was convicted and sentenced to six years in prison for accepting more than US$300,000 in bribes from executives at two energy companies to influence the award of energy and real estate projects by the state. Percoco has appealed his conviction on grounds that the government failed to meet its burden of proof under *McDonnell*, but was ordered in March 2019 to begin his prison sentence pending that appeal.

As to lessons from these and other developments in the enforcement landscape, it bears repeating, first, that the United States remains committed to investigating and punishing public corruption overseas. As noted, resolved enforcement actions in 2018 and the first half of 2019 are generally on pace with the trends of the past 10 years. The business-friendly nature of the current US administration has not substantially affected these efforts – though the DOJ policies discussed above and elsewhere are designed to address long-standing complaints from the US business community regarding the certainty of benefits for companies that make voluntary disclosures, the potential burden created by compliance monitorships, standards for cooperation credit granted to companies under investigation and the possible fairness issues related to multi-agency actions.

Investigations and enforcement resolutions continue to cover various industries, including, for example, life sciences, industrial engineering, information technology, telecommunications, food services industries, retail, software, mining, oilfield services, and financial institutions. Recent publicly-disclosed investigations include 3M (manufacturing) and Herbalife (nutrition). And it is not just US companies that are targeted – non-US companies (often listed on US exchanges) have been the subjects

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of some of the largest FCPA-related settlements. Recent examples include MTS (Russia), Petrobras and Electrobras (Brazil) Telefônica Brasil (Brazil, with a parent in Spain), TechnipFMC (UK) and Fresenius Medical (Germany).

US agencies continue to target corrupt activities around the world, though data show that business activities in China are the ones most frequently involved in public resolutions – the 46 resolutions involving China during the period 2009–2018 constitute 18 per cent of the combined corporate FCPA actions during that period (recent cases involve dispositions with Polycom (December 2018), Fresenius (March 2019) and Walmart (June 2019)). The US government's 'China Initiative' – launched in November 2018 – promises to continue enforcement attention on China, as the DOJ stated that, as part of the initiative, prosecutors would '[i]dentify . . . FCPA cases involving Chinese companies that compete with American businesses'. The initiative has not produced any public results in the FCPA area to date, though it is noteworthy that in August 2017, it was reported that a major state-owned Chinese company, China Petroleum and Chemical Corp (Sinopec), was itself under FCPA investigation related to its activities in Africa.

The countries other than China most frequently involved in FCPA enforcement actions during the 2009–2018 time period are Brazil (largely due to the massive and ongoing Car Wash investigation there), Nigeria, Indonesia, Mexico, India, Russia and Angola. Several recent FCPA cases also have reinforced the corruption risks present in the Middle East and Central Asia.

On the US domestic side, prosecutors continue to prioritise cases against executive branch officials and members of Congress (for example, a case against Representative Duncan Hunter of California, who has been charged with misusing campaign funds for personal expenses such as lavish trips and whose trial will occur in the fall of 2019), though federal cases against state and local officials using a variety of legal theories have also received significant attention from the DOJ's network of US Attorneys across the country. The *McDonnell* standard will remain a challenge for prosecutors bringing such cases, although not necessarily an impossible one. Indeed, the *Menendez* trial resulted in a ruling by the federal district judge overseeing the case that the *McDonnell* case does not invalidate a commonly-used prosecutorial argument in public corruption cases – that a steady flow of gifts or favours (a 'stream of benefits') can add up over time to establish an improper quid pro quo linked to official acts by a defendant.

Certain signals from the Trump Administration regarding, at minimum, a lack of sensitivity to domestic public corruption may undermine the overall enforcement climate and even specific cases. The number of former Cabinet members and other senior officials who have resigned under the cloud of ethics issues, continuing allegations of violations of the US Constitution's Emoluments Clause and talk by

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the President of potential pardons for officials convicted of public corruption such as former Illinois Governor Rod Blagojevich all contribute to perceptions that the current administration does not concern itself much with public corruption issues.

2 What are the key areas of anti-corruption compliance risk on which companies operating in your jurisdiction should focus?

First and foremost, companies subject to the FCPA need to be aware of the potential worldwide reach of the law over corporate activities. The agencies responsible for enforcing the FCPA push the limits of the jurisdictional provisions, and in resolutions with corporations have used the peripheral involvement of US banks or dollar-based transactions, or emails routed through US-based servers, to reach transactions that otherwise have no US contacts. A still-relevant example of this was the July 2015 resolution with Louis Berger International.

Another area of focus should be identifying and analysing the US agencies' assertive positions regarding the scope and meaning of key, but sometimes vaguely defined, legal concepts in the FCPA, which are often seen in public resolutions or in legal briefs filed in court cases. One example that has played out publicly over the past several years involves the definition of a government 'instrumentality' – essentially, whether employees of state-owned enterprises or other entities qualify as 'foreign officials' subject to the strictures of the FCPA. A number of challenges to the DOJ's expansive and multipronged approach to this issue have ultimately been turned back by the US courts. Some recent settlements highlight the breadth of who qualifies as a 'foreign official' under the FCPA. The March 2019 *Fresenius* case cited benefits to doctors and health workers employed by public hospitals in several countries as payments to 'officials'. In the November 2017 *SBM* case, an employee of an Italian oil and gas company that served as the operator of a project for a state-owned Kazakh gas company was deemed to be an 'official' because he was 'acting in an official capacity' for the state instrumentality. Compliance professionals need to account for these broad definitions when addressing specific compliance risks.

Perhaps the most challenging set of FCPA compliance risks involves the actions of third parties with which a company has a relationship – sales representatives, joint venture partners, consultants, distributors, agents, vendors and the like. Data we have analysed show that close to 75 per cent of FCPA cases in the past 10 years involve actions by third parties. Recent cases that have involved corporate liability for actions by third parties include resolutions with Petrobras, United Technologies Company, Vantage Drilling, MTS, Fresenius and Walmart. This trend is driven by the FCPA's provision stating that payment to a third party with 'knowledge' that the payment will be passed on to an official is a violation of the statute. The agencies have

adopted an expansive definition of 'knowledge' that goes beyond actual knowledge to also cover 'conscious disregard' of information showing corruption risks. The best illustration of this interpretation is the 2009–2012 case against Frederick Bourke (*US v Kozeny*), in which a jury convicted Mr Bourke for conspiracy to violate the FCPA using the conscious-disregard standard. Appropriate, risk-based compliance policies, procedures and internal accounting controls related to due diligence on, contracting with, and monitoring and auditing of third parties are critical to managing this key area of risk.

Inadequate internal accounting controls and violations by public company employees of the books and records provisions are another key area of FCPA risk. The relevant statutory requirements apply to all areas of corporate conduct (and there have been hundreds of non-bribery cases involving these controls). However, in the FCPA area, the SEC uses the broad reach of these requirements – issuers are responsible for worldwide compliance with these requirements by almost all subsidiaries – to penalise corrupt activities that may fall outside the DOJ's criminal jurisdiction or that do not meet all of the elements of an anti-bribery violation. Recent examples include settlements involving Beam Suntory and Sanofi. Compliance professionals should work closely with their finance and accounting function counterparts to ensure that the relevant controls are consistent with the company's compliance processes and that business transactions are accurately recorded in the company's records.

US domestic bribery laws and enforcement actions often focus on the specific and complex rules that govern federal executive branch employees. Often these cases are combined with allegations of violations of detailed government contracting requirements. As noted, there are also prosecutions on the Congressional side, though the rules governing lobbying, gifts or entertainment and public disclosure requirements are sometimes drastically different from those for executive branch personnel. Close coordination with a company's US lobbying and government relations functions and advice from experienced counsel on these rules are required to manage risks.

3 Do you expect the enforcement policies or priorities of anti-corruption authorities in your jurisdiction to change in the near future? If so, how do you think that might affect compliance efforts by companies or impact their business?

I do not expect a fundamental change in enforcement practices or priorities to take place. The pace of announced FCPA-related resolutions by the DOJ and SEC can vary over time and during some periods can seem to drop off. However, that pace

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is driven by a number of factors, many of which are case-specific. Thus, it would be a mistake to assume that any apparent slowdowns in announced resolutions (such as during much of the first half of 2019) signal a slowdown in investigations or a significant redirection of FCPA enforcement resources. Indeed, the week of 20–27 June 2019 was one of the busiest weeks in FCPA enforcement history, with the DOJ announcing two corporate enforcement actions (including the conclusion of the long-running *Walmart* case, which began with media allegations published in 2012) and five actions against individuals. Unlike some other areas of law, FCPA enforcement enjoys strong bipartisan political support and for many years has not been subject to changes in political control over the US government. The signs of the Trump Administration's continuing commitment to FCPA investigations that are discussed throughout this section bear this out.

I expect that the DOJ will continue to look for cases that can be settled pursuant to the FCPA Corporate Enforcement Policy through formal declinations, in order to show companies tangible benefits for self-reporting issues to the DOJ. The policy also incentivises compliance efforts by companies – since declination requires the DOJ to conclude that a company's compliance programme is effective at the time of

"The current administration has made closing out long-running investigations a priority for the past couple of years."

the investigation's conclusion. Having a robust programme in place can potentially speed along the DOJ's decision on this requirement.

Indeed, some data suggest that cases ending in declinations tend to be resolved more quickly than usual. Historically, FCPA investigations by the SEC and DOJ have tended to be lengthy affairs, lasting years and, in a few cases, upwards of a decade. The current administration has made closing out long-running investigations a priority for the past couple of years, in response to companies' complaints regarding high costs and long periods of uncertainty that can place a drag on business. On the SEC side, as noted the *Kokesh* decision's effects on the relevant limitations period has also played a role in forcing the agency to resolve cases on a more accelerated basis than has historically been the case.

4 Have you seen evidence of continuing or increasing cooperation by the enforcement authorities in your jurisdiction with authorities in other countries? If so, how has that affected the implementation or outcomes of their investigations?

The US agencies have actively pursued cooperation with other enforcement authorities in the past several years and multinational investigations remain a priority under the Trump Administration. In September 2019, the SEC chairman delivered public remarks that some saw as a critique of multilateral anti-corruption enforcement efforts when he noted the lack of vigorous enforcement by many countries – even those with FCPA equivalents – and stated that he had not seen 'meaningful improvement' in international cooperation. It should be noted, however, that these remarks preceded later parts of the speech in which the chairman said he continues to support FCPA enforcement and will continue to 'engage with my international counterparts on matters where common, cooperative and enforcement strategies are essential'.

International cooperation is managed through bilateral mutual legal assistance treaties and through the assistance provisions of treaties such as the Organisation for Economic Co-operation and Development Anti-Bribery Convention. Often, though with lessening frequency as other countries have stepped up enforcement efforts, the US authorities take the lead.

In May 2018, the DOJ announced a new policy directing its attorneys to coordinate with other enforcement authorities, both in the United States and abroad, with the aim of avoiding duplicative penalties for the same corporate misconduct. The policy recognised the rule-of-law and fairness implications of subjecting a company to uncoordinated enforcement actions by multiple authorities – sometimes referred to as 'piling on' – and seeks to provide greater predictability and certainty to

companies considering a resolution with multiple agencies. The relevant factors largely codified existing DOJ practices and considerations, explicitly mandating coordination with US federal and state agencies and enforcement authorities in other countries and directing DOJ prosecutors to 'consider all relevant factors' in selecting enforcement methods and apportioning penalties for the same conduct among multiple authorities. The DOJ policy offers a greater level of certainty to companies facing multiple investigations, particularly those involving authorities outside the United States. However, the policy also adds to existing pressures on companies to disclose issues to and cooperate simultaneously with the DOJ and foreign agencies, with the consequent imposition of significant extra costs, risks, and related pressures.

The DOJ and SEC have a long track record of coordinating their investigations, enforcement and penalties under the FCPA. The coordination of anti-corruption enforcement among authorities outside of the United States is a more recent, but growing, trend, with global settlements becoming a standard component of the DOJ's and SEC's approach to anti-corruption enforcement. The US authorities have credited the May 2018 coordination policy with increasing cooperation between the United States and other countries in terms of evidence gathering and sharing.

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Representatives of both agencies in July 2019 cited enhanced working relationships with authorities in Brazil, the UK, France, Sweden and other Latin American countries. The DOJ official stated that a 'big component of that is our commitment to crediting penalties to overseas counterparts'.

The December 2016 global settlement by the Brazilian conglomerate Odebrecht and its petrochemical subsidiary Braskem that resulted in the companies agreeing to pay more than US$3.5 billion in combined penalties to Brazilian, US and Swiss authorities signalled the extent to which global investigations and settlements are becoming the norm for the DOJ and SEC. DOJ officials continue to cite the case in 2019 as the 'gold standard' for multinational anti-corruption cooperation. Apart from its record-breaking size (which was tied to the fact that the improper payments paid by the companies totalled more than US$1 billion), the case is notable in that the Brazilian prosecutors took the lead – unsurprising, as the case is linked to the larger Car Wash investigation that has gripped Brazil since 2014. The allocation of the combined penalties among the enforcement agencies reflects this – between 70 and 80 per cent of the penalties went to Brazil and in the aftermath of an April 2017 court decision, the US agencies received the smallest portion of the actual criminal penalties.

Other notable recent examples of cases involving multinational cooperation by the US agencies (many of which featured substantial penalties paid to non-US agencies) include:

- the June 2018 settlement with Société Générale involving US and French agencies;
- the September 2018 settlement of an investigation of Petrobras that involved Brazilian and US agencies; and
- the November 2018 *Vantage* case (in which the SEC settled with the company and Brazilian prosecutors targeted relevant individuals).

In *Société Générale*, the US and French agencies effectively split the corruption related penalties 50–50. In the *Petrobras* matter, a complex series of offsets and credits in penalties and disgorgement calculations resulted in 80 per cent of the total funds paid out being credited towards penalties owed in Brazil. The DOJ also declined to impose a compliance monitor in recognition of plans for Petrobras to be subject to continuing oversight by Brazilian authorities. In a twist, a 2017 coordinated settlement among the US, Dutch and Swedish authorities involving Telia was affected by Sweden's failure to meet its prosecution obligations when three former Telia executives were acquitted by a Swedish court in February 2019. Telia thus paid the disgorgement instalment originally allocated to Sweden (worth US$208 million) to the Dutch authorities instead.

The US authorities' encouragement of coordinated multinational investigations creates some tension with their goal of resolving investigations faster. Coordination among various agencies in different countries can be challenging, especially with entities that are less experienced in investigation techniques or that operate under different legal systems. In addition, legal and regulatory developments in several countries that are involved in anti-corruption cooperation efforts with the US authorities will likely create additional challenges for multinational enforcement and for companies' internal investigations, which often are a critical factor in advancing resolutions to conclusion. As discussed in more detail below, the EU's new General Data Privacy Regulation (GDPR) has in some cases created additional time-consuming hurdles to accessing witnesses and documents in key jurisdictions outside the United States. The GDPR joins other existing national data privacy and national security-based restrictions on access to information in various countries that have been involved in past FCPA-related enforcement actions, such as Russia and China. In addition, recent cases in the United Kingdom and Germany have created a wider gulf between the treatment of the attorney–client privilege in the United States and Europe, which may well affect the coordination of internal investigations by companies.

Multinational cooperation often increases the complexities and costs of any investigation for companies and can create difficult dynamics as the laws in different investigating jurisdictions sometimes are at odds regarding issues such as the extent of attorney–client privilege or the applicability of data privacy rules. Cooperation also allows US and other authorities to share evidence that might not be within reach of one or the other agency, which can expose companies to liability based on conduct that might not otherwise have been discovered. Companies therefore need to base important compliance decisions, such as whether or not to disclose a potential FCPA violation, in part on the possibility of cooperation among possibly several interested investigating jurisdictions.

5 Have you seen any recent changes in how the enforcement authorities handle the potential culpability of individuals versus the treatment of corporate entities? How has this affected your advice to compliance professionals managing corruption risks?

The DOJ and SEC are continuing to target individuals aggressively, with a focus on identifying the highest-level company personnel who can be deemed responsible for improper payments or related wrongdoing. According to the enforcement plan of the DOJ's Fraud Section, which is responsible for FCPA enforcement, various policies and initiatives are designed to enhance the DOJ's ability to 'prosecute

"Multinational cooperation often increases the complexities and costs of any investigation for companies and can create difficult dynamics."

individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove'. The DOJ's emphasis on individual prosecutions has been reinforced by elements of the FCPA Corporate Enforcement Policy and statements from senior agency officials. For example, in announcing the November 2018 changes to the Justice Manual, the Deputy Attorney General emphasised that pursuing individuals involved in corporate fraud continues to be a top priority for the DOJ, noting that 'the most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes'. To this point, the current policy on corporate accountability emphasises that a corporate resolution cannot shield individuals from criminal liability, absent 'extraordinary circumstances'.

The SEC has continued to emphasise a focus against culpable individuals, though in the FCPA area the agency has lagged behind the DOJ in cases resolved over the past two years. Indeed, for the first half of 2019 the SEC did not conclude a single FCPA-related settlement against an individual.

Last year was an average year for FCPA-related enforcement activity against individuals. The DOJ successfully reached guilty pleas or jury convictions for seven individuals, almost on par with its long-term average of eight such dispositions per year. This year, however, is shaping into an above-average year for the DOJ, which has already achieved eight convictions of individuals in the first half of the year. That number is likely to increase, especially as the DOJ plans for as many as six FCPA-related trials involving individual defendants in the fall of 2019.

It is often as a result of such trials that the US federal courts decide precedent-setting cases in the FCPA space (FCPA cases against companies almost never result in such court judgments). One notable recent decision occurred in the case of *US v Hoskins*. A federal appeals court held that the DOJ cannot use theories of complicity or conspiracy to charge a foreign national with violating the FCPA where the foreign national is not otherwise within the FCPA's jurisdiction. Therefore, only foreign nationals who are within the categories of persons covered by the FCPA's provisions – United States issuers and their agents, American 'domestic concerns' (including individual persons) and their agents, and foreign persons or businesses that take actions within the United States – can be prosecuted for conspiracy to violate the FCPA or aiding and abetting a violation of the FCPA. The DOJ has asserted that this result is not necessarily binding outside of the relevant circuit and indeed a federal trial court in a different circuit declined to apply the *Hoskins* holding in another case in June 2019. The DOJ will try Hoskins in the fall of 2019 on the theory (allowed by the court) that he was an agent of a US company.

Finally, in a recent case linking the FCPA and US domestic public corruption cases, in August 2019 a federal appeals court rejected a claim by a defendant that

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the requirements set out by the US Supreme Court's McDonnell holding apply to FCPA cases.

6 Has there been any new guidance from enforcement authorities in your jurisdiction regarding how they assess the effectiveness of corporate anti-corruption compliance programmes?

As a general matter, the state of a company's compliance programme factors into penalty guidelines and the discretion that both the DOJ and SEC have to negotiate dispositions of investigations. Both US agencies have issued guidance regarding what they consider to be the key elements of a corporate FCPA compliance programme as part of the November 2012 FCPA Resource Guide and as annexes to individual disposition documents.

The FCPA Corporate Enforcement Policy's presumption of a declination in certain cases requires, in part, timely and appropriate remediation of the problematic conduct, including the implementation of an effective compliance and ethics programme. The policy lists several basic criteria for such a programme, noting that

the programme elements 'may vary based on the size and resources of the organisation'. Notable on the list are requirements related to a company's culture, resources dedicated to compliance, the quality and independence of compliance personnel, the effectiveness of a company's risk assessment processes and responses to them, and the periodic auditing of a programme's effectiveness.

At the end of April 2019, the DOJ issued updated guidance on the Evaluation of Corporate Compliance Programs, intended to direct prosecutors on how to assess the effectiveness of a company's compliance programme. The recent guidance incorporates much of the same content included in a previous DOJ guidance document issued in February 2017. The guidance does not establish a 'rigid formula' or a mandatory set of questions to be asked, but rather offers useful insights for companies regarding the DOJ's views on the design and operation of compliance programmes. The document has been reorganised to include 12 topic areas, which are grouped to track the three core questions about compliance programme effectiveness contained in the Justice Manual: whether a corporation's compliance programme is well designed, whether the programme is being implemented effectively and whether the programme works in practice.

Among the notable aspects of the new guidance are:

- an emphasis on a company's documented rationale for specific decisions related to the design and implementation of its compliance programme elements;
- a focus on whether programme elements are integrated into the day-to-day business processes and financial controls of the company;
- the need for a documented risk assessment as a starting point, to determine the 'degree to which the programme devotes appropriate scrutiny and resources to the spectrum of risks'; and
- the importance of proactive justification of business rationales for third parties – that is, asking whether such third parties are needed at all, and if so what qualifications should they have to be legitimate and effective.

In a September 2019 public panel discussion, a DOJ attorney noted another key aspect – 'compliance personnel must be empowered within the company.'

The 2017 version of this evaluation guidance was designed by a compliance expert with corporate experience retained by the DOJ. That expert later resigned her position and was not replaced. Instead, current DOJ leadership has stated that the goal is to train all of its FCPA-focused prosecutors on how compliance programmes work in practice. There is some questioning from the corporate community regarding this approach, but only actual experiences derived from investigations conducted by prosecutors under the terms of this new guidance will signal whether such scepticism is warranted.

"At the end of April 2019, the DOJ issued updated guidance on the Evaluation of Corporate Compliance Programs, intended to direct prosecutors on how to assess the effectiveness of a company's compliance programme."

7 How have developments in laws governing data privacy in your jurisdiction affected companies' abilities to investigate and deter potential corrupt activities or cooperate with government inquiries?

US data privacy laws generally are less stringent than such laws in Europe, Russia and the former Soviet Union and China. The primary challenge for companies subject to the FCPA is complying with host country restrictions on information-sharing and data processing while simultaneously being able to access compliance-sensitive company information when needed to operate compliance programmes, conduct internal investigations of allegations of misconduct or respond to requests or demands for information by enforcement authorities.

The entry into force of the EU's GDPR in May 2018 has presented significant challenges to multinational companies' handling of a wide variety of data and key issues remain unsettled. The new regulation is more restrictive than previous EU rules and will likely have a significant impact on the way that cross-border internal investigations and multi-jurisdictional agency enforcement actions are conducted.

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A detailed discussion of the GDPR is beyond the scope of this section, but several points are worth noting.

One of the most significant facets of the GDPR is its reach. First, the regulation seeks to protect the 'personal data' of individuals who are physically in the EU and therefore applies to more than just EU citizens and residents by reaching out to give rights to anyone who is in the EU, even temporarily, and who has personal data in the EU that an entity wants to access. Second, the types of data protected are defined broadly to include any information related to a natural person that can be used to either directly or indirectly identify him or her, and go well beyond what information had been protected by prior data privacy laws. A third important aspect of the GDPR is its territorial scope – the regulation seeks to control the activities of any companies or other entities that want to access, use, store or otherwise 'process' the personal data of individuals who are in the EU, no matter where the company is operating or where the processing would take place. The regulation also continues to restrict the ability of companies or other entities to transfer such data outside of the EU. As a result, the GDPR essentially affects any company anywhere in the world that wants to access or process the personal data of EU data subjects.

Processing of personal data may only occur under a strict set of circumstances and only for a clearly articulated and legal purpose, and must be limited to only what is necessary to fulfil the legal basis for the processing. The purposes most applicable to internal and cross-border investigations include processing that is necessary for a contract with a data subject, necessary for the company 'controller' to comply with EU law, or for the controller's 'legitimate interest'. This last purpose – a 'legitimate interest' – is on preliminary review the most potentially useful legal basis available to most companies conducting investigations. Companies may argue that they have a legitimate interest in investigating, stopping or preventing possible corruption or addressing internal compliance issues. The fact, however, that such investigations and related legal advice may result in a company decision to cooperate with a US or other country enforcement action to minimise or possibly eliminate criminal liability and any commensurate financial penalty can create significant complications for the company's obligations to comply with the GDPR.

Indeed, the FCPA Corporate Enforcement Policy's requirement that a company produce all relevant documents, including overseas documents, on its face creates a clear conflict with the GDPR's restrictions on the processing and disclosure of EU data subjects' personal data. And the penalties for violations of or non-compliance with the GDPR are severe – up to 4 per cent of a company's global annual revenue or €20 million, whichever is greater. A company deciding whether to provide documents and data to the US government therefore faces a dilemma – those wishing to benefit from the DOJ policy must balance the benefits of a potential declination

or a reduced financial penalty with the risk of significant fines under the GDPR. The DOJ policy places the burden on the company to justify its argument that it cannot disclose documents and the company must show specific efforts to identify all available legal avenues to locate and produce relevant material. Companies and their external counsel will be challenged to think creatively about how to collect and produce information sufficient to obtain cooperation credit from the DOJ, while minimising the risks of liability under the GDPR.

More generally, compliance professionals working for companies subject to the FCPA should work closely with data privacy experts in each operational jurisdiction around the world to craft solutions that give appropriate access and comply with data privacy protections or other legal restrictions on information access. As noted, the US authorities are aware of and sensitive to these issues, but are also wary of companies using data privacy and related laws to avoid full cooperation with investigations. Companies that have plans in place to address these issues before any investigation arises are more likely to be considered to be acting in good faith when the inevitable conflicts of legal requirements arise.

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The Inside Track

What are the critical abilities or experience for an adviser in the anti-corruption area in your jurisdiction?

Much of the key knowledge needed to give FCPA advice lies outside the normal legal sources and methods – there are very few adjudicated cases, no substantive regulations and the enforcement agencies traditionally have been opaque regarding their investigation and charging decisions. Thus, the best adviser combines extensive experience managing government and internal investigations with expertise in analysing and addressing the varied compliance issues actually faced by companies. Because the agencies have considerable leverage over companies that are targets of investigations, counsel must be able to gain the trust of the enforcement personnel while advocating appropriately on behalf of clients.

What issues in your jurisdiction make advising on anti-corruption compliance challenging or unique?

US domestic bribery laws are a patchwork that sometimes can create compliance contradictions. Analysing specific issues requires identifying whether federal or state laws control, the identity and position of any official within government (so that the right regulations can be reviewed) and the company's own classification under those rules. These rules are sometimes subject to different sets of court precedents or administrative guidance, some of which can be mutually inconsistent.

What have been the most interesting or challenging anti-corruption matters you have handled recently?

In 2017, I was appointed as an independent compliance monitor per an FCPA resolution, a project that was completed by mid-2019. These engagements require DOJ and SEC sign-off as to the monitor's experience and suitability, and call for efficient, yet comprehensive, reviews of corporate compliance programmes and internal controls and the exercise of independent judgment in balancing the goals of the company and the agencies. I am also handling a number of active investigations in front of the US enforcement agencies, most of which also involve interactions with agencies in other countries as well.

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