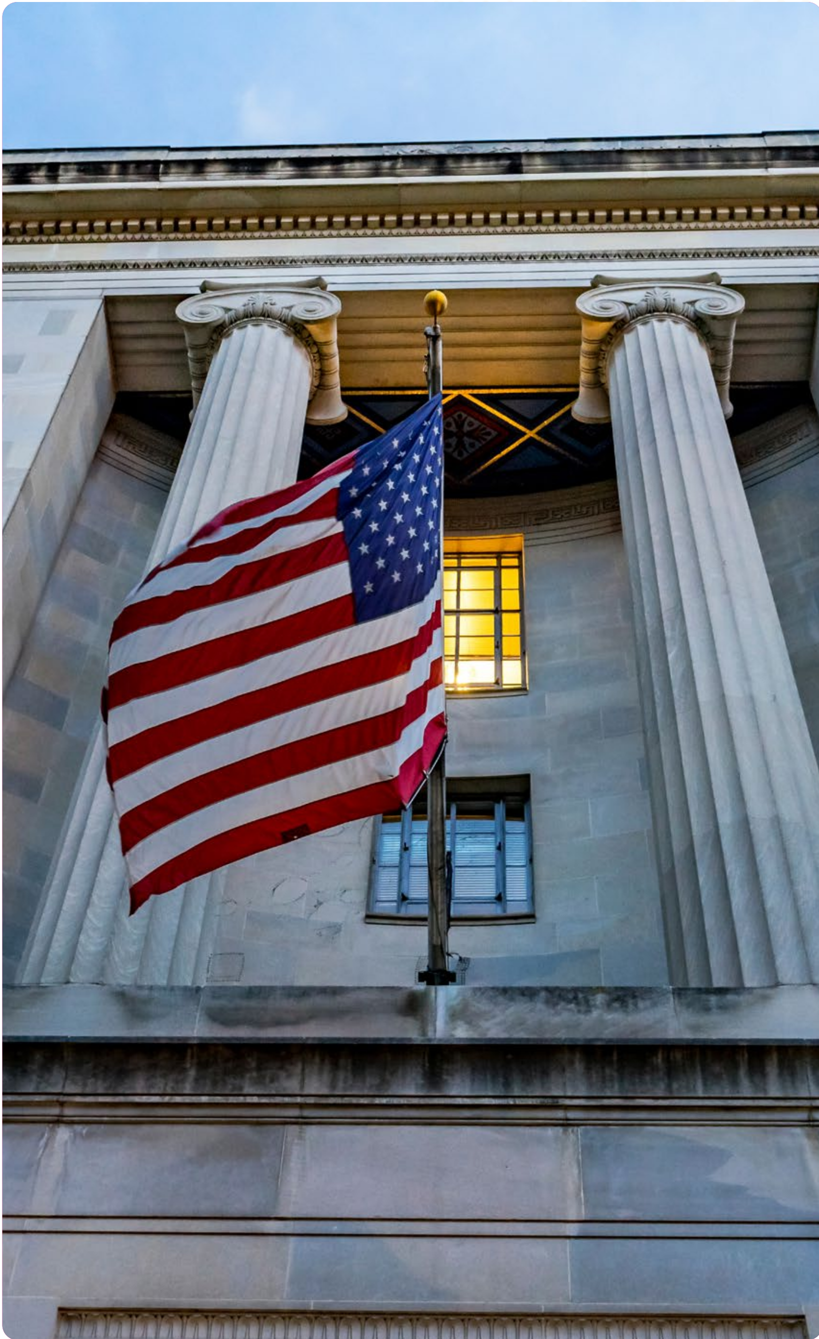

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# ANTI-CORRUPTION 2023

**Global interview panel lead by John E Davis of Miller & Chevalier**

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# United States

John E Davis is a member and coordinator of Washington DC-based Miller & Chevalier's Foreign Corrupt Practices Act (FCPA) and International Anti-Corruption Practice Group, and he focuses his practice on international regulatory compliance and enforcement issues. He has almost 30 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the US FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ), and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union, Southeast Asia, and Latin America.

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 for a multi-year term. 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.

QUESTIONS

**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?**

Despite a slowdown in the pace of announced cases in the past few years created by the covid-19 pandemic, the United States remains the most active country in the world in punishing both corporations and individuals for foreign bribery, primarily through the US Foreign Corrupt Practices Act (FCPA) (which features anti-bribery and accounting/internal controls requirements) and laws against money laundering and certain types of fraud. US government investigations of companies continue to be resolved almost exclusively through negotiated dispositions, and many actions against individuals also are concluded prior to trial through plea agreements or negotiated civil settlements. 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 companies and individuals.

As with most other areas of corporate endeavour (and life generally), the covid-19 pandemic had a significant impact on FCPA-related enforcement by the US government. This impact was evident through 2020–21 and for much of 2022, as it was clear that the DOJ and SEC were working to catch up to pre-pandemic levels of activity. That said, throughout the pandemic, the DOJ and SEC continued to message publicly that the agencies' commitment to FCPA enforcement has not subsided. And in 2022 and the first half of 2023, as will be discussed below, the Biden administration (especially the DOJ) took several steps to bolster US anti-corruption efforts.

Updated statistics show the pandemic's effect, especially in cases that required multilateral cooperation (as many cases these days do), since the covid-19 outbreak has had vastly different impacts in

John E Davis

different countries. In 2020, the US enforcement agencies announced 25 enforcement actions (some of which were combined) – the lowest total since 2015. In 2021, the agencies announced only 11 actions. However, the statistics are rising again – in 2022 the DOJ and SEC completed 16 dispositions. The first half of 2023 produced only five dispositions, but two more resolutions occurred in August and there are several potentially large matters that may well be announced before year's end. It bears noting, as I have done in past editions, that the statistics on investigations are derived from incomplete information – information that is continually updated as public companies make relevant disclosure filings or journalists acquire updated statistics through 'freedom of information' requests. The investigation statistics tracked by my firm and others are necessarily incomplete because neither the DOJ nor the SEC disclose official

> "The new 'Monaco Memorandum' announced new guidance for DOJ prosecutors in several key areas of interest to companies potentially facing criminal investigation."

investigations statistics in real time and only some companies are likely to disclose this information publicly.

Despite the slowdown in volume, FCPA enforcement efforts in the last couple of years have resulted in substantial penalties and disgorgement against major corporations such as:

- Honeywell International (US$200 million in December 2022);
- ABB Limited (US$460 million in December 2022);
- Glencore (US$440 million in May 2022, as part of a multilateral disposition worth over US$1 billion and counting); and
- Credit Suisse (US$475 million in October 2021).

Following up on an October 2021 memorandum on 'initial revisions' to the DOJ's corporate criminal enforcement policies, on 15 September 2022, Deputy Attorney General Lisa Monaco issued a new memorandum on 'Further Revisions to Corporate Criminal Enforcement Policies.' The new 'Monaco Memorandum' announced new guidance for DOJ prosecutors in several key areas of interest to companies potentially facing criminal investigations, including:

- 'Guidance on individual accountability' including the prioritisation of building cases against culpable individuals in parallel with related corporate investigations, with specific discussions on:
  - how the DOJ will assess whether corporate voluntary disclosures are 'timely' for purposes of assessing cooperation, including whether these disclosures provide sufficient evidence to build cases against individuals on a timely basis; and
  - coordination of investigation of potentially culpable individuals by non-US authorities;
- discussion of how to evaluate a company's history of prior corporate misconduct in making decisions about resolving present investigations;
- further guidance on assessment of credit for voluntary self-disclosures and cooperation, designed to harmonise this analysis across the DOJ;
- new commentary on how to evaluate a company's corporate compliance programme, including new specific discussion of the increased importance that the DOJ is placing on the role of executive compensation structures (incentives and disciplinary mechanisms);
- expansion of prior DOJ guidance on corporate policies related to use of personal devices and 'third party applications' (such as WhatsApp and other chat applications), focused on the need for corporate policies to ensure that information from these sources can be provided to the DOJ in investigations;
- new discussion on the imposition, selection, and management of Independent Compliance Monitors, including the need for active DOJ engagement throughout the term of any monitorship; and
- reiteration of the DOJ's commitment to appropriate transparency regarding its corporate enforcement decisions.

The Monaco Memorandum directed the various DOJ components, including the Criminal Division (which enforces the FCPA) to issue updated policies and guidance consistent with the priorities outlined above. On 17 January 2023, the Criminal Division issued its revised Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP), which applies to FCPA cases and which has been 'codified' in the DOJ's *Justice Manual* (section 9-47.120).

The revised CEP continues to promise a 'presumption' of declination of enforcement for companies that meet certain conditions – a presumption that may be overcome 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 basic conditions that companies must satisfy to be eligible for declination:

- voluntary self-disclosure;
- full cooperation with any government investigation; and
- timely and appropriate remediation of issues.

The policy contains detailed criteria for evaluating each of these three conditions. For the self-disclosure to be truly voluntary, it must be made 'within a reasonably prompt time after becoming aware of the offense,' 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.

The revised CEP offers the possibility of a declination to recidivist companies if they undertake 'immediate' self-disclosure and

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'extraordinary' cooperation and remediation above and beyond the normal standards. The policy also offers added incentives to companies that self-disclose, fully cooperate, and effectively remediate, including corporate recidivists and companies facing other aggravating circumstances, in circumstances where the DOJ determines that a company is ineligible for a declination. For example, such companies under certain conditions can now benefit from 'up to a 75 per cent reduction off of the low end of the US Sentencing Guidelines (USSG) fine range' and the DOJ 'will generally not require a corporate guilty plea . . . absent the presence of particularly egregious or multiple aggravating circumstances'.

In addition, the revised CEP contains additional or updated commentary from the DOJ on several aspects of the policy's core requirements. For example, in new language, the revised policy states that the DOJ 'encourages self-disclosure of potential wrongdoing at the earliest possible time, even when a company has not yet completed an internal investigation, if it chooses to conduct one'. New commentary makes clear that '[a] cooperating company must

> "Another clear goal of the revised policy is to encourage further the proactive development and maintenance of effective compliance programmes."

earn credit for cooperation. In other words, a company starts at zero cooperation credit and then earns credit for specific cooperative actions (as opposed to starting with the maximum available credit and receiving reduced credit for deficiencies in cooperation).' An additional new and lengthy paragraph discusses how prosecutors should weigh aspects of cooperation in line with the broad discretion the CEP continues to give them. Finally, another clear goal of the revised policy is to encourage further the proactive development and maintenance of effective compliance programmes, in particular for companies at risk of being considered recidivists. Recidivists or others facing aggravating circumstances can receive substantial benefits, but only if they have effective compliance programmes in place 'at the time of misconduct' that 'enabled the identification of the misconduct and led to the company's voluntary self-disclosure'. Given past DOJ public pronouncements, the likely intention is to provide more concrete benefits that corporate compliance officers can cite to obtain appropriate resources for compliance programmes and related controls.

Even though declinations under the revised CEP may be potentially easier to achieve under certain conditions, qualifying for a declination does not necessarily allow a company to walk away from an FCPA investigation without consequences. First, the policy continues to make 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 financial consequences even if no criminal fines are imposed. The most recent example of this dynamic occurred in March 2023, when the DOJ publicly announced that it had declined to prosecute US miner Corsa Coal Corporation for alleged FCPA bribery violations, but that Corsa Coal had agreed to disgorge approximately US$1.2 million (reduced from an initial figure of US$32.7 million due to the company's inability to pay) as part of the disposition. 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. For example, in June 2022, Tenaris SA settled an SEC FCPA action by paying fines and disgorgement worth over US$78 million, even though (according to the company's related press release) the DOJ had declined to prosecute the company for similar conduct.

In another development related to implementation of the Monaco Memorandum, on 22 February 2023, the US Attorneys for the Southern and Eastern Districts of New York announced a new Voluntary Self-Disclosure Policy For United States Attorney's Offices (USAOs). The new policy's 'goal . . . is to standardize how [self-disclosures] are defined and credited by USAOs nationwide, and to incentivize companies to maintain effective compliance programs capable of identifying misconduct, expeditiously and voluntarily disclose and remediate misconduct, and cooperate fully with the government in corporate criminal investigations'. There are many

similarities between the USAO policy and the revised CEP, though there are some differences, as well – such as on how the USAO guidance defines the scope of 'aggravating circumstances.' Both the USAO policy and related public statements emphasise that the USAOs will continue to cooperate closely with 'Main Justice' in many cases, including FCPA matters.

The SEC had already issued five FCPA-related settlements by the end of June 2023, which is more than the agency's entire output for (pandemic-affected) 2021 and only two cases short of its total for 2022. Unlike the DOJ, the SEC has not undertaken significant formal changes to policy or processes regarding FCPA investigations in the past few years. That said, the SEC continues to publicly emphasise themes similar to those articulated by the DOJ in the agency's discussions of corporate enforcement priorities and how they treat companies under investigation. Recent SEC FCPA actions, such as the September 2022 disposition with US technology company Oracle and the May 2023 settlements with Dutch consumer products company Koninklijke Philips NV and US consultancy Gartner, Inc, have discussed the effects that the companies' self-disclosures, efforts at cooperation, and remediation measures have had on case outcomes. These aspects have long been part of SEC practice under the agency's 'Seaboard' factors.

One development that bears watching is the potential fallout from the US Fifth Circuit Court of Appeals' May 2022 decision in the case of *Jarkesy v SEC*, which involved the SEC's administrative proceedings against Jarkesy for securities fraud. The appeals court's findings will likely create significant challenges for the SEC's longstanding and extensive use of in-house administrative dispositions – potentially including FCPA matters. The US Supreme Court agreed to hear the case by granting *certiorari* on 30 June 2023, and it will be argued and decided in the Court's 2023-24 term.

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With regard to anti-corruption laws applicable to US federal and state officials, a line of US Supreme Court cases starting in 2016 (in a decision that overturned the corruption-related conviction of former Virginia governor Robert McDonnell) has had significant effects on some high-profile cases and narrowed the ability of prosecutors to use certain legal theories to pursue domestic corruption. At the same time, DOJ enforcement personnel have continued to prosecute and convict corrupt officials and payors of bribes in various contexts at the federal and state levels.

The *McDonnell* case made 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. In May 2020, in the case of *Kelly v United States*, the US Supreme Court overturned the convictions of two former aides to the former Governor of New Jersey related to the 'Bridgegate' scandal. The former officials had been charged and convicted under federal wire fraud and programme fraud statutes. The unanimous opinion, which is a rarity, stated, in part, that 'not every corrupt act by a state or local official is a federal crime.'

This decision further narrowed the options that federal prosecutors have to attempt to redress public corruption.

Most recently, in another unanimous decision issued in May 2023, the Supreme Court in *Percoco v United States* vacated the conviction of former New York governor Andrew Cuomo's campaign head, who had been convicted under federal fraud and 'honest services' statutes. In this case, the Court held that the jury instructions were too vague, but the various opinions by the justices raised more fundamental questions about the concept of 'honest services' prosecutions generally.

Despite the challenges raised by these Supreme Court precedents, prosecutors have continued to have in cases of public corruption by US officials, including in dozens of local or regional cases. At the federal level, for example, in March 2020, former US Representative Duncan Hunter of California pled guilty to a charge of misuse of campaign funds to resolve more than 60 counts (including corruption-related allegations) against him and his wife and was sentenced to 11 months in prison (though he was pardoned in December 2020 by President Trump). In May 2023, New York Congressman George Santos was indicted on 13 counts, including money laundering and 'theft of public funds.' At the state/territorial level, in August 2022, the former governor and secretary of justice of Puerto Rico, Wanda Vazquez, was arrested on seven counts of corruption related to the receipt of monies for her 2020 election campaign.

Data compiled by the US Sentencing Commission reported that, for FY 2022, there were 360 cases reported to the Commission that involved sentencing for bribery-related offences.

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. Investigations and enforcement resolutions continue

> "The United States remains committed to investigating and punishing public corruption overseas."

to cover various industries, including, for example, life sciences, consulting, industrial engineering/construction, financial institutions, government contracting, information technology, manufacturing, telecommunications, retail, software, commodities trading, mining and oilfield services. And it is not just US companies that are targeted –non-US companies (often listed on US exchanges) have been the subjects of some of the largest FCPA-related dispositions. Recent examples include Koninklijke Philips NV (The Netherlands), Flutter Entertainment (Ireland), Rio Tinto (UK/Australia), Safran (France – a declination), GOL Airlines (Brazil), Tenaris SA (Luxembourg), Glencore (Switzerland), and KT Corporation (South Korea).

The US agencies target corrupt activities around the world, though data continue to show that business activities in China are most frequently involved in public resolutions – the 55 resolutions involving China during the period January 2010-May 2023 constitute almost 25 per cent of the combined corporate FCPA actions during that period. Recent China-related cases involve dispositions with Koninklijke Philips NV (May 2023), Safran (December 2022 – a declination), WPP

(September 2021), Novartis (June 2020) and Cardinal Health (February 2020). China likely will remain a key focus of FCPA enforcement given the size of its market and the prevalence of state-owned or controlled entities in most economic sectors. The countries other than China most frequently involved in FCPA enforcement actions during the January 2010-May 2023 time period are Brazil (largely due to the massive 'Car Wash' investigation there), Mexico, India, Nigeria, Russia, Indonesia, Saudi Arabia, Iraq and Angola. Several recent FCPA cases also have reinforced the corruption risks generally present in Central Asia, the Middle East and Southeast Asia.

On the US domestic side, federal prosecutors continue to look for high profile cases at all levels of government. The most significant recent example is the March 2023 conviction of the former Ohio House Speaker, Larry Householder, by a federal jury on racketeering charges connected to an alleged US$61 million in bribes paid to secure a state bailout for close to US$1 billion for two nuclear energy power plants. The case was unusual in part because the alleged payment scheme was run through a non-profit entity. The jury also returned a similar guilty verdict for Matthew Borges, the former Ohio Republican Party Chair. One of the companies involved in the scheme, Commonwealth Edison (ComEd), agreed in July 2020 to a deferred prosecution agreement (DPA) with federal prosecutors in Ohio in which ComEd agreed to pay a US$200 million criminal penalty to address various charges – including a charge related to criminal misconduct under the FCPA's accounting provisions. In July 2021, the other company, FirstEnergy Corp., agreed to a DPA and paid a criminal penalty of US$230 million to address a charge of 'conspiracy to commit honest services wire fraud' related to its payments to entities connected with Householder. Several former ComEd executives, including the former CEO, have been indicted, and in October 2020 a former aide to Householder and a lobbyist pled guilty to charges related to their roles in the scheme. Householder has stated that he will appeal the conviction.

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More typical cases include a case against a real estate developer in Tallahassee, Florida who was convicted of bribing Tallahassee's former city commissioner. In April 2023, the federal Eleventh Circuit upheld the conviction and three-year jail term despite the defendant's arguments that the jury instructions raised issues under the *McDonnell* case.

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

The economic environment created by the covid-19 pandemic and its aftermath almost certainly increased FCPA-related compliance risks, even if some companies are not necessarily aware of them. Many critical compliance activities – including internal investigations, compliance risk assessments, third-party due diligence and monitoring, and operating company audits – were curtailed by restrictions on travel and by limitations in company ERP and

> "Managing these compliance-related challenges in the face of time pressures and potential reduced resources driven by the possibility of an economic downturn will continue to require active planning and creativity."

other controls systems. At the same time, many companies' risk profiles have been changing rapidly, due to plant closures, supply chain disruptions (and in many cases increasing reliance on third parties), restrictions on the movement of gatekeeper personnel and management compliance champions, pressures on financial targets, and more – many of which created additional opportunities for corruption and fraud. More recent political and economic issues, such as pressure to de-couple supply chains from over-reliance on China, the continuing impacts of the Russia-Ukraine conflict, and recent political instability in West Africa can also affect risk profiles.

Managing these compliance-related challenges in the face of time pressures and potential reduced resources driven by the possibility of an economic downturn will continue to require active planning and creativity. Staying on top of changing company risk profiles is critical to adapting and targeting diminished compliance resources to their best use. Among other actions, company compliance personnel should consider such activities as updated management messaging on company values and ethics programmes, increased virtual trainings, focused travel to high-risk affiliates or newly acquired businesses, and ensuring that planned monitoring activities and audits stay on track.

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 can be seen in the 2020 edition of the FCPA Resource Guide, public resolutions, or 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. In the September 2022 *Oracle* settlement, some of the payments were made to the chief technology officer of a state-owned company. The April 2022 *Stericycle* case and the June 2020 *Novartis* case both cited benefits to doctors and health workers employed by public hospitals in several countries (including Mexico, Greece, and China) as payments to 'officials.' The September 2021 *WPP* matter involved, in part, payments to a mayoral campaign in Peru. The January 2021 *Deutsche Bank* disposition involved payments to employees of at least one sovereign wealth fund. And 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 just over 75 per cent of FCPA cases in the last 10 years involve actions by third parties. Recent cases that have involved corporate liability for actions by third parties include resolutions with Rio Tinto (involving an investment banker who allegedly acted as a payment conduit); Flutter Entertainment (involving consultants lobbying for legalisation of gambling); ABB (which retained the 'friend' of a key official as a subcontractor); Glencore (involving regional and local intermediary companies that generated 'sham' agreements, inflated invoices, and fake commissions to conceal payments to officials); Stericycle (which involved numerous vendors that generated fake invoices); Credit Suisse (involving payments to agents of government officials); Foster Wheeler (involving payments via an intermediary – Unaoil); Deutsche Bank (involving specific third parties the bank called 'Business Development Consultants'); Goldman Sachs (involving payments to financier Low Taek Jho); and Vitol (involving some payments through a Brazilian *doleiro* (a professional money launderer and black-market money exchanger)).

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 FCPA incorporates an expansive definition of 'knowledge' that goes beyond actual knowledge to also cover 'conscious disregard' of information

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showing corruption risks. The best illustration of this provision and its application 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 (the 2020 edition of the DOJ/SEC FCPA Resource Guide continues to use this case as its illustrative example). 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 essential to managing this critical area of risk. In several of the cases noted in the previous paragraph, these policies and processes were in place but were deliberately circumvented by company personnel, including in some cases senior executives.

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 requirements). In the FCPA space, the SEC uses the broad reach of these rules – issuers are

> "Several recent developments make the management of whistle-blowers an increasingly important priority."

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. A recent example is the April 2020 *Eni* matter, in which Eni paid almost US$25 million to resolve SEC allegations that Eni did not in 'good faith' implement effective internal accounting controls at its minority-owned subsidiary, which, nonetheless the company controlled. Compliance professionals should work closely with their finance and accounting function counterparts to ensure that relevant internal accounting controls are consistent with the company's compliance processes and that business transactions are accurately recorded in the company's records.

Finally, several recent developments make the management of whistle-blowers an increasingly important priority. In December 2020, amendments to the rules governing the SEC's whistle-blower programme went into effect. The amendments contain significant reforms that are likely to result in increased employee whistle-blowing. For example, the SEC expanded the definition of enforcement 'action' by the agency to include DPAs and NPAs entered into with the DOJ and settlement agreements entered into with the SEC. These are the most common forms of FCPA-related dispositions, and in February 2021, the SEC issued its first award based on an NPA or DPA with DOJ. The SEC also has changed the way that awards are calculated – whistle-blowers can now automatically receive the statutory maximum for awards at certain levels (absent the existence of negative factors or an 'unreasonable delay in reporting'), which provides greater certainty regarding the size of eventual awards and may well result in higher awards generally. Finally, the rules make clear that, to be eligible for anti-retaliation protections, whistle-blowers must first report information to the SEC rather than through internal company reporting tools. Given that a reported 81 per cent of employee whistle-blowers in 2020 raised concerns internally before going to the SEC, this rule change may drive an increase in reports to the SEC before companies receive the same information internally.

Publicity regarding sizeable whistle-blower awards also likely will encourage whistle-blowers to go to the SEC with compliance concerns. According to its own public reporting, FY 2022 was 'the Commission's second highest year in terms of dollar amounts and number of awards' following the agency's record-breaking numbers in FY 2021. The SEC awarded approximately US$229 million in 103 awards in FY 2022 (these account for awards for all eligible securities law violations, not just the FCPA). The same report notes that the SEC received 202 FCPA-related tips from whistle-blowers in FY 2022.

Individual awards are also receiving more prominent mentions in the media. On 5 May 2023, the SEC announced that it had paid out by far the 'largest-ever' award to a whistle-blower – nearly US$279 million. The related order is heavily redacted per the SECs standard practice, so it is unclear what type of investigation or disposition triggered the payment, but the SEC's Enforcement Director asserted

that the award 'not only incentivizes whistleblowers to come forward with accurate information about potential securities law violations [including FCPA violations], but also reflects the tremendous success of our whistleblower program'. In a recent public FCPA-related example, in May 2021, the SEC announced a US$28 million dollar award to a whistle-blower who provided information that led to 2018 FCPA enforcement actions against Panasonic Avionics Corporation. The award is one of the 10 largest ever handed out under the SEC's Dodd-Frank whistle-blower programme. Notably, the SEC granted the award despite the fact that 'there [was] not a strong nexus' between the whistle-blower's tip and the conduct at issue in the eventual enforcement actions.

US domestic bribery laws and enforcement actions typically 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. Finally, investigations of state officials can implicate the varying state-level laws and policies, which can differ from their federal counterparts and from the same laws in other states. 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.

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**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 the US agencies' assertive enforcement practices or priorities to occur. The pace of announced FCPA-related resolutions by the DOJ and SEC has varied over time, and during some periods can seem to drop off. However, that pace 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 cases (such as during the pandemic-affected time from 2020-mid-2022) signal a slowdown in investigations or a significant redirection of FCPA enforcement resources. One indicator of the ongoing commitment is the size of recent penalties. Admittedly the cases involving such penalties are years in the making, but recent cases – including *Glencore, Goldman Sachs, Ericsson, Mobile TeleSystems* and *Airbus* – featured some of the largest combined

> "US domestic bribery laws and enforcement actions typically focus on the specific and complex rules that govern federal executive branch employees."

penalties in the history of FCPA-related enforcement. While not in the 'Top 10,' recent dispositions with ABB (US$460 million in penalties in December 2022), Honeywell (over US$200 million in penalties in December 2022), and Credit Suisse (US$475 million in penalties to US and UK authorities in October 2021) show that FCPA cases can involve substantial fines and other losses for companies.

Perhaps the clearest indicator of the Biden administration's commitment to the fight against corruption is the 3 June 2021 National Security Study Memorandum (NSSM) issued by President Biden – the first of his presidency. Citing corruption's substantial adverse financial effects and other negative consequences (including 'contribut[ing] to national fragility, extremism, and migration' and 'provid[ing] authoritarian leaders a means to undermine democracies worldwide'), the NSSM concluded that countering corruption is a 'core United States national security interest.' The NSSM, therefore, directed various departments and agencies of the US federal government to conduct an interagency assessment and send a report to President Biden with recommendations and strategies for upgrading the US fight against corruption.

On 6 December 2021, the administration issued the resulting report – the United States Strategy on Countering Corruption (SCC). The strategy establishes 'five mutually reinforcing pillars' of actions to be taken by the US government:

- 'Modernizing, coordinating, and resourcing U.S. government efforts to fight corruption'.
- 'Curbing illicit finance' by 'addressing vulnerabilities in the U.S. and international financial systems'.
- 'Holding corrupt actors accountable…through a combination of diplomatic engagement, foreign assistance, and enforcement actions' and 'bolstering international best practices, regulations and enforcement efforts'.
- 'Preserving and strengthening the multilateral anti-corruption architecture' and the actions of non-governmental actors.
- 'Improving diplomatic engagement and leveraging foreign assistance resources to advance policy goals'.

Of most interest to corporate compliance professionals is the SCC's statement that the US government will 'vigorously pursue the enforcement of foreign bribery cases through the FCPA, money laundering charges, and forfeitures for promoting corrupt schemes and laundering corruption proceeds as appropriate'. More generally, like the NSSM, the SCC defines corruption broadly and focuses much of its discussion on the 'demand' side of the equation – on methods to prevent public officials from receiving or hiding their corrupt gains and to hold such persons and their enablers (especially financial institutions) accountable. Thus, many of the SCC's most concrete action plans focus on enhanced tools to fight the demand for corrupt payments, including working with Congress 'to criminalize [directly] the demand side of bribery by foreign public officials'.

QUESTIONS

QUESTIONS

The SCC also discusses many other efforts to combat corruption and kleptocracy, such as enhanced corporate transparency rules (building on new legal requirements created by the January 2021 Corporate Transparency Act), strengthened anti-money laundering laws, expansions to US sanctions and visa regulations, and the expanded use other laws and resources, including the increased availability of intelligence and other national security methods and means.

On 29 March 2023, the White House issued a fact sheet detailing recent steps taken under the SCC. The White House emphasised recent efforts to 'align U.S. government authorities and policy' and to 'increase intra- and inter-agency coordination' to counter corruption threats. Of particular note, the fact sheet noted that the DOJ prioritised 'combating corruption' and 'advancing international anti-corruption efforts and partnerships with foreign authorities' in its 2022-2026 Strategic Plan. The fact sheet highlighted the Treasury Department's efforts to prevent criminals from using shell and front companies to launder illicit proceeds, as well as the Financial Crimes Enforcement Network's issuance in April 2022 of an advisory on kleptocracy and foreign corruption that urges US financial institutions to focus their efforts on detecting the proceeds of foreign public corruption, including detailing 10 financial 'red flags'.

The White House also cited 'over 80 visa restrictions' on foreign officials and their relatives and discussed several recent cases involving repatriation of funds (eg, the DOJ's repatriation of over US$20 million in assets stolen by a former Nigerian dictator). The fact sheet states that the US government also has taken steps to fight kleptocracy, including indictments resulting from the interagency 'Task Force KleptoCapture' and attempts to get access to information related to assets linked with foreign corruption under the Kleptocracy Asset Recovery Rewards Program. The DOJ has undertaken several forfeiture and related actions to seize assets deemed to be the result of public corruption, including multi-million-dollar mansions in Los

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Angeles and the Washington, DC areas, as well as superyachts tied to Russian oligarchs.

Also discussed by the fact sheet, the increasing use of economic sanctions by the US Treasury and State departments against corrupt officials and other actors is a trend that compliance professionals should be tracking. Such action is authorised by Executive Order (EO) 13818 (issued in December 2017) to build upon and implement the Global Magnitsky Human Rights Accountability Act. As of December 2021, according to a Congressional Research Service report, more than 148 individuals and 189 entities were subject to economic sanctions under EO 13818. Most recently, the Director of Serbia's Security Information Agency (who was previously Serbia's Minister of Defence and Minister of the Interior) was sanctioned for corrupt activities and threats to the rule of law in July 2023. Three senior Liberian officials were sanctioned in August 2022. Other recent notable examples of persons sanctioned for corruption include Israeli businessman Dan Gertler (in 2017), along with various persons and entities identified as connected to him related to activities in the Democratic Republic of the Congo (DRC); certain Cambodian

"DOJ likely will continue to highlight cases illustrating the current administration's enforcement priorities."

officials cited in November 2021 related to 'significant corruption' in defence procurement; and current and former Bulgarian officials and 64 related entities in June 2021 related to corruption and the undermining of the rule of law in Bulgaria. The Russian invasion of Ukraine has significantly increased the scope of these economic and other sanctions related to corrupt actors tied to Russia in 2022-23 through various legal authorities.

In the short term, the SCC and related efforts have not necessarily had a direct effect on FCPA enforcement. Any increase in announced cases for the rest of 2023 likely will still be the legacy of the reduction of covid-19 pandemic effects on existing investigations, enhanced agency staffing, and the effects of the new DOJ policies. However, the SCC's action plans could have significant long-term ramifications for US anti-corruption efforts, through developments such as the criminalisation of the demand side of bribery or the expansion of corruption-related sanctions.

In the meantime, DOJ likely will continue to highlight cases illustrating the current administration's enforcement priorities – for example, as indicated by the Monaco Memorandum. We saw an increase in the use of compliance monitors in 2022, for example, and DOJ officials have highlighted in public statements how the recent declinations handed to Safran SA in December 2022 and Corsa Coal Corporation in March 2023 show the benefits to companies that follow the requirements of the revised January 2023 CEP.

On the SEC side, the agency likely will continue to focus on using the FCPA's accounting requirements to address corrupt activities by companies and individuals for which criminal charges may be more difficult to bring. Indeed, the past careers of the SEC's Chair and Director of Enforcement suggest that the SEC may well stake out more aggressive legal positions and to demand tougher sanctions from companies and individuals in the future.

**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 continue actively to pursue cooperation with enforcement authorities in other countries. Multinational investigations were prioritised by both the Trump and Biden administrations, and current DOJ and SEC policymakers continue to look for additional opportunities for enforcement collaboration.

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

Under current policy dating from May 2018, the DOJ directs 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 recognises 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 policy directs DOJ prosecutors to 'consider all relevant factors' in selecting enforcement methods and apportioning penalties for the same conduct among multiple authorities. The DOJ 'piling on' 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 demands.

Global settlements have become a standard component of the DOJ's and SEC's approach to FCPA and related 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. DOJ officials over time have called attention to enhanced working relationships with authorities in Brazil, the UK, France, Sweden, Switzerland, and other countries, noting particularly the benefits of '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 signaled 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 2023 as the 'gold standard' for multinational anti-corruption cooperation. Apart from its record-breaking size at the time (which was tied to the fact that the bribes 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 gripped Brazil from 2014 through 2021. 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 December 2022 dispositions with ABB that involved US, Swiss, and South African authorities (as well as, potentially, German authorities);
- the December 2022 settlements with Honeywell involving US and Brazilian authorities;
- the May 2022 dispositions with Glencore, which involved US, UK and Brazilian agencies, and likely will also include Swiss and Dutch authorities (and perhaps others) in the future;
- the April 2022 settlements with Stericycle involving US and Brazilian authorities;
- the October 2021 dispositions with Credit Suisse involving US, UK and Swiss authorities;
- the June 2021 dispositions with Foster Wheeler involving US, UK and Brazilian authorities;
- the October 2020 settlements and leniency agreements with J&F Investimentos involving US and Brazilian enforcement agencies; and

> "Global settlements have become a standard component of the DOJ's and SEC's approach to FCPA and related anti-corruption enforcement."

- the January 2020 disposition with Airbus involving US, French and UK agencies.

In the *ABB* matter, the DOJ agreed to credit up to US$157.5 million against fines that ABB paid to the South African authorities, US$11 million against fines that ABB paid to the Swiss authorities and US$11 million against anticipated fines that ABB may be required to pay to German authorities so long as the fines are paid to the German authorities within 12 months. In the *Glencore* case, the US authorities received a substantial portion of the total penalties, though the Brazilian authorities claimed almost US$40 million. The DOJ authorised a credit of more than US$136 million for any future penalties paid to the UK (which in November 2022 were set by a UK court at £281 million), as well as almost US$30 million for possible future payments by the company to the Swiss authorities. In the *Foster Wheeler* matter, the UK obtained the lion's share of the combined penalties (approximately US$143 million of the US$177 million total), and the UK Serious Fraud Office cited a broader set of allegations than the US public case documents covered. The J&F Investimentos settlements with the DOJ and SEC noted that the agencies modified the US penalty and disgorgement levels downward in light of a separate leniency agreement between the company and Brazilian authorities under which J&F agreed to pay a fine of approximately US$1.4 billion and to support 'social projects' in Brazil through payments of US$414 million. The *Airbus* case surpassed the *Odebrecht* disposition to become the largest internationally coordinated resolution to date, with almost US$4 billion in combined global penalties. The complex payment arrangements saw France taking the largest share (about US$2.3 billion), with the agencies in other countries agreeing to credit or offset penalties paid to other jurisdictions. The massive investigation covered activities in 16 countries and took almost five years to resolve. The extensive international cooperation efforts were made possible in part by an agreement in 2016 between the UK and French agencies that allowed them to overcome significant legal and practical hurdles created by the French 'blocking statute's' significant restrictions on mutual legal assistance.

Coordination among various agencies in different countries can be challenging, especially with enforcement 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 likely will create additional challenges for multinational enforcement and for companies' internal investigations, which often are a critical factor in advancing resolutions to conclusion. For example, the EU's General Data Privacy Regulation (GDPR) and the related EU litigation on the US-EU Privacy Shield have 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, for example, Switzerland and the UK have created a wider gulf between the treatment of the attorney-client privilege in the United States and Europe, which may affect the coordination of internal investigations by companies.

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. Coordination among various agencies also can create significant delays in the process of resolving investigations – delays to which the US authorities can contribute. Indeed, a July 2021 DOJ report noted that the DOJ office handling international requests for legal assistance is 'challenged by [the office's] high pending caseload, difficulty hiring and retaining staff, and an antiquated case management system'. 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 continue to target individuals, with a focus on identifying the highest-level company personnel who can be deemed responsible for improper payments or related wrongdoing. Various DOJ officials, including Attorney General Merrick Garland, have emphasised that they are focusing on the prosecution of individual wrongdoers as a 'top priority'. The DOJ's emphasis on individual prosecutions has been reinforced by elements of the revised CEP and

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statements from senior agency officials. For example, the October 2021 Monaco Memorandum, noted above, asserts that '[o]ne of the most effective ways to combat corporate misconduct is to hold accountable the individuals who perpetrated the wrongdoing.' The revised CEP itself notes that, to obtain credit for cooperation in an investigation, companies must disclose 'all relevant, non-privileged facts known to it, including all relevant facts and evidence about all individuals involved in or responsible for the misconduct at issue, including individuals inside and outside of the company regardless of their position, status, or seniority'. The DOJ's general 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 past several years.

The number of publicly announced resolutions against individuals by both US enforcement agencies in 2022 and the first half of 2023

> "The DOJ has had mixed success recently in high-profile FCPA-related prosecutions of individuals."

remains somewhat below pre-2019 levels, though activity levels have picked up more recently. The effects of the covid-19 pandemic likely weighed heavier in actions against individuals than on corporate investigations, since most cases involving individuals require extensive court-based activities, which were substantially curtailed for much of 2020 and through at least early 2022. During that time, the DOJ continued to complete some long-running matters through remote activities. Now, however, courts are again operating at full capacity and backlogs created by the pandemic have eased.

The DOJ has had mixed success recently in high-profile FCPA-related prosecutions of individuals. The DOJ has continued to obtain plea agreements and jail terms from various individuals who have acted as payors, intermediaries, or recipients of bribes. These cases often also (or primarily) involve charges of money laundering and fraud, which can assist prosecutors in bringing pressure to bear on defendants. Recent high-profile defendants have included a former senior executive at Monaco-based intermediary company Unaoil (sentenced in January 2023 for conspiracy to violate the FCPA, money laundering, and obstruction of justice), two former government ministers (from Guatemala and Bolivia) sentenced in separate proceedings in October 2022 to jail terms for money laundering-related charges, and the sons of a former President of Panama (sentenced to prison in July 2022 for money laundering).

In April 2022, a federal jury in New York convicted Roger Ng, a former managing director for Goldman Sachs, on three counts of conspiracy related to the multi-billion-dollar attempts by Ng and others to steal and launder money from 1Malaysia Development Berhad (1MDB), Malaysia's state-owned investment development agency. Ng was sentenced to 10 years in prison and ordered to forfeit US$35 million in March 2023. The trial generated considerable media attention due to the scheme's ties to fugitive Malaysian financier Low Taek Jho and the use of some of the laundered funds for production of a Hollywood film, among other issues. In 2018, another former Goldman Sachs executive, Tim Leissner, pleaded guilty to two conspiracy counts related to his role in the 1MDB scheme, and Leissner served as a key cooperating witness for the DOJ in Ng's trial. Ng's former employer Goldman Sachs pleaded guilty to conspiracy to violate the FCPA and paid over US$2.9 billion in penalties in October 2020 for the company's role in the scheme.

The DOJ has faced setbacks in other cases against individuals, including in the long-running prosecutions of two businessmen, Joseph Baptiste and Roger Richard Boncy, for conspiracy to bribe public officials in connection with a port development project in Haiti. Though the two defendants were convicted in 2019, a US federal court threw out those convictions in 2020 due to ineffective assistance of counsel and ordered a new trial (a finding that was confirmed on appeal in 2021). While preparing for the new trial, the US FBI turned over previously undisclosed documents containing exculpatory evidence to the DOJ. The DOJ immediately shared the evidence with

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the defendants and moved to dismiss the charges, thus ending the years-long prosecution in June 2022.

It is often as a result of trials involving individuals that the US federal courts decide precedent-setting cases in the FCPA space (as FCPA cases against companies almost never result in such court judgments). One notable set of holdings occurred in multiple court proceedings in *US v Hoskins*. In August 2018, 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 asserted that this result is not necessarily binding outside of the relevant circuit (a statement 'codified' in the current edition of the FCPA Resource Guide), and, indeed, in June 2019 a federal trial court in a different circuit declined to apply the *Hoskins* holding in another case. In the fall of 2019, the DOJ tried Hoskins on the theory (allowed by the appeals court) that he was an 'agent' of a US company. In November 2019, a jury convicted Hoskins of almost all of the FCPA- and money laundering counts against him; however, in February 2020, the trial judge effectively threw out the jury verdict as to the FCPA-related charges, ruling that the court saw 'no evidence upon which a rationale jury could conclude that Mr. Hoskins agreed to or understood that' the company for whose benefit he was working 'would control his actions on the [p]roject, as would be required to create an agency relationship.' The judge upheld the money laundering charges and sentenced Hoskins to 15 months of prison based on the verdict on those charges, despite his winning two separate legal arguments against the DOJ. The DOJ appealed the trial judge's FCPA holding to attempt to blunt its precedential impact on other cases. In August 2022, the Second Circuit upheld the acquittal on FCPA charges, and the case effectively ended in November 2022.

The dissent in the appellate court's August 2022 decision raised concerns about the potential consequences that the majority's decision might have on US compliance with its international obligations under the OECD Anti-Bribery Convention. The dissenting judge noted that, as part of its Phase 4 process, the OECD Working Group in 2020 had already questioned whether the Second Circuit's 2018 decision limiting Hoskins's liability under conspiracy/aiding and abetting theories might 'violate the Convention.' He then stated, '[t]oday's decision cannot possibly help in that regard' and cited with approval the DOJ's statement in its case brief asserting that ''a restrictive definition of agent' under the FCPA 'could put the U.S. in violation of the OECD Convention to the extent that it prevents prosecution of those responsible for bribery that occurred in part in this country.' It is unclear how the OECD will view this ruling – in part, that will depend on results in other circuits (that either follow or diverge from the Second Circuit's holding) and on any actions by Congress or the administration to address the issue.

Finally, another set of cases in which the DOJ has had mixed success involve two Swiss nationals, Daisy Rafoi-Bleuler and Paulo Jorge Da Costa Casqueiro Murta, who were charged in an alleged international bribery scheme between US-based businesses and Venezuelan officials. A federal district court dismissed the charges against both defendants in November 2021 and July 2022, respectively, based on jurisdictional and other grounds. In February 2023, the US Fifth Circuit Court of Appeals reversed those decisions and remanded the cases to trial. The district court judge dismissed Murta's indictment for a second time in May 2023, and the DOJ appealed that decision in June. These cases thus bear continued monitoring.

"The state of a company's compliance programme factors significantly in FCPA-related penalty guidelines."

The SEC's most recent FCPA-related individual action was a June 2022 decision by a federal judge in New York that ordered Yanliang 'Jerry' Li, a former managing director of a Chinese subsidiary of Herbalife, Ltd., to pay civil penalties. The SEC had brought civil charges against Li in November 2019 (around the same time as a DOJ indictment of Li) alleging that Li had directed a scheme to bribe officials in China to obtain licences for, stop Chinese regulatory investigations into, and prevent negative media coverage of Herbalife China. Li allegedly falsified expense reports and otherwise circumvented internal accounting controls to hide the bribe payments, and the DOJ and SEC both asserted that Li overtly lied to SEC staff during their investigation. Li, a Chinese national, never responded to the SEC's complaint, and the agency moved for default judgment, which the court granted in the June 2022 decision.

**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?**

The state of a company's compliance programme factors significantly in FCPA-related penalty guidelines and the discretion that both the DOJ and SEC have to negotiate corporate dispositions. 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 July 2020 FCPA Resource Guide and as annexes to individual disposition documents. In addition, recent DOJ policy pronouncements provide updated guidance on how prosecutors assess compliance programme effectiveness.

The revised DOJ CEP reiterates that the presumption of a declination by the DOJ in certain cases requires, in part, timely and appropriate remediation of the problematic conduct, including the implementation by the company of an effective compliance and ethics programme. The policy lists several basic criteria for such a programme, noting that the elements 'may vary based on the size and resources of the organization'. Notable on the list are requirements related to a company's 'commitment to instilling corporate values that promote compliance', 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 testing of a programme's effectiveness.

In March 2023, the DOJ issued its latest 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 new version updates DOJ guidance initially issued in February 2017 and substantively revised in April 2019 and June 2020. The guidance does not establish a 'rigid formula' or

a mandatory set of questions to be asked, but rather offers useful insights regarding the DOJ's views on the design and operation of company compliance programmes. The document has been organised 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 'adequately resourced and empowered to function effectively'; and whether the programme 'works in practice'.

The 2023 updates focused mainly on two key DOJ initiatives. The first involves an increased emphasis on companies using employee compensation to drive compliance. In a March 2023 speech, Deputy Attorney General Monaco asserted, '[c]ompanies should ensure that executives and employees are personally invested in promoting compliance. And nothing grabs attention or demands personal investment like having skin in the game, through direct and tangible financial incentives.' The revised Evaluation Guidance makes clear that companies should explicitly tie executive compensation to compliance leadership, using financial or other positive incentives such as promotion.

The DOJ guidance also emphasises that companies should extract financial penalties from employees who engage in wrongdoing or who do not appropriately supervise their teams, thus allowing misconduct to occur. DOJ expects companies to have in place mechanisms to 'claw back' bonuses, incentives or other compensation from such persons and to use those mechanisms consistently and proactively. The guidance suggests that companies that do not have such abilities within the scope of their compliance programmes risk those programmes being seen by prosecutors as not 'effective' for purposes of penalty reductions in deciding FCPA dispositions. For further emphasis, in March 2023, the DOJ also rolled out a pilot programme under which companies that claw back compensation from executives

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responsible for misconduct under investigation by the DOJ may, under certain conditions, reduce their penalties by the amount of the clawback achieved.

Beyond a general recognition that clawbacks are difficult and may take time, it remains unclear how extensively the DOJ has considered the potential challenges for companies to implement features such as clawbacks in their existing executive compensation systems (especially as to former executives), given the rules that govern such systems and the market dynamics that drive such compensation at senior levels. Often the money at issue has already been taxed, invested, or spent, and managing the tax consequences can be difficult for both the company and executives.

Thus, any decision to apply for fine reduction benefits under the clawbacks pilot programme will require consideration of a much broader set of factors than those articulated by the DOJ, and in some cases the costs might outweigh the potential benefits.

> "The DOJ guidance also emphasises that companies should extract financial penalties from employees who engage in wrongdoing or who do not appropriately supervise their teams, thus allowing misconduct to occur."

The second initiative focuses on DOJ expectations regarding company policies on employees' use of 'ephemeral messaging applications' (such as WhatsApp, Telegram, WeChat or other services) for company business and the management and retention of company information on employees' personal devices. The guidance states that company policies on these issues 'should be tailored to the corporation's risk profile and specific business needs and ensure that, as appropriate and to the greatest extent possible, business-related electronic data and communications are accessible and amenable to preservation by the company'. The DOJ expects companies to understand what messaging applications are being used by their employees, limit them appropriately, design and implement policies that require preservation of data on these applications for appropriate time frames, and discipline employees who do not follow the rules. DOJ officials have stated publicly that failure to implement such policies could hurt companies' chances of being deemed cooperative during an investigation if the company cannot provide relevant data from these applications to investigators.

### 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. Companies in the United States, for example, can generally share personal data with third party service providers, such as outside counsel, auditors, etc, as well as with government regulators and investigatory authorities. Certain laws, such as the US Freedom of Information Act, require US government authorities to screen certain types of sensitive data from general public release, but generally do not inhibit such authorities' use of such data for investigation purposes. Even the most restrictive data privacy law in the United States (the California Consumer Privacy Act, which went into (partial) effect at the beginning of 2020 and mirrors many requirements adapted from more stringent data privacy laws in other countries) currently contains some exceptions that allow companies to collect, process and view information from their employees during an investigation. Since 1 January 2023, however, those exceptions are more limited and questions remain as to how the current CCPA will be applied going forward.

The primary challenge for companies subject to the FCPA is complying with host country restrictions on information-sharing/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 US enforcement authorities. Such host country laws can regulate data privacy or invoke national security considerations – both of which can limit the ability of companies to collect, use and share relevant information.

The updated DOJ CEP contains revised language addressing this critical issue, in light of the DOJ's ongoing and repeated statements of concern about the effect of foreign data privacy and similar laws on access to evidence. The CEP recognises that non-US data privacy or other laws and regulations can create valid restrictions on companies' abilities to access or share certain types of data in an FCPA or other investigation. However, to receive cooperation credit under the CEP, companies continue to 'bear the burden of establishing the existence of such a prohibition or restriction' on accessing or providing information and now must 'identify[] reasonable and legal alternatives to help the [DOJ] preserve and obtain the necessary facts, documents, and evidence for its investigations and prosecutions'.

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 remained unsettled. Further questions arose as a result of the July 2020 decision by the European Court of Justice (ECJ) that struck down the EU-US Privacy Shield, an agreement on which many companies had relied to facilitate transfers of data to the United States while complying with GDPR requirements. The Court's decision stated, in part, that US laws allowing for national security-based surveillance and acquisition of personal data did not adequately protect EU citizens' rights.

The 2020 ECJ decision created a period of uncertainty and led to intensive negotiations between the US and EU governments. In the meantime, on 4 June 2021, the European Commission released new versions of the 'standard contractual clauses' – the provisions that the Commission requires companies to use to govern various transfers of personal data to entities in countries that are not considered to provide appropriate data privacy rights, including the United States. Companies had until the end of 2022 to implement these clauses fully, but their broad scope and some undefined terms within raise

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additional unresolved issues for companies seeking to navigate this area.

On 25 March 2022, the US and EU announced that they had agreed in principle on a new 'Trans-Atlantic Data Privacy Framework' designed to address the concerns raised by the 2020 ECJ decision. The US government release stated, '[t]hose forthcoming reforms will ultimately underpin all commercial transfers of EU personal data to the United States, including those made in reliance on the EU-U.S. Privacy Shield, Standard Contractual Clauses, and Binding Corporate Rules.'

On 10 July 2023, the EU Commission issued a long-awaited 'adequacy decision' affirming that the EU-US Data Privacy Framework 'ensures an adequate level of protection – compared to that of the EU – for personal data transferred from the EU to US companies participating in the [framework]'. This decision occurred in the face of concerns raised by EU Members of Parliament and the European Data Protection Board. It is almost certain that this new framework will

again be challenged in court in the EU, prolonging the uncertainty for companies trying to manage requirements in this area.

The GDPR has had a significant impact on the way that cross-border internal investigations and multi-jurisdictional agency enforcement actions are conducted. A detailed discussion of the GDPR is beyond the scope of this section, but several points are worth noting. 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' – may be 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, especially if the concerns raised by the July 2020 ECJ decision come into play.

Indeed, the DOJ CEP'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?

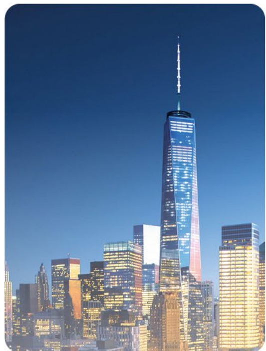
Much of the knowledge needed to give effective FCPA advice comes from outside traditional legal sources – there are very few adjudicated cases, no substantive regulations and the US authorities traditionally have been opaque regarding what drives their enforcement decisions. The best adviser combines extensive experience managing government and internal investigations with expertise in addressing the varied compliance issues actually faced by companies. Because the agencies have considerable leverage over targeted companies, counsel must be able to gain the trust of enforcement personnel while advocating effectively 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 (to apply the right regulatory analysis), and the company's own status 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 as the pandemic began. These engagements require US agency sign-off as to the monitor's experience and suitability, and require efficient, yet comprehensive, reviews of corporate compliance programmes and the exercise of independent judgment in balancing the goals of the company and the agencies. I am also handling several active investigations before the US DOJ and SEC, many of which also involve interactions with agencies in other countries; I also act as 'buffer counsel', advising companies on how to manage compliance monitors, using my past experience as one to advocate effectively.



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