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Anti-Corruption

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global interview panel*

market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the second annual issue focusing on the latest global trends within anti-corruption regulation and investigations.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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ANTI-CORRUPTION IN 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 close to 25 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, South East 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.

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 on FCPA compliance and related topics.

Mr Davis has worked extensively with clients in developing and implementing internal compliance programmes, 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.



John E Davis

GTDT: *What are the key developments related to anti-corruption regulation and investigations in the past year in your jurisdiction?*

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

In 2017, practitioners have been closely watching the Trump administration for signs of changes in the US enforcement climate. There has been speculation that past criticisms of the FCPA by the president (in a 2012 press interview) and the new chair of the SEC (as a co-author of a 2011 paper expressing reservations about US agencies' 'zealous' enforcement approach) could signal a

decrease in the US government's enforcement commitment.

While the first half of 2017 saw a significant reduction in announced FCPA resolutions, it is clear as of early October 2017 that the DOJ and SEC remain fundamentally committed to an assertive FCPA enforcement programme. In April 2017, the attorney general observed in a speech that 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'. The chair of the SEC reaffirmed in public remarks in early September 2017 that 'there is not going to be some dramatic shift in priorities at the SEC' related to FCPA or other enforcement areas, and made similar statements in a congressional oversight hearing later the same month. Data on new FCPA investigations publicly disclosed by companies in the first half of 2017 supports these statements – the numbers remain consistent with (or perhaps even ahead of) reports tallied in the past few years. In addition, several large resolutions were announced in the early fall of 2017.

At the DOJ, the so-called 'Yates Memorandum' (named for now-departed Deputy Attorney General Sally Yates), issued on 9 September 2015, remained in early October 2017 the controlling guidance for DOJ enforcement policy related to companies. However, in late September 2017, DOJ officials, including Deputy Attorney General Rod Rosenstein, indicated that the Yates Memorandum was under review and that changes could be announced later in the fall of 2017. The results of that review had not been publicly reported as of early October 2017, but some members of Congress and commentators have raised concerns that the contemplated changes could weaken the DOJ's enforcement posture.

The Yates Memorandum states that if a company wishes to receive credit for cooperating with a US government criminal investigation then it must provide 'all relevant facts' related to potential wrongdoing by company employees to the DOJ. The Yates Memorandum signalled a renewed focus by the DOJ on pursuing potentially culpable individuals in white-collar criminal investigations. DOJ statements related to this policy emphasised that prosecutors will be looking for information regarding C-suite level involvement in corrupt or other criminal activities. At various times in 2017, DOJ officials, including the attorney general, have reiterated the Yates Memorandum's (and thus the DOJ's) focus on individual culpability and disclosure of all relevant facts as critical to their evaluation of corporate culpability in specific cases.

The long-term fate of the other DOJ policy affecting FCPA enforcement is also unclear. In April 2016, the DOJ announced a year-long pilot programme designed to clarify the benefits that companies may receive from self-disclosure of potential violations and cooperation in investigations. In summary, the four main requirements of the pilot programme are: voluntary self-disclosure of potential FCPA violations; full cooperation with any DOJ investigation; appropriate measures by the company to remediate wrongdoing and compliance gaps; and disgorgement of all profits resulting from any FCPA violation. The pilot programme materials state that if a company takes all these steps, the DOJ may reduce penalties by up to 50 per cent off the bottom end of the applicable fine range and 'generally should not' require the company to appoint a compliance monitor. In certain cases, the DOJ will consider declining prosecution of the company. Most aspects of the pilot programme represent informal DOJ policies that have been in place for some time.

Various DOJ FCPA dispositions in 2016 cited pilot programme factors in their discussions regarding credit given (or not) to companies that had engaged in self-disclosure and remediation. However, in April 2017, the DOJ stated that the programme was undergoing a 'full assessment' regarding its usefulness and whether there were any additional steps that could be taken to promote compliance and transparency regarding the Department's 'expectations and prosecutorial priorities'. As of early October 2017, the DOJ had not announced the results of that review. The DOJ has made clear, however, that until any changes are announced, the pilot programme remains in force.

Perhaps the main recent development affecting SEC enforcement was the June 2017 US Supreme Court case *Kokesh v SEC*, which held 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 illegal activities. In the past five years, the SEC's FCPA enforcement actions against companies have yielded more than US\$2 billion, approximately 80 per cent of which constituted disgorged profits. The SEC could bring significant disgorgement claims because the agency treated disgorgement as an 'equitable remedy' that was not subject to the five-year statute of limitations. The aggrieved parties in the Supreme Court case argued that disgorgement amounts were penalties that were effectively the same as civil fines, and thus should be subject to the limitations period. The Court agreed, noting among other things that disgorgement 'is intended to deter, not to compensate'. As a result of *Kokesh*, the SEC will be pressured to reach faster resolutions and defendants will no longer face the threat of disgorgement on gains earned outside the five-year period. At the same time, companies that refuse to toll the limitations period may be

subject to more aggressive SEC investigative steps in response.

With regard to anti-corruption laws applicable to US federal and state officials, a significant development occurred related to the 2014-2015 trial and conviction of Robert McDonnell, the former governor of Virginia, on corruption-related charges. In June 2016, the US Supreme Court unanimously overturned that conviction in an opinion that is likely to make 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. Prosecutors decided not to retry the former governor under the narrower standard. The Court's decision has been criticised as having the effect of undermining public confidence in the accountability of elected officials – a concern that was heightened by two events: the July 2017 reversal of the conviction against former New York State Assembly Speaker Sheldon Silver and the October 2017 ruling that overturned many counts supporting the conviction of former US congressman William Jefferson. Both of these decisions cited the *McDonnell* decision as critical to their results. Another key test of these effects will be the corruption trial of US Senator Robert Menendez of New Jersey, which began in September 2017.

GTDT: What lessons can compliance professionals learn about government enforcement priorities from recent enforcement actions?

JED: 2016 was a record-breaking year for FCPA enforcement, featuring 57 resolutions (40 against companies and 17 against individuals) – the second highest number for any calendar year since the FCPA's passage in 1977. FCPA-related dispositions involved a record US\$2.65 billion in fines, penalties and disgorgement, more than doubling the previous record. The trends in 2017 run below those numbers, but it is clear that numerous FCPA investigations are ongoing, including ones that have been initiated under the Trump administration.

Investigations continue to cover multiple industries, including, for example, healthcare, telecoms, casinos and entertainment, manufacturing and internet service providers. And it is not just US companies that are targeted – non-US companies listed on US exchanges have been the subjects of some of the largest FCPA-related settlements. Recently announced investigations involve companies ranging from ride-sharing/technology company Uber to energy company TechnipFMC.

The US agencies continue to target corrupt activities around the world, though data shows that business activities in China are the ones most frequently involved in public resolutions – the 32 resolutions involving China since 2010 constitute

“Companies subject to the FCPA need to be aware of the potential worldwide reach of the law over company activities”

nearly a quarter of the combined corporate FCPA actions during that period. Indeed, in August 2017, it was reported that major state-owned Chinese company China Petroleum and Chemical Corp (Sinopec) was under FCPA investigation related to its activities in Africa. The countries other than China most frequently involved in FCPA enforcement actions over the past six years are Russia, Indonesia, India, Mexico and Argentina, each of which has served as a setting for seven or more resolved enforcement actions since 2010. The past year has seen Brazil make this list, due to several cases that were outgrowths of the ongoing *Car Wash* investigation there.

The past two years have also seen renewed focus by the DOJ and SEC on the effectiveness of corporate compliance programmes. The state of a company's compliance programme factors into penalty guidelines and the discretion that the agencies 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. In November 2015, the DOJ retained its first ‘compliance expert’, a former compliance executive at multiple companies (and former US prosecutor). The expert's job was to assist with the DOJ's assessment of compliance programmes during disposition negotiations and to advise on compliance issues that arise during periods set by disposition agreements while a company is effectively ‘on probation’.

In February 2017, the DOJ issued a guidance document regarding the ‘Evaluation of Corporate Compliance Programs’. This guidance was designed by the DOJ's compliance expert to help companies evaluate the robustness of their compliance programmes by reciting a series of questions focusing on various programme elements – likely the same questions the DOJ would ask when reviewing whether a company's compliance programme is effective under the penalty guidelines or when considering whether an independent compliance monitor is required. The guidance does not provide benchmarks, but its questions are useful for evaluating new compliance

programmes or considering enhancements to existing ones. The DOJ's compliance expert resigned her position in June 2017; while the DOJ has indicated a desire to name a replacement, it is unclear when that will occur and whether further programme guidance or benchmarks will be issued in the near future.

The imposition of independent compliance monitors in corporate FCPA settlements increased sharply in 2016 and early 2017 – in 2016, nine companies were required to engage a monitor and four of the five resolved cases in the first quarter of 2017 included a monitorship requirement. By contrast, there were only five monitors required in the entire range of cases from 2013 to 2015. The reason for this increase is unclear and could be related to a number of factors. Two possibilities are a more rigorous evaluation of company compliance programmes by the agencies, with the assistance of the guidance noted above, and the fact that some cases were resolved relatively quickly, such that programme remediation was not yet complete at the time of settlement. Since corporate dispositions have decreased significantly in 2017 overall, it is unclear whether this trend will continue, though at least one large resolution in September 2017 did not impose a monitorship.

On the US domestic side, prosecutors continue to prioritise cases against executive branch officials and members of Congress, though federal cases against state officials have also received significant attention (aside from the *McDonnell* and *Silver* cases, former Illinois governor Rod Blagojevich remains behind bars after his corruption conviction, though his appeals continue). The results of the September 2017 trial of Senator Menendez related to allegations that he accepted almost US\$1 million in gifts, travel and legal donations in exchange for intervening in the payor's business affairs may be a bellweather for the potential successes of future US public corruption cases.

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

JED: 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 recent clear 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 undefined, legal concepts in the FCPA,



“Perhaps the most challenging set of FCPA compliance risks involves the actions of third parties.”

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. As a consequence, compliance professionals need to account for these broad definitions when addressing specific compliance issues.

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 shows that close to 75 per cent of FCPA cases since 2008 involve actions by third parties. Cases in 2017 that have involved liability for actions by third parties include resolutions with Las Vegas Sands, Orthofix, Zimmer Biomet and TeliaSonera. 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 to 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 remediating this key compliance 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 2017 settlements involving Mondelez International and Orthofix. 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.

“Unlike some other areas of law, FCPA enforcement enjoys strong bipartisan political support and is not subject to changes in political control over the government”

US domestic bribery laws and enforcement actions focus on the specific and complex rules that govern 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.

GTDT: *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?*

JED: The pace of announced FCPA-related resolutions by the DOJ and SEC can vary over time. 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 (such as those that occurred in 2015 and the middle two quarters of 2017) signal a slowdown in investigations or a significant redirection of FCPA enforcement resources. 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 government. The signs of the Trump administration’s continuing commitment to FCPA investigations that are discussed throughout this section bear this out.

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. In April 2017, a senior DOJ official announced that the Department is ‘making a concerted effort to move corporate investigations expeditiously’ and to close out longer-running cases. The stated goal is to substantially shorten the length of FCPA investigations and their associated costs and uncertainties. It is too soon to see whether and how these goals will be achieved, and whether the

continuing growth of multinational efforts (with the needed coordination among various agencies) will impact this effort.

One area of multinational cooperation that appears for now to be continuing is the DOJ’s Kleptocracy Asset Recovery Initiative (the Kleptocracy Initiative), which, since 2010 has targeted the ill-gotten gains of officials who have received corrupt payments. While most FCPA enforcement focuses on the ‘supply’ side of corruption, the Kleptocracy Initiative focuses on the ‘demand’ side (indeed, the DOJ in 2016 stated that the FCPA enforcement programme and the Initiative were ‘two sides of the same anti-corruption coin’). The Kleptocracy Initiative involves cooperation by US authorities with multiple jurisdictions to trace and seize corruption-tainted assets. The Kleptocracy Initiative has had mixed success, and the policy implications of returning funds to governments that are widely considered to be institutionally corrupt are not fully resolved. The impact of these efforts on companies can occur in several ways; for example, companies under investigation might be expected to cooperate in efforts to trace tainted assets or funds, creating additional costs. The cooperation among agencies across jurisdictions also could give US authorities access to evidence of wrongdoing by company employees that otherwise might be beyond US reach.

GTDT: *Have you seen evidence of 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?*

JED: The US authorities have actively pursued cooperation with other enforcement authorities in the past several years, and multinational investigations remain a priority under the Trump administration. Cooperation is managed through bilateral mutual legal assistance treaties and through the assistance provisions of treaties such as the OECD Anti-Bribery Convention. Often, though not always, the US authorities take the lead in coordinating these efforts.

DOJ personnel have remarked at several public events in 2017 that international cooperation and global dispositions of corruption-related investigations are an important enforcement goal. In early September 2017, the SEC chair reiterated that agency’s commitment to the ‘pursuit of international corruption’, which he noted was no longer a ‘unilateral exercise’. He has implied that the growth of international cooperation has ‘change[d] the dynamic substantially’ and has addressed some of the concerns he had voiced in 2011 regarding FCPA enforcement.

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 signals the extent to which global investigations and settlements are becoming the norm for the DOJ and SEC. 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 will go to Brazil, and in the aftermath of an April 2017 court decision, the US agencies will receive the smallest portion of the actual criminal penalties. In early October 2017, the Trump administration’s nominee for assistant attorney general of the DOJ’s Criminal Division, who oversees FCPA prosecutions, cited the Odebrecht-Braskem case as a model for the types of cases he would pursue if confirmed in that post.

Other notable recent examples of cases involving multinational cooperation by the US agencies include the October 2016 settlement by Embraer SA with US and Brazilian authorities; the January 2017 settlement of an international investigation of Rolls-Royce that involved US, UK and Brazilian enforcement agencies; and the September 2017 resolution of the investigation of TeliaSonera by US, Dutch and Swedish authorities. Similar to the Odebrecht-Braskem settlement, the *Rolls-Royce* case involved a substantially higher payment to UK authorities than to the DOJ. The other cases resulted in significant penalties collected by the non-US agencies. As international anti-corruption cooperation continues to expand, the DOJ is likely to continue to defer, in whole or part, to foreign regulators who have a better claim over and are equally committed to pursuing allegations of corrupt activities that may also violate the FCPA.

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. There is also a risk of ‘over-penalising’ as the various jurisdictions each seek to apply their penalty standards – though a DOJ official noted in April 2017 that the DOJ seeks to ‘apportion penalties between the relevant jurisdictions so that companies seeking to accept responsibility for their prior misconduct are not unfairly penalised for the same conduct by multiple agencies.’ Companies therefore need to base

“Many have criticised the focus of the Yates Memorandum, suggesting it may negatively impact compliance programmes and may deter corporate cooperation”

important compliance decisions, such as whether or not to disclose a potential FCPA violation, in part on the possibility of cooperation among interested investigating jurisdictions.

GTDT: *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?*

JED: As noted above, the DOJ and SEC are continuing to aggressively target individuals, 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, the Yates Memorandum, the pilot programme and other initiatives are designed to enhance the DOJ’s ability to ‘prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove’.

Recent statements from the Trump administration confirm the focus on individual, in addition to corporate, culpability. For example, senior DOJ officials in April 2017 highlighted the Department’s commitment to ‘prioritise prosecutions of individuals who have willfully and corruptly violated the FCPA’ and noted that the attorney general had repeatedly stressed ‘the importance of individual accountability for corporate misconduct’. In early September 2017, the SEC’s co-director of enforcement stated that the SEC is ‘incredibly focused’ on the liability of individuals across the enforcement spectrum, including with regard to the FCPA; she noted that individuals had been the subjects of over 70 per cent of the agency’s dispositions in the past five years, and that the agency intended to continue this approach.

As noted above, the DOJ may revise or replace the Yates Memorandum in the last quarter of 2017. Many compliance professionals and defence lawyers have criticised the focus of the Yates Memorandum, suggesting it may negatively impact compliance programmes and may deter corporate

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 both 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 unique?

US domestic bribery laws are a patchwork that can sometimes 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. For example, the rules on gifts and disclosures are different depending on whether a company is US-based or,

perhaps, a 'foreign agent'. More stringent rules can apply to government contractors. 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?

We represented VimpelCom Ltd (now VEON) during investigation by US and Dutch enforcement authorities that were resolved February 2016. Because the company directed and supported actions ultimately acknowledged by the agencies as constituting extraordinary cooperation, the company was able to negotiate a resolution in two years (the average investigation lasts over four years), with penalties that represented substantial reductions from what relevant guidelines allowed. In 2017, I was appointed as an independent compliance monitor by the DOJ and SEC per an FCPA resolution. These engagements require 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.

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cooperation. Others have noted that the document merely crystallises long-standing DOJ practice. In response to questions regarding actual application, the DOJ has emphasised that it does not expect companies to specify or allege whether individual employees are criminally or civilly liable; instead, companies merely 'give [DOJ] the facts'.

Until there is an announced change in policy, it is prudent for companies to assume that the Yates Memorandum still guides DOJ decisions regarding corporate accountability for FCPA violations created by the actions of company employees. The Memorandum's requirements require compliance professionals and their counsel to consider risks related to attorney-client privilege (and possible waiver thereof), data privacy rules and costs when evaluating a company's position in an investigation.

GTDT: 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?

JED: 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. Developments such as the entry into force of the EU's General Data Protection Regulation in May 2018 will present additional challenges to multinational companies' handling of a wide variety of data.

Compliance professionals working for companies subject to the FCPA should work closely with data privacy experts in each operational jurisdiction to craft solutions that give appropriate access and comply with data privacy protections or other legal restrictions on information access. These can include obtaining prior informed consent from employees, implementing binding corporate rules, or establishing information review protocols in jurisdictions deemed to meet data privacy requirements. 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 are more likely to be considered to be acting in good faith when the inevitable conflicts of legal requirements arise.

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