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Anti-Corruption

Will increased international cooperation stem corruption?

John E Davis leads the global interview panel covering anti-corruption regulation and investigations in key economies

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John E Davis

ANTI-CORRUPTION IN THE UNITED STATES

John E Davis is coordinator of 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 over 20 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the Securities and Exchange Commission and US Department of Justice, and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union and South East Asia.

Mr Davis is a frequent speaker and trainer on FCPA issues and has written various articles 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 compliance processes. Additionally, Mr Davis focuses his practice on a range of issues relating to structuring and regulating international trade and investment transactions, including compliance with US export controls, the application of US and multilateral sanctions, the negotiation of joint ventures and other agreements.

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

John Davis: The United States remains far and away the most active country in enforcing its laws prohibiting foreign bribery against both 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 are also concluded prior to any actual trial. These results are driven by the substantial leverage that the US agencies enforcing the FCPA (the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC)) can bring against both companies and individuals.

On 9 September 2015, the DOJ issued to all US federal prosecutors a memorandum entitled 'Individual Accountability for Corporate Wrongdoing', signed by Deputy Attorney General Sally Yates. 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 signals a renewed focus by the DOJ on pursuing potentially culpable individuals in white-collar criminal investigations, partially in response to political criticism regarding the lack of 'jail time' for corporate employees seen to be involved in massive fraud cases, such as those behind the US federal bank bail-outs during the financial crisis. DOJ statements related to this policy emphasise that prosecutors will be looking for information regarding C-suite level involvement in corrupt or other criminal activities. As Deputy Attorney General Yates stated, '[the DOJ is] not going to be accepting a company's cooperation when they just offer up the vice president in charge of going to jail'.

More recently, in April 2016 the DOJ announced its 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. The first resolution that specifically involved the pilot programme was in relation to Analogic Corporation, and was announced on 21 June 2016. Most aspects of the pilot programme represent informal DOJ policies that have been in place for some time, and it is too early to tell how the programme's application may affect existing and future investigations. Many compliance professionals will be 'reading the tea leaves' in announced settlements to analyse the programme's practical effect.

Both agencies have taken steps in more cases to avoid review of dispositions by US federal court judges, thus limiting independent supervision and the risk that a federal court will reject the terms of a negotiated corporate resolution. This occurred most notably in regard to a 2012 proposed FCPA resolution between the SEC and IBM, and more recently in an international sanctions settlement proposal by the DOJ in relation to Fokker Services (though in April 2016, a US appeals court allowed the Fokker settlement to proceed).

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, 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 recently decided not to retry the former governor under the narrower standard.

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

JD: Resolutions of FCPA investigations by the US authorities continue at a steady pace. Following a relatively slow 2015 (in which only 20 FCPA-related actions were announced), there have been 26 resolutions in the first half of 2016. Investigations have covered multiple industries, including, for example, healthcare, telecoms, casinos and entertainment, manufacturing, and internet service providers. The US agencies continue to target corrupt activities around the world, though data show that China is the country most frequently involved in public resolutions – the 25 resolutions involving China since 2010 constitute nearly a quarter of the combined corporate FCPA actions during that period. In 2016 alone, the agencies have concluded China-related dispositions for eight companies to date. The countries other than China most frequently involved in FCPA enforcement actions over the past six years are Russia, Indonesia, Mexico and Argentina, each of which has served as a setting for seven or more resolved enforcement actions since 2010.

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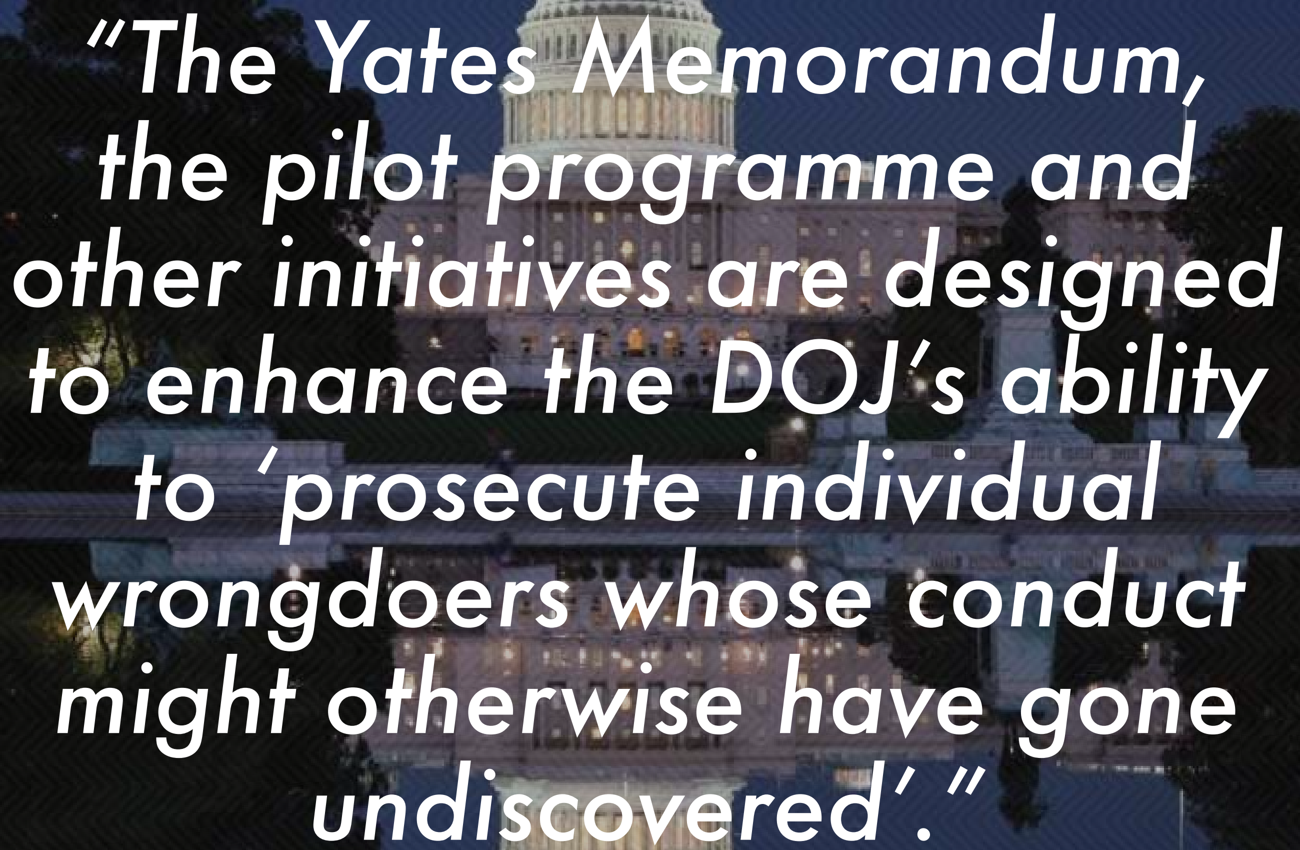

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As discussed above, both the DOJ and SEC are aggressively targeting individuals, with a focus on identifying the highest-level company personnel who can be deemed responsible for improper payments or related wrongdoing. According to the enforcement 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'.

The agencies continue in some resolutions to require that companies retain independent compliance monitors to ensure the sufficiency of corporate compliance programmes. The state of a company's compliance programme also 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 is to assist with the assessment of compliance programmes and to interface with companies and independent monitors regarding compliance issues that arise during periods set by deferred prosecution agreements and non-prosecution agreements while a company is effectively 'on probation'. In public statements, the expert has identified four broad considerations that, in her view, distinguish an effective compliance programme from a 'paper-based' one: whether the programme is 'thoughtfully designed' (risk-based and adaptable to changing compliance realities); 'operational' (integrated into business processes); closely communicated to and coordinated with all stakeholders; and adequately resourced.

On the US domestic side, prosecutors continue to prioritise cases against executive branch officials and members of Congress. The ongoing investigation against Senator Robert Menendez of New Jersey alleging that he accepted almost $1 million in gifts, travel and legal donations in exchange for intervening in the payor's business affairs is a typical, if high-profile, example.

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

JD: First and foremost, companies subject to the FCPA need to be aware of the potential worldwide reach of the law over company 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 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, 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 show that close to 75 per cent of FCPA cases since 2008 involve actions by third parties. Cases in 2016 that have involved liability for actions by third parties include resolutions with Las Vegas Sands, SAP, and Nordion. This trend is driven by the FCPA's provision stating that payment to a third party with 'knowledge' that the payment will be passed on to an official is a violation of the statute. The agencies have adopted an expansive definition of 'knowledge' that goes beyond actual knowledge to also cover 'conscious disregard' of information showing corruption risks. The best illustration of this interpretation is the 2009–2012 case against Frederick Bourke (*US v Kozeny*), in which a jury convicted Mr Bourke for conspiracy to violate the FCPA using the conscious-disregard standard. Appropriate, risk-based compliance policies, procedures and internal accounting controls related to due diligence on, contracting with, and monitoring and auditing of third parties are critical to 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 2016 settlements involving Akamai, Nortek, Analogic and Novartis. Compliance professionals should work closely with their finance and accounting function counterparts to ensure that the relevant controls are consistent with the company's compliance processes and that business transactions are accurately recorded in the company's records.

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

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?

JD: Though the pace of announced resolutions by the DOJ and SEC can vary over time, it would be a mistake to assume that any apparent slowdown (such as the one that occurred in 2015) signals a slowdown in investigations or a significant redirection of FCPA enforcement resources. Unlike some other areas of law, FCPA enforcement is not subject to changes in political control over the government.

The most significant potential change in FCPA enforcement priorities apart from the Yates Memorandum was a statement by the DOJ in October 2015 that it was 'focusing on bigger, higher-impact cases, including those against culpable individuals, both in the US and abroad' – this is in contrast to past years, in which the DOJ 'handled more cases based on self-reporting by companies, and as a result of that we saw more resolutions, but smaller cases'. Such cases generally are more complex and take longer to resolve – indeed, the DOJ in 2015–2016 stated that it had doubled the number of prosecutors and tripled the number of FBI agents assigned to

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THE INSIDE TRACK

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

Much of the key knowledge needed to give FCPA advice lies outside the normal legal sources and methods – there are very few adjudicated cases, no substantive regulations and the enforcement agencies traditionally have been opaque regarding their investigation and charging decisions. Thus, the best adviser combines extensive experience of 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 sometimes can create compliance contradictions. Analysing specific issues requires identifying whether federal or state laws control, the identity and position of any official within government (so that the right regulations can be reviewed), and the company's own classification under those rules. 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 during the investigation of the company by US and Dutch enforcement authorities, the resolution of which was announced in February 2016. The case involved several challenging aspects, including coordination with multiple investigating agencies and the need to adhere to multiple local law requirements related to data privacy and national security concerns. 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.

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foreign corruption investigations in recognition of these resource challenges. It is too soon to assess the full impact of this announced change, although there is evidence in several cases in 2016 that the DOJ declined to pursue some cases in which the SEC took action, resulting in relatively low penalties.

Another shift already in progress that could affect enforcement priorities 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 Initiative involves cooperation by US authorities with multiple jurisdictions to trace and seize corruption-tainted assets. The 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.

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?

JD: The US authorities have actively pursued cooperation with other enforcement authorities in the past several years. This is managed through bilateral mutual legal assistance treaties and through the cooperation provisions of treaties such as the OECD Anti-Bribery Convention. Often, though not always, the US authorities take the lead in coordinating these efforts.

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> *"Many compliance professionals and defence lawyers have criticised the focus of the Yates Memorandum."*

As an example, the recent SBM (November 2014) and VimpelCom (February 2016) resolutions involved close cooperation between the US and Dutch authorities. The VimpelCom disposition involved settlement agreements with both the US and Dutch agencies, and showed how the penalties were split between the two. In the SBM investigation, however, it appears that the Dutch authorities took the lead. SBM paid the Dutch authorities US$240 million in fines and disgorgement for bribes paid by SBM personnel in three countries; at the same time, the DOJ declined to take action and closed its investigation. 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.

Other examples of reported international cooperation in ongoing investigations abound. The long-running investigation in Brazil of corruption related to the operations of Petrobras (the Car Wash investigation) has involved reported cooperation between Brazilian and US authorities, and several US issuers have reported enquiries from US agencies regarding their business operations related to Petrobras. Indeed, media reports suggest that SBM's business with Petrobras was under investigation by Brazilian authorities in the wake of the Dutch settlement.

International cooperation often increases the complexities and costs of any investigation for 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. 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 interested investigating jurisdictions.

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?

JD: The effect of the Yates Memorandum is still unclear. Several recent corporate settlements have suggested that the policies in the Yates Memorandum are being applied to those contexts; however, current known FCPA-related prosecutions against individuals started well before the memorandum was released.

In response to questions about how the Yates Memorandum's policies would be put into effect, 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'.

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 cooperation. Others have noted that the document merely crystallises long-standing DOJ practice. The memorandum's requirements, in either event, require compliance professionals and their counsel to consider risks related to attorney–client privilege, data privacy rules and costs when evaluating a company's position in an investigation.

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?

JD: 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 while simultaneously being able to access compliance-sensitive company information when needed to operate compliance programmes, conduct internal investigations of whistle-blower allegations, or respond to requests or demands for information by enforcement authorities. Company compliance professionals should work closely with data privacy experts in each relevant 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 consent from employees, 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 the agencies' 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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