PANORAMIC NEXT

Anti-Corruption

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Contributing Editor

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Miller & Chevalier Chartered

Panoramic Next: Anti-Corruption

the most prominent recent developments in the global fight against corrupt practices. A panel of legal experts from key jurisdictions discuss enforcement trends, compliance risks and the related practical effects on companies' anti-corruption compliance programmes.

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ABOUT THE LAWYERS

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, where he focuses his practice on international regulatory compliance and enforcement issues. He has 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 on a multi-year project 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 toTheDaily 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.

Q&A

WHAT ARE THE KEY DEVELOPMENTS RELATED TO ANTI-CORRUPTION REGULATION AND INVESTIGATIONS IN THE PAST YEAR IN YOUR JURISDICTION, AND WHAT LESSONS CAN COMPLIANCE PROFESSIONALS LEARN FROM THEM?

The United States remains the most active country in the world in 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 before 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.

Both the DOJ and SEC remain publicly committed to active anti-corruption enforcement against companies and individuals. Though the numbers of announced enforcement actions in 2023 and early 2024 have not reached the high watermarks established in the mid-2010s, the numbers show some recovery from the low numbers produced during the time of (and partially caused by) the COVID-19 pandemic. In 2023, the DOJ concluded

five corporate enforcement actions, while the SEC had nine, for a total of 14, which is slightly below the 2022 combined total and above the 2021 combined total. The first quarter of 2024 produced three more resolutions involving companies, including two relatively rare corporate guilty pleas. No actions were announced in Q2 2024, though the Stanford Law School FCPA Clearinghouse noted in its report for that period that it is tracking FCPA-related investigations of 'at least 32 different entity groups'. 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 investigation 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:

- Trafigura (US$100 million in March 2024 + corporate guilty plea);
- Gunvor (US$474 million in March 2024 + corporate guilty plea);
- Albemarle (US$219 million in September 2023);
- Honeywell International (US$200 million in December 2022);
- ABB Limited (US$460 million in December 2022); and
- Glencore (US$440 million in May 2022 + corporate guilty plea, as part of a multilateral disposition worth over US$1 billion and counting).

In addition, the DOJ has continued to issue new or revised policies and guidance designed to incentivise companies to commit to three basic principles that assist in enforcement: voluntary self-disclosure of potential violations, full cooperation with any government investigations and effective remediation that addresses the 'root causes' of any improper activities to ensure future compliance. Following up on the two 'Monaco Memoranda' issued by the DOJ's Deputy Attorney General, in January 2023 the DOJ's Criminal Division issued its revised Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP), which applies to FCPA cases and has been 'codified' in the DOJ's Justice Manual (in 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 details criteria for prosecutors to evaluate the three basic principles of self-disclosure, full cooperation and effective remediation – what Deputy Attorney General Monaco labelled in an October 2023 speech as a 'virtuous cycle'. 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 also sets out additional or updated commentary from the DOJ on various aspects of the policy's core requirements. For example, the 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'. The new commentary makes clear that '[a] cooperating company must 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 examples of this dynamic occurred in November 2023, when the DOJ declined to prosecute Lifecore Biomedical in part based on the company's agreement to disgorge over US$400,000, and in March 2023, when the DOJ declined to prosecute US miner Corsa Coal Corporation after the company 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 of 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 April 2023, Frank's International NV settled an SEC FCPA action by paying fines and disgorgement totalling roughly US$8 million, even though (according to a November 2022 company disclosure) the DOJ had declined to prosecute the company for similar conduct.

In October 2023 the DOJ announced a new Mergers & Acquisitions (M&A) Safe Harbour policy to promote voluntary self-disclosure by companies of misconduct discovered in the course of pre- and post-acquisition due diligence. As with the CEP itself, the safe harbour is designed to promote self-disclosures, creating a presumption of declination for a company that discloses discovered misconduct at an acquired entity within six months of closing a transaction and remediating any such misconduct within one year of closing. Under the policy, the six-month and one-year time frames are subject to a reasonableness analysis, and DOJ prosecutors will take into account 'facts, circumstances, and complexity of a particular transaction' (including the presence of aggravating circumstances), which could

result in the extension of the time frame. The policy raises various questions that are unanswered within the confines of the actual policy document and thus bears monitoring for signs as to how the DOJ will manage these issues in specific future cases.

Congress handed the DOJ a new tool to prosecute bribery recipients in December 2023 when President Biden signed the massive National Defense Authorization Act (NDAA) for fiscal year (FY) 2024, which included a section called the Foreign Extortion Prevention Act (FEPA). FEPA for the first time directly criminalises the 'demand side' of official corruption in transactions involving US persons. Although it amends the primary US domestic bribery statute (18 USC 201) rather than the FCPA, FEPA borrows many key concepts from the FCPA, including as to jurisdiction and key elements of the defined offence. Fundamentally, FEPA prohibits foreign officials from soliciting or receiving bribes, and like the FCPA, there can still be a FEPA violation even if there is no actual bribe, as the law also prohibits requests or demands for bribes as well as agreements to receive bribes. In one way FEPA is broader in scope than the FCPA, as the new law applies not only to foreign government and political party officials, but also in many cases to the officials' immediate family members, close associates and related business entities.

FEPA does not create a new area of potential direct liability for companies. Rather, FEPA supplements the existing tools used by the DOJ – primarily anti-money laundering and related laws – to prosecute foreign officials who demand bribes from US companies. FEPA can provide a new and potentially persuasive response by company personnel to any solicitation of benefits by host country officials. Such a response does not have to set out the complexities of potential jurisdictional or other legal interpretive arguments – it can focus instead on FEPA potentially directly applying to the official, as well as on the increased pressure created by FEPA on the host government to prosecute the official for potentially corrupt actions.

Unlike the DOJ, the SEC has not undertaken significant formal changes to its policy or processes regarding FCPA investigations in the past few years. SEC FCPA investigations continue to be guided by the 2001 'Seaboard Report' and the agency's Enforcement Manual. That said, the SEC continues to publicly emphasise themes from the Seaboard Report that are similar to those articulated by the DOJ in the agency’s discussions of corporate enforcement priorities and how they treat companies under investigation. For example, the SEC's Director of Enforcement delivered a speech in May 2024 outlining 'five principles of effective cooperation' with SEC investigations. Those principles included self-policing, self-reporting, remediation, cooperation, and 'collaboration' with the SEC in investigations. The first four principles are discussed in the Seaboard Report; the last is defined as timely, frequent and substantive communication between the SEC and the party being investigated to 'establish [the company's] credibility with [enforcement] staff'. Recent SEC FCPA actions, such as the January 2024 cease-and-desist order with German software company SAP and the September 2023 settlement with US media company Clear Channel, have discussed the effects that the companies’ self-disclosures, efforts at cooperation and remediation measures have had on case outcomes.

A potential major development for SEC FCPA enforcement practices is the 27 June 2024 decision by the US Supreme Court in the case SEC v Jarkesy, which involved the SEC’s administrative proceedings against Jarkesy for securities fraud. The Supreme Court ruled that, under the Seventh Amendment of the US Constitution, when the SEC brings civil fraud actions in which the agency seeks monetary penalties, such actions must be brought in

federal court rather than before an administrative law judge. This ruling vitiates the SEC's current practice, adopted under the Dodd-Frank Act in 2010, of imposing such penalties through its in-house administrative process – including in FCPA cases. That said, most FCPA cases are settled via negotiation, and it is also unclear whether the analysis applied by the Court – which focused on similarities between SEC civil monetary penalties for fraud and similar common law fraud actions that triggered the Seventh Amendment rights for defendants – might apply to, for example, the FCPA accounting provisions. The issue may well be litigated in the next few years.

With regard to anti-corruption laws applicable to US federal and state officials, the 26 June 2024 US Supreme Court decision in the case US v Snyder represents the latest in a line of Supreme Court cases starting in 2016 (in a decision that overturned the corruption-related conviction of former Virginia governor Robert McDonnell) that has narrowed the ability of federal 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 the May 2020 decision in Kelly v United States, the 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. 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 that 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.

The Snyder decision may represent the most fundamental challenge to prosecutors since the McDonnell case, though the scope of the potential effects is as yet unclear. The Snyder majority held that a federal statute aimed at curbing bribery of US state and local officials in contexts related to federally-funded programmes –18 USC § 666 -- does not reach 'gratuities', and instead is limited to circumstances in which a thing of value is given or received pursuant to the quid pro quo agreement that is a key provision in federal bribery statutes, including 18 USC § 201 (the primary domestic bribery statute) and the FCPA. Thus, a gratuity paid after the fact to an official who has already taken official action is, per the majority, not a criminal act under § 666.

The Snyder decision evoked a strongly worded dissent that raised concerns over the majority's interpretive approach and the potential broader effects of the decision, and the 'jury is still out' on whether those effects will occur. However, it is worth noting that the majority opinion did not disturb 18 USC. § 201(c)'s prohibition on gratuities or cast doubt on the validity of the myriad state and local laws criminalising gratuities – indeed, the Court cited these regulations as one reason to avoid an expansive reading of the scope of the federal statute under review. Moreover, the Court declined to accept the defendant's argument that the definition of 'corruptly' should be interpreted to require prosecutors to

prove specific intent to violate a specific law, thus leaving undisturbed the core element of all federal bribery statutes, including the FCPA.

Despite the challenges raised by these Supreme Court precedents, the DOJ has continued to have success in prosecuting cases of public corruption by US officials, including in dozens of local or regional cases. At the federal level, for example, in July 2024, a federal court jury in New York convicted US Senator Robert Menendez of New Jersey of 16 counts of bribery, extortion, fraud and obstruction of justice following a two-month trial. A previous conviction of Senator Menendez for corruption was overturned following the Supreme Court's McDonnell decision, but the current prosecution centered on new facts. While Menendez is appealing the conviction, he ended his reelection campaign as a result of the verdict. In May 2023, former New York Congressman George Santos was indicted on 13 counts, including money laundering and 'theft of public funds'; in August 2024, Santos pleaded guilty to wire fraud and identity theft and will be sentenced in February 2025. At the state/territorial level, for example, in March 2024 a US federal appeals court reinstated charges against former New York Lt Governor Brian Benjamin related to alleged payments and campaign contributions he received from a real estate developer in exchange for allocating state funds. Former Illinois House of Representatives Speaker Mike Madigan is awaiting trial on federal bribery and racketeering charges in a prosecution that has already sent his former top aide to jail (in part for lying to a federal grand jury).

Data compiled by the US Sentencing Commission reported that, for FY 2023, there were 366 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 to cover various industries, including, for example, life sciences, consulting, industrial engineering/construction, media, 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 Trafigura Beheer BV (The Netherlands/Switzerland), Gunvor SA (Switzerland), SAP SE (Germany), Koninklijke Philips NV (The Netherlands), Flutter Entertainment (Ireland), Rio Tinto (UK/Australia), Safran (France – a declination), GOL Airlines (Brazil),and Tenaris SA (Luxembourg).

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 57 resolutions involving China during the period January 2010-February 2024 constitute almost 25 per cent of the combined corporate FCPA actions during that period. Recent China-related cases involve dispositions with Clear Channel (September 2023), Albemarle, (September 2023), 3M (August 2023), Koninklijke Philips NV (May 2023), and Safran (December 2022 – again, as noted, a declination). 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-February 2024 time period are Brazil (largely due to the massive 'Car Wash' investigation there), Mexico, India, Nigeria, Russia, Indonesia, Angola, Saudi Arabia and Vietnam. Several recent FCPA

cases also have reinforced the regional corruption risks generally present in Latin America, 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, as indicated by the cases involving current and former Senators, Members of Congress and senior state officials noted above.

More typical cases include the conviction in December 2023 of a former Chicago alderman and a businessman co-defendant by a federal jury on 13 counts of racketeering, bribery, and other allegations -- part of an ongoing probe of corruption in the city. In April 2023, the federal Eleventh Circuit upheld the conviction and three-year jail term of a real estate developer in Florida alleged to have bribed a former Tallahassee city commissioner despite the defendant's arguments that the jury instructions raised issues under the McDonnell case.

WHAT ARE THE KEY AREAS OF ANTI-CORRUPTION COMPLIANCE RISK ON WHICH COMPANIES OPERATING IN YOUR JURISDICTION SHOULD FOCUS?

The recent economic environment continues to create FCPA-related compliance risks and to change companies' risk profiles, even if some companies are not necessarily aware of these trends. Plant closures or re-locations, supply chain disruptions (and in many cases increasing reliance on third parties), restrictions on the movement of gatekeeper personnel and management compliance champions for budget or safety reasons, pressures on financial targets and other issues all open opportunities for corruption and fraud. 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 the resulting enhanced enforcement focus on sanctions and money laundering, and political instability in places such as West Africa and the Middle East can also affect risk profiles.

Managing these compliance-related challenges in the face of time pressures and potentially reduced resources driven by the ongoing possibility of an economic downturn continues 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; indeed, the DOJ has emphasised in various policies and guidelines, including the CEP, that continuous risk assessment and monitoring are crucial baseline components of an effective compliance programme. Among other actions, company compliance personnel should consider such activities as updated management messaging on company values and ethics programmes, increased virtual training, 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 current DOJ/SEC 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. The November 2023 dispositions involving reinsurance brokers Tysers Insurance Brokers and HW Wood Limited focused on payments to managers of state-owned insurers. 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 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 close to 80 per cent of FCPA cases in the last 10 years involve actions by third parties. Recent cases that have resulted in corporate liability for actions by third parties include resolutions with SAP (involving 'consultants' and commission-earning sales intermediaries), Gunvor (involving 'agents' using shell companies), Rio Tinto (involving an investment banker who allegedly acted as a payment conduit); 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); 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 Braziliandoleiro (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 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 current edition of the 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 by 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 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 still-relevant 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.

Several recent developments make the management of whistle-blowers an increasingly important priority. In August 2024, the DOJ announced a new three-year 'Corporate Whistleblower Awards Pilot Program' designed to 'fill the gaps' in other such policies (most importantly, the Dodd-Frank programme administered by the SEC that covers public companies). The companies most affected are non-issuer/private companies still subject to DOJ jurisdiction. The program establishes potential awards to whistle-blowers related to information on company activities that implicate the FCPA, FEPA, '[d]omestic corruption cases, especially involving illegal corporate payments to government officials' and '[c]riminal abuses of the U.S. financial system'. . Rewards are available in circumstances in which the whistle-blower's information 'leads to criminal or civil forfeiture exceeding $1,000,000 in net proceeds forfeited in connection with a successful prosecution, corporate criminal resolution, or civil forfeiture action'.

The whistle-blower pilot programme offers some support for continued employee use of corporate internal reporting systems – for example, by making prior reporting to such systems a factor that can increase an award's amount. However, the primary incentive – which allows an employee to be eligible for an award if they report to the DOJ within 120 days of making an internal report – also significantly (and deliberately) increases the pressure on a company to self-report within that timeframe as well. A temporary amendment to the DOJ CEP that coordinates with the pilot programme allows the presumption of declination to remain in place for a company if the company self-discloses an issue to the DOJ within 120 days of receiving the internal report of allegations. In response to this new programme, companies subject to DOJ jurisdiction should assess their current internal reporting, investigation and self-disclosure processes to ensure that they account for the new potential risks and benefits offered.

Since late 2020, the SEC's Dodd-Frank whistle-blower programme has operated under a set of amendments designed to increase employee whistle-blowing to the agency. The rules allow for awards that result in DPAs and NPAs entered into with the DOJ and settlement agreements entered into with the SEC -- the most common forms of FCPA-related dispositions. Whistle-blowers can 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 be driving an increase in reports to the SEC before companies receive the same information internally -- though the public data on that to date continues to be mixed.

Publicity regarding sizeable whistle-blower awards may also encourage whistle-blowers to go to the SEC with compliance concerns. According to its own public reporting, FY 2023 was a record-breaking year for the SEC programme, in which the agency awarded almost US$600 million to 68 individuals (these account for awards for all eligible securities law violations, not just the FCPA). The same report notes that the SEC received 237 FCPA-related tips from whistle-blowers in FY 2023. 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 SEC's standard practice, so it is unclear what type of investigation or disposition triggered the payment, but the award received significant attention from mainstream media at the time.

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, as highlighted by the recent Snyder Supreme Court decision, 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.

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 several 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 Gunvor (from March 2024), Glencore, Goldman Sachs, Ericsson, Mobile TeleSystems and Airbus – have featured some of the largest combined penalties in the history of FCPA-related enforcement. While not in the 'Top 10', recent dispositions with Albemarle (US$ 219 million in penalties in September 2023), ABB (US$460 million in penalties in December 2022), and Honeywell (over US$200 million in penalties in December 2022) show that FCPA cases still can involve substantial fines and other losses for companies.

Beyond the DOJ's flurry of policy revisions and guidelines noted above, perhaps the clearest indicator of the current administration's commitment to the fight against corruption is the 3 June 2021 National Security Study Memorandum (NSSM) issued by President Biden. 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. The passage and signing of FEPA in December 2023 is the most concrete result to date of this focus.

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 -- which, in a setback for the administration, were enjoined by a federal court in March 2024, though that ruling is being appealed), 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 11 December 2023, the White House issued its latest 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, noting actions by the Department of State, USAID, and the FBI among other agencies. The fact sheet highlighted FCPA and money laundering cases and international cooperation with other countries' law enforcement authorities. The White House also cited financial sanctions on 'more than 130 individuals and entities engaged in corruption and related activities, spanning 17 countries', as well as 'public visa restrictions on more than 90 individuals for their involvement in significant corruption'; the use of such visa restrictions was bolstered by a presidential proclamation issued on the same day as the fact sheet. The report also noted several recent cases involving the repatriation of stolen public funds (eg, the DOJ's repatriation of over US$53 million in assets stolen by a former Nigerian petroleum minister).

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. Recently, for example, the Treasury Department issued sanctions in March 2024 against the current President of Zimbabwe and others 'for their involvement in corruption or serious human rights abuse'. A former president and minister of energy and mining in Guatemala, along with their family members, were sanctioned in January 2024 for 'widespread bribery schemes'. In December 2023, the Treasury Department sanctioned two former Afghan government officials for their extensive roles in transnational corruption; the sanctions covered 44 associated entities located in multiple countries, including Afghanistan, Germany, Cyprus, the United Arab Emirates, Austria and the Netherlands. The ongoing Russian invasion of Ukraine has significantly increased the scope of these economic and other sanctions, which target assets across the world linked to corrupt actors in Russia.

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. The agency will continue to assess the potential effects of the Supreme Court's Jarkesy decision and, while corporate FCPA cases will likely still be driven by negotiated settlements, the need to adjudicate other cases in federal court could further slow the pace of enforcement activity.

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, which is celebrating its 25th anniversary in 2024. 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, to avoid 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'. More recently, in November 2023, the DOJ announced its new International Corporate Anti-Bribery Initiative (ICAB), an effort to facilitate cooperation with authorities in other, unidentified jurisdictions where historically the DOJ has not had significant levels of cooperation. The ICAB will be driven by three designated DOJ prosecutors, and DOJ officials have stated that ICAB efforts will 'start by focusing on regions where we can have the most impact in both coordination and case generation, with a focus on key threats to financial markets and the rule of law'.

As to specific enforcement actions that have involved significant multilateral cooperation involving US authorities, the December 2016 global settlement by the Brazilian conglomerate Odebrecht and its petrochemical subsidiary Braskem that resulted in the companies agreeing to pay more than US$3.5 billion in combined penalties to Brazilian, US and Swiss authorities signalled the extent to which global investigations and settlements are becoming the norm for the DOJ and SEC. DOJ officials continue to cite the case in 2024 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. These cases have again come into focus in Brazil as at least one court there recently has questioned the process of evidence-gathering and voided some of the results under Brazilian law, though the US dispositions are not affected by these rulings.

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

- the March 2024 case with Gunvor involving US, Swiss and potentially Ecuadorian authorities;
- the January 2024 dispositions with SAP involving the US and South African authorities;
- the August 2023 dispositions with Corficolombiana that involved publicly discussed intensive cooperation between US and Colombian authorities;
- 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; and
- the June 2021 dispositions with Foster Wheeler involving US, UK and Brazilian authorities.

In the Gunvor case, the DOJ required Gunvor to pay 50 per cent of the criminal fine within 10 days of the judgement and agreed to credit the remaining amount for any amounts that Gunvor pays to the Swiss and Ecuadorian authorities within one year of the judgement. The same day, the Swiss Office of the Attorney General announced a parallel resolution that required the company to pay the Swiss authorities US$98 million; there is an ongoing case in Ecuador against Gunvor and related individuals that has not been resolved as of the date of publication. 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.

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, 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 the 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.

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, regularly 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 statements from senior agency officials. For example, the October 2021 Monaco Memorandum asserts that '[o]ne of the most effective ways to combat corporate misconduct is to hold accountable the individuals who perpetrated the wrongdoing'. The CEP 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 in public statements, though in the FCPA area, the agency has lagged significantly behind the DOJ in terms of the number of cases publicly resolved over the past several years.

The number of publicly announced resolutions against individuals by both US enforcement agencies in 2023 and the first half of 2024 remains somewhat below pre-2019 levels, though activity levels have picked up more recently. The DOJ has continued to obtain plea agreements and jail terms from and for 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. The implementation of FEPA likely will allow prosecutors to bring even more 'demand-side' cases.

Recent high-profile defendants have included a former Comptroller General of Ecuador (convicted by a federal jury in April 2024 after a two-week trial for his role in a a multimillion-dollar money laundering and bribery scheme), as well as former executives at Stericycle and Maxwell Technologies, each of whom plead guilty to violations tied to prior corporate dispositions involving those companies. Roger Ng, a former managing director for Goldman Sachs convicted in 2022 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, was sentenced to 10 years in prison and ordered to forfeit US$35 million in March 2023. Ng was returned to Malaysia in October 2023 for further proceedings there.

In August 2024, a US federal jury convicted Manuel Chang, the former Finance Minister of Mozambique, of conspiracies to commit wire fraud and money laundering in connection with his alleged role in running fraudulent transactions in connection with government-led projects that were intended to boost maritime security and develop Mozambique's tuna fishing industry – the 'tuna bond' scheme – and paying over US$200 million in bribes and kickback to himself, his conspirators and other Mozambican government officials. Notably, the DOJ's announcement of the verdict included expressed appreciation to the authorities of the UK, Switzerland, Spain, Portugal and South Africa for cooperation in the case.

In February 2024, after a seven-week trial, a federal jury in New York convicted former Vitol commodities trader Javier Aguilar on FCPA and money laundering conspiracy charges connected to his alleged role the payment of bribes to officials of Petroecuador, Ecuador's state-owned oil company. This result occurred despite some initial setbacks for the DOJ, when in August 2023 the New York federal judge dismissed some additional charges related to allegations of bribery in Mexico due to lack of venue. Subsequently, the DOJ brought additional charges against Aguilar in a federal court in Texas, where a trial that was originally scheduled to begin in mid-April 2024 was pushed back. In August 2024, after losing post-trial motions in New York, Aguilar agreed to plead guilty to FCPA and related conspiracy and money laundering charges to resolve the Texas case. During the New York trial, the judge issued several substantive, though non-precedential rulings, including related to the scope of the FCPA's 'local law' affirmative defence.

The DOJ has faced setbacks in other cases against individuals, though even in those cases the agency often has prevailed overall. An example involves a long-running prosecution of a Swiss national, Paulo Jorge Da Costa Casqueiro Murta, who was charged in an alleged international bribery scheme between US-based businesses and Venezuelan officials. A federal district court dismissed the charges against Murta in July 2022 based on jurisdictional and other grounds. In February 2023, the US Fifth Circuit Court of Appeals reversed this decision and remanded the case to trial.

The district court judge dismissed Murta's indictment for a second time in May 2023, and in November 2023 — and again in a superseding opinion in early January 2024 — the Fifth Circuit affirmed the trial court's dismissal of the indictment related to aspects covered by the Speedy Trial Act. However, the appeals court concluded that the trial court erred in finding that delays created by Murta's fight against extradition to the US violated Murta's constitutional rights and reversed the district court's order dismissing the case with prejudice, sending the case once again back to the trial court level. Finally, in May 2024,

Murta and the DOJ agreed to a disposition under which Murta pleaded guilty to one count of conspiracy to violate the FCPA that resulted in the trial judge sentencing Murta to time served and forfeiture.

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 rarely result in such court judgements). 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 ultimately 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.

The SEC's most recent FCPA-related individual action dates back to 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.

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 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 efficacy.

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 workings 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, a senior DOJ official 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.

With further regard to compensation, the DOJ guidance 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 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 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 second initiative focuses on DOJ expectations regarding company policies on employees' use of 'ephemeral messaging applications' (such as WhatsApp, Signal, 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 the 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.

In several corporate resolutions beginning in the second half of 2023, the DOJ included significant revisions to the standard attachment in the relevant disposition documents (usually labelled Attachment C) that describes minimum elements that a company subject to a DPA, NPA, or guilty plea must satisfy to exit a monitorship or self-reporting period. The changes emphasised the importance of certain activities (such as risk assessments) and significantly raised expectations in the areas of company culture, third-party management, mergers and acquisitions (M&A) integration, and more. While these obligations are specific to the companies subject to the relevant resolutions, they reflect the DOJ's current thinking on compliance best practices and are a useful tool for companies to use in self-evaluation of their own programmes.

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, 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 or 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 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 revised 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 eventually 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's 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 potential conflict with the GDPR's restrictions on the processing and disclosure of EU data subjects' personal data. 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.

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 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 judgement 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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