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ANTI-CORRUPTION 2021

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United States

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

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

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

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

The United States remains the most active country in the world in enforcing laws prohibiting foreign bribery against both corporations and individuals, primarily through the US Foreign Corrupt Practices Act (FCPA) (which features anti-bribery and accounting/internal controls requirements) and laws against money laundering and certain types of fraud. As has been the case historically, US government investigations of companies continue to be resolved almost exclusively through negotiated dispositions, and many actions against individuals also are concluded prior to any 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 both companies and individuals.

As with most other areas of corporate endeavour (and life generally), the ongoing covid-19 pandemic has had a significant impact on FCPA-related enforcement by the US government. This impact has been evident through the first half of 2021 and likely will continue through the end of the year, depending in part on the impacts of the delta variant of the coronavirus. Throughout the pandemic and despite reduced numbers of announced enforcement actions, the DOJ and SEC have continued to message publicly that the agencies' commitment to FCPA enforcement has not subsided. As will be discussed, the Biden administration also has emphasised the importance of anti-corruption efforts to US national security.

The impact of the pandemic and related lockdowns on FCPA-related investigations has been felt in some – but not all – relevant areas. Most notably, practical limitations on the agencies' abilities to conduct in-person interviews have arisen, though both the DOJ and SEC have moved to adapt in some cases to video and other online solutions. Such alternative methods raise their own concerns regarding, for example, security and confidentiality (eg, secure video feeds, awareness of who is involved but not seen, unauthorised recording) and whether company or individual counsel can effectively represent their clients in such remote settings. On the other hand, many other core investigation activities, such as the production of documents by companies to the agencies (which can largely be performed remotely through technology platforms), as well as status calls and factual briefings, have continued with relatively few adjustments. Indeed, the DOJ and SEC have options available to open and conduct investigations that do not require formal action by grand juries or courts – the DOJ through its FCPA Corporate Enforcement Policy, which encourages self-disclosure and voluntary cooperation by companies to gain leniency, and the

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John E Davis

SEC through its various administrative processes. There have been significant impacts on FCPA cases involving individuals, though as US courts have reopened in the spring of 2021 the agencies and courts have started working through the backlog, especially as to sentencings.

It is clear that the pandemic has produced and will continue to cause a decline in the pace of existing enforcement cases, at least in the short term. This is especially true in cases that will require multilateral cooperation (as many cases these days do), since the coronavirus outbreak has had vastly different impacts in different countries and their governing institutions. In 2020, the US enforcement agencies announced 25 enforcement actions (some of which were combined) – the lowest total since 2015. And in 2021, through the middle of August the agencies have announced only eight actions – a figure that is significantly off pace from the number of announced resolutions as of the same date in previous years. It bears noting, as I have done in past editions of *Anti-Corruption*, 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

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"Recently, the US authorities imposed substantial penalties and disgorgement for FCPA-related violations against major corporations such as Deutsche Bank (US$122 million in January 2021) and Goldman Sachs (US$2.9 billion in October 2020)."

firm and others are necessarily incomplete because neither the DOJ nor the SEC disclose official investigations statistics in real time and only some companies are likely to disclose such information through SEC filings or other means.

Even though corporate and white-collar enforcement by the previous US administration was less active than the efforts of some of its predecessors, FCPA enforcement continued at a notable pace. For example, there were 44 FCPA-related resolutions in 2019 (the last year not affected by the pandemic) – the most since 2016 and the third-highest total since 2010. Recently, the US authorities imposed substantial penalties and disgorgement for FCPA-related violations against major corporations such as:

- Deutsche Bank (US$122 million in January 2021);
- Goldman Sachs (US$2.9 billion in October 2020);
- Novartis (US$347 million in June 2020);
- Airbus (US$3.9 billion in January 2020); and
- Ericsson (US$1.06 billion in December 2019).

There is little doubt that the Biden administration will continue to emphasise anti-corruption enforcement, such that cases likely will increase as pandemic-related

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effects are handled or recede. For example, during his Senate confirmation process, new US Attorney General Merrick Garland stated that he was committed to 'vigorous enforcement of the Foreign Corrupt Practices Act and other federal anti-corruption laws.' SEC Chairman Gary Gensler is expected to enhance the SEC's focus on misconduct by corporations, including violations of the FCPA. Chairman Gensler can be expected to seek to exact large penalties in the various cases the SEC brings, likely with less concern about the impact of corporate fines on public companies than under the previous administration.

FCPA cases managed by the DOJ remain subject to the FCPA Corporate Enforcement Policy, which has been 'codified' in the DOJ's Justice Manual (section 9-47.120). The policy promises a 'presumption' of declination of enforcement for all companies that meet certain conditions – a presumption that may be overcome only if there are 'aggravating circumstances' that include involvement by executive management, significant profit earned from the misconduct, pervasiveness of misconduct within the company, and criminal recidivism. The policy sets forth three conditions that companies must satisfy to be eligible for declination:

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

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

Qualifying for a declination under the policy does not necessarily allow a company to walk away from an FCPA investigation without consequences. First, the policy makes clear that a company will be required to pay 'all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue,' which could result in significant financial consequences even if no criminal fines are imposed. Declinations decided pursuant to the policy are made public, which means that a company may still face public scrutiny into its conduct – though most public companies announce FCPA investigations when they disclose potential issues to the US agencies. Finally, a DOJ declination does not apply to any SEC case, if that agency has jurisdiction. For example, in August 2020, World Acceptance Corporation settled

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an SEC FCPA action by paying fines and disgorgement worth US$21.7 million, even as the DOJ declined to prosecute the company for similar conduct under the Corporate Enforcement Policy.

In July 2020, the DOJ and SEC released a second edition of the *Resource Guide to the US Foreign Corrupt Practices Act (FCPA)*, which summarises the key aspects of the FCPA, sets out the agencies' positions related to interpretation of statutory provisions and relevant legal principles, and discusses the agencies' enforcement policies and priorities, including as to the requirements and benefits of an effective FCPA compliance programme and related controls. The guide is 'non-binding, informal, and summary in nature' and its text 'does not constitute rules or regulations'; however, the US agencies have stated that they plan to act consistent with the positions articulated in the guide in specific matters. The Guide's second edition is an update that accounts for almost eight years of developments – including some international developments – since the original's issuance in 2012.

The updated guide integrates and summarises DOJ policies introduced since the first edition, including the FCPA Corporate Enforcement Policy; the policy on 'Coordination of Corporate Resolution Penalties' (also known as the policy against 'piling on' of penalties); guidelines on the 'Selection of Monitors in Criminal Division Matters'; and the guidance on 'Evaluation of Corporate Compliance Programs.' Some of these policies receive their own new summary sections, while others have driven changes seeded throughout the guide's text. The FCPA Resource Guide also summarises long-standing SEC policies, noting for example that the DOJ's Corporate Enforcement Policy 'does not bind or apply to the SEC'. All in all, the updated FCPA Resource Guide remains a useful source of information on the DOJ's and SEC's views regarding the interpretation and enforcement of the FCPA. Users of the guide should continue to be aware, however, of the guide's status as a non-binding summary and its US-centric views. Because of that focus, the guide in some places omits or does not fully discuss key aspects of FCPA-related investigations and compliance issues that companies face in their day-to-day operations, especially as they pertain to interactions with the laws of other countries.

Other than co-authoring the FCPA Resource Guide (which restated existing agency policies), the SEC did not undertake significant changes in policy or processes regarding FCPA investigations in the past year. A key focus of the agency over the past year was the June 2020 decision by the US Supreme Court in *Liu et al. v SEC*, which confirmed that the SEC has the authority to collect disgorgement as a form of equitable relief but established certain conditions for allowing that practice to continue. The Court decided that the SEC can seek disgorgement as an equitable remedy if the award meets certain characteristics (derived from historical equity practice); the award must be: distributed to the defrauded parties, based on a theory

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of individual (versus collective) liability, and limited to only the net profits of the fraudulent scheme.

In response to this decision, on 1 January 2021, as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA), Congress clarified that the federal courts have statutory authority to order disgorgement – and other equitable remedies – for violations of federal securities laws, including the FCPA, that result in 'unjust enrichment'. In addition, in certain cases (involving 'scienter' or intent – which the SEC likely will assert include the FCPA's anti-bribery provisions), the NDAA states that the courts can authorise equity-based remedies for a period of up to 10 years from the latest date of a violation. Finally, the NDAA automatically tolls the limitations periods for disgorgement and equitable relief during 'any time in which the person against which the action or claim, as applicable, is brought is outside of the United States'. The language makes no distinction between individuals ('natural persons') and corporations; it is unclear as yet how the SEC will apply this provision to companies.

With regard to anti-corruption laws applicable to US federal and state officials, while the 2016 US Supreme Court decision that overturned the corruption-related

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conviction of former Virginia governor Robert McDonnell has had significant effects on some high-profile cases, DOJ enforcement personnel have continued to prosecute and convict corrupt officials and payors of bribes in various contexts. Arguably, the *McDonnell* case makes it more difficult for prosecutors to build and win cases that do not have evidence of an explicit agreement by the official to use his or her position in return for benefits – a concern illustrated by multiple instances of courts overturning previous corruption-related convictions of public officials in response to the *McDonnell* holding. The most notable such cases involved a 2017 mistrial in the case against US Senator Robert Menendez of New Jersey on 14 corruption-related counts related to gifts, travel and donations from a Florida physician allegedly in return for intervening on behalf of the donor's business and personal interests, as well as successful appeals in high-profile corruption cases, including convictions of former New York State Assembly Speaker Sheldon Silver and former Pennsylvania Congressman Chaka Fattah – both of whom were granted new trials.

Further, in May 2020, the US Supreme Court overturned the convictions of two former aides to the former Governor of New Jersey related to the so-called '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.

Despite the challenges raised by these Supreme Court precedents, prosecutors have continued to have successes in cases of public corruption by US officials, including in dozens of local or regional cases. For example, Silver and a co-defendant were convicted for a second time of various charges, including bribery, honest service fraud, extortion and money laundering, and was sentenced (again) to over six years in prison in July 2020. Fattah was also re-sentenced to 10 years in prison in July 2019, largely on the basis of his convictions on related crimes, such as racketeering, mail fraud and wire fraud. In March 2020, former US Representative Duncan Hunter of California pled guilty to a charge of misuse of campaign funds to resolve more than 60 counts (including corruption-related allegations) against him and his wife and was sentenced to 11 months in prison (though he was pardoned in December 2020 by then-President Trump).

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, industrial engineering and construction, financial institutions, information technology, aircraft manufacturing, telecommunications, retail, software, mining, and oilfield services.

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"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."

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 settlements. Recent examples include Amec Foster Wheeler/John Wood Group (UK), J&F Investimentos (Brazil), Novartis (Switzerland), Airbus (Europe), Ericsson (Sweden), TechnipFMC (UK), and MTS (Russia).

US agencies continue to target corrupt activities around the world, though data continues to show that business activities in China are the ones most frequently involved in public resolutions – the 58 resolutions involving China during the period 2009–2020 constitute almost 25 per cent of the combined corporate FCPA actions during that period. Recent China-related cases involve dispositions with Novartis (June 2020), Cardinal Health (February 2020), Airbus (January 2020), and Ericsson (December 2019). 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 between 2009 and 2020 are Brazil (largely due to the massive and ongoing 'Car Wash' investigation there), Mexico, Nigeria, Indonesia, Russia, India, Angola, Iraq and Saudi Arabia. Several recent FCPA cases also have

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reinforced the corruption risks generally present in Central Asia, the Middle East and South East Asia.

On the US domestic side, federal prosecutors continue to look for high-profile cases at all levels of government – for example, in July 2020, prosecutors arrested and charged the Ohio House Speaker, Larry Householder, and four others with crimes connected to an alleged US$60 million in bribes paid to secure a state bailout totalling as much as US$1 billion for two nuclear energy power plants. The federal US Attorney said in a public statement on the case: 'This was bribery, plain and simple. This was a quid pro quo. This was pay to play.' Since that time, one of the companies involved, Commonwealth Edison (ComEd), agreed in July 2020 to a deferred prosecution agreement (DPA) with federal prosecutors in Ohio in which ComEd agreed to pay a US$200 million criminal penalty to address various charges – including a charge related to criminal misconduct under the FCPA's accounting provisions. In July 2021, the other company, FirstEnergy Corp, agreed to a DPA and paid a criminal penalty of US$230 million to address a charge of 'conspiracy to commit honest services wire fraud' related to its payments to entities connected with Householder. Several former ComEd executives, including the former CEO, have been indicted, and

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in October 2020 a former aide to Householder and a lobbyist pled guilty to charges related to their roles in the scheme. The various charges likely will continue to play out over the next couple of years.

More typical cases include a May 2020 guilty plea by the former CEO of a Virginia-based government contractor related to his conspiring to bribe the former Director of Procurement for the US Pension Benefit Guaranty Corporation (PBGC) through cash, gifts and the promise of a job in exchange for steering PBGC contracts to his company (the former PBGC official also pled guilty for his role in the scheme). In March 2020, a federal jury in North Carolina convicted the chairman of a multinational investment company and a consultant on public corruption and bribery-related charges for their involvement in a scheme to funnel millions of dollars to the campaign of a commissioner of the North Carolina Department of Insurance in exchange for the removal of another commissioner responsible for regulating an insurance company the executive owned.

Certain signals from the Trump administration regarding, at minimum, a lack of sensitivity to domestic public corruption may have undermined the overall enforcement climate, and certainly affected specific cases. The number of former Trump administration cabinet members and other senior officials who resigned under the cloud of ethics issues, continuing allegations of violations of the US Constitution's Emoluments Clause, the February 2020 commutation by the President of the corruption-related sentence of former Illinois Governor Rod Blagojevich, and the December 2020 pardon of former Representative Hunter all contributed to perceptions that the prior administration did not concern itself much with public corruption issues related to US officials. The Biden administration has signalled that it will return to previous norms followed by past administrations led by both US political parties, focusing on curbing public corruption both abroad and at home.

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

The economic environment created by the covid-19 pandemic almost certainly has increased FCPA-related compliance risks (and, in the long term at least, related investigation and enforcement risks). Many critical compliance activities – including internal investigations, compliance risk assessments, third-party due diligence and monitoring, and operating company audits – have been curtailed by restrictions on travel and by limitations in company ERP and other controls systems. At the same time, companies' risk profiles are in many cases changing rapidly, due to plant closures, supply chain disruptions (and in many cases increasing reliance on third parties), restrictions on the movement of gatekeeper personnel and management

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compliance champions, pressures on financial targets, and more – many of which create additional opportunities for corruption and fraud. There is and will continue to be significant pressure on transactions deemed critical to company success or survival, with attendant calls by management to get them done quickly and without the time or expense associated with normal compliance-related due diligence and other safeguards.

Managing these compliance-related challenges in the face of time pressures and reduced resources will continue to require active planning and creativity. Staying on top of changing company risk profiles is critical to adapting and targeting diminished compliance resources to their best use. Among other actions, company compliance personnel should consider such activities as updated management messaging on company values and ethics programmes, increased virtual training, and accelerating planned monitoring activities through virtual methods when possible. And compliance personnel can take valuable data from this time period to learn longer-term lessons regarding where companies should invest in, for example, upgrades to ERP systems or tools for remotely directed investigation activities to be better prepared for the next crisis. As pandemic restrictions ease, compliance personnel should focus their attention on the higher risk locations that become accessible as in-person training, meetings and compliance monitoring activities increase.

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 updated 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 June 2020 *Novartis* case cited benefits to doctors and health workers employed by public hospitals in several countries (including Greece and China) as payments to 'officials'; the July 2020 *Alexion* case involved similarly situated healthcare providers in Russia.

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The January 2021 *Deutsche Bank* disposition involved payments to employees of at least one sovereign wealth fund. 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 shows that close to 75 per cent of FCPA cases in the last 10 years involve actions by third parties. Recent cases that have involved corporate liability for actions by third parties include resolutions with Deutsche Bank (involving specific third parties the bank called 'business development consultants'), Goldman Sachs (involving payments to financier Low Taek Jho), Beam Suntory, Vitol (involving some payments through a Brazilian 'doleiro' – a professional money launderer and black-market money exchanger), Eni, Novartis, Airbus, Cardinal Health, and Ericsson.

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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 July 2020 edition of the FCPA Resource Guide continues to use this case as the best 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 critical to managing this key area of risk. It is noteworthy that, in several of the cases noted in the previous paragraph, such policies and processes were in place but were deliberately circumvented by company personnel, including, in some cases, senior executives.

Inadequate internal accounting controls and violations by public company employees of the books and records provisions are another key area of FCPA risk. The relevant statutory requirements apply to all areas of corporate conduct (and there have been hundreds of non-bribery cases involving these requirements). However, in the FCPA area, the SEC uses the broad reach of these rules – issuers are responsible for worldwide compliance with these requirements by almost all subsidiaries, including even minority-owned affiliates over which the issuer exercises control – to penalise corrupt activities that may fall outside the DOJ's criminal jurisdiction or that do not meet all of the elements of an anti-bribery violation. A recent example is the April 2020 *Eni* matter, in which Eni paid almost US$25 million to resolve SEC allegations that Eni did not in 'good faith' implement effective internal accounting controls at its minority-owned subsidiary, which nonetheless the company controlled. Compliance professionals should work closely with their finance and accounting function counterparts to ensure that the relevant internal accounting controls are consistent with the company's compliance processes and that business transactions are accurately recorded in the company's records.

Finally, several recent developments make the management of whistleblowers an increasingly important priority. In December 2020, amendments to the rules governing the SEC's whistleblower programme went into effect. The rule amendments contain significant reforms that are likely to result in increased employee whistleblowing. For example, the SEC expanded the definition of enforcement 'action' by the agency to include DPAs and NPAs entered into with the DOJ and settlement agreements entered into with the SEC. These are the most common forms of FCPA-related dispositions, and in February 2021, the SEC issued its first award based on an NPA or DPA with DOJ. The SEC also has changed the way that

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awards are calculated – whistleblowers now automatically receive the statutory maximum for awards at certain levels (absent the existence of negative factors or an 'unreasonable delay in reporting'), which provides greater certainty regarding the size of eventual awards and may well result in higher awards generally. Finally, the rules make clear that, to be eligible for anti-retaliation protections, whistleblowers must first report information to the SEC rather than through internal company reporting tools. Given that a reported 81 per cent of employee whistleblowers in 2020 raised concerns internally before going to the SEC, this rule change could well drive a significant increase in reports to the SEC before companies receive the same information internally.

Publicity regarding sizeable whistleblower awards also likely will encourage whistleblowers to go to the SEC with compliance concerns. The SEC awarded a record-breaking amount of monetary awards (approximately US$175 million to 39 individuals) in 2020 (these account for awards for all eligible securities law violations, not just the FCPA). Individual awards are also receiving more prominent mentions in the media. For example, in May 2021, the SEC announced a US$28 million dollar award to a whistleblower who provided information that led to

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"Notably, [under the US Treasury Department's stolen assets whistleblower progamme,] a whistleblower tip need not lead to a successful prosecution in order to make the whistleblower eligible for award."

2018 FCPA enforcement actions against Panasonic Avionics Corporation. The award is one of the 10 largest ever handed out under the SEC's Dodd-Frank whistleblower programme. Notably, the SEC granted the award despite the fact that 'there [was] not a strong nexus' between the whistleblower's tip and the conduct at issue in the eventual enforcement actions.

In addition to the SEC rules, the January 2021 NDAA enhanced the US Treasury Department's anti-money laundering whistleblower programme, increasing award caps, adding additional whistleblower reporting incentives, and upgrading the anti-retaliation protections. The NDAA also established a new Treasury Department whistleblower pilot programme (as part of the Kleptocracy Recovery Rewards Act (KARRA)) under which the Treasury may award up to US$5 million to whistleblowers who provide information leading to the restraint, seizure, forfeiture, or repatriation of 'stolen assets' (ie, funds traceable to foreign government corruption). The assets must be held in an account of a US financial institution (including US branches of foreign financial institutions), have come within the US, or have come within the possession or control of any US person. Notably, a whistleblower tip need not lead to a successful prosecution in order to make the whistleblower eligible for award; it

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need only lead to the successful restraint or seizure of stolen assets. Currently, the awards are purely discretionary and certain key provisions remain undefined, but the KARRA programme could well provide additional incentives to whistleblowers.

US domestic bribery laws and enforcement actions typically focus on the specific and complex rules that govern federal executive branch employees; often these cases are combined with allegations of violations of detailed government contracting requirements. As noted, there are also prosecutions on the congressional side, though the rules governing lobbying, gifts or entertainment, and public disclosure requirements are sometimes drastically different from those for executive branch personnel. Finally, investigations of state officials can implicate the varying state-level laws and policies, which can differ from their federal counterparts and from the same laws in other states. Close coordination with a company's US lobbying and government relations functions and advice from experienced counsel on these rules are required to manage risks.

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

I do not expect a fundamental change in enforcement practices or priorities to take place, even in light of the substantial challenges created by the covid-19 pandemic. The pace of announced FCPA-related resolutions by the DOJ and SEC has varied over time, and during some periods can seem to drop off. However, that pace is driven by a number of factors, many of which are case-specific. Thus, it would be a mistake to assume that any apparent slowdowns (such as during the first halves of 2020 and 2021) signal a slowdown in investigations or a significant redirection of FCPA enforcement resources. One indicator of the ongoing commitment is the size of recent awards. Admittedly the cases involving such awards are years in the making, but recent cases in the past couple of years – including *Goldman Sachs*, *Ericsson*, *MTS* and *Airbus* featured some of the largest combined penalties in the history of FCPA-related enforcement.

Perhaps the clearest indicator of the Biden administration's commitment to the fight against corruption is the 3 June 2021 National Security Study Memorandum (NSSM) issued by President Biden – the first of his presidency. Citing corruption's substantial adverse financial effects on global GDP 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 concludes that countering corruption is a 'core United States national

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security interest.' The NSSM therefore directs various departments and agencies of the US federal government to conduct an interagency assessment and send a report to President Biden by 20 December 2021 with recommendations and strategies for upgrading the US fight against corruption.

The NSSM defines corruption broadly and focuses much of its discussion on the 'demand' side of the equation – on methods to prevent public officials from receiving or hiding their corrupt gains and to hold such persons and their enablers (especially financial institutions) accountable. Thus, while the FCPA is certainly a key tool for the administration's overall mandate 'to prevent and combat corruption', it is likely that many of the NSSM study's ultimate recommendations will focus on tools to fight the demand for corrupt payments, such as enhanced corporate transparency rules (building on new legal requirements created by the January 2021 Corporate Transparency Act – another part of the NDAA), strengthened anti-money laundering laws, expansions to US sanctions regulations (some of which – such as sanctions related to the US Magnitsky Act – already focus on corruption), and the expanded use other laws and resources, including the increased availability of intelligence and other national security methods and means.

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In the short term, the NSSM will not have a direct effect on FCPA enforcement. Any increase in announced cases for the rest of 2021 and into 2022 likely will be the legacy of the reduction of covid-19 pandemic effects on existing investigations and enhanced agency staffing. However, the recommendations that result from the NSSM-directed study could have significant long-term ramifications, including through proposed amendments to existing laws such as the FCPA and through the benefits of enhanced interagency and tools for international cooperation that likely will be one focus of the study's conclusions.

In the meantime, I expect that the DOJ will continue to look for cases that can be settled pursuant to the FCPA Corporate Enforcement Policy through formal declinations, in order to show companies tangible benefits for self-reporting issues to the DOJ and cooperating with investigations. The July 2020 update of the FCPA Resource Guide takes pains to detail a number of such declinations in the service of this message. The policy also incentivises compliance efforts by companies – since declination requires the DOJ to conclude that a company's compliance programme is effective at the time of the investigation's conclusion. Having a robust programme in place before an investigation occurs can potentially speed along the DOJ's decision on this requirement.

Some commentators and practitioners have questioned whether the Corporate Enforcement Policy actually achieves its goal of encouraging companies to self-report violations, pointing to some statistics showing a reduction in such reports and in FCPA-related investigations generally over the past few years. One argument is that the public nature of the policy's declinations and the potential financial penalties from the disgorgement requirements discourage companies from coming forward, especially since before the advent of the formal policy, declinations by the DOJ often were not public. This is an issue that DOJ leadership may review, as the Biden administration's DOJ policy team is now largely in place.

On the SEC side, the recent changes made by the NDAA clarifying the agency's equitable enforcement capabilities resolve many of the uncertainties created by the Supreme Court's decisions in the *Liu* and *Kokesh* cases. It is likely that some of the remaining boundaries of that authority will be tested in future court challenges, but those likely will not fundamentally affect the SEC's approach for at least the next several years, which includes focusing on using the FCPA's accounting requirements to address corrupt activities by companies and individuals for which criminal charges may be more difficult to bring. Indeed, the past careers of the SEC's new Chair and Director of Enforcement suggest that the SEC may well stake out more aggressive legal positions and to demand tougher sanctions from companies and individuals in the future.

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4 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?

US agencies have continued actively to pursue cooperation with other enforcement authorities in the past several years. Multinational investigations were a priority under the previous administration and the Biden administration likely will continue to look for additional opportunities for enforcement collaboration. Indeed, during a February 2021 webinar sponsored by the International Bar Association, the primary DOJ and SEC enforcement officials predicted a continuing increase in multi-jurisdictional investigations and coordinated resolutions – with the SEC official noting that future resolutions may involve jurisdictions with which US authorities have not coordinated in the past.

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

In May 2018, the DOJ announced a new policy directing its attorneys to coordinate with other enforcement authorities, both in the United States and abroad, with the aim of avoiding duplicative penalties for the same corporate misconduct. The policy 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 relevant factors largely codified existing DOJ practices and considerations, explicitly mandating coordination with US federal and state agencies and enforcement authorities in other countries and directing DOJ prosecutors to 'consider all relevant factors' in selecting enforcement methods and apportioning penalties for the same conduct among multiple authorities. The DOJ policy offers a greater level of certainty to companies facing multiple investigations, particularly those involving authorities outside the United States. However, the policy also adds to existing pressures on companies to disclose issues to and cooperate simultaneously with the DOJ and foreign agencies, with the consequent imposition of significant extra costs, risks, and related pressures.

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. Representatives of both US agencies in July 2019 cited enhanced working

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

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

The December 2016 global settlement by the Brazilian conglomerate Odebrecht and its petrochemical subsidiary Braskem that resulted in the companies agreeing to pay more than US$3.5 billion in combined penalties to Brazilian, US and Swiss authorities signalled the extent to which global investigations and settlements are becoming the norm for the DOJ and SEC. DOJ officials continue to cite the case in 2021 as a 'gold standard' for multinational anti-corruption cooperation. Apart from its record-breaking size at the time (which was tied to the fact that the improper payments paid by the companies totalled more than US$1 billion), the case is notable in that the Brazilian prosecutors took the lead – unsurprising, as the case is linked to the larger 'Car Wash' investigation that has gripped Brazil since 2014. The allocation of the combined penalties among the enforcement agencies reflects this – between 70 and 80 per cent of the penalties went to Brazil, and in the aftermath of an April 2017 court decision, the US agencies received the smallest portion of the actual criminal penalties.

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The DOJ has continued its involvement with the *Odebrecht* matter through supervision of an independent compliance monitor's activities and cases against individual defendants. Originally, the monitorship was scheduled to end in February 2020, but in January 2020 the DOJ and Odebrecht agreed to extend the monitor's term through November 2020. The DOJ asserted that the company had not fulfilled all of its obligations to enact the monitor's compliance programme recommendations, which Odebrecht linked to its ongoing financial struggles, illustrated by the company's June 2019 bankruptcy filing. Odebrecht completed the monitorship in November 2020, and the company was soon after rebranded as Novonor. As to individuals, in April 2021, Jose Carlos Grubisich, the former chief executive officer of Braskem (the Odebrecht petrochemical subsidiary), pleaded guilty before a US federal judge in New York to conspiracy to violate the FCPA for his role in the bribery schemes.

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

- the June 2021 disposition with Amec Foster Wheeler involving US, UK and Brazilian authorities;

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- the October 2020 settlements and leniency agreements with J&F Investimentos involving US and Brazilian enforcement agencies;
- the January 2020 disposition with Airbus involving US, French and UK agencies; and
- the June 2019 settlement with TechnipFMC involving US and Brazilian authorities.

In the *Amec 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 SFO cited a broader set of allegations than the US public case documents covered. The *J&F Investimentos* settlements with the DOJ and SEC noted that the agencies modified the US penalty and disgorgement levels downward in light of a separate leniency agreement between the company and Brazilian authorities under which J&F agreed to pay a fine of approximately US$1.4 billion and to support 'social projects' in Brazil through payments of US$414 million. The *Airbus* case surpassed the *Odebrecht* disposition to become the largest internationally coordinated resolution to date, with almost US$4 billion in combined global penalties. The complex payment arrangements saw France taking the largest share (about US$2.3 billion), with the agencies in other countries agreeing to credit or offset penalties paid to other jurisdictions. The massive investigation covered activities in 16 countries and took almost five years to resolve. The extensive international cooperation efforts were made possible in part by an agreement in 2016 between the UK and French agencies that allowed them to overcome significant legal and practical hurdles created by the French 'blocking statute's' significant restrictions on mutual legal assistance. In the *TechnipFMC* disposition, the majority of the criminal penalties (US$214.3 million of the US$296 million total), were paid to Brazil. The DOJ public announcement of the resolution stated that the governments of Australia, Brazil, France, Guernsey, Italy, Monaco and the UK all provided significant assistance in the investigation.

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) has in some cases created additional time-consuming hurdles to accessing witnesses and documents in key jurisdictions outside the United States. The GDPR joins other existing national data privacy and

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national security-based restrictions on access to information in various countries that have been involved in past FCPA-related enforcement actions, such as Russia and China. In addition, recent cases in, for example, Switzerland and the UK have created a wider gulf between the treatment of the attorney–client privilege in the United States and Europe, which may well affect the coordination of internal investigations by companies.

Cooperation also allows US and other authorities to share evidence that might not be within reach of one or the other agency, which can expose companies to liability based on conduct that might not otherwise have been discovered. Coordination among various agencies also can create significant delays in the process of resolving investigations – delays to which the US authorities can contribute. Indeed, a July 2021 DOJ report noted that the DOJ office handling international requests for legal assistance is 'challenged by [the office's] high pending caseload, difficulty hiring and retaining staff, and an antiquated case management system.' Companies therefore need to base important compliance decisions, such as whether or not to disclose a potential FCPA violation, in part on the possibility of cooperation among possibly several interested investigating jurisdictions.

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

The DOJ and SEC continue to target individuals, with a focus on identifying the highest-level company personnel who can be deemed responsible for improper payments or related wrongdoing. According to statements from the DOJ's Fraud Section, which is responsible for FCPA enforcement, various policies and initiatives are designed to enhance the DOJ's ability to 'prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove'. The DOJ's emphasis on individual prosecutions has been reinforced by elements of the FCPA Corporate Enforcement Policy and statements from senior agency officials. For example, in announcing changes to the DOJ's Justice Manual in November 2018, the then-Deputy Attorney General emphasised that pursuing individuals involved in corporate fraud continues to be a top priority for the DOJ, noting that 'the most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes'. To this point, the current policy on corporate accountability emphasises that a corporate resolution cannot shield individuals from criminal liability, absent 'extraordinary circumstances'.

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The SEC has continued to emphasise a focus against culpable individuals, though in the FCPA area the agency has lagged behind the DOJ in cases resolved over the past several years. For example, in 2020 the SEC concluded only two FCPA-related dispositions with individuals and resolved only three cases with individuals in 2019 (as compared to 20 DOJ resolutions with individuals for the same period).

The number of publicly announced resolutions against individuals by both US enforcement agencies in 2020 was substantially below 2019 levels and levels for the last few years. This decline was especially precipitous for the DOJ, which resolved only five such cases, as compared to 15 in 2019 and 10 in 2018. The effects of the covid-19 pandemic likely weigh heavier in actions against individuals than on corporate actions, since most cases involving individuals require extensive court-based activities, which were substantially curtailed for much of 2020 and into 2021. During that time, the DOJ continued to complete some long-running matters through remote activities. Indeed, in the second quarter of 2021, some of those activities resulted in a slight increase in announced guilty pleas by individuals, as well as a slew of sentencings for individuals that in many cases had been postponed in light of the pandemic.

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"[Some US federal courts have ruled that] only foreign nationals who are within the categories of persons covered by the FCPA's provisions can be prosecuted for conspiracy to violate the FCPA or aiding and abetting a violation of the FCPA."

It is often as a result of trials involving individuals that the US federal courts decide precedent-setting cases in the FCPA space (FCPA cases against companies almost never result in such court judgments). One notable 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 July 2020 in the new 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 autumn 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

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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 project, as would be required to create an agency relationship.' The judge upheld the money laundering charges and sentenced Hoskins to 15 months' imprisonment based on the verdict on those charges, despite his winning two separate legal arguments against the DOJ. The DOJ has appealed the trial judge's FCPA holding to attempt to blunt its precedential impact on other cases and is awaiting a decision.

In a December 2020 decision, a federal appeals court in New York in the case *US v Ho* affirmed a 2018 conviction of a former Hong Kong official, Patrick Ho, for FCPA and money laundering charges. The court's decision first confirmed that defendants may be charged under multiple provisions of the FCPA for behaviour in a single bribery scheme. Prosecutors had successfully obtained such dual convictions in the past, but courts had not previously been asked to rule on whether the two relevant jurisdictional prongs of the FCPA are mutually exclusive. In addition, the court's upholding of Ho's money laundering charges may encourage future enforcement actions involving transactions that flow through US correspondent bank accounts, but have no other US nexus, potentially strengthening the application of US anti-money laundering laws to behaviour that occurs largely abroad.

On the SEC side, the agency charged a former Goldman Sachs executive with FCPA and other charges in April 2020. The SEC notably did not charge Goldman Sachs itself with any misconduct related to the facts at issue (which were different from the facts and circumstances that resulted in Goldman Sachs' later October 2020 FCPA-related dispositions), and the SEC's complaint detailed how the former executive had circumvented his employer's compliance protocols and internal controls, including using personal email, lying to company legal and compliance personnel, and falsifying documents. This case is a rare example of the US agencies recognising a 'rogue employee' in light of facts demonstrating the effectiveness of a company's strong compliance programme and other steps taken by the company, including showing willingness to walk away from a substantial transaction when faced with high corruption risks.

Finally, in important cases linking the FCPA and US domestic public corruption areas, in August 2019 a federal appeals court rejected claims by two different defendants that the requirements set out by the US Supreme Court's *McDonnell* holding apply to FCPA cases. These decisions complement other appellate court cases in which those courts have declined to extend *McDonnell* to other federal anti-corruption and fraud statutes beyond the specific legal provision at issue in

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McDonnell's case. Otherwise, as with the FCPA, the DOJ often brings cases against individuals who have engaged in domestic bribery even after settling with their employers – as the earlier cited example involving the CEO of ComEd and other former ComEd executives shows.

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

As a general matter, the state of a company's compliance programme factors significantly in penalty guidelines and the discretion that both the DOJ and SEC have to negotiate dispositions of investigations. Both US agencies have issued guidance regarding what they consider to be the key elements of a corporate FCPA compliance programme as part of the updated July 2020 FCPA Resource Guide and as annexes to individual disposition documents.

The FCPA Corporate Enforcement Policy's presumption of a declination by the DOJ in certain cases requires, in part, timely and appropriate remediation of the

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

On 1 June 2020, the DOJ issued updated guidance on the 'Evaluation of Corporate Compliance Programs' intended to direct prosecutors on how to assess the effectiveness of a company's compliance programme. The new version updates DOJ guidance initially issued in February 2017 and substantively revised in April 2019. 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'.

Among the notable aspects of the updated guidance are:

- an emphasis on a company's documented rationale for specific decisions related to the design and implementation of its compliance programme elements;
- a focus on whether programme elements are integrated into the day-to-day business processes and financial controls of the company, including whether and how often employees actually access programme policies and resources;
- the need for a documented risk assessment as a starting point, to determine the 'degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks';
- an enhanced emphasis on collecting and using various data to track the effectiveness of programs;
- the importance of proactive justification of business rationales for third parties – that is, asking whether such third parties are needed at all, and if so what qualifications should they have to be legitimate and effective – as well as a focus on third-party risk management not just at the beginning but 'throughout the lifespan of the relationship';
- 'timely and orderly integration' of acquired or merged entities into a company's compliance programme; and
- an emphasis on 'lessons learned' during programme operation and using such lessons to improve the programme over time.

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The update also notes potential challenges to programme operations created by host country laws and tells prosecutors to approach such issues with scepticism, especially as to 'impediments' to data transfers. The guidance instructs prosecutors to ask specific questions companies about how they have 'addressed the [relevant foreign law challenge] to maintain the integrity and effectiveness of its compliance program while still abiding by foreign law'.

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

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

US data privacy laws generally are less stringent than such laws in Europe, Russia and the former Soviet Union, and China. Companies in the United States, for example, can generally share personal data with third-party service providers, such as outside counsel, auditors, as well as with government regulators and investigatory authorities. Certain laws, such as the US Freedom of Information Act (FOIA), 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 exceptions that allow companies to collect, process and view information from their employees during an investigation. Those exceptions run through to the end of 2021 (due to approval of a companion law, the California Privacy Rights Act, in November 2020), but there is substantial business pressure to make them permanent.

The primary challenge for companies subject to the FCPA is complying with host country restrictions on information sharing and data processing while simultaneously being able to access compliance-sensitive company information when needed to operate compliance programmes, conduct internal investigations of allegations of misconduct, or respond to requests or demands for information by US enforcement

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"Even the most restrictive data privacy law in the United States currently contains exceptions that allow companies to collect, process and view information from their employees during an investigation."

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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 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 full impact of this decision on investigations remains under evaluation. Finally, 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 have roughly until the end of 2022 to implement these clauses fully,

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but their broad scope and some undefined terms within raise additional unresolved issues for companies seeking to navigate 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.

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

Processing of personal data may only occur under a strict set of circumstances and only for a clearly articulated and legal purpose, and must be limited to only what is necessary to fulfil the legal basis for the processing. The purposes most applicable to internal and cross-border investigations include processing that is necessary for a contract with a data subject, necessary for the company 'controller' to comply with EU law, or for the controller's 'legitimate interest'. This last purpose – a 'legitimate interest' – may be the most potentially useful legal basis available to most companies conducting investigations. Companies may argue that they have a legitimate interest in investigating, stopping or preventing possible corruption or addressing internal compliance issues. The fact, however, that such investigations and related legal advice may result in a company decision to cooperate with a US or other country enforcement action to minimise or possibly eliminate criminal liability and any commensurate financial penalty can create significant complications for the company's obligations to comply with the GDPR, especially if the concerns raised by the July 2020 ECJ decision come into play.

Indeed, the FCPA Corporate Enforcement Policy's requirement that a company produce all relevant documents, including overseas documents, on its face creates a clear conflict with the GDPR's restrictions on the processing and disclosure of EU

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data subjects' personal data. And the penalties for violations of or non-compliance with the GDPR are severe – up to 4 per cent of a company's global annual revenue or €20 million, whichever is greater. A company deciding whether to provide documents and data to the US government therefore faces a dilemma – those wishing to benefit from the DOJ policy must balance the benefits of a potential declination or a reduced financial penalty with the risk of significant fines under the GDPR. The DOJ policy places the burden on the company to justify its argument that it cannot disclose documents, and the company must show specific efforts to identify all available legal avenues to locate and produce relevant material. Companies and their external counsel will be challenged to think creatively about how to collect and produce information sufficient to obtain cooperation credit from the DOJ, while minimising the risks of liability under the GDPR.

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

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The Inside Track

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

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

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

US domestic bribery laws are a patchwork that sometimes can create compliance contradictions. Analysing specific issues requires identifying whether federal or state laws control, the identity and position of any official within government (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 in 2019. 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 internal accounting controls 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 DOJ and SEC, many of which also involve interactions with agencies in other countries; we are adapting quickly and efficiently to manage the many challenges to these investigations created by the current covid-19 pandemic.

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