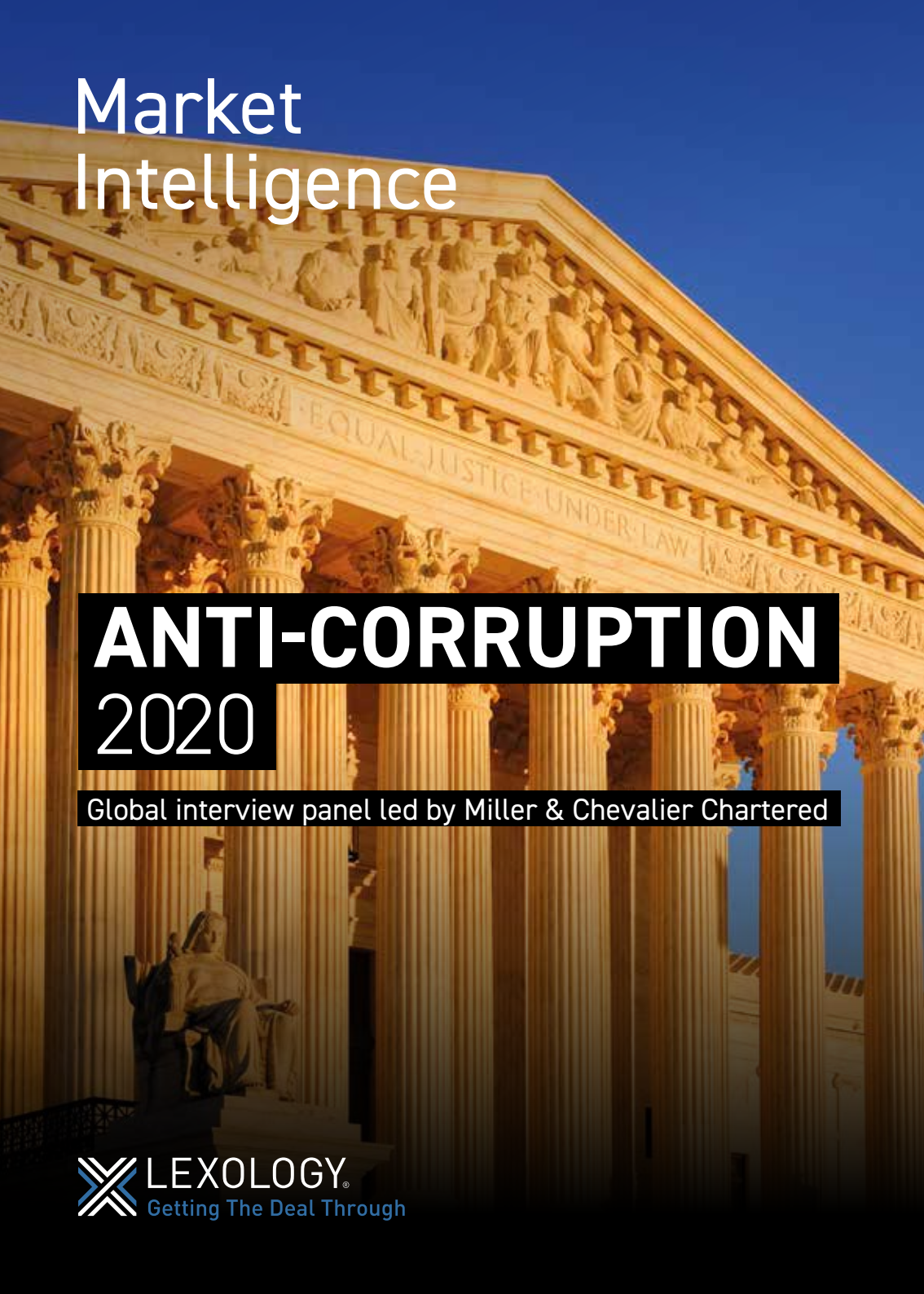
Market Intelligence

ANTI-CORRUPTION 2020

Global interview panel led by Miller & Chevalier Chartered



LEXOLOGY®
Getting The Deal Through

LEXOLOGY
Getting The Deal Through

Publisher
Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager
Dan Brennan
dan.brennan@gettingthedealthrough.com

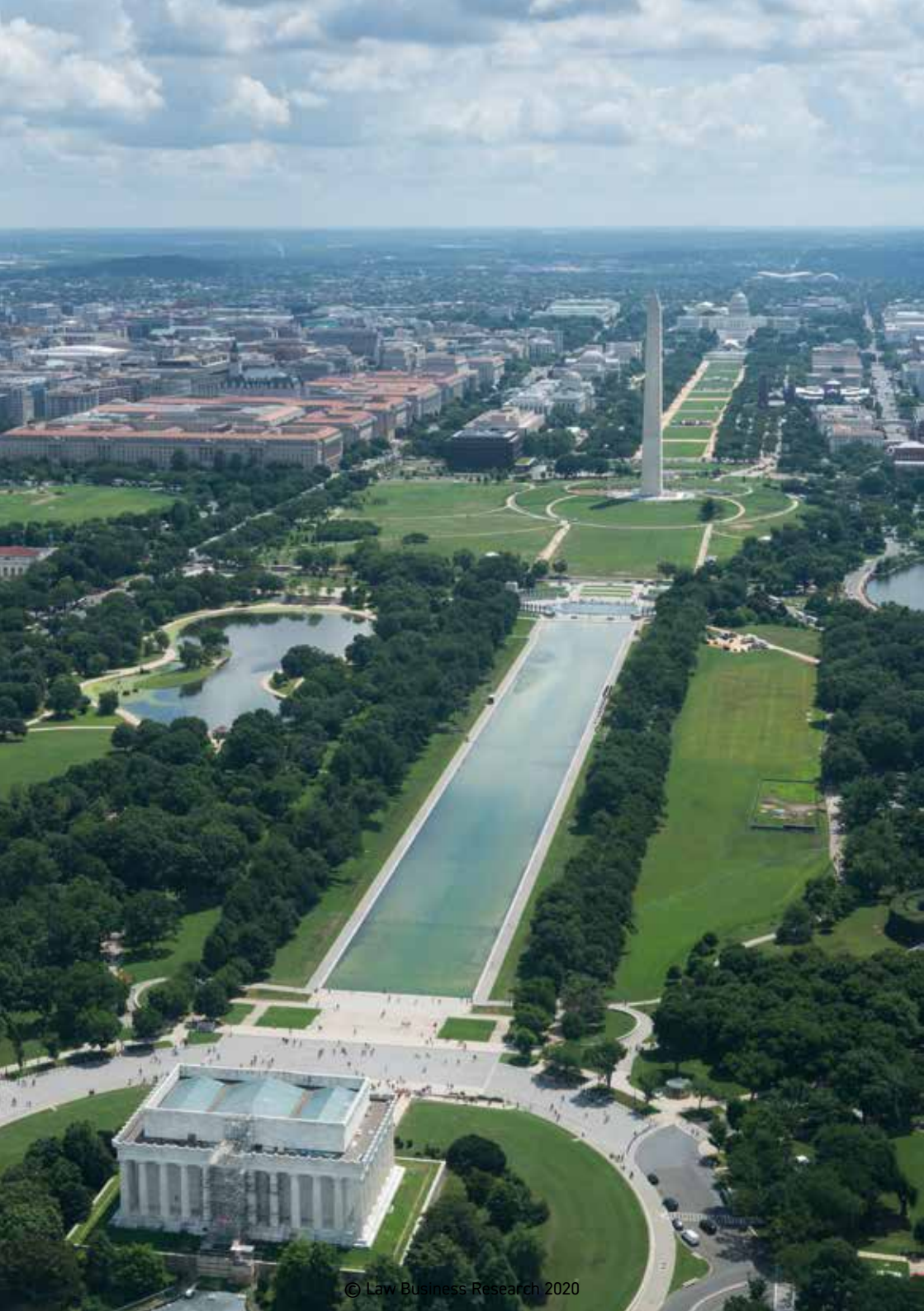
Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

Cover photo: shutterstock.com/g/orhancam

ISBN: 978-1-83862-372-2

Printed and distributed by Encompass Print Solutions

Anti-Corruption 2020



United States

John E Davis is a member and coordinator of Washington, DC-based Miller & Chevalier's Foreign Corrupt Practices Act (FCPA) and International Anti-Corruption Practice Group, and he focuses his practice on international regulatory compliance and enforcement issues. He has over 25 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the US FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ), and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union, South East Asia and Latin America.

In 2017, Mr Davis was appointed to serve as an Independent Compliance Monitor pursuant to an FCPA disposition following extensive vetting by the DOJ and SEC. 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.

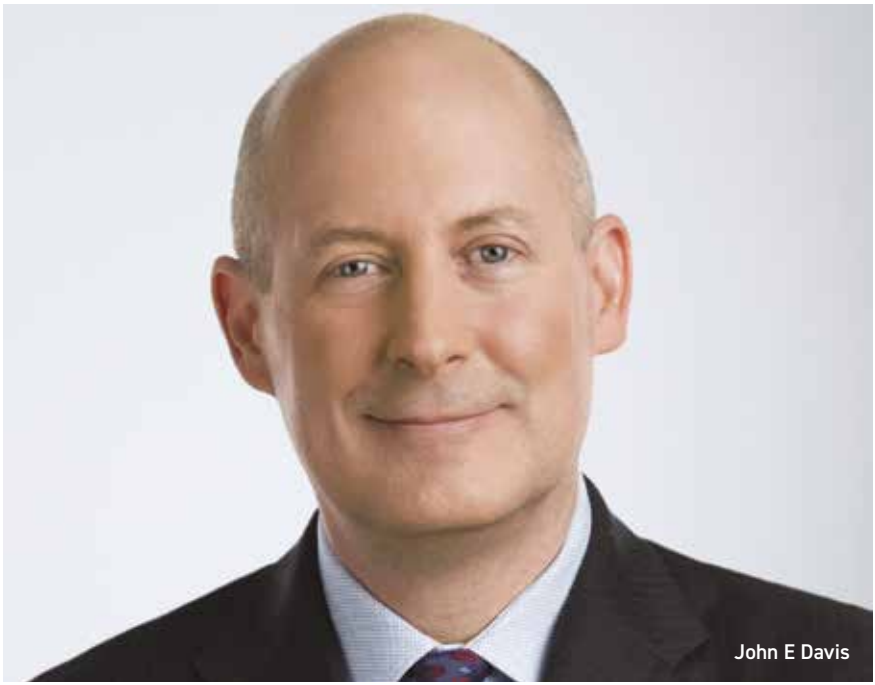
Photo by Olmez on Shutterstock

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, accounting and internal controls requirements) and laws against money laundering and certain types of fraud. As has been the case historically, US government investigations against companies continue to be resolved almost exclusively through negotiated settlements and many actions against individuals are also 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. It is likely that this impact will be felt through the remainder of 2020 and into 2021. In March 2020, the DOJ and SEC issued public statements (which continue to be updated on their respective websites) that they would redirect significant enforcement resources toward combating misconduct related specifically to the covid-19 pandemic. That said, the DOJ and SEC have continued to message publicly that the agencies' commitment to FCPA enforcement has not subsided. In May 2020, for example, representatives from both agencies noted during a public webinar that, to date, their respective FCPA units were still focused on their missions and that they did not anticipate that their staff would be reallocated to non-FCPA-related cases. A supervising FCPA enforcement official at the SEC asserted that the agency is 'not hitting the pause button on' those investigations despite the pandemic's challenges.

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 potential 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, some other core investigation activities, such as the production of documents by companies to the agencies (which can largely be performed remotely


John E Davis

through technology platforms), as well as status calls and factual briefings, have continued with relatively few adjustments. The DOJ and SEC have also continued to issue new public guidance on their enforcement policies. There have been significant impacts on FCPA cases involving individuals, including grants of petitions for early or home release and delays and even challenges to sentencing processes (though some FCPA-related sentences did occur during the latter part of the second quarter of 2020 via video hearings).

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 require multilateral cooperation (as many cases these days do), since the virus has had vastly different impacts in different countries and their governing institutions. While 2019 resulted in the most combined FCPA resolutions since 2016 (44) and a new record of more than US$2.6 billion in FCPA-related corporate fines, disgorgement and interest charges for the year, the US enforcement agencies have announced only nine enforcement actions as at the end of August 2020 – a figure that is significantly off pace from the number of announced resolutions as at the same date in previous years.

"The current and accelerating trend of corporate employee lay-offs may also lead to greater levels of whistle-blower activity."

There are still questions regarding how extensively the pandemic has affected and will continue to impact the pace of new FCPA-related investigations. Even before the pandemic erupted, the pace of publicly announced new investigations had decreased during 2019 as compared to the long-term (10-year) average and even as compared to the average pace under the Trump administration. 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 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.

While agency attention and resources may be focused elsewhere or taking time to adapt, the current and accelerating trend of corporate employee lay-offs may also lead to greater levels of whistle-blower activity that, for example, can result in a future uptick of investigative activity. As at the date of writing, grand juries in many states are not sitting – and thus no new criminal indictments or court-ordered

subpoenas are being issued – but the US federal courts issued guidelines in June 2020 that likely will spur at least some locales to empanel such juries again in the autumn of 2020. In addition, both the DOJ and SEC have options available to open 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 SEC through its various administrative processes.

While some have continued to raise questions about the current administration's commitment to the enforcement of public corruption laws, the data shows that the DOJ and the SEC have continued a robust anti-corruption enforcement programme under the FCPA. DOJ and SEC officials have repeatedly reinforced this message in various public statements. For example, in late March 2019, the DOJ official overseeing FCPA enforcement affirmed that 'effective white-collar enforcement promotes market integrity and fairness, as well as fundamental values of democratic accountability' and that the DOJ's 'commitment to white-collar criminal enforcement and the promotion of ethical business practices remain as strong as ever'. Likewise, the SEC chairman stated in a September 2019 speech: 'To be clear, I do not intend to change the FCPA enforcement posture of the SEC.'

FCPA enforcement numbers in early (that is, pre-pandemic) 2020 largely support this official rhetoric. As noted, there were 44 FCPA-related resolutions in 2019 – the most since 2016 and the third-highest total since 2010. US authorities in the past year have imposed substantial penalties and disgorgement for FCPA-related violations against major corporations such as:

- Novartis (US$347 million in June 2020);
- Airbus (US$3.92 billion in January 2020);
- Ericsson (US$1.06 billion in December 2019);
- Samsung (US$75 million in November 2019);
- Microsoft (US$25 million in July 2019);
- Walmart (US$282 million in June 2019); and
- MTS, a telecom company (US$850 million in March 2019).

As noted, data on new FCPA investigations publicly disclosed by companies for 2019 and early 2020 has shown some fall-off in reported numbers, though various unrelated factors, including incomplete public information, likely affected these numbers to some degree. Even accounting for the current issues related to covid-19, in my view, companies that are subject to the FCPA face the same US government enforcement posture that they have faced over at least the past decade.

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 offence' 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, the February 2019 *Cognizant* matter involved a formal DOJ declination but also resulted in a parallel SEC settlement that required disgorgement of illicit profits.

In July 2020, the DOJ and SEC released a second edition of the Resource Guide to the US Foreign Corrupt Practices Act, which the agencies originally issued in November 2012. The FCPA Resource Guide 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, US agencies have stated they plan to act consistent with the positions articulated in the guide in specific matters.

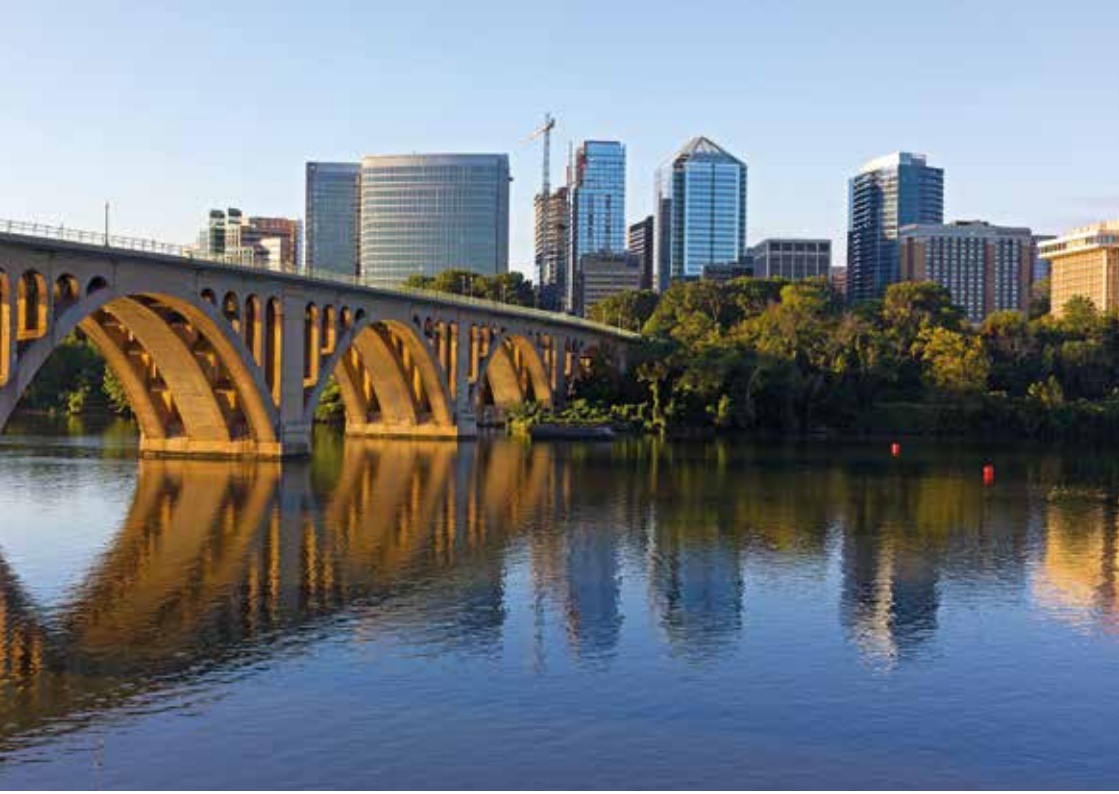


Photo by Andrei Medvedev on Shutterstock

Overall, the second edition of the FCPA Resource Guide does not substantially change the agencies' positions on the interpretation of the FCPA or their enforcement priorities. Rather, the new edition is an update that accounts for almost eight years of developments – including some international developments – since the original was issued. As stated in the guide's new forward: 'although many aspects of the guide continue to hold true today, the last eight years have also brought new cases, new law, and new policies', including 'new case law on the definition of the term "foreign official" under the FCPA, the jurisdictional reach of the FCPA, and the FCPA's foreign written laws affirmative defense'. The forward notes that the update also 'addresses certain legal standards, including the *mens rea* requirement and statute of limitations for criminal violations of the accounting provisions', 'reflects updated data, statistics, and case examples' and 'summarizes new policies applicable to the FCPA that have been announced in the DOJ's and SEC's continuing efforts to provide increased transparency'.

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 that the DOJ's Corporate Enforcement Policy 'does not bind or apply to the SEC', with the relevant footnote referencing different agency dispositions in the 2018 *Dun & Bradstreet* and 2016 *Nortek* matters.

Among the more helpful additions or revisions is new language related to mergers and acquisitions (and the application of US successor liability principles) recognising that 'in certain instances, robust pre-acquisition due diligence may not be possible' and that in 'such instances, [the agencies] will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts' in assessing potential liability for improper conduct at the acquired entity. The first edition of the FCPA Resource Guide contained a number of illustrative hypotheticals covering key legal concepts that many companies found to be helpful in assessing 'real world' compliance issues. Those hypotheticals remain but have not been updated. This signals that the principles elucidated by the hypotheticals – for example, that small gifts and inexpensive hospitality generally are not the subject of enforcement interest – remain valid.

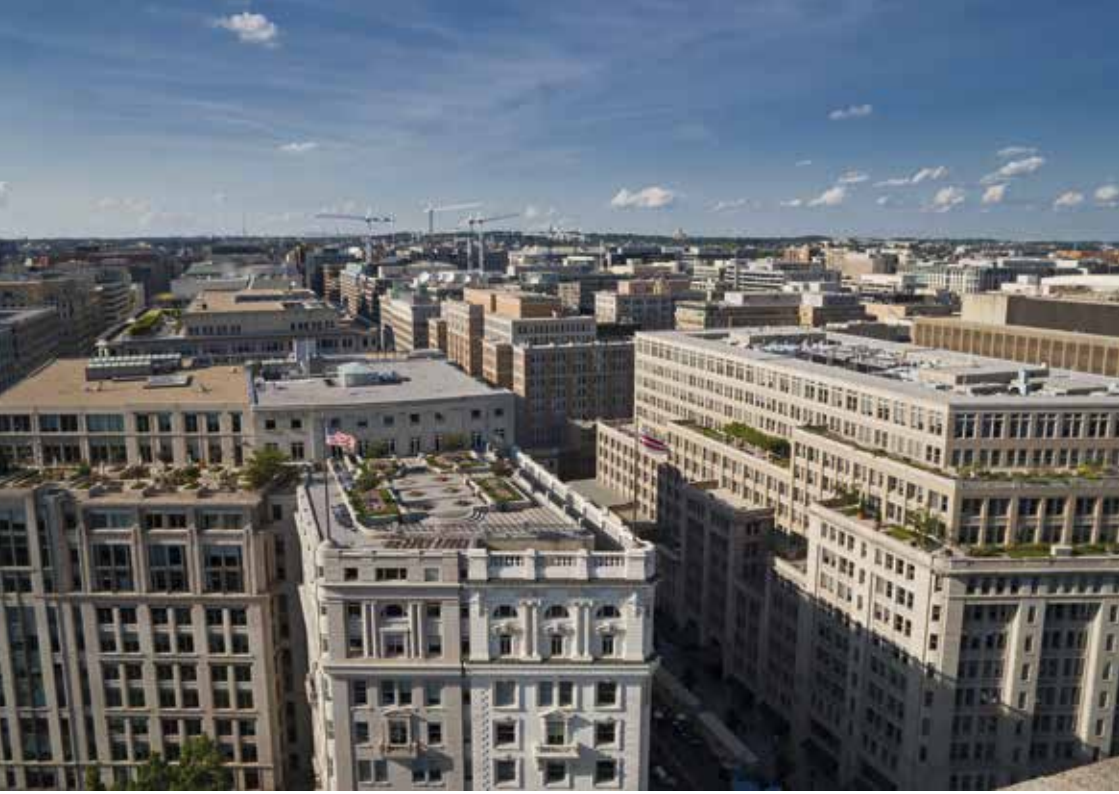
All in all, the updated FCPA Resource Guide remains a useful source of information on the DOJ's and SEC's views regarding the interpretation and enforcement of the FCPA. Users of the guide should continue to be aware, however, of the guide's status as a non-binding summary and its US-centric views. Because 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 development that will affect SEC practice is the June 2020 decision by the 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 Supreme Court in the June 2017 *Kokesh v SEC* case held that the disgorgement was a penalty rather than an equitable remedy for statute of limitations purposes. However, in that case the court declined to comment on whether courts have the authority to award disgorgement in SEC enforcement proceedings under a key statutory provision that limits options for relief to

"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."

equitable remedies rather than punitive sanctions. In *Liu*, the Supreme Court addressed this lingering question and 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 of individual (versus collective) liability and limited to only the net profits of the fraudulent scheme.

There are several unresolved questions about how this ruling will impact the SEC's FCPA enforcement proceedings moving forward. For instance, the Supreme Court offered limited guidance on how to determine what costs should be considered as 'legitimate expenses' to be deducted during the required net profit calculation. This calculation will be crucial in FCPA cases in which disgorgement awards can be substantial – sometimes far exceeding civil penalties. Similarly, the requirement that disgorged funds be returned to the victims of the fraud is more complicated in the FCPA context, where in many cases specific victims are not readily identifiable and thus the funds are normally deposited in the US Treasury. The court left open the question of whether this practice can continue for disgorged funds subject to the new rules and there will undoubtedly be further



litigation between the SEC and defendants in the lower courts on this and related issues in the future.

The SEC is still feeling the effects of the *Kokesh* case's ruling on disgorgement. An SEC enforcement official stated in October 2018 that:

> *[t]he impact of* Kokesh *has been felt across our enforcement program. A few months ago, we calculated that Kokesh led us to forego seeking approximately $800 million in potential disgorgement in filed and settled cases [a figure that covers a broader spectrum of SEC cases than those dealing with public corruption]. That number continues to rise.*

Along with other factors (including the *Liu* result), the *Kokesh* case is likely driving the SEC's continuing efforts to speed up FCPA investigations and consider non-monetary relief in more cases. The SEC maintains the view that *Kokesh* does not extend to claims for injunctive relief and thus that the agency still has tools to address corrupt and other improper conduct that is more than five years old.

Photo by Lemonpink Images on Shutterstock

With regard to anti-corruption laws applicable to US federal and state officials, the 2016 US Supreme Court decision that overturned the corruption-related conviction of former Virginia governor Robert McDonnell continues to have significant effects. That 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. The court's decision has been criticised as having the effect of undermining public confidence in the accountability of elected officials – a concern that has been heightened by multiple instances of courts overturning previous corruption-related convictions of public officials in response to the *McDonnell* holding.

The challenges of pursuing public corruption cases under the Court's announced standards continue to be evident. Notably, the 2017 trial of 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 ended when the judge declared a mistrial after the jurors announced they were unable to reach a unanimous decision. In January 2018, prosecutors decided not to bring a new case. The McDonnell decision also formed the basis for several other 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. Ultimately, Silver was 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 May 2020, the US Supreme Court overturned the convictions of two former aides to the former Governor of New Jersey related to the 'Bridgegate' scandal. The former officials had been charged and convicted under federal wire fraud and programme fraud statutes. The unanimous opinion, which is a rarity, stated, in part, that 'not every corrupt act by a state or local official is a federal crime'. While the affected laws can still apply to certain cases, this decision further narrows the options that federal prosecutors have to attempt to redress public corruption.

Despite the challenges raised by the Supreme Court precedents, prosecutors have continued to have successes in cases of public corruption by US federal, state and local officials, including in dozens of local or regional cases. These cases do not involve the federal domestic bribery law, but rather use other laws to target relevant activity, such as other anti-fraud laws, racketeering laws and tax laws. A typical example is a May 2020 guilty plea by an aide to a Los Angeles City Council member

to racketeering charges in connection with an alleged scheme involving bribery of US$1 million related to real estate projects.

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, information technology, aeroplane manufacturing, telecommunications, retail, software, mining, oilfield services and financial institutions. 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 Novartis (Switzerland), Airbus (Europe), Ericsson (Sweden), TechnipFMC (UK), MTS (Russia), and Petrobras and Electrobras (Brazil).

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 53 resolutions involving China during the period 2009–2019 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). The US government's 'China Initiative' – launched in November 2018 – promises to continue enforcement attention on China, as the DOJ stated that, as part of the initiative, prosecutors would 'identify . . . FCPA cases involving Chinese companies that compete with American businesses'. The initiative has not produced any public results in the FCPA area to date, though it is noteworthy that in August 2017, it was reported that a major state-owned Chinese company, China Petroleum and Chemical Corp (Sinopec), was itself under FCPA investigation related to its activities in Africa.

The countries other than China most frequently involved in FCPA enforcement actions during the 2009–2019 time period are Brazil (largely due to the massive and ongoing 'Car Wash' investigation there), Nigeria, Mexico, Indonesia, India, Russia, Angola and Iraq. Several recent FCPA cases have also reinforced the corruption risks generally present in the Middle East and Central Asia.

On the US domestic side, prosecutors continue to prioritise cases against US executive branch officials and members of Congress – for example, in March 2020, former US Representative Duncan Hunter of California pled guilty to a charge of misuse of campaign funds to resolve more than 60 counts (including corruption-related allegations) against him and his wife and was sentenced to 11 months in prison. Federal authorities continue to look for high-profile cases at all levels of government – for example, in July 2020, prosecutors arrested and charged the

"Business activities in China are the ones most frequently involved in public resolutions with US agencies."

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.' It is expected that the investigation and related trials will take years to complete.

The *McDonnell* standard and the recent 'Bridgegate' decisions will continue to create challenges for prosecutors bringing such cases, although not necessarily an impossible one. The *Menendez* trial resulted in a ruling by the federal district judge overseeing the case that the *McDonnell* case does not invalidate a commonly used prosecutorial argument in public corruption cases – that a steady flow of gifts or favours (a 'stream of benefits') can add up over time to establish an improper quid pro quo linked to official acts by a defendant. And the convictions of others, such as Silver, Fattah and Hunter, show that prosecutors can use other legal theories to redress alleged corruption by US officials at various levels.

Certain signals from the Trump administration regarding, at minimum, a lack of sensitivity to domestic public corruption may undermine the overall enforcement

climate and even specific cases. The number of former Cabinet members and other senior officials who have resigned under the cloud of ethics issues, continuing allegations of violations of the US Constitution's Emoluments Clause and the February 2020 commutation by the President of the corruption-related sentence of former Illinois Governor Rod Blagojevich all contribute to perceptions that the current administration does not concern itself much with public corruption issues, at least for US officials.

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 will increase 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 limits on travel and limitations of in-company enterprise resource planning (ERP) and other control systems. At the same time, companies' risk profiles are in many cases changing rapidly, with plant closures, supply chain disruptions (and in many cases increasing reliance on third parties), restrictions on the movement of gatekeeper personnel and management compliance champions, pressures on financial targets and more – many of which 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 has needed, and 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 new and updated management messaging on company values and the programme, increased virtual training and accelerating planned monitoring activities through virtual methods when possible. Compliance personnel can take valuable data from this time period to learn longer-term lessons regarding where companies should invest; for example, upgrades to ERP systems or tools for remotely directed investigation activities to be better prepared for the next crisis.

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'. In the November 2017 *SBM* case, an employee of an Italian oil and gas company that served

Photo by B R O N on Shutterstock

"Perhaps the most challenging set of FCPA compliance risks involves the actions of third parties with which a company has a relationship."

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 75 per cent of FCPA cases in the past 10 years involve actions by third parties. Recent cases that have involved corporate liability for actions by third parties include resolutions with Eni, Novartis, Airbus, Cardinal Health, Ericsson, Samsung, Microsoft and TechnipFMC. 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

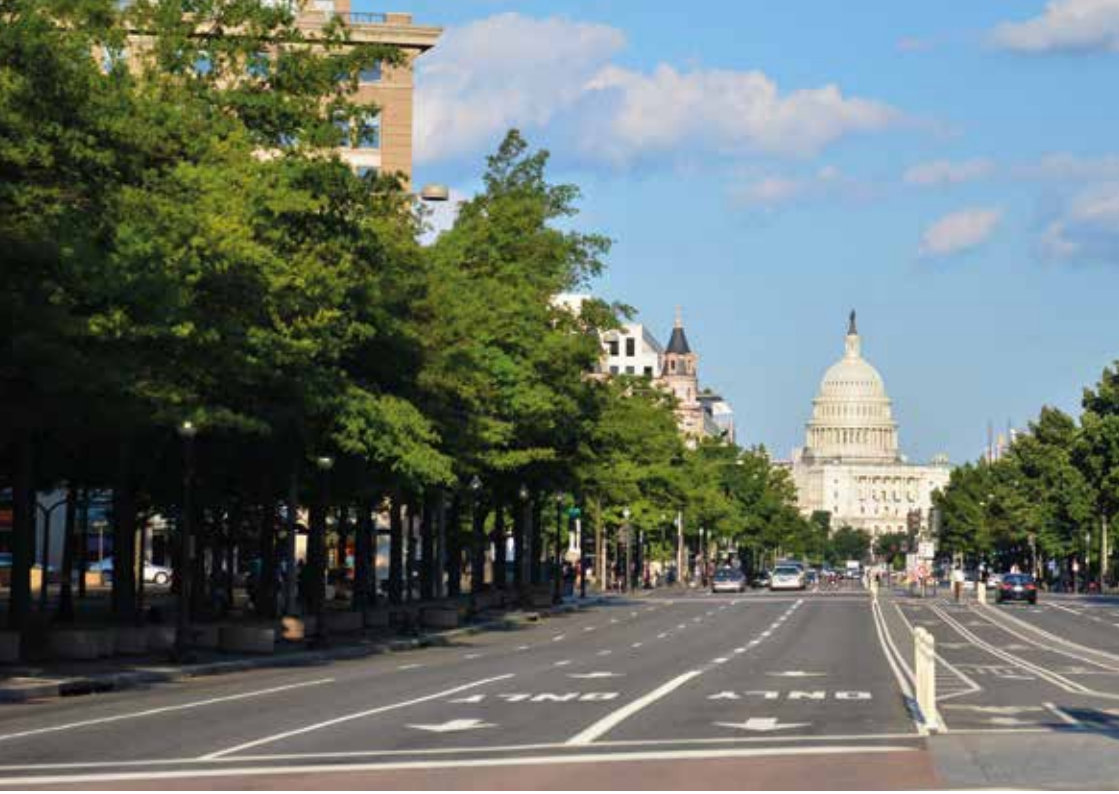
the conscious disregard standard (the July 2020 edition of the FCPA Resource Guide continues to use this case as the best example). Appropriate risk-based compliance policies, procedures and internal accounting controls related to due diligence on, contracting with and monitoring and auditing of third parties are critical to managing this key area of risk.

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 it did not in 'good faith' implement effective internal accounting controls at its minority-owned subsidiary, which nonetheless they 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.

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 half of 2020) signal a slowdown in investigations or a significant redirection of FCPA enforcement resources. Indeed, there were relatively few cases announced in the first half of 2019, but, by the end of the year, the agencies had racked up the most total resolutions (corporate and individual) since 2016. Three cases in the second half of 2019 and early 2020 (*Ericsson*, *MTS* and *Airbus*) featured some of the largest combined penalties in the history of FCPA-related enforcement. Unlike some other areas of US law, FCPA enforcement enjoys strong bipartisan political support and for many years has not been affected by changes in political control over the US government. The signs of the current administration's continuing commitment to FCPA investigations reflect this.

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

Photo by Orhan Cam on Shutterstock

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.

Indeed, some data suggests that cases ending in declinations tend to be resolved more quickly than usual. Historically, FCPA investigations by the SEC and DOJ have tended to be lengthy affairs, lasting years and, in a few cases, upwards of a decade. The current administration has made closing out long-running investigations a priority for the past couple of years, in response to companies' complaints regarding high costs and long periods of uncertainty that can place a drag on business. A good example of this was the June 2019 *Walmart* resolution, which concluded a case dating back to 2012.

On the SEC side, over the past couple of years the *Kokesh* decision's effects on the relevant limitations period has also played a role in forcing the agency to resolve cases on a more accelerated basis than has historically been the case. The Supreme Court's recent *Liu* decision may represent a more fundamental challenge; while the decision confirmed the SEC's authority to collect disgorgement as a form of equitable relief, the holding established certain conditions for allowing that practice with which the agency will have to grapple and that will likely be subjected to further challenge by defendants in the lower courts. Despite these questions, I believe that the SEC will continue its FCPA-related enforcement programme as it has for the past several years, 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.

4 Have you seen evidence of continuing or increasing cooperation by the enforcement authorities in your jurisdiction with authorities in other countries? If so, how has that affected the implementation or outcomes of their investigations?

US agencies have actively pursued cooperation with other enforcement authorities in the past several years and multinational investigations remain a priority under the current administration. In September 2019, the SEC chairman delivered public remarks that some saw as a critique of multilateral anti-corruption efforts when he noted the lack of vigorous enforcement by many countries – even those with FCPA-equivalents – and stated that he had not seen 'meaningful improvement' in international cooperation. It should be noted, however, that these remarks preceded later parts of the speech in which the chairman said he continues to support FCPA enforcement and will continue to 'engage with my international

counterparts on matters where common, cooperative enforcement strategies are essential'.

International cooperation is managed through bilateral mutual legal assistance treaties and through the assistance provisions of treaties such as the Organisation for Economic Co-operation and Development Anti-Bribery Convention. Often, though with lessening frequency as other countries have stepped up enforcement efforts, 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.

The DOJ and SEC have a long track record of coordinating their investigations, enforcement and penalties under the FCPA. The coordination of anti-corruption enforcement among authorities outside of the United States is a more recent, but growing, trend, with global settlements becoming a standard component of the DOJ's and SEC's approach to anti-corruption enforcement. 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 relationships with authorities in Brazil, the United Kingdom, 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, which 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

"The DOJ and SEC have a long track record of coordinating their investigations, enforcement and penalties under the FCPA."

settlements are becoming the norm for the DOJ and SEC. DOJ officials continue to cite the case in 2020 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 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, US agencies received the smallest portion of the actual criminal penalties.

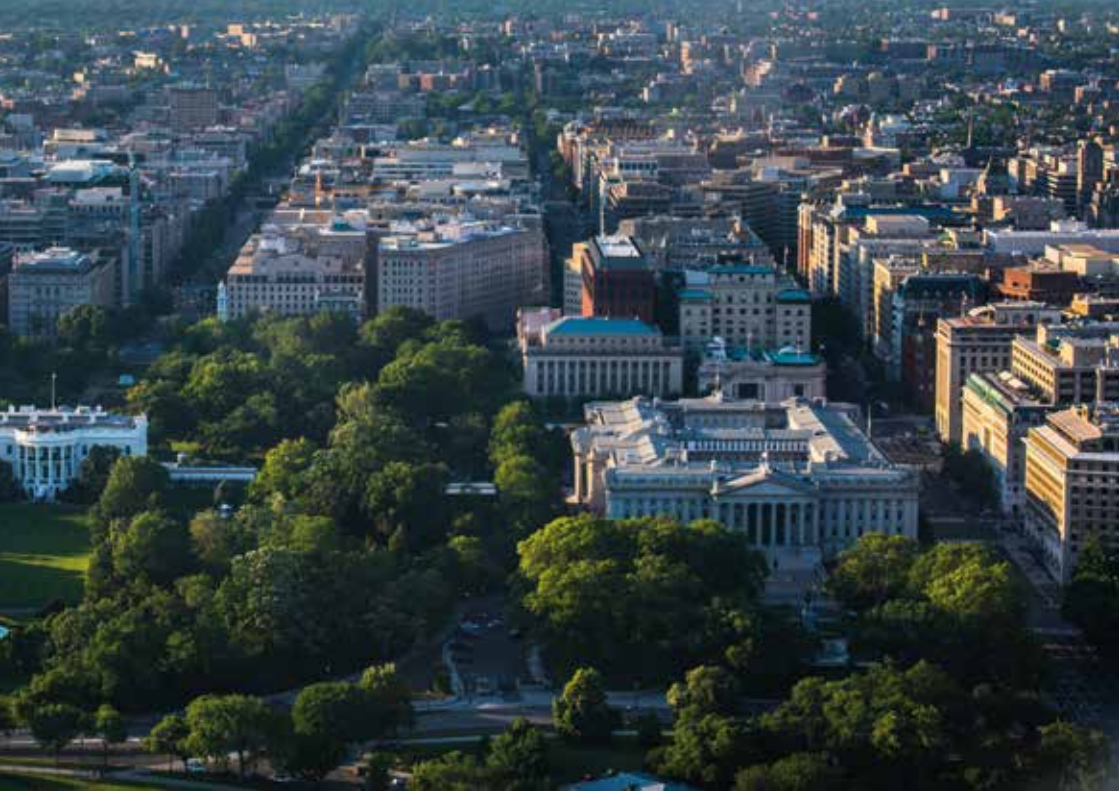
The DOJ has continued their involvement with the *Odebrecht* matter through supervision of an independent compliance monitor's activities. Originally, the monitorship was scheduled to end in February 2020, but in January 2020 the DOJ and Odebrecht agreed to extend the monitor's term to November 2020. 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.

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 January 2020 disposition with Airbus involving US, French and UK agencies;
- the June 2019 settlement with TechnipFMC involving US and Brazilian authorities; and
- the June 2018 settlement with Société Générale involving US and French agencies.

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. In *Société Générale*, the US and French agencies effectively split the corruption-related penalties by half.

The US authorities' encouragement of coordinated multinational investigations creates some tension with their goal of resolving investigations faster. Coordination among various agencies in different countries can be challenging, especially with 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 European Union'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 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, the United Kingdom and Germany 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. 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 the enforcement plan of the DOJ's

Photo by Evgenia Parajanian on Shutterstock

"The DOJ's emphasis on individual prosecutions has been reinforced by elements of the FCPA Corporate Enforcement Policy."

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 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'.

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 two years. Indeed, for the first half of 2020, the SEC did not conclude a single FCPA-related disposition with an individual and resolved only three cases

with individuals in 2019 (as compared to 17 DOJ resolutions with individuals for the same period).

Last year was an above-average year for FCPA-related enforcement activity against individuals, especially on the DOJ side. The 17 DOJ resolutions in 2019 more than doubled the long-term average of eight per year and it is notable that these numbers built on the 2017 results, which saw 14 DOJ resolutions against individuals – an impressive record during the current US administration. As noted, the numbers for 2020 are down, in substantial part due to the effects of the covid-19 pandemic, but the DOJ has continued to complete some long-running matters through remote activities.

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 – US issuers and their agents, US '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 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 rational 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 in 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; arguments in the case were heard in July 2020.

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 and the SEC's complaint detailed how the former executive had circumvented his employer's compliance protocols and internal controls, including using a 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 an important case 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. This decision complements 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 McDonnell's case.

Photo by Orhan Cam on Shutterstock

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 in certain cases requires, in part, timely and appropriate remediation of the problematic conduct, including the implementation 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 organisation'. 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. DOJ Assistant Attorney General Brian Benczkowski stated, at the time, that the latest updates are 'based on [the DOJ's] own experience and important feedback from the business and compliance communities'. The guidance does not establish a 'rigid formula' or a mandatory set of questions to be asked but 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 programme devotes appropriate scrutiny and resources to the spectrum of risks';
- an enhanced emphasis on collecting and using various data to track the effectiveness of programmes;
- 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 '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.

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 to companies about how they have 'addressed the [relevant foreign law challenge] to maintain the integrity and effectiveness of [their] compliance programme 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.

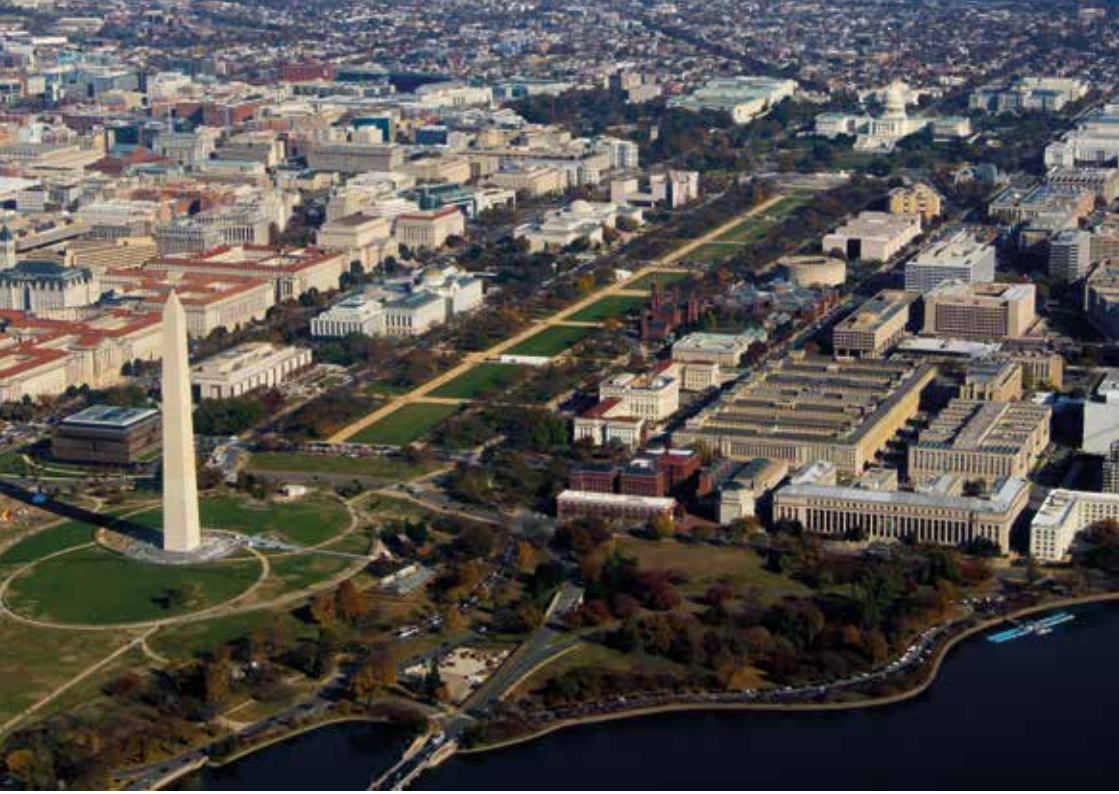
7 How have developments in laws governing data privacy in your jurisdiction affected companies' abilities to investigate and deter potential corrupt activities or cooperate with government inquiries?

US data privacy laws are generally less stringent than such laws in Europe, Russia and the former Soviet Union, and China. Companies in the United States, for

"Companies in the United States can generally share personal data with third-party service providers, government regulators and investigatory authorities."

example, can generally share personal data with third-party service providers, such as outside counsel and auditors, and 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) contains exceptions that, for now, allow companies to collect, process and view information from their employees during an investigation. While those exceptions currently only run until the end of 2020, 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



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 GDPR in May 2018 has presented significant challenges to multinational companies' handling of a wide variety of data and key issues remain unsettled – indeed, as recently as mid-July 2020, the European Court of Justice 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 that, in part, 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 development is still under evaluation.

The GDPR is more restrictive than previous EU rules and 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.

Photo by Images by Dr. Alan Lipkin on Shutterstock

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 European Union 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 European Union. 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 – is potentially the most 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.

Indeed, the FCPA Corporate Enforcement Policy's requirement that a company produce all relevant documents, including overseas documents, creates a clear conflict with the GDPR's restrictions on the processing and disclosure of EU data subjects' personal data. And the penalties for violations of or non-compliance with the GDPR are severe – up to 4 per cent of a company's global annual revenue or €20 million, whichever is greater. A company deciding whether to provide documents and data to the US government therefore faces a dilemma – those wishing to benefit from the DOJ policy must balance the benefits of a potential declination or a reduced financial penalty with the risk of significant fines under the GDPR. The DOJ policy places the burden on the company to justify its argument that it

cannot disclose documents and the company must show specific efforts to identify all available legal avenues to locate and produce relevant material. Companies and their external counsel will be challenged to think creatively about how to collect and produce information sufficient to obtain cooperation credit from the DOJ, while minimising the risks of liability under the GDPR.

More generally, compliance professionals working for companies subject to the FCPA should work closely with data privacy experts in each operational jurisdiction around the world to craft solutions that give appropriate access and comply with data privacy protections or other legal restrictions on information access. As noted, 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.

John E Davis
jdavis@milchev.com

Miller & Chevalier Chartered
Washington, DC
www.millerchevalier.com

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.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Miller & Chevalier Chartered, this *Anti-Corruption* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

Covid-19 impact
Enforcement trends
International cooperation
2021 outlook

an LBR business

ISBN 978-1-83862-372-2