

JENNER & BLOCK

ANTI-CORRUPTION ENFORCEMENT

2021 YEAR IN REVIEW



A Guide to the FCPA, UK Bribery Act,
and International Anti-Corruption Laws

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INTRODUCTION

Due to the impact of the COVID-19 pandemic, and the change in presidential administrations in the United States in January 2021, US enforcement of the Foreign Corrupt Practices Act (FCPA) declined in 2021. However, we anticipate that 2022 will see an uptick in enforcement as President Biden's US Department of Justice (DOJ) and Securities Exchange Commission (SEC) nominees are confirmed and the investigatory limitations posed by the COVID-19 pandemic begin to abate.

In a policy shift from the previous Trump Administration, the Biden Administration has publicly affirmed that it views the fight against corruption as a core US national security interest and plans to take an aggressive approach to corruption-related investigations and enforcement moving forward. This shift has been accompanied by much more aggressive rhetoric about corporate enforcement more broadly, including a stricter approach toward "recidivist" corporations and an increased emphasis on the use of independent compliance monitors. The current administration has dedicated new resources to support this renewed emphasis on anti-corruption investigation and enforcement, including a full-time squad of agents from the Federal Bureau of Investigation (FBI) for DOJ Criminal Division's Fraud Section.


Additionally, the SEC now has new leadership in the Enforcement Division, with New Jersey Attorney General Gurbir Grewal taking over as Director in September 2021. During his brief time at the SEC, Grewal has made it clear that the SEC will be focused on party accountability and cooperation. Even before Grewal's confirmation, the SEC, during 2021, continued its practice of bringing FCPA charges for payments and/or gifts under the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. In 2021 charges were brought against:

1. Deutsche Bank AG in January 2021;
2. WPP plc in September 2021; and
3. Credit Suisse Group AG in October 2021.

These cases involved misconduct around the globe, as the allegations arose in India, Latin America, China, and the United Kingdom.

There were also statutory changes to the structure of anti-money laundering (AML) and countering the financing of terrorism (CFT) laws, with the passage of the Anti-Money Laundering Act of 2020 (AMLA) in early 2021. The AMLA directed the Secretary of the Treasury to establish national priorities for AML/CFT policy and set a series of year-end 2021 deadlines for the Financial Crimes Enforcement Network (FinCEN) to promulgate rules implementing certain provisions of the AMLA. FinCEN has issued reports and proposed rules throughout 2021.

On the US policy front, there were three key announcements over the past two years reflecting DOJ's and the SEC's continuing focus on enforcement and the importance of effective corporate compliance programs. In July 2020, DOJ and the SEC released the first new edition of their joint



guidance on the FCPA in eight years. DOJ also continued to expand upon the importance of effective corporate compliance programs, issuing an updated version of the Criminal Division's formal guidance, "Evaluation of Corporate Compliance Programs," which describes how prosecutors probe a company's compliance efforts in determining how to address a company's misconduct. And, in August 2020, DOJ released its first FCPA advisory opinion in six years.

Across the pond, 2021 previewed the future of anti-corruption enforcement after the United Kingdom formally left the European Union in 2020. There was a desire by the UK government leadership for Brexit to have "no impact" on the Serious Fraud Office (SFO)—and a year in it seems that they have managed to limit the impact. This is, in large part, due to the trade and co-operation deal (the Brexit Deal) entered between the UK and EU in December 2020. However, post-Brexit, the UK has lost access to certain criminal justice databases maintained by the EU and information and evidence sharing may take much longer than before. Further, the UK is no longer a part of the European Investigation Order (EIO) or European Arrest Warrant (EAW) schemes. However, it appears that the initial impacts of Brexit have not proven as profound as once thought, and many of the mechanisms used for cross-border investigations and cooperation remain intact, albeit in slightly different form.

In 2021, the UK SFO faced a tumultuous year. While the SFO has secured three deferred prosecution agreements (DPAs) — including one involving the payment of £103 million (\$143 million) — as well as two high-profile criminal convictions, it has also suffered some notable setbacks. These include a UK Supreme Court judgment which held that the SFO could not compel foreign companies to produce documents stored overseas and the collapse of the SFO's case against two former executives at Serco as a result of failures in the SFO's disclosure process. The SFO was also accused in a civil claim

of having mishandled a long-running investigation, which has caused the SFO reputational damage and embarrassment.

This 2021 guide analyzes these and other significant developments in anti-corruption laws and practice. It continues to offer (in the appendices) an overview of the FCPA and the UKBA, and answers questions that may be pertinent to companies operating in the international marketplace. The information presented here is not legal advice.

Jenner & Block's Anti-Corruption team includes numerous lawyers with deep experience involving the FCPA, the UK Bribery Act, and other international anti-corruption laws. In 2021, we provided our clients compliance counseling, conducted internal investigations, and defended individuals and corporations.

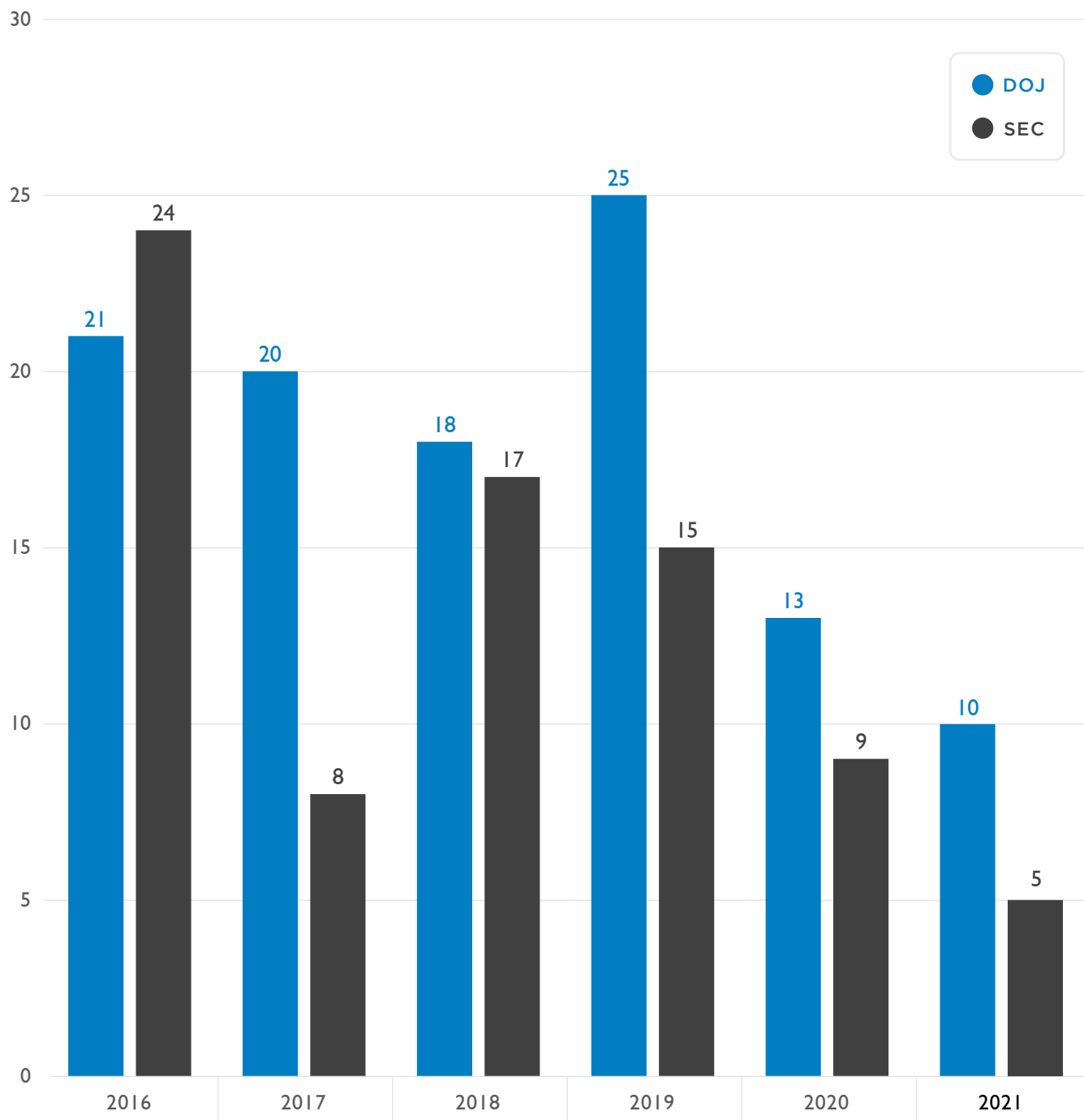
Our team includes senior alumni of DOJ, SFO, and SEC. Several of our partners during their time in DOJ led, created, and implemented key policies affecting international anti-corruption enforcement. For instance, one partner was the most senior career official in the DOJ's Criminal Division, supervising the Fraud Section which institutes or oversees every FCPA investigation and prosecution brought by the Department. Another ran the criminal division and the public corruption section of a major US Attorney's Office, where he created and implemented anti-corruption priorities and policies.

If you have any questions or would like to discuss any of the topics covered in the guide, we would be delighted to hear from you; please contact any member of the Investigations, Compliance, and Defense Practice.

SECTION I
UNITED STATES

COMPARISON OF ENFORCEMENT IN 2021 COMPARED WITH PRIOR YEARS

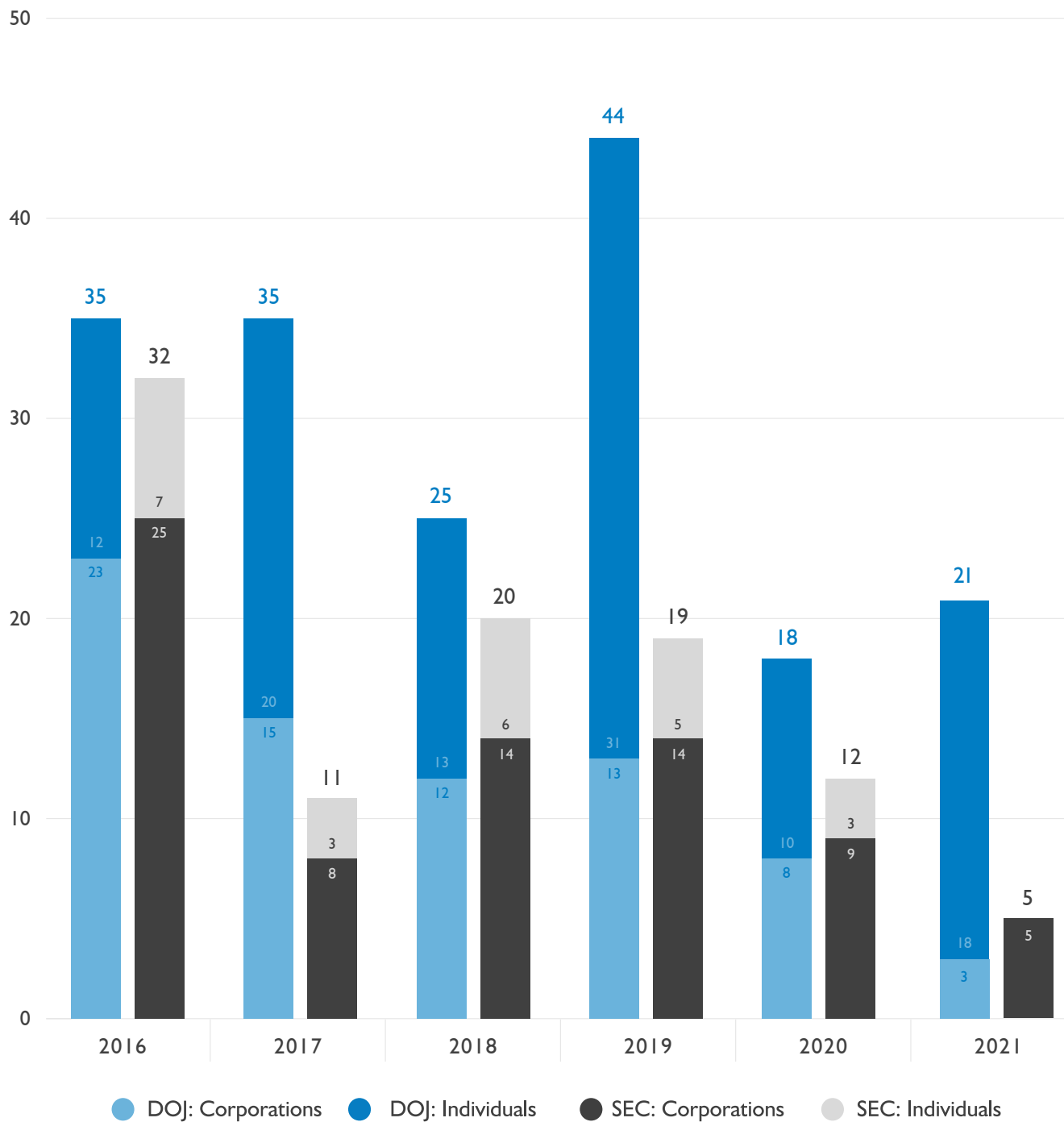
NUMBER OF MATTERS INITIATED OR RESOLVED BY DOJ AND SEC (2016-2021)



We define a matter as all enforcement actions involving the same misconduct. For example, the SEC brought cases against JBS S.A., Joesley Batista, and Wesley Batista related to J&F Investimentos' activities in Brazil from 2005 to 2017. We count actions against those three defendants as one SEC matter. Where DOJ and SEC brought parallel actions, we include the matter in both DOJ's and SEC's tallies. Where a matter was initiated and resolved from 2016 through 2021, we tallied the matter in the year it was resolved.

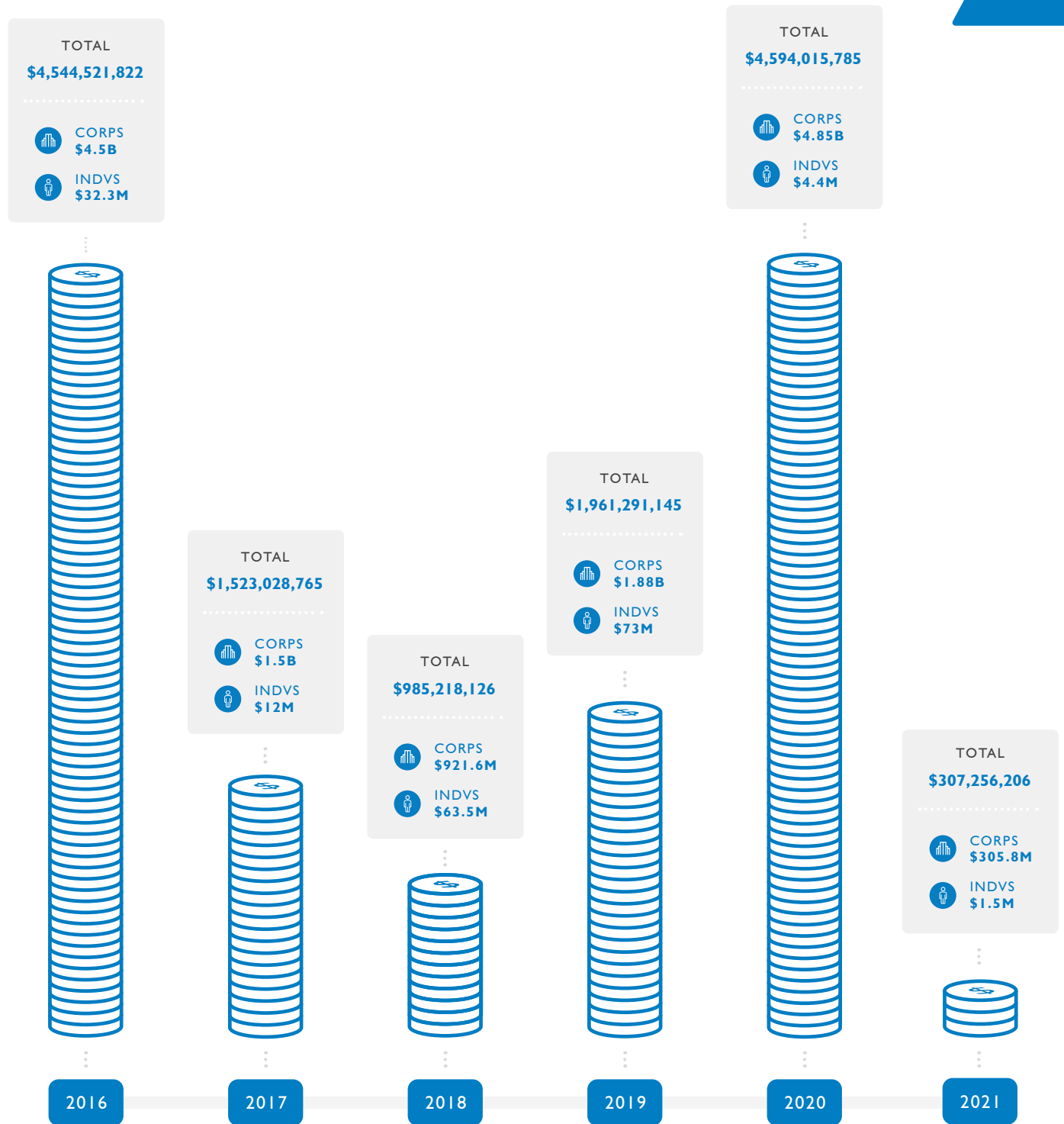
COMPARISON OF ENFORCEMENT IN 2021 COMPARED WITH PRIOR YEARS (CONT'D)

NUMBER OF MATTERS INITIATED OR RESOLVED BY DOJ AND SEC (2016-2021)



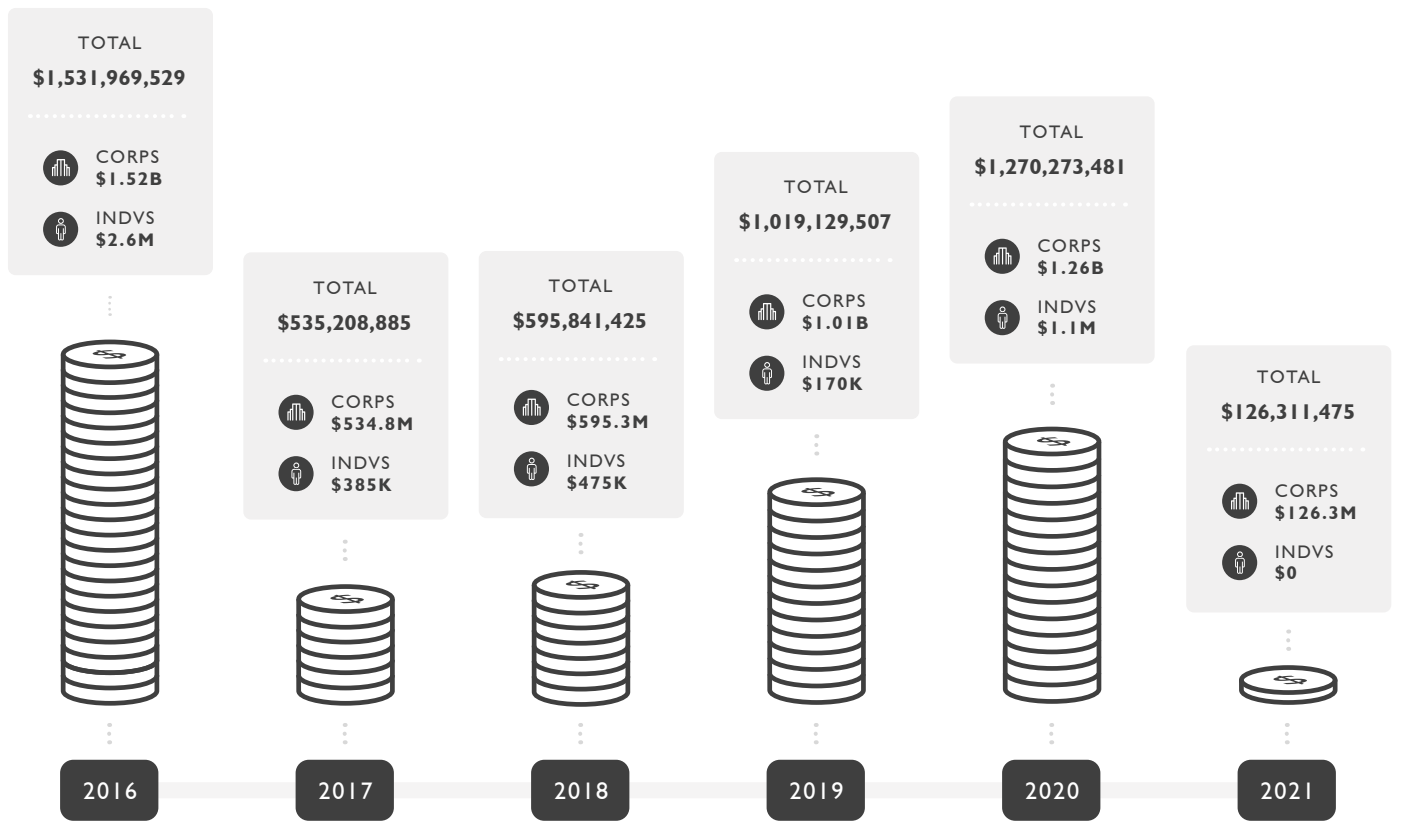
This chart represents the number of defendants whose cases were resolved or initiated from 2016 through 2021. Where cases were brought and resolved in different years, we counted the defendant in its year of resolution, and not its initiation.

COMPARISON OF DOJ PENALTIES ASSESSED (2016-2021)



Penalties include any criminal or civil fines, forfeitures, disgorgements, criminal penalties, restitution, or judgments. Where DOJ credited penalties paid to SEC, we offset DOJ’s penalty amount so as not to double count penalties within this chart and the SEC chart on the following page. We did not offset payments DOJ credited to foreign regulators to provide an accurate account of the total penalties assessed.

COMPARISON OF SEC PENALTIES ASSESSED (2016-2021)



Penalties include any criminal or civil fines, forfeitures, disgorgements, criminal penalties, restitution, or judgments. Where SEC credited penalties paid to DOJ, we offset SEC’s amount so as not to double-count penalties within this chart and the DOJ chart on the previous page. We did not offset payments SEC credited to foreign regulators to provide an accurate account of the total penalty assessed.

LOCUS OF WRONGDOING IN US ENFORCEMENT ACTIONS
(DOJ AND SEC) AND NUMBER OF FCPA MATTERS FOCUSED THERE



INDUSTRIES AT ISSUE



Financial 4



Aerospace and Defense 2



Consumer Goods 2



Oil and Gas 2



Services 1



LIST OF CORPORATE DEFENDANTS AND RESOLUTION TYPE IN ACTIONS BROUGHT OR RESOLVED IN 2021

PARALLEL DOJ-SEC ACTIONS (GROUPED BY MATTER)¹

In the Matter of Credit Suisse Group AG

- Credit Suisse Group AG (DPA; Cease and Desist)

In the Matter of Amec Foster Wheeler Limited

- Amec Foster Wheeler Limited (Cease and Desist)
- Amec Foster Wheeler Energy Limited (DPA)

In the Matter of Deutsche Bank AG

- Deutsche Bank AG (DPA; Cease and Desist)

Novartis' Activities in Greece, South Korea, and Vietnam between 2012 and 2016

- Alcon Pte Ltd. (DPA)
- Novartis AG (Cease and Desist)
- Novartis Hellas S.A.C.I (DPA)

INDIVIDUAL DEFENDANTS IN DOJ ACTIONS

US v. Deck Won Kang

- Deck Won Kang (Plea Agreement)

CORPORATE DEFENDANTS IN SEC ACTIONS

(ALL RESOLVED THROUGH CEASE AND DESISTS)

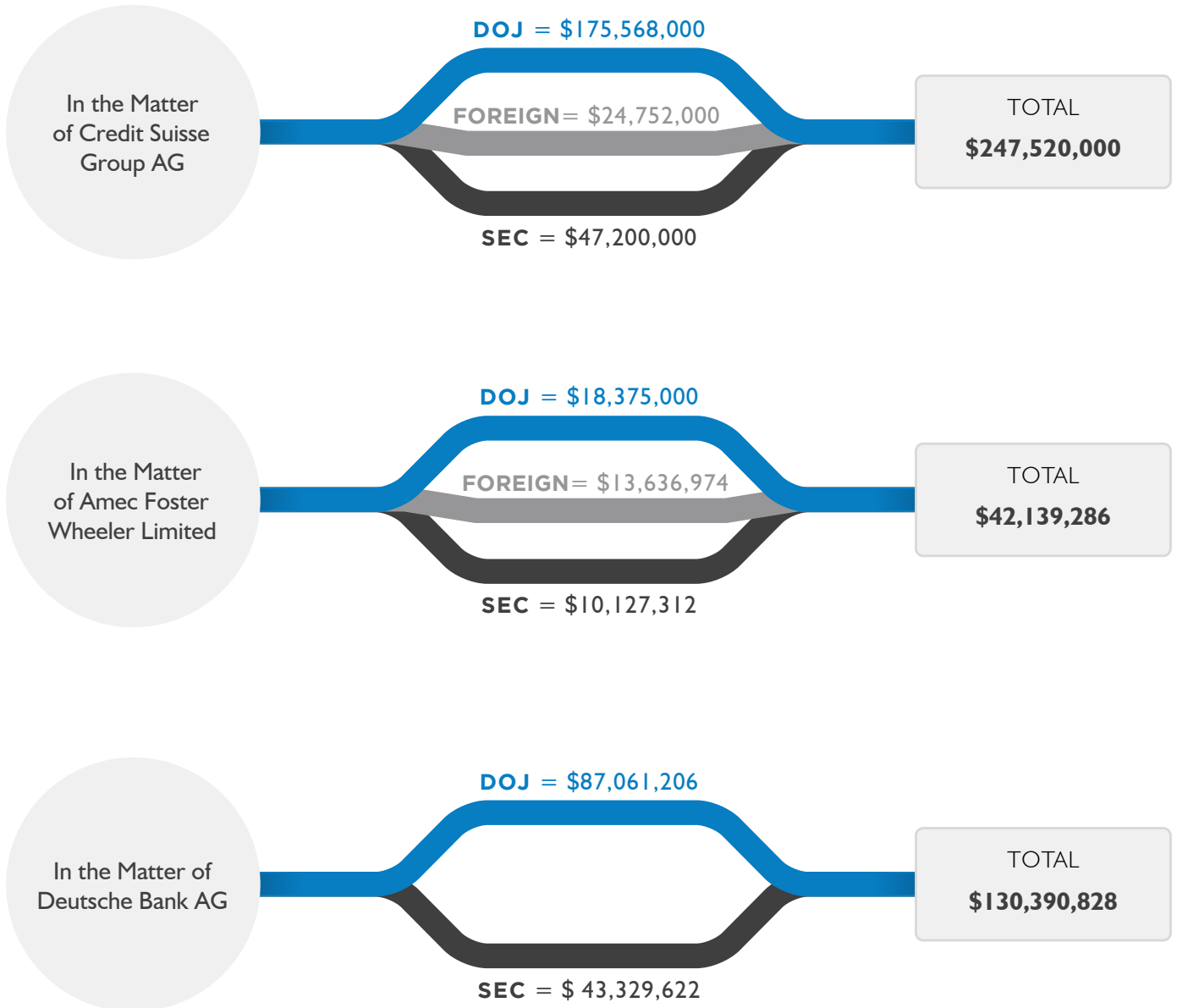
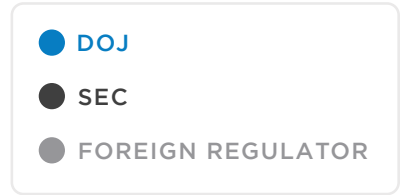
In the Matter of VTB Capital plc

In the Matter of WPP plc

¹ DPAs and plea agreements refer to resolutions with DOJ; Cease and desists refer only to SEC resolutions.

2021 PENALTIES ASSESSED IN MATTERS AGAINST CORPORATE DEFENDANTS

PARALLEL DOJ-SEC ACTIONS (3)



2021 PENALTIES ASSESSED IN MATTERS AGAINST DEFENDANTS

● DOJ
● SEC

DOJ ACTIONS (4)



SEC ACTIONS (4)





SPOTLIGHT ON POTENTIAL FACTORS AFFECTING CORPORATE RESOLUTIONS

MONITORSHIPS

For the second time since 2015 and for the second straight year, none of the FCPA resolutions in 2021 imposed a corporate compliance monitor. In concluding that corporate compliance monitors were unnecessary, the DOJ focused on two factors:

1. the company had, at the time of resolution, already implemented remediation efforts and improved its compliance program; and
2. the company agreed to periodically self-report to DOJ on its remediation efforts, as set forth in compliance reporting requirements included in the resolution agreement.

In one instance, involving Deutsche Bank Aktiengesellschaft, DOJ noted that in addition to these factors, a monitorship was unnecessary because the company was already subject to an ongoing compliance monitorship as a result of its 2015 deferred prosecution agreement (DPA) related to the manipulation of the London Interbank Offered Rate.¹

While the use of corporate monitorships has declined in recent years, changes to DOJ guidance may signal a shift in this trend. On October 28, 2021, Deputy Attorney General Lisa Monaco issued revised guidance regarding the use of corporate monitorships.² That guidance concluded that DOJ should favor the imposition of a monitor “where there is a demonstrated need for, and clear benefit to be derived from, a monitorship,” and directed prosecutors to consider the use of monitorships in cases “[w]here a corporation’s compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution.”³

¹ *United States v. Deutsche Bank Aktiengesellschaft*, Deferred Prosecution Agreement

² Memorandum from Deputy Attorney General Lisa Monaco (Oct. 28, 2021), <https://www.justice.gov/opa/speech/file/1100531/download>.

³ *Id.* at 4



SPOTLIGHT ON POTENTIAL FACTORS AFFECTING CORPORATE RESOLUTIONS (CONT'D)

COORDINATION OF SETTLEMENTS BETWEEN REGULATORS

DOJ's "No Piling-On" Policy⁴ directs prosecutors to avoid the "unnecessary imposition of duplicative fines, penalties, and/or forfeiture against the company" by, among other things:

- coordinating with other federal, state, local, or foreign authorities when resolving a case concerning the same misconduct; and
- considering whether "multiple penalties serve the interests of justice," including "the egregiousness of the misconduct; statutory mandates regarding penalties; the risk of delay in finalizing a resolution; and the adequacy and timeliness of a company's disclosures and cooperation with the Department."⁵

In 2021, consistent with this policy, DOJ credited penalties paid to other foreign or domestic regulators when assessing its own penalties. For example, it credited \$10,718,750 to Amec Foster Wheeler Energy Limited for penalties paid to authorities in the UK and Brazil.

⁴ Memorandum from Rod S. Rosenstein, "Policy on Coordination of Corporate Resolution Penalties," (May 9, 2018), <https://www.justice.gov/opa/speech/file/1061186/download>. This policy, although formally implemented by Rosenstein, was devised during the prior administration, and reflects the continuity of approach between the two administrations.

⁵ *Id.*

¹ Merrick Garland, *Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General*, at 43, [QFR Responses 2-28.pdf \(senate.gov\)](#).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

DOJ POLICY CHANGES AND UPDATES

FCPA enforcement in 2020-2021 was dominated by the COVID-19 pandemic and the change in administration. The pandemic presented significant challenges for the detection and investigation of corruption, including travel restrictions and a largely remote work environment. The first part of this chapter will review those challenges, as well as the ways in which companies adapted their compliance programs to the remote environment. The second part of this chapter will discuss the Biden Administration's renewed emphasis on anti-corruption investigation and enforcement, including a significant commitment of resources for the DOJ to fight corruption. In 2021, the Biden Administration announced it would enhance its focus on corporate crime generally, and anti-corruption specifically. This message has been communicated by both President Biden and other key Administration leaders, such as Attorney General Merrick Garland, who pledged to pursue "vigorous enforcement of the Foreign Corrupt Practices Act and other federal anti-corruption laws, including efforts to foster voluntary compliance and cooperation with the Department of Justice."¹ Part two of this chapter will explain the Administration's specific policy goals and enforcement approach in greater detail.

COMPLIANCE UPDATE

This sub-chapter reviews how the COVID-19 pandemic impacted enforcement actions during 2020-2021—because both companies and the government may have had less of an opportunity to identify and investigate possible wrongdoing—and the ways in which companies adapted their compliance programs to a predominantly remote work environment.

I. Remote Enforcement During the COVID-19 Pandemic

The COVID-19 pandemic and the shift to a remote work environment challenged traditional compliance and enforcement structures, increasing the risk that corruption could go undetected. With restrictions on travel and other disruptions to internal investigations related to a decreased capacity to conduct work in-person, companies' ability to identify and probe suspected wrongdoing may have diminished.² In some instances, companies postponed investigations and subpoena responses while addressing pressing financial and logistical issues.³ In turn, a pipeline of reliable tips and self-reports to government agencies may have decreased.⁴ Of course, government agents faced similar pandemic-induced challenges in conducting investigations. In some instances, interviews that could not take place in-person were delayed and cross-border cooperation was challenged by travel restrictions. These factors may have contributed to the decrease in new FCPA cases brought by the SEC during 2020,⁵ and the decrease in the number of

⁶ Clara Hudson, "DOJ Sees Decrease in Corporate Enforcement Policy Declinations," *Global Investigations Review* (Apr. 15, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/doj-corporate-enforcement-policy-declinations-decrease>.

⁷ Clara Hudson, "Pandemic Sparked Potentially Lasting Compliance Changes," *Global Investigations Review* (July 22, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/pandemic-sparked-potentially-lasting-compliance-changes>.

⁸ *Id.*

declinations—public statements from the DOJ declining to prosecute companies that self-report and cooperate with the government to remedy FCPA violations—in 2020.⁶

In light of these challenges, many companies adapted their compliance programs to better fit the remote work environment. For example, rather than hosting large, in-person training sessions, compliance officers at certain companies retooled their programs to conduct virtual training sessions in smaller groups.⁷ In addition, some companies shifted money traditionally spent traveling and conducting in-person investigations to data analytics that would assist in detecting violations of company policy and other misconduct.⁸ As the challenges of the pandemic develop in 2022, companies that made compliance program changes during the pandemic will need to reassess these changes to determine whether to keep them or revert to more traditional compliance models.

BIDEN ADMINISTRATION'S APPROACH TO FCPA INVESTIGATIONS AND ENFORCEMENT

This sub-chapter reviews the new administration's change in emphasis for anti-corruption investigations and enforcement and its commitment of new resources to combat corruption, both domestically and globally. The Biden Administration has publicly affirmed that it views the fight against corruption as a core US national security interest and plans to take an aggressive approach to corruption-related investigations and enforcement moving forward. This shift has been accompanied by much more aggressive rhetoric about corporate enforcement more broadly, including a stricter approach toward "recidivist" corporations and an increased emphasis on the use of independent compliance monitors. The current administration has dedicated new resources to support anti-corruption investigation and enforcement, including a full-time squad of agents from the FBI for DOJ Criminal Division's Fraud Section.

2. Biden Administration Declared Fight Against Corruption as a Core United States National Security Interest

As previously [reported](#) by Jenner & Block, the Biden Administration on June 3, 2021, issued a [National Security Study Memorandum](#) declaring the fight against corruption a core US national security interest, thereby signaling a redoubled emphasis on anti-corruption efforts.

The Memorandum directed the National Security Advisor and the Assistant to the President for Economic and Domestic Policy to conduct an interagency review process over a period of 200 days, with input from 15 different agencies and offices, and submit a report with recommendations to the President to improve the ability of the US government to combat "the abuse of power for private gain, the misappropriation of public assets, bribery, and other forms of corruption," both at home and abroad. In response to this directive, on December 6, 2021, the Biden Administration [issued](#) a [strategy document](#) outlining the first ever "US Strategy on Countering Corruption." The 38-page memorandum presents a comprehensive approach for the US to work

domestically and internationally in order “to prevent, limit, and respond to corruption and related crimes,” and identifies five pillars to guide and anchor the strategy:

- modernizing, coordinating, and resourcing US government efforts to fight corruption;
- curbing illicit finance;
- holding corrupt actors accountable;
- preserving and strengthening the multilateral anti-corruption architecture; and
- improving diplomatic engagement and leveraging foreign assistance resources to advance policy goals.

Implementation of the strategy would require a significant increase in federal resources directed at anti-corruption efforts, and the Administration is moving quickly to provide those resources. On December 9, 2021, the Biden Administration announced the funding of up to \$424 million to meet some of the objectives of the strategy through the Presidential Initiative for Democratic Renewal. The Biden Administration is focused on using these resources to enhance corruption-related research, data gathering, and analysis by reinforcing information sharing between law enforcement agencies, the intelligence community, and agencies dealing with foreign commerce and trade. The strategy includes plans to engage with the private sector, including “a diverse array of non-traditional partners and technologies” “to collaborate on tracking, developing, improving, and applying new and existing technological solutions to systemic challenges in preventing and detecting corruption.”

The strategy specifically calls for new legislation and regulations to “address deficiencies in the US anti-money laundering regime,” and appears to signal the Biden Administration’s support for the Establishing New Authorities for Business Laundering and Enabling Risks to Security (ENABLERS) Act—draft legislation that would, among other things, impose anti-money laundering requirements on investment advisors, law firms and lawyers, accountants, art galleries, public relations and marketing firms, and registered agents and would enable the prosecution of foreign public officials who demand bribes. Additionally, the Administration is calling for new regulations that allow intelligence agencies to collect information and build databases on beneficial ownership in corporate shell companies and in real estate transactions. The goal of these databases is to learn whether assets and transactions are used to hide ill-gotten cash or launder criminal proceeds.

The strategy pledges more aggressive investigative and enforcement measures, specifically through the FCPA money laundering laws, and forfeiture statutes. The strategy also makes clear that the Biden Administration seeks to strengthen international cooperation, pledging to “deepen cooperation with and assistance to countries with the political will for meaningful anti-corruption efforts . . . including, where appropriate, partnering with countries in joint investigations and prosecutions.” This includes supporting the United Nations Convention

⁹ Nicholas McQuaid, Acting Assistant Attorney General, Dep't of Justice, Keynote Address at the Foreign Corrupt Practices Act New York (June 2, 2021); Clara Hudson, "FCPA Enforcement is 'In An Entirely New' Place, Says Acting Criminal Division Chief," *Global Investigations Review* (June 2, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/fcpa/fcpa-enforcement-in-entirely-new-place-says-acting-criminal-division-chief>.

¹⁰ *Id.*

¹¹ DOJ, "Deputy Attorney General Rod J. Rosenstein Delivers Keynote Address on FCPA Enforcement Developments" (Mar. 7, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement>.

¹² McQuaid, *supra* note i; see also Hudson, *supra* note i.

¹³ *Id.*

¹⁴ *Id.*

against Corruption and the Organization of American States and engaging other countries to coordinate law enforcement actions and/or enforce sanctions.

Finally, to ensure that the memorandum's stated objectives are being met, relevant federal agencies and departments will annually report their progress to the President. The release of this strategy is a clear signal that the Biden Administration believes in aggressive enforcement of the FCPA and other anti-corruption laws and regulations by the DOJ, the SEC, and other agencies.

3. DOJ Officials Signal "Proactive" Anti-Corruption Investigations

DOJ leadership has reaffirmed an aggressive approach toward FCPA investigations and enforcement. At the June 2021 American Conference Institute's Foreign Corrupt Practices Act Conference, Principal Deputy Assistant Attorney General and former Acting Assistant Attorney General Nicholas McQuaid, who at the time led DOJ's Criminal Division, announced "entirely new" investigative methods aimed at fortifying the pipeline of FCPA investigations and stated that the DOJ expects to match—if not exceed—the "size, scope, and significance" of enforcement actions in recent prior years.⁹

At the same conference, McQuaid and then-Fraud Section Acting Chief Daniel Kahn indicated a shift in the origination of FCPA investigations from company self-reporting to more proactive methods,¹⁰ a departure from the perceived approach under the Trump Administration, which encouraged American companies to "regard law enforcement as an ally."¹¹ McQuaid noted that DOJ is "not sitting idly by, awaiting a self-disclosure by a company" to start investigations.¹² Kahn emphasized the importance of "learning of cases through a number of different ways" as an opportunity for increased detection of corruption rather than primarily relying on self-disclosure.¹³ Instead, DOJ has gathered key evidence "as much, if not more" from "proactive and innovative mining of a variety of data for investigative leads," law enforcement sources and cooperators, and DOJ's partnerships with foreign counterparts.¹⁴

Whether increased enforcement will materialize from DOJ-initiated investigations remains to be determined. Both McQuaid and Kahn discouraged the public from making any assumptions about FCPA enforcement despite a recent lull in corporate criminal FCPA resolutions.¹⁵ At the end of the third quarter of 2021, however, FCPA enforcement and investigation activity remained quiet and below historic averages.¹⁶

McQuaid also cautioned American companies against abusing or gaming DOJ's anti-piling-on initiative to get lower penalties for FCPA violations.¹⁷ The anti-piling-on initiative was launched in 2018 to address "disproportionate enforcement of laws by multiple authorities" in highly regulated industries, in which a company may be accountable to multiple regulatory bodies.¹⁸ As a result of this regulation, a full and final settlement with one agency lacked the benefits of finality and certainty that a company may otherwise secure. The anti-piling-on policy encourages coordinated agency action to discourage multiple enforcement actions against a company for the same misconduct. McQuaid warned companies against seeking no action from DOJ after first seeking deals with other enforcement authorities.¹⁹ The DOJ,

¹⁵ *Id.*

¹⁶ The Stanford Law Foreign Corrupt Practices Act Clearinghouse, “2021 Q3 Report” (Sept. 2021), <https://fcpa.stanford.edu/fcpac-reports/2021-fcpa-q3-report.pdf>.

¹⁷ Reuters, “US Official to Firms: Don’t Game DOJ Policy Against Multiple Penalties” (June 2, 2021), <https://www.reuters.com/business/us-official-firms-dont-game-doj-policy-against-multiple-penalties-2021-06-02/>.

¹⁸ DOJ, “Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute” (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>.

¹⁹ Reuters, *supra* note ix.

²⁰ *Id.*

²¹ *Id.*

²² DOJ, “Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA’s 36th National Institute on White Collar Crime” (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

McQuaid stated, “will not restrict the scope of our enforcement actions in response to tactically front-loaded resolutions.”²⁰ To receive credit for resolving other investigations, companies must make “good faith” efforts to coordinate with DOJ.²¹

4. Biden Administration Reverses Trump-Era Enforcement Policies

Deputy Attorney General Lisa Monaco announced several new policy changes to DOJ’s response to white-collar crime on October 28, 2021.²² The tougher federal response outlined by Monaco targets individuals and repeat corporate offenders, representing a shift from the policies of the Trump Administration in a number of areas. First, to be eligible for cooperation credit, companies must disclose all non-privileged information about individuals who are involved in or responsible for the misconduct at issue regardless of their seniority.²³ Previously, companies were permitted to limit disclosures to individuals they found were “substantially involved” in the misconduct. Monaco explained the former standard granted companies too much discretion and discounted the important role that even peripherally involved individuals may play in misconduct. Second, “the full criminal, civil and regulatory record of any company, . . . not just a narrower subset of similar misconduct” must be evaluated when considering corporate resolutions.²⁴ The stated goal of this change is to harmonize the treatment of corporations and individuals with prior criminal histories and to provide a safeguard against overlooking relevant information.²⁵ Finally, after noting that independent monitors have been a useful tool to encourage and verify compliance for many years, Monaco announced DOJ may impose independent monitors “whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA[.]” and rescinded any contrary guidance disfavoring the imposition of monitors.²⁶

Monaco said that in addition to the above changes, DOJ is exploring a number of other issues related to corporate crime. Monaco emphasized that DOJ particularly is concerned with recidivist companies, and noted that DOJ plans to examine whether it is appropriate to allow companies with a documented history of wrongdoing to have the opportunity to engage in pretrial diversion—i.e., NPAs and DPAs—since the purpose of such resolutions is to give a break to companies in recognition of cooperation with DOJ and in exchange for a promise to fix certain problems.²⁷ Monaco observed that enabling repeat offenders to take advantage of NPAs and DPAs may instill a sense that these fines and obligations are simply a cost of doing business rather than encouraging meaningful institutional change.²⁸ Monaco also expressed a desire to ensure that companies take their obligations under NPAs and DPAs seriously and vowed to “hold accountable” any company that breaches the terms of its DPA or NPA.²⁹ Monaco announced a newly formed Corporate Crime Advisory Group, which will examine these issues—along with a number of additional issues including, for example, benchmarking a company’s cooperation—and will craft recommendations that may eventually shape the Biden Administration’s white-collar crime policy.³⁰

²⁸ *Id.*

²⁹ *Id.*

³⁰ Clara Hudson and Ines Kagubare, "DOJ Will 'Surge Resources' to Corporate Enforcement, Official Says," *Global Investigations Review* (Oct. 5, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/doj-will-surge-resources-corporate-enforcement-official-says>.

³¹ *Id.*

³² *Id.* at 2.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

5. DOJ "Surges Resources" for Corporate Enforcement

On October 5, 2021, Principal Associate Deputy Attorney General John Carlin announced that DOJ will "surge resources" for corporate enforcement, as part of the Department's intensified commitment to white-collar enforcement.³¹ Notably, these additional resources include a squad of FBI agents who will work full time inside the Criminal Division's Fraud Section at Main Justice.³²

In addition to discussing this new surge in resources, Carlin highlighted three important areas of focus: (1) sanctions and export control enforcement, (2) cryptocurrency enforcement, and (3) reexamining the DOJ's use of corporate resolutions.

Regarding sanctions and export control enforcement, Carlin stated that there has been a "significant" increase in sanctions and export control investigations over the past few years, and that he expects this trend will continue.³³ He also noted that 70 percent of the sanctions and export control cases focus on four countries—Iran, China, North Korea, and Russia—and said the Department is likely to continue to use new tools in this arena, such as leveraging asset forfeiture "in ways to have the maximum disruptive effect."³⁴

Next, Carlin remarked that cryptocurrency is another area "ripe for innovation and vigorous enforcement." He noted that cryptocurrency is used prominently in a wide variety of criminal activity—from ransomware and fraud to terrorist financing—and that Bank Secrecy Act compliance is going to be "a key tool in the crypto space."³⁵

Finally, with respect to corporate resolutions, Carlin stated that DOJ's approach to the use of corporate resolutions will change and emphasized that it will be firm with companies that do not comply with government agreements. He said that DOJ will continue to use NPAs, DPAs, and guilty pleas, "but that is not the end of an obligation for a company, and to the contrary, it's just the start."³⁶ Carlin remarked that there will be increased scrutiny on the use of those agreements to ensure that those "who get the benefit of such an arrangement comply with their responsibility" and that companies that do not comply with agreement obligations "should expect to see serious repercussions."³⁷

6. Biden Administration Creates Two New Task Forces To Fight Corruption and Combat Human Smuggling and Trafficking in Central America

As previously [reported](#) by Jenner & Block, DOJ on June 7, 2021, [announced](#) the creation of Joint Task Force Alpha, which seeks to identify, disrupt, and prevent migrant smuggling and human trafficking operations, and serve as a complement to the Department's anti-corruption efforts in Mexico and the Northern Triangle countries of Guatemala, Honduras, and El Salvador. The task force was established in partnership with the Department of Homeland Security (DHS) and includes federal prosecutors from Arizona, California, and Texas—as well as personnel from DHS, the FBI, and the Drug Enforcement Administration (DEA).

Alongside its Office of Prosecutorial Development, Assistance, and Training and International Criminal Investigative Training Assistance Program personnel—including new anti-corruption legal advisors in the Northern Triangle—Joint Task Force Alpha will work with regional prosecutors and investigators to build corruption cases in the region and develop leads for the Kleptocracy Asset Recovery Initiative.

Joint Task Force Alpha will work closely with a second task force—focused on prosecuting corruption in Central America—[announced](#) by the Biden Administration the same day. According to the White House announcement, DOJ, with support from the State Department, will establish an anti-corruption task force to investigate and prosecute corruption cases connected to the United States, Guatemala, and the region. The task force will include US prosecutors and law enforcement experts and will involve three components:

- increased focus of the global Kleptocracy Initiative to prosecute corruption cases and seize illicitly gained assets arising from corruption in Guatemala, El Salvador, and Honduras;
- expansion of the number of Resident Legal Advisors to provide capacity-building, training, and case-based mentoring to the Guatemalan Public Ministry, including the Special Prosecutor Against Impunity (FECI), to build corruption cases; and
- rapid response capability to deploy US prosecutors and law enforcement experts to provide mentorship to develop corruption cases.

Both task forces are aligned with the recently enacted United States-Northern Triangle Enhanced Engagement Act, which required the Department of State to assemble a list of “corrupt and undemocratic actors” in the Northern Triangle.

¹ Gurbir Grewal, Speech: PLI Broker/ Dealer Regulation and Enforcement 2021 (Oct. 2021), <https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621>.

² Gurbir Grewal, Speech: Remarks at SEC Speaks 2021 (Oct. 2021), <https://www.sec.gov/news/speech/grewal-sec-speaks-101321>.

³ See SEC, "SEC Surpasses \$1 Billion in Awards to Whistleblowers with Two Awards Totaling \$114 Million," No. 2021-177 (Sept. 15, 2021), <https://www.sec.gov/news/press-release/2021-177>.

SEC FCPA ENFORCEMENT YEAR IN REVIEW

The SEC brought several high-profile FCPA actions in 2021. Under the current securities laws, the SEC has the authority to bring cases against companies with securities listed on US exchanges, both for bribery of foreign officials as well as for books and records violations. With new leadership, the SEC is expected to expand the use of its whistleblower program and other tools to identify and bring new cases. In bringing such cases, the SEC works closely both with the DOJ and with foreign authorities.

THE SEC'S NEW LEADERSHIP AND THE CONTINUED IMPORTANCE OF THE WHISTLEBLOWER PROGRAM

The SEC is currently chaired by Chairman Gary Gensler, who is widely expected to oversee an aggressive enforcement program. The SEC also has new leadership in its Enforcement Division, with former New Jersey Attorney General Gurbir Grewal taking over as Director. In October 2021, just months after taking his role, Grewal made two separate speeches where he made important points regarding his expectations for parties and possible results of SEC cases, emphasizing party accountability in SEC investigations. In one of these speeches, Grewal made clear the SEC's expectations regarding cooperation with its investigations and noted that cooperation requires more than mere adherence to a party's legal and regulatory obligations. More specifically, speaking for the SEC, Grewal noted that the agency would "look to whether the would-be cooperator took significant, tangible steps that enhanced the quality of our investigation, allowed us to conserve resources and bring charges more quickly, or helped us to identify additional conduct or other violators that contributed to the wrongdoing."¹

In another October 2021 speech, Grewal continued the theme of accountability and signaled the SEC's intention to seek admissions in appropriate cases. Specifically, Grewal noted that "[w]hen it comes to accountability, few things rival the magnitude of wrongdoers admitting that they broke the law," and extolled the ability of admissions to "serve as a clarion call to other market participants to stamp out and self-report the misconduct to the extent it is occurring in their firm."²

Consistent with the SEC's focus on cooperation and accountability, the Commission is expected to continue to take advantage of the whistleblower program established under Section 922 of the Dodd-Frank Act. This program allows whistleblowers to receive 10 to 30 percent of the ultimate recovery from any SEC enforcement action taken in response to or in conjunction with provided information. In total, the SEC has awarded over \$1 billion to 207 whistleblowers, with over \$500 million in awards distributed in 2021.³

⁴ See SEC, "SEC Charges Deutsche Bank With FCPA Violations Related to Third-Party Intermediaries," No. 2021-3 (Jan. 8, 2021), <https://www.sec.gov/news/press-release/2021-3>.

⁵ See SEC, "SEC Charges World's Largest Advertising Group with FCPA Violations," No. 2021-191 (Sept. 24, 2021), <https://www.sec.gov/news/press-release/2021-191>.

Enforcement Actions From 2016 to 2021

	2016	2017	2018	2019	2020	2021
Standalone Enforcement Actions	548	446	490	526	405	434
Follow-On Administrative Proceedings	195	196	210	210	180	143
Delinquent Filings	125	112	121	126	130	120
Total Actions	868	754	821	862	697	697

In 2021, the SEC continued its practice of bringing FCPA charges for payments and/or gifts under the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. The agency brought such charges in proceedings that both did and did not involve parallel criminal proceedings. These cases involved misconduct around the globe, as the allegations arose in India, Latin America, China, and the United Kingdom.

KEY PROCEEDINGS

The SEC brought charges under the FCPA against Deutsche Bank AG in January 2021. The Commission claimed that the bank violated the books and records and internal account controls provisions of the FCPA in connection with improper payments to foreign officials and their associates in China, the UAE, Italy, and Saudi Arabia. The SEC's case focused on the fact that Deutsche Bank worked with foreign officials, their relatives, and associates as third-party intermediaries and finders to obtain and retain business. The SEC also alleged that Deutsche Bank inaccurately recorded these payments as legitimate business expenses and lacked sufficient internal controls related to the use of third-party intermediaries. The bank agreed to pay over \$43 million in disgorgement and prejudgment interest to settle these charges. The SEC did not seek a civil penalty in connection with these violations, as the bank had already paid a \$79 million penalty in connection with criminal charges.⁴

In September 2021, the SEC charged WPP plc with violations of the anti-bribery, books and records, and internal account controls provisions of the FCPA. These charges arose out of alleged violations at the advertising group's subsidiaries in India, Brazil, China, and Peru. The SEC claimed that WPP, the world's largest advertising group, executed an aggressive business growth strategy in these markets, with the agency failing to ensure that its subsidiaries adhered to its internal accounting controls and compliance policies. In supporting these charges, the SEC alleged that WPP failed to ensure that companies they acquired operated pursuant to WPP's internal accounting controls and compliance policies and permitted the existing management to exercise with autonomy. This oversight ultimately resulted in alleged failures to properly identify or respond to red flags related to corruption and control failures. For example, according to the SEC, despite receiving several anonymous complaints about bribes to officials in the Indian government, WPP permitted its subsidiary in the country to continue making such bribes in exchange for advertising contracts. WPP agreed to cease and desist these violations and paid over \$19 million in disgorgement, prejudgment interest, and civil penalty.⁵

More recently, the SEC charged Credit Suisse Group AG with violations of the FCPA for fraudulently misleading investors. The Commission claimed that Credit Suisse executed

⁶ See SEC, “Credit Suisse to Pay Nearly \$475 Million to US and UK Authorities to Resolve Charges in Connection with Mozambican Bond Offerings,” No. 2021-213 (Oct. 19, 2021), https://www.sec.gov/news/press-release/2021-213?utm_medium=email&utm_source=govdelivery.

⁷ *Id.*

a scheme involving bond offerings and a syndicated loan to raise funds on behalf of state-owned entities in Mozambique. The SEC contended that these transactions raised over \$1 billion, with these funds allegedly being used to bribe government officials in Mozambique, perpetrate a hidden debt scheme, and pay kickbacks to Credit Suisse investment bankers and their intermediaries. Furthermore, according to the SEC order, Credit Suisse failed to provide investors with complete and accurate disclosures regarding these bond offerings, depriving investors of critical information regarding Mozambique’s mounting debt and substantial risk of default from prior credit facilities. In response to the alleged violations, Credit Suisse agreed to pay over \$34 million in disgorgement and prejudgment interest as well as a \$65 million penalty.⁶

CONTINUED INTERNATIONAL COOPERATION

Finally, the SEC continued its FCPA enforcement in partnership with other domestic and foreign agencies. Of the five enforcement actions this year, three involved coordination between the SEC and foreign authorities from five countries: the United Kingdom, Switzerland, the United Arab Emirates, Brazil, and India.

For example, in connection with the SEC’s action against Credit Suisse, Grewal praised the agency’s “close and successful coordination with counterparts in Europe and Asia” and said the SEC would “continue to work collaboratively with overseas law enforcement and regulatory agencies.”⁷

ANTI-MONEY LAUNDERING UPDATE

On January 1, 2021, Congress overrode a presidential veto and passed the AMLA into law. The AMLA included a series of sweeping reforms to AML and CFT laws and directed the Secretary of the Treasury to establish national priorities for AML/CFT policy. In addition, the AMLA set a series of year-end 2021 deadlines for the FinCEN to promulgate rules implementing certain provisions of the AMLA, and FinCEN has issued reports and proposed rules throughout 2021. This update will focus on the Corporate Transparency Act within the AMLA, as well as the AMLA's enhancements to the Bank Secrecy Act's (BSA) whistleblower program and expansion of the US government's authority to subpoena information from certain foreign financial institutions.

I. The Corporate Transparency Act

The Corporate Transparency Act added a new section to the Bank Secrecy Act, 31 USC § 5336, that requires certain organizations that are incorporated or doing business in the US to disclose to FinCEN specified information on their beneficial owners. The Corporate Transparency Act also directed FinCEN to establish a national database of that beneficial ownership information and authorized FinCEN to disclose collected beneficial ownership information to federal law enforcement agencies and to non-federal law enforcement agencies upon court order. The Corporate Transparency Act also allows FinCEN to share a reporting entity's beneficial ownership information with banks that are required by the Bank Secrecy Act to conduct due diligence on their customers, but only with the reporting entity's consent.

On April 5, 2021, FinCEN issued an Advance Notice of Proposed Rulemaking that sought comment from the public on the implementation of the Corporate Transparency Act. FinCEN's Notice posed 48 questions that sought input on defining the Corporate Transparency Act's key terms, the scope and burdens of beneficial ownership reporting requirements, maintaining the beneficial ownership database, and insight on the harmonization of the Corporate Transparency Act with current Customer Due Diligence requirements. For example, FinCEN sought comment on the definition of "other similar entities" that are included in the Corporate Transparency Act's list of entities subject to beneficial ownership reporting, and whether the Corporate Transparency Act regulatory definition of "beneficial owner" should be the same as the existing Bank Secrecy Act regulatory definition of that term. FinCEN also sought comment on the definition of the "timely manner" within which reporting entities must update the information they submit to FinCEN. Additionally, FinCEN asked the public whether reporting entities should be required to "affirmatively confirm," on a periodic basis, the continued accuracy of submitted beneficial ownership information. FinCEN will issue the final Corporate Transparency Act rule by January 1, 2022.

While the Corporate Transparency Act section of the AMLA increases transparency into beneficial owners, it has certain limitations which curtail the extent to which banks

¹ 31 USC § 5323(a)(5)

can use beneficial ownership information to conduct Customer Due Diligence. For instance, banks still need the reporting entity's consent to obtain information regarding the entity's beneficial owners, and the bank must make a formal request to FinCEN for beneficial owner information. The text of the Corporate Transparency Act also appears to foreclose beneficial ownership information sharing between financial institutions. Indeed, banks are required to maintain the confidentiality of beneficial ownership information once received from FinCEN. In addition, the Corporate Transparency Act exempts numerous entities from the beneficial ownership reporting requirements, including large, publicly traded companies, federal and state credit unions, and money transmitting business that are registered with FinCEN. Finally, until FinCEN issues the final Corporate Transparency Act rule, financial institutions do not yet know the details of what their on-going responsibilities will be to ensure that the beneficial ownership database contains accurate customer information. FinCEN's forthcoming final Corporate Transparency Act rule will bring to light the scope of the law's reach, the details of its reporting requirements, and the future of financial institutions' Customer Due Diligence responsibilities and resources.

2. Enhanced Whistleblower Program

AMLA amended the Bank Secrecy Act¹ by updating the definition of a whistleblower as it pertains to a financial institution's compliance officers and other executives. Additionally, the AMLA increases the potential awards to whistleblowers, while also offering stronger protections against retaliation.

a. Expanded Definition of Whistleblowers

Under the AMLA, a "whistleblower" is defined as "any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of this subchapter or subchapter III to the employer of the individual or individuals, including as part of the job duties of the individual or individuals, or the Secretary of the Attorney General." This definition has dual significance. First, it contemplates that a compliance employee can blow the whistle on her employer using information that was accessed as part of her official duties. This expands prior definitions, as previously an employee was barred from using confidential information gained during her employment as the basis for a whistleblower claim. Importantly, this definition also diverges from the Dodd-Frank Act whistleblower program for SEC violations, described below. Second, the AMLA's amendment allows the whistleblower to report the alleged infractions directly her employer rather than to the government. However, not all employees are covered by the AMLA's expanded definition of a whistleblower – employees of federal credit unions and federal banking agencies are not included in the AMLA as they are covered by previously enacted whistleblower programs under the Federal Deposit Insurance Act and the Federal Credit Union Act.

b. Increased Potential Financial Awards for Whistleblowers

The AMLA increased the potential award to the whistleblower in cases in which the fine levied by the government exceeds \$1 million. Previously, the monetary award

was discretionary and capped at \$150,000. The AMLA removed the \$150,000 cap and provided a payment of up to 30 percent of the fine, at the government's discretion, based on the significance of the information provided by the whistleblower, the degree of assistance provided by the whistleblower, and the potential deterrence of future wrongdoing. Interestingly, awarding money to the whistleblower is now mandatory if these requirements are met but as stated above the *amount* of the award is completely at the Secretary's discretion and there is no statutory minimum. This is a vital difference between the AMLA and Dodd-Frank; under Dodd-Frank, the award has a statutory minimum of 10 percent and caps at 30 percent but under AMLA, which removed the \$150,000 cap, there is no such minimum in place and the AMLA does not provide a mechanism for a whistleblower to appeal the amount of the award.

The AMLA also increased the penalties for violations of the Bank Secrecy Act. Under the new statutory penalty scheme, potential fines have more than doubled for most violations, including increasing the maximum daily penalty for non-compliance of BSA/AML program requirements to \$59,017 from \$25,000. This new penalty structure increases the likelihood that fines will exceed the \$1 million amount required to trigger an award to a whistleblower, further incentivizing potential whistleblowers.

c. Stronger Anti-Retaliation Protections for Whistleblowers

Section 6315(g) of the National Defense Authorization Act (NDAA) prohibits an employer from "directly or indirectly discharging, demoting, suspending, threatening, blacklisting, harassing, or in any manner discriminating" against an employee that makes allegations to either her employer or the Government. Additionally, the employee can now file a complaint with the Secretary of Labor, and then, if the complaint is not acted on, she can sue the employer in federal court for reinstatement, monetary damages up to two times the lost wages, compensatory damages, and "any other appropriate remedy." These protections expand on the previous anti-retaliation statute by adding to the list of prohibited conduct, protecting the employee against retaliation for allegations made against her employer, and provided a complaint process to the Secretary of Labor. Previously, an employee was only protected against discharge if she provided information to the Secretary or another federal agency.

d. Comparison to Protections in Dodd-Frank Act

There are two main differences between the expanded whistleblower definition in the AMLA and the definition the Dodd-Frank Act applied to public companies that are required to register with, and are regulated by, the SEC. First, under the AMLA's expansion, the whistleblower can alert either the government or her employer. In contrast, under the Dodd-Frank Act, the whistleblower is protected only once she alerts the SEC. Second, the Dodd-Frank Act does not allow a whistleblower to receive an award for information that she learned during her employment. The AMLA has no such limitation to it. These two differences, when taken together, reshape the entire whistleblower process.

3. Expanded Subpoena Power

In a significant departure from the prior regime, the AMLA gives the government increased authority to collect information from foreign financial institutions. The AMLA allows the US Treasury Department and the DOJ to subpoena foreign banks if the bank maintains a correspondent account within the United States. Notably, if the records sought are relevant to certain types of investigations (listed in the AMLA), the Treasury Department and DOJ can subpoena records for any account at the bank, not just records related to the correspondent account.

e. Subpoena Power Under the Prior Regime

Prior to the passage of the AMLA, subpoena power under 31 USC § 5318(k) was limited to issuing a subpoena to the foreign bank with a correspondent account in the US for records relating to that specific account. Besides a subpoena, the Treasury Department and DOJ could also make a request under a Mutual Legal Assistance Treaty with the country in question (which allows for the exchange of evidence and information in criminal and related matters) or issue a *Bank of Nova Scotia* subpoena (which extends the authority of the US government to compel production from a foreign country).

f. Subpoena Power Under the AMLA

Under the AMLA, the Treasury Department and DOJ have a significantly expanded scope of authority to seek and enforce subpoenas on a foreign financial institution, and documents will be produced in a format more easily used at trial. In addition, the AMLA imposes severe penalties for failing to comply with a subpoena.

As amended, 31 USC § 5318(k)(3)(A)(i) states that the Treasury Department or DOJ may subpoena “any foreign bank that maintains a correspondent account in the United States and request any records relating to the correspondent account **or any account at the foreign bank, including records maintained outside of the United States . . .**” The statute also states that the records requested must be the subject of: “(I) any investigation of a violation of a criminal law of the United States; (II) any investigation of a violation of [the Bank Secrecy Act]; (III) a civil forfeiture action; or (IV) an investigation pursuant to section 5318A.”

Under the amended statute, documents produced in response to such a subpoena must be properly authenticated. 31 U.S.C. § 5318(k)(3)(A)(ii) requires the foreign financial institution subject to a subpoena to “authenticate all requested records with testimony in the manner described in . . . rule 902(12) of the Federal Rules of Evidence; or . . . section 3505 of title 18.” This allows the documents produced to be easily used at trial.

The AMLA also calls for severe penalties for failing to comply with a subpoena under this section. Under the amended statute, a foreign financial institution is liable for a civil penalty of up to \$50,000 per day it does not comply with the subpoena.² Any funds held in the correspondent account of the foreign financial institution maintained in the United States may be seized to satisfy civil penalties.³ Notably, under the AMLA foreign financial institutions may not assert conflicts with local law to avoid compliance. 31 USC § 5318(k)(3)(A)(iv)(II) states: “An assertion that

² 31 USC § 5318(k)(3)(E)(iii)(II)

³ 31 USC § 5318(k)(3)(F)

compliance with a subpoena . . . would conflict with a provision of foreign secrecy or confidentiality law shall not be a sole basis for quashing or modifying the subpoena.”

g. Implications

The Treasury Department and DOJ may make extensive use of their expanded subpoena powers, as the AMLA provided an easy mechanism for obtaining records from financial institutions overseas. In particular, expanded subpoena powers will be especially vital to AML efforts around countering the financing of terrorism, and foreign export money laundering schemes in general. Foreign financial institutions may re-think their use of correspondent accounts in the United States (which now greatly increase their subpoena liability), but their necessity for cross-border transactions in different currencies may force banks to maintain these correspondent accounts. Finally, given the provision that conflicts with foreign laws is not a ground to quash the subpoena, foreign financial institutions that receive such a subpoena may have to make tough choices between violating US law or applicable foreign law.

SECTION II
UNITED KINGDOM

¹ Cross-border co-operation on policing, security and criminal justice after Brexit, Northern Ireland Affairs Committee (22 April 2021), <https://committees.parliament.uk/publications/5650/documents/55754/default/>.

² National Crime Agency – Written evidence (PBS0001): Post EU Exit Law Enforcement Cooperation (3 February 2021), <https://committees.parliament.uk/writtenevidence/23533/pdf/>.

“NO IMPACT” AT ALL? THE REALITIES OF BREXIT ON THE UK ENFORCEMENT LANDSCAPE

In March 2021, while speaking at the 9th Annual European Compliance & Ethics Institute Conference, the director of the SFO, Lisa Osofsky, asserted that Brexit would have “no impact” on the SFO—a statement many saw as downplaying the challenges enforcement agencies would face due to the United Kingdom leaving the European Union. Now, almost a year on, and despite the fears that Brexit would cause significant damage to cross-border investigations and enforcement, it appears that Brexit’s consequences have been more limited in these areas than many feared. This is, in large part, due to the trade and co-operation deal (the Brexit Deal) entered into by the UK and EU on 30 December 2020.

But to say that Brexit would have “no impact” may have been an overstatement. Post-Brexit, the UK has lost access to certain criminal justice databases maintained by the EU and information and evidence sharing may take much longer than before. Further, the UK is no longer a part of the EIO or EAW schemes. These changes alone may cause more difficulties once the backlog of pre-Brexit investigations and cases is resolved, and authorities begin to tackle post-Brexit matters. With Brexit still a recent development, a greater impact may become apparent over time and companies should continue to monitor these issues. However, it appears that the initial impacts of Brexit have not proven as profound as once thought, and many of the mechanisms used for cross-border investigations and cooperation remain intact, albeit in slightly different forms.

WHY CHANGE A GOOD THING?

The Brexit Deal means that we are likely to continue to see close cooperation on criminal justice issues. In the context of the Irish border (a potential enforcement flashpoint), a UK parliamentary committee found (in April 2021) that, “Brexit had had no discernible operational impact on cross-border policing and the ability to co-operate with partners in the EU has been maintained”.¹ In addition to the Brexit Deal, the steps that the UK government took to maintain access to a similar level of information from European enforcement agencies following Brexit appears to be helping to maintain the status quo. In February 2021, the UK government stated that the Interpol systems and Warning Index used by the UK for law enforcement purposes, which are no longer automatically integrated into the UK’s Police National Computer following Brexit, update at broadly the same speed as the pre-Brexit systems.² And although the UK is no longer a party to the EAW and EIO schemes, alternative mechanisms have been put in place that should achieve similar goals.

Importantly, the surrender of citizens between the UK and Member States was expressly included in the Brexit Deal, and the future extradition regime may not differ significantly from the EAW scheme in terms of the number of requests and arrests, or in terms of timings (an uncontested extradition under the EAW scheme took 16 days on average).

³ Home Office – Written evidence (PBS0002): EU Member State Notifications under the Law Enforcement and Criminal Justice Title of the Trade and Cooperation Agreement, including Extradition of Own Nationals (5 March 2021), at <https://committees.parliament.uk/writtenevidence/23544/pdf/>.

⁴ *In R (KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, the Supreme Court decided that Section 2 cannot be used to compel non-UK persons to produce documents held outside of the UK. For additional information on this case see chapters 6 and 8 of this Guide.

However, it is worth noting the differences between the regimes, including that the new regime makes provision for states to decline to surrender their own nationals.

In fact, following the UK's withdrawal from the EAW system, 10 Member States have notified the UK of their intention to exercise an absolute bar on the extradition of their own nationals to the UK, and an additional two nations shall only extradite their own nationals to the UK with the individual's consent.³ It appears that the EU and UK will need to take care to ensure cross-border enforcement actions can be maintained, otherwise it is possible that the UK government will soon find it difficult to close cases against individuals of certain nationalities who have returned to their home nation in Europe. Before Brexit, the EAW would probably have resolved that issue. It remains to be seen whether this will prove to be a significant challenge for UK enforcement activity in the future. Although the UK has other bi-lateral arrangements, including its relationship with Interpol, which assist in securing the presence of accused persons for trial, these are not a substitute for properly functioning extradition arrangements.

With regard to obtaining evidence from Member States, the Brexit Deal provided that UK-EU arrangements would revert to a mutual legal assistance scheme governed by a 1959 European convention. The process may, however, take longer than the EIO scheme, as it allows for 45 days from the receipt of a request to decide whether to execute it, rather than the 30 days previously allowed. The SFO, more specifically, also has the ability to gather information for its investigations by a notice issued pursuant to Section 2 of the Criminal Justice Act 1987. Section 2 allows the director of the SFO to issue a notice compelling the production of documents and information in order to investigate fraud and corruption. It is a criminal offence if a person does not comply with a Section 2 notice, giving serious teeth to this power. Although the extra-territorial effect of the Section 2 notice has been limited by the recent UK Supreme Court decision in *KBR*,⁴ links to the UK, such as having a registered office or carrying on business in the UK, will be enough for the SFO to assert this power against an organisation.

The Brexit Deal also alleviated concerns that the UK would lose access to EU criminal justice databases. The Brexit Deal preserved arrangements for the reciprocal exchange of passenger data, DNA, fingerprints, and vehicle registration data (under the Prüm Convention), and for the exchange of criminal records (although the UK's loss of access to the European Criminal Records Information System may lead to slower turnaround times), as well as information on wanted or missing persons. The UK will continue to cooperate with Europol and Eurojust, agencies promoting cooperation between member states in combating terrorism and organised crime, but it will have no say in the management of these agencies.

WHAT ABOUT DATA TRANSFERS?

There had also been concerns that internal investigations may be affected by Brexit in terms of the ability to transfer personal data from the EU to the UK. But on 28 June 2021, the European Commission adopted two adequacy decisions for the UK, which allow data to flow freely from the EU to the UK where it benefits from an essentially equivalent level of protection to that guaranteed

⁵ Lisa Osofsky, UK Serious Fraud Office, Speech, "Future Challenges in Economic Crime: A View from the SFO" (9 October 2020), <https://www.sfo.gov.uk/2020/10/09/future-challenges-in-economic-crime-a-view-from-the-sfo/>.

under EU law. This should resolve any uncertainty over issues of transferring data between the UK and Member States, if only for the time being. The adequacy decisions included safeguards, including a 'sunset clause' which limits their duration to four years. The UK therefore must continue to maintain an adequate level of data protection in order for the adequacy decisions to be renewed.

ONLY TIME WILL TELL...

The impact on cooperation between UK and EU law enforcement agencies would clearly have been much more dramatic in the event of a no-deal Brexit. However, with the Brexit Deal and other investigative tools remaining in place, we are offered some reassurance that cross-border investigations and enforcement post-Brexit should not see drastic change. At the level of policy and strategy, however, the UK's role in EU criminal justice arrangements will be diminished. Although it will continue to cooperate with Europol and Eurojust, for example, the UK will no longer have any voice in how those agencies should be run. This is inevitable given the UK's new status as a non-Member State. The effects of this and the other changes will only become clearer with time, but for now at least the SFO is confident that Brexit is not "likely to leave law enforcement short of work."⁵

¹ *In R (on the application of KBR Inc) v Director of the Serious Fraud Office* [2021] UKSC 2, <https://www.supremecourt.uk/cases/docs/uksc-2018-0215-judgment.pdf>

² SFO website, About Us, available at <https://www.sfo.gov.uk/about-us/>

CAN THE UNITED KINGDOM'S SERIOUS FRAUD OFFICE COMPEL DOCUMENTS FROM COMPANIES WHEN THOSE DOCUMENTS ARE LOCATED OUTSIDE THE UK?

On 5 February 2021, the UK Supreme Court overturned the Divisional Court and found that the SFO was unable to use its powers under Section 2(3) of the Criminal Justice Act 1987 to compel a foreign company to produce documents located outside the United Kingdom.¹

The Supreme Court's decision to restore what had been the status quo, although unsurprising, is significant because the SFO is responsible for prosecuting "the top level of serious or complex fraud, bribery and corruption"² and its work often (and increasingly so) involves cross-border elements. Yet, as discussed further below, commentators have perhaps overstated the impact of this case. Although the decision makes the SFO's task of investigating cross-border serious fraud more difficult, it does not make it impossible. Where necessary the SFO can continue to rely on mutual legal assistance arrangements with other countries to obtain information outside the jurisdiction.

In this section, we set out the practical implications of the decision for three different categories of company:

- a foreign company with no direct presence in the UK;
- a UK based company with documents held abroad; and
- a foreign company with a direct presence in the UK.

We then consider in more detail what this decision means for the future of SFO investigations.

BACKGROUND

KBR, Inc. is a US incorporated entity. KBR, Inc.'s UK subsidiary, Kellogg Brown and Root Ltd (KBR UK), was under investigation by the SFO.

In April 2017, the SFO issued a Section 2 notice to KBR UK. A Section 2 notice is the typical means by which the SFO compels an entity to produce materials. KBR UK provided various documents but responded that it was unable to produce certain documents held abroad as they were not in its possession, but were instead held by KBR, Inc. in the US. KBR UK offered to meet with the SFO to discuss the investigation. At the SFO's insistence, KBR, Inc. officers from the US also attended the meeting in London. It was at this meeting that the SFO served a Section 2 notice on KBR, Inc.'s officers in order to obtain the material held by KBR, Inc. in the US. KBR, Inc. then sought to quash the Section 2 notice in court. While the Divisional Court dismissed KBR, Inc.'s challenge of the Section 2 notice, the Supreme Court agreed with KBR, Inc. and overturned the Divisional Court.

³ SFO press release, "SFO closes investigation into KBR Inc.'s UK subsidiaries," <https://www.sfo.gov.uk/2021/03/18/sfo-closes-investigation-into-kbr-inc-s-uk-subsiidiaries/>

In March 2021, a month after the Supreme Court's decision, the SFO closed its investigation into the activities of KBR UK, its officers, employees, and agents. The SFO noted that following a "thorough investigation of the available evidence" the evidence in this case did not satisfy the evidential burden that must be established before a prosecution can be brought.³

PRACTICAL IMPLICATIONS FOR COMPANIES

We set out below the Supreme Court's decision's implications for different companies. However, a key practical lesson this decision offers to all companies is to carefully consider how they respond to any SFO requests. At a time when there is a huge emphasis on the benefits of cooperation (as touched upon in chapter 8 of this Guide), companies may be hesitant to challenge requests from the SFO. However, cooperation does not mean allowing the SFO to overstep its powers, and companies seeking cooperation credit may elect to challenge an investigating agency in this type of scenario, while continuing to cooperate in other ways.

1. A foreign company with no direct presence in the UK

The Supreme Court's decision made clear that foreign companies, such as KBR, Inc., with no direct presence in the UK (i.e., with no fixed place of business in the UK and which do not carry on business in the UK), cannot be compelled pursuant to a Section 2 notice to produce documents held abroad. The Supreme Court rejected the Divisional Court's view that a foreign company may be compelled to produce documents where there is "a sufficient connection between the company and the [UK] jurisdiction." The fact that the SFO served a Section 2 notice on a representative of KBR, Inc. in London, and the fact that KBR UK was under investigation by the SFO at that time, did not alter the Supreme Court's conclusion that the Section 2 notice could not be used to compel KBR, Inc. to disclose documents held abroad. Therefore, a foreign company with or without a UK subsidiary cannot be required to produce documents purely on the basis that there is some "sufficient connection between the [foreign] company and the [UK] jurisdiction."

For the SFO to be able to require a foreign company to produce documents, that company must "carr[y] on business in the United Kingdom or have a registered office or any other presence here." However, when this test is not met, such documents will not necessarily be out of the SFO's reach. Although it is time-consuming and cumbersome for the SFO, the SFO can continue to rely on mutual legal assistance arrangements with other countries to obtain information held by foreign companies outside the UK.

2. A UK company with documents held abroad

A Section 2 notice can be used by the SFO to compel a UK company to produce documents that the company holds abroad (e.g., on an overseas server). This was common ground between the parties, and the Supreme Court appears to accept this in its analysis.

⁴ Reuters, "UK fraud prosecutor closes KBR investigation," <https://www.reuters.com/article/us-kbr-britain-idUSKBN2BA1A3>

⁵ mLex, "KBR ruling won't kill UK fraud investigations, says SFO's Osofsky," <https://content.mlex.com/#/content/1271889>

As indicated earlier, KBR UK did not provide certain documents located in the US to the SFO. However, this was because the documents were held by KBR, Inc. in the US and were therefore not in KBR UK's possession. It was immaterial that the documents were in the US; the relevant issue was whether the documents belonged to KBR UK or KBR, Inc.

3. A foreign company with a direct presence in the UK (i.e., one which has a registered office or a fixed place of business in the UK or which carries on business in the UK)

The Supreme Court explicitly stated that this decision did not concern the position of a foreign company with a direct presence in the UK. Accordingly, the question remains as to whether a foreign company with a presence in the UK could be compelled to provide documents held abroad.

In this regard, the Supreme Court's analysis is instructive. The Supreme Court suggested that it is "questionable" whether the operation of Section 2 in respect of documents held abroad by a UK-based company gives it any material extra-territorial effect. Rather, a Section 2 notice would be a request for a UK company (which is within the UK's jurisdiction) to bring documents into the jurisdiction in order to produce them.

The same could be said about documents held abroad by foreign companies with a direct presence in the UK. Given the view of the Supreme Court, we consider it unlikely that a successful challenge could be made by a foreign company with a direct UK presence to a Section 2 request for documents held or controlled by that company abroad. Therefore, a foreign company with direct presence in the UK should assume that the SFO could request any document it holds abroad.

WHAT DOES THIS MEAN FOR THE SFO?

Commentators were quick to describe this decision as a huge "blow" or "defeat" for the SFO. This view was compounded by the fact the SFO closed its investigation into KBR UK just over a month after the decision (this is despite the SFO's statement that the Supreme Court's ruling had no bearing on the decision to close the investigation).⁴ Speaking at an event, Lisa Osofsky welcomed the clarity that the judgment gave and noted that it was particularly helpful that the court confirmed that "UK companies cannot funnel information out of the jurisdiction and keep it away from the SFO."⁵

Lisa Osofsky denied that the decision "killed" the SFO's ability to successfully prosecute cases. Indeed, as pointed out above, the SFO can continue to rely on mutual legal assistance arrangements with other countries to obtain information held by foreign companies outside the UK, although with regard to European Union (EU) member states (as we note in chapter 5 of this Guide) the SFO and other law enforcement agencies in the UK now find themselves unable to rely on many of the EU cross-jurisdictional enforcement tools previously available to them.

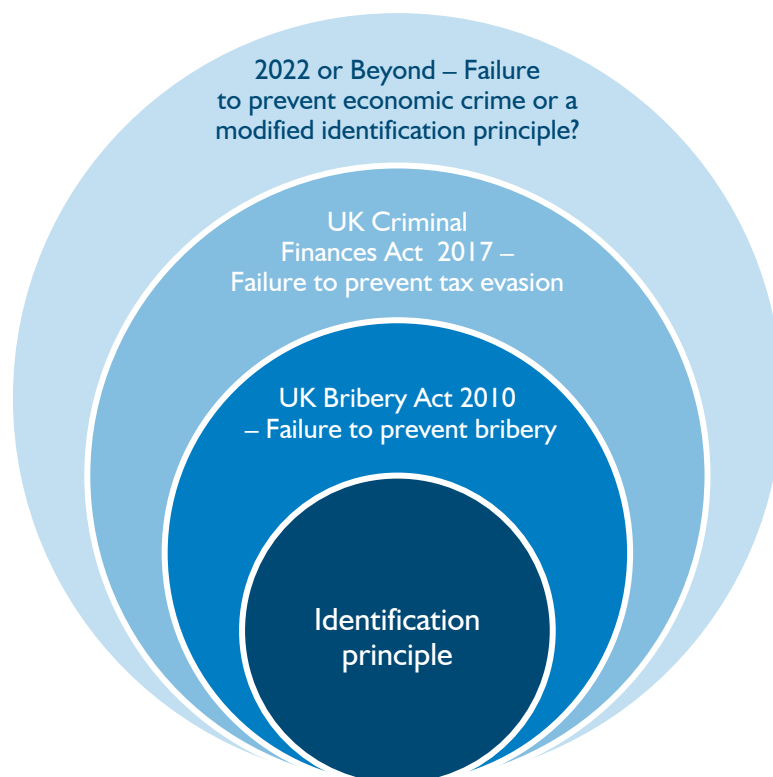
AN EXPANSION OF UK CORPORATE CRIMINAL LIABILITY?

BACKGROUND

Over the past decade, there has been a distinct trend in the UK to move towards the expansion of corporate criminal liability. The general approach of UK criminal law, unless modified by statute, is to attribute criminal conduct to a company only where a sufficiently senior individual or group of individuals also commits the offence in question and whose conduct in committing the offence can be attributed to the company (known as the identification principle). However, beyond certain strict liability offences, corporate criminal liability was significantly expanded by statute in the UK during recent years:

- in 2010, when the UK Bribery Act introduced the corporate offence of failure to prevent bribery; and
- in 2017, when the UK Criminal Finances Act introduced the corporate offence of failure to prevent the facilitation of tax evasion.

The continued expansion of UK corporate criminal liability:



REVIEW BY THE UK'S LAW COMMISSION

The identification principle continues to be criticized by UK law enforcement, civil society, and international anti-corruption organizations as an ineffective way to hold companies to account. Whilst the two "failure to prevent" offences have expanded corporate criminal liability beyond the identification principle, that is only with respect to two discrete types of wrongdoing. It is against this backdrop that the UK government asked the UK's Law Commission to consider the need for reform in this area.

The Law Commission is an independent body in the UK that keeps the laws of England and Wales under review and recommends reform when needed. While the UK government is not obliged to follow the Law Commission's recommendations, they are nevertheless persuasive and have in the past resulted in significant new legislation. If the Law Commission recommends reform to the way in which corporations are held criminally liable, it is possible that the UK government will seriously consider introducing proposals to implement those recommendations.

On 9 June 2021 the Law Commission opened a consultation into the UK's approach to corporate criminal liability. The consultation closed on 31 August 2021, and it is anticipated that the Law Commission will publish its views on the extent to which the corporate criminal liability in the UK should be reformed – if at all – at some point in 2022.

IS THERE A NEED FOR REFORM?

In recent years, the effectiveness of the identification principle has come under increasing scrutiny, particularly given the collapse of several high-profile prosecutions in the UK. This clamour prompted the UK government to request that the Law Commission examine the need for reform.

Beyond recent prosecutorial difficulties, conceptual complaints about the identification principle include:

- that this approach disproportionately criminalizes smaller companies, who will have a shorter, more direct, line between the conduct of their staff, and individuals who meet the definition of 'sufficiently senior';
- conversely, in the modern era most companies are now much larger and can effectively make themselves immune to prosecution by way of the identification principle through the delegation of corporate functions, and the diffusion of knowledge amongst employees below the level of 'sufficiently senior'; and
- generally, it is unsatisfactory to have this level of complexity and uncertainty in such a critical area of criminal law.

Against this backdrop the UK government has faced continuing pressure to at least investigate the need for reform, hence the Law Commission's task.

WHAT REFORMS ARE BEING CONSIDERED?

In summary, the following points are being considered by the Law Commission, each of which may impact companies subject to UK criminal law. This may include companies located outside of the UK, if they are subject to UK law by virtue of a UK statute with extraterritorial reach.

- 1. Is the identification principle fit for a modern society?**
- 2. If reform of the identification principle is needed, what shape should this reform take? The current options identified by the Law Commission as under consideration are:**
 - a. the introduction of vicarious liability, applicable to corporates through the criminal conduct of their employees;
 - b. amending the identification principle to allow for fault to be attributed to a company that enabled, tolerated, or somehow led to a corporate culture of non-compliance;
 - c. specifically amending the identification principle to lower the bar such that the attribution of knowledge can be made through the identification of a single senior individual at the company; or
 - d. introducing one or more 'failure to prevent' offences in the area of economic crime more generally.

WHAT MIGHT THE OUTCOME BE?

At the time of this writing the Law Commission had not indicated where it was likely to land with respect to either the need for reform, or what any potential reform should look like.

Given the consultation is now closed, companies will have to adopt a 'wait and see' approach. In the event the Law Commission decides to recommend particularly onerous reforms then it is only at this point that corporates could seek to lobby parliament.

That said the Law Commission held a series of events as part of its consultation, where senior individuals in the legal profession in the UK provided their thoughts on this issue. While in no way indicative of the outcome of the Law Commission's consultation, several broad themes emerged from these events from which one could take some direction. These themes included:

- The general view that vicarious liability would not be recommended by the Law Commission, on the basis that such an approach was not one favored or approved of by the UK criminal courts.

- It was a distinct possibility that the Law Commission might recommend reform of the identification principle, but such an approach is fraught with difficulty. Those who held this view seemed to do so on the basis that neither of the potential reforms posed by the Law Commission for discussion (2a. or 2b. above) truly dealt with the problems posed by the current formulation of the identification principle.
- That the Law Commission was more likely to propose some version of the failure to prevent economic crime model. Proponents of this view argued that of all the options for reform, this one poses the fewest issues.
- However, proponents of any reform noted the difficulty posed by unintended consequences. One particular concern was that any change could result in the over-criminalization of conduct. Were this to occur, companies would likely be overly incentivized to self-report conduct to improve their position in the event an allegation of failure to prevent economic crime was subsequently made. Parallels were drawn to the increasingly overburdened and ineffectual suspicious activity reporting system, which is currently struggling to adequately combat money laundering.
- Despite the failure to prevent economic crime model being generally favoured out of the options for reform, no definitive definition of “financial crime” was agreed upon. Time will tell if a clearer approach is identified for this critical concept, if this recommendation is indeed favoured by the Law Commission.

WHAT SHOULD COMPANIES BE THINKING ABOUT?

As we are yet to receive any formal indication of likely changes to the law, there is nothing that a company needs to do at present.

However, we anticipate that there will be some form of expansion to corporate criminal liability in the near future. On this basis we consider it prudent for any company potentially subject to UK criminal law to start considering the boundaries of its current compliance program, and what information is, or is not, currently being collected and analysed.

It is only by mapping the information that a compliance team currently has access to, and can utilize, that the areas where additional information or controls may be required, in response to a change in the law, can be identified.

¹ SFO case update, "SFO enters into £103m DPA with Amec Foster Wheeler Energy Limited," <https://www.sfo.gov.uk/2021/07/02/sfo-enters-into-103m-dpa-with-amec-foster-wheeler-energy-limited-as-part-of-global-resolution-with-us-and-brazilian-authorities/>

² Another of Wood's subsidiaries reached a civil settlement with the Scottish authorities in relation to the historical engagement of Unaoil in Kazakhstan (Wood reaches settlement with Scottish authorities on Unaoil investigation, <https://www.woodplc.com/investors/financial-and-regulatory-news/2021/wood-reaches-settlement-with-scottish-authorities-on-unaoil-investigation>)

³ Amec Foster Wheeler Energy Limited – Deferred Prosecution Agreement Judgment at paragraph 29, <https://www.sfo.gov.uk/download/amec-foster-wheeler-energy-limited-deferred-prosecution-agreement-judgment/>

2021 – ANOTHER CHALLENGING YEAR FOR THE SERIOUS FRAUD OFFICE

SFO, the UK authority responsible for investigating and prosecuting serious or complex fraud, bribery, and corruption has faced a tumultuous year. While the SFO has secured three DPAs – including one involving the payment of £103 million (\$143 million) – as well as two high-profile criminal convictions, it has also suffered some notable setbacks. These include a UK Supreme Court judgment which held that the SFO could not compel foreign companies to produce documents stored overseas (as discussed in Chapter 6 of this Guide) and the collapse of the SFO's case against two former executives at Serco because of failures in the SFO's disclosure process. The SFO was also accused in a civil claim of having mishandled a long-running investigation, which has caused the SFO reputational damage and embarrassment.

I. Deferred prosecution agreements

July 2021 was a busy month for the SFO during which it entered into three DPAs with companies that it had been investigating for bribery. This development brings the total number of DPAs that the SFO has entered into (since the introduction of DPAs in 2014) to 12.

a. Amec Foster Wheeler Energy Limited

The SFO reached its first DPA of 2021 with Amec Foster Wheeler Energy Limited (AFWEL). AFWEL agreed to pay a total of £103 million (\$143 million) in connection with 10 offences relating to the use of corrupt agents in Nigeria, Saudi Arabia, Malaysia, India, and Brazil between 1996 and 2014. In a continued trend of multi-jurisdictional cooperation, the DPA was part of a global resolution relating to AFWEL's conduct with settlements also reached in the US and in Brazil.¹

Amec Foster Wheeler Plc and its subsidiary AFWEL was acquired by John Wood Group Plc (Wood)² in October 2017, at which point the SFO's investigation was at a relatively early stage. Wood cooperated fully with the SFO (and other authorities) and gave an undertaking assuming responsibility for the payment of the financial penalty and the SFO's costs. Wood also committed to reporting annually to the SFO on its group-wide ethics and compliance programme. The judge who approved the DPA noted that Wood was not involved in the misconduct and added that "[the] criminal activity accepted by AFWEL is so serious that if those who were individually responsible for it had any continuing connection with or interest in the company a DPA would not be appropriate."³

In addition, for the first time since the introduction of DPAs in the UK, the DPA documents in this case included a statement emphasising that the Court made no findings of fact or assessment of the culpability of any individuals who may have been involved in the company's wrongdoing. This statement is likely

⁴ SFO case update, "SFO secures two DPAs with companies for Bribery Act offences," <https://www.sfo.gov.uk/2021/07/20/sfo-secures-two-dpas-with-companies-for-bribery-act-offences/>

⁵ SFO case update, "GPT pleads guilty to corruption," <https://www.sfo.gov.uk/2021/04/28/gpt-pleads-guilty-to-corruption/>

to have been included to avoid prejudicing the position of any individuals the SFO may in future charge in connection with the AFWEL DPA. The statement makes clear that that AFWEL's acceptance of liability for bribery offences should not be taken to mean a Court has made any findings (or even considered evidence) relating to the guilt of individuals associated with AFWEL.

b. Two DPAs with unknown companies

A few weeks following the AFWEL DPA, the SFO announced that it had secured "two DPAs with companies for Bribery Act offences".⁴ For legal reasons, the SFO was not able to identify the companies. The documents relating to these DPAs have not been published, so few details are available, but we understand that the two DPAs share a common statement of facts. This is the first time the SFO has secured two DPAs relating to the same investigation. The charges relate to the companies' failure to prevent, and their active participation in, bribery offences.

The two companies were said to have "cooperated fully with the SFO" and were ordered to pay approximately £2.5 million (\$3.4 million). This amount included the disgorgement of profits and a financial penalty. The DPAs also contained an undertaking by the parent company to support a comprehensive compliance programme and an obligation to report regularly to the SFO on the programme's implementation.

2. Corporate Convictions

The SFO has also secured two high profile corporate convictions for bribery. Neither case resulted in a trial as both companies pleaded guilty, meaning that little can be gleaned about the extent of misconduct and why DPAs were not thought to be suitable.

a. GPT Special Project Management Ltd

On 28 April 2021, the SFO announced that GPT Special Project Management Ltd (GPT) – a subsidiary of Airbus – had pleaded guilty to one count of corruption. The GPT case is not connected to the record-breaking DPA that Airbus entered into with the SFO in January 2020 as part of a global settlement relating to corruption in Malaysia, Sri Lanka, Indonesia, Taiwan, and Ghana. The charges in the GPT case related to a £2 billion contract to supply telecoms services to the Saudi Arabian National Guard. The services were being provided on behalf of the UK government, and the case threatened to bring embarrassment to the UK-Saudi arms trading relationship. The Court ordered GPT to pay £30.3 million (\$35.2 million), comprising a fine, confiscation order, and costs.⁵

The SFO spent 10 years investigating and prosecuting the case and it is particularly significant that the SFO secured a conviction despite the highly politically and sensitive nature of the matter. The misconduct pre-dated 2011 (when the UK Bribery Act 2010 came into force), so charges were brought under the old English corruption legislation (the Prevention of Corruption Act 1906). Prosecutions under this legislation require permission from the Attorney General. The SFO sought the Attorney

⁶ *Global Investigations Review*, "Drago Kos: Airbus GPT case shows UK SFO is 'badly needed'," <https://globalinvestigationsreview.com/anti-corruption/drago-kos-airbus-gpt-case-shows-uk-sfo-badly-needed>

⁷ Petrofac, "Update on SFO investigation and Board change," <https://www.petrofac.com/media/news/update-on-sfo-investigation-and-board-change/>

⁸ SFO case update, "Serious Fraud Office secure third set of Petrofac bribery convictions," <https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/>

⁹ *FT Markets*, "Update on SFO Investigation and Board Change," <https://markets.ft.com/data/announce/full?dokey=1323-13237846-1VEB6SNC5TD058J13CUF7IAADP>

¹⁰ Insider.co.uk, "Petrofac to pay £77 million over Middle Eastern bribery case," <https://www.insider.co.uk/news/petrofac-admits-failing-stop-staff-25129799>

General's consent in 2016 and 2018 but it was not ultimately given until 2020. The Chair of the Organisation for Economic Co-operation and Development's (OECD) Working Group on bribery praised the SFO, noting "this was not just like any other case. [The conviction] shows that the SFO is badly needed" and adding that it considered the SFO "really independent, highly professional and successful".⁶

b. Petrofac Limited

In October 2021, Petrofac Limited (Petrofac) pleaded guilty to seven counts of failing to prevent bribery under the Bribery Act 2010 between 2011 and 2017. The SFO announced its investigation into Petrofac in 2017 as part of its investigation into Petrofac's use of Unaoil "and other agents".⁷ The allegations concerned the systematic use of agents by former senior executives of Petrofac's subsidiaries, to bribe officials to win oil contracts in Iraq, Saudi Arabia, and the United Arab Emirates. Petrofac admitted to paying £32 million in bribes to secure contracts worth approximately £2.6 billion.⁸ Petrofac was ordered to pay £77 million (\$95 million) in penalties and costs.

There is no clear reason why this case did not result in a DPA. It is possible that Petrofac was not sufficiently cooperative to justify being considered for a DPA. Certainly in 2017, the "SFO... informed Petrofac that it does not consider the Company to have cooperated with [the SFO], as that term is used in relevant SFO and sentencing guidelines".⁹ It is also possible that the SFO had sufficient evidence to successfully prosecute Petrofac and therefore had no incentive to offer Petrofac a DPA. In this regard, Petrofac's former head of sales, David Lufkin, had pleaded guilty to 14 counts of bribing agents and cooperated extensively with the SFO's investigation. Lufkin was sentenced to two years' imprisonment, suspended for a period of 18 months. The judge praised his "considerable degree of moral courage" in cooperating and added that "it is undoubtable that Petrofac would not have pleaded guilty had you not provided the cooperation you did".¹⁰ The case highlights the weight prosecuting authorities appear to place on cooperation when considering whether to enter into DPA negotiations with a company. The case could also indicate that individuals involved in wrongdoing who cooperate with the authorities, may escape immediate custodial sentences. Whether or not this encourages more cooperating witnesses to come forward and assist the SFO remains to be seen.

3. KBR Judgment: a constraint on the jurisdictional reach of the SFO's powers

On 5 February 2021, the Supreme Court held that the SFO could not compel the production of documents held outside the UK by a foreign company. We discuss the case in more detail at Chapter 6 of this Guide. In short, the Supreme Court's decision confirmed that foreign companies with no direct presence in the UK (i.e., with no fixed place of business in the UK and which do not carry on business in the UK), cannot be compelled to produce documents held abroad. In turn, the Supreme Court appears to accept what was common ground between the parties: that the SFO **can** compel a **UK company** to produce documents stored overseas. In addition, the Supreme Court's analysis would also suggest that the SFO could request documents held abroad by a

¹¹ SFO case update, "SFO charges former Serco directors with fraud," <https://www.sfo.gov.uk/2019/12/16/sfo-charges-former-serco-directors-with-fraud/>

¹² SFO Annual Report and Accounts 2020-2021, <https://www.sfo.gov.uk/download/annual-report-and-accounts-2020-2021/>

¹³ BBC, "Ex-Serco bosses cleared after fraud case collapses," <https://www.bbc.co.uk/news/uk-england-56890662>

¹⁴ *Financial Times*, "ENRC opens £70m claim against Serious Fraud Office," <https://www.ft.com/content/af24a19f-6bc4-4a18-a29f-ced34e23fecb>

¹⁵ *Law360*, "Dechert Blasts ENRC's 'Conspiracy Theory' SFO Leak Claims," <https://www.law360.co.uk/corporate-crime-uk/articles/1387911/dechert-blasts-enrc-s-conspiracy-theory-sfo-leak-claims>

foreign company with a direct presence in the UK (although this point was not addressed specifically). As a result of this judgment, the SFO will be forced to revert to the slow mutual legal assistance process to obtain evidence stored overseas from overseas companies. Following the judgment, the SFO dropped its investigation into KBR as the SFO considered there was insufficient evidence to have a realistic prospect of conviction.

4. The Collapse of the Serco Trial: repeated failures in prosecuting individuals

The trial of two former executives at Serco Geografix Ltd (Serco) collapsed in April 2021 due to fundamental failures in the SFO's disclosure process. The collapse of the case also brought into sharp focus the SFO's failure to secure convictions of any individuals in connection with wrongdoing underlying the DPAs the SFO has reached with companies.

On 4 July 2019, the SFO entered into a DPA with Serco in relation to three offences of fraud and two of false accounting. The case related to a scheme to defraud the Ministry of Justice by hiding the true extent of the profits Serco made between 2010 and 2013 for the provision of services relating to the electronic monitoring of prisoners. Six months later, in December 2019, the SFO charged two Serco executives, Nicholas Woods and Simon Marshall, with fraud in relation to representations made to the Ministry of Justice.¹¹ Following a defence request for disclosure of certain documents, it became apparent that there were issues with the SFO's disclosure process. The judge refused an application made by the SFO to adjourn the trial pending the rectification of the disclosure issues. As a result, the SFO was forced to offer no evidence and the defendants were acquitted. The SFO has acknowledged the "disclosure challenges" which it faced during this trial and commissioned an independent review to address any shortcomings in its disclosure process.¹²

The collapse of the Serco trial may also, more broadly, have undermined confidence in the DPA regime. Companies weighing whether to enter into a DPA may be emboldened by the SFO's inability to secure convictions against individuals and opt instead to take their chances at trial. From an individual defendant's perspective, the collapsed trial highlights the issue raised by Marshall himself as to whether individuals are "prosecuted, not as a result of a fair assessment of the evidence, but because [they are] collateral damage in the deal [i.e. DPAs]...done by [companies] with the SFO".¹³ It is interesting that in May 2021, weeks after the Serco trial collapsed, the SFO closed its investigations into individuals connected to the Airbus DPA.

5. ENRC – a possible stain on the SFO's reputation

The SFO have also faced a £70 million civil claim for damages by Kazakh mining company ENRC¹⁴ this year. The SFO is accused of misfeasance in public office and encouraging improper conduct by ENRC's previous legal representatives. ENRC's previous legal representatives also face allegations that they supplied privileged and confidential information to the SFO.¹⁵ The hearing started in May 2021 and concluded in September 2021, but the judgment is unlikely to be handed down before Spring 2022. The SFO denies the allegations and says it considers the claim "devoid of merit".¹⁶

¹⁶ Mlex, "ENRC's multimillion-pound SFO claim has 'failed' for lack of evidence, lawyer says," <https://content.mlex.com/#/content/1325551w>

¹⁷ Mlex, "UK fraud agency lost its way and had culture of leaking, former head Green tells court," <https://content.mlex.com/#/content/1308066>

However, damage to the SFO's reputation has already been done, with its former director testifying in the trial about a culture of leaking in the SFO prior to 2012.¹⁷

CONCLUSION

During 2022, we expect the SFO to keep up a steady beat of activity. However, the SFO has much work to do in 2022 if it is to restore confidence in its ability to prosecute individuals, pick up the pace with its casework, and navigate cross-border investigations in light of Brexit and the KBR judgment.

SECTION III
**INTERNATIONAL
DEVELOPMENTS**

¹ Jenner & Block, *Anti-Corruption Enforcement: 2020 Year in Review*, https://jenner.com/system/assets/assets/11377/original/Jenner_and_Block-Anti_Corruption_Enforcement-2020_Year_in_Review.pdf.

² Matthew Jenkins, Multilateral development banks' integrity management systems 2, Transparency International (Sept. 14, 2016), https://knowledgehub.transparency.org/assets/uploads/helpdesk/Multilateral_development_banks%E2%80%99_integrity_management_systems_2016.pdf.

³ Sanctions System Annual Report FY20 4, 12–13, World Bank Group (Oct. 9, 2020), <http://documents1.worldbank.org/curated/en/861191602141633639/pdf/World-Bank-Group-SanctionsSystem-Annual-Report-FY20.pdf>.

⁴ <https://www.worldbank.org/en/about/unit/sanctions-system/osd/brief/exclusion-survey> (last visited Oct. 31, 2021).

⁵ Global Suspension & Debarment Directory, The World Bank Group, <https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/other-documents/Global%20Suspension%20and%20Debarment%20Directory.pdf> (last visited Oct. 31, 2021).

MULTILATERAL DEVELOPMENT BANKS ENFORCEMENT

As described in last year's report¹, while the primary function of global multilateral development banks (MDBs) is to provide financial support in the form of loans and grants, along with professional advice, to projects in developing countries, they also play a role in preventing, rooting out, and punishing corruption affecting the projects they finance. Anti-corruption developments in 2021 at two of the most prominent MDBs—the World Bank and the Inter-American Development Bank (IDB)²—are discussed in this section. As set forth in more detail below, the World Bank's Office of Suspension & Debarment (OSD) has unveiled its inaugural Global Suspension & Debarment Directory. The World Bank also lifted sanctions on SNC-Lavalin two years early due to SNC-Lavalin's compliance overhaul. At the same time, two individuals and a Barbados company that were debarred by IDB have sued IDB for breach of contract and related claims; the district court dismissed the suit, and the appeal is pending.

WORLD BANK'S LAUNCH OF GLOBAL SUSPENSION AND DEBARMENT DIRECTORY

The World Bank's arrangement for investigating and punishing corruption includes the Integrity Vice President, which investigates sanctionable conduct and may seek sanctions or enter a settlement; the OSD, which reviews settlements, conducts first-tier adjudication, and may recommend sanctions; the Sanctions Board, which provides a second and final adjudication in contested cases; as well as an Integrity Compliance Office, which advises on and assess respondents' implementation of remedial measures imposed as conditions of non-debarment.³ In addition to its adjudicatory function, the World Bank's OSD has recently undertaken a systematic effort to examine and analyze exclusion systems from around the world. In some systems, including those of the United States and the World Bank, this kind of mechanism is referred to as "suspension and debarment." In others, the mechanism may be called "blacklisting," "disqualification," or some other term.

In July 2021, OSD unveiled its inaugural Global Suspension & Debarment Directory—a consultative resource summarizing the results of OSD's Global Suspension & Debarment Survey, which launched in March 2020.⁴ The Survey sought to collect, and the Directory now presents, comparative information about the exclusion regimes from dozens of jurisdictions around the globe.⁵ The Directory functions as a resource to explain how different jurisdictions employ exclusion mechanisms to prevent certain suppliers from accessing and misusing public funds.

Each jurisdiction's summary presents information on six key areas relating to the exclusion system's structure and operation:

- Government-Wide Legal and Institutional Framework

⁶ *Id.* at ii.

⁷ *Id.*

⁸ *Id.* at 1. Australia does not employ a government-wide exclusion mechanism.

⁹ *Id.* at ii.

¹⁰ *Id.*

¹¹ <https://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years> (last visited Oct. 31, 2021).

¹² *Id.*

¹³ *Id.*

¹⁴ <https://www.snclavalin.com/en/media/press-releases/2021/20-04-2021> (last visited Oct. 31, 2021).

- Functioning and Enforcement of the Government-Wide Exclusion System
- Substantive Grounds for Government-Wide Exclusion
- Scope and Effect of Government-Wide Exclusion
- Government-Wide Transparency: The Exclusion List
- Limited Scope Exclusion Systems⁶

According to the Directory, OSD's research leading up to the Survey and the publication of the Directory discovered a significant gap in interdisciplinary research on exclusion mechanisms. The first iteration of the Directory aims to bridge these gaps, capturing the differences and similarities across exclusion mechanisms.⁷ For example, the Directory shows that all but one of the surveyed jurisdictions employed some type of exclusionary system to prevent access to public funds.⁸ This data suggests that governments routinely use exclusion as a deterrent to fraud and corruption. And each of the 22 exclusion systems in the Directory affords the individual or entity proposed for a sanction a measure of due process or an opportunity to respond prior to the imposition of a sanction.

Although there is some uniformity in how frequently exclusionary systems appear to be used by governments, the Directory data show that how these systems function varies significantly across jurisdictions. As one of many examples, the Directory reveals that due process looks very different from system to system. In some systems, a party proposed for a sanction is always entitled to a hearing before the decision is made, while in others, an appeal is possible only after the exclusion is determined.

The OSD's 2021 Directory is the first dedicated taxonomy of exclusion systems, and future iterations will be published in furtherance of the World Bank's efforts to identify commonalities and differences across jurisdictions.⁹ The Survey and Directory were completed in partnership with the Sanctions Officer for the IDB Group (consisting of the IDB, IDB Invest, and IDB Lab) and Le Bureau de l'Inspecteur General de la Ville de Montréal to form a Working Group under the International Bar Association's (IBA) Anti-Corruption Committee.¹⁰

LIFTING OF SNC-LAVALIN SANCTIONS

In 2013, SNC-Lavalin and the World Bank entered into a Negotiated Resolution Agreement (NRA) whereby an SNC-Lavalin Group subsidiary and more than 100 affiliates were debarred for 10 years and banned from receiving World Bank funds.¹¹ At the time, this decade-long debarment was the longest ever imposed by the World Bank.¹² The NRA stemmed from allegations of bribery and corruption by SNC-Lavalin in Bangladesh and Cambodia.¹³ In April 2021, two years shy of the 10-year mark, the World Bank lifted all sanctions.¹⁴

¹⁵ <https://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years> (last visited Oct. 31, 2021).

¹⁶ <https://www.snc-lavalin.com/en/media/press-releases/2021/20-04-2021> (last visited Oct. 31, 2021).

¹⁷ <https://www.iadb.org/en/transparency/sanctioned-firms-and-individuals> (last visited Oct. 31, 2021).

¹⁸ <https://www.iadb.org/en/transparency/sanctioned-firms-and-individuals> (last visited Oct. 31, 2021).

¹⁹ Memorandum Opinion, *Rosenkrantz et al. v. Inter-American Development Bank* (Apr. 5, 2021) (D.D.C. No. 20-3670).

²⁰ <https://www.iadb.org/en/transparency/sanctioned-firms-and-individuals> (last visited Oct. 31, 2021).

²¹ Noah J. Rosenkrantz, Christopher Thibedeau, *TTEK, Inc. v. Inter-American Development Bank*, 1:20-cv-03670 (D.D.C.).

²² Memorandum Opinion, *Rosenkrantz et al. v. Inter-American Development Bank* (Apr. 5, 2021) (D.D.C. No. 20-3670).

²³ Memorandum Opinion, *Rosenkrantz et al. v. Inter-American Development Bank* (Apr. 5, 2021) (D.D.C. No. 20-3670).

²⁴ Memorandum Opinion, *Rosenkrantz et al. v. Inter-American Development Bank* (Apr. 5, 2021) (D.D.C. No. 20-3670).

²⁵ Noah J. Rosenkrantz, Christopher Thibedeau, and TTEK, Inc. *v. Inter-American Development Bank*, Case No. 21-07047 (US Court of Appeals for the Dist. of Columbia).

The decision is consistent with the World Bank's move toward focusing on compliance mechanisms and the terms of its NRA with SNC-Lavalin, which specifically included a clause permitting the debarment to be cut short after eight years if SNC complied with all the terms of the agreement.¹⁵

Since the debarment was imposed, SNC-Lavalin has undergone a significant compliance overhaul, adding the following processes and functions, among others:

- adding a Chief Integrity Officer who reports directly to the Board of Directors and General Counsel at the operational level;
- renewing its management team and board members;
- forming a compliance investigation team (separate from the internal audit function) for all alleged violations by employees, former employees, partners, suppliers, and subcontractors; and
- implementing a Supplier Code of Conduct.¹⁶

SNC-Lavalin's renewed approach to compliance was apparently sufficient to persuade the World Bank that the company should now be eligible to bid for projects financed by the World Bank.

ROSENKRANTZ ET AL. V. INTER-AMERICAN DEVELOPMENT BANK

On September 20, 2021, US national Noah Rosenkrantz, Canadian national Christopher Thibedeau, and Barbados company TTEK, Inc. were placed on the IDB debarment list by the IDB Sanctions Committee.¹⁷ Rosenkrantz is debarred until 2029,¹⁸ on grounds of corruption and fraud related to contracts entered into with the government of Barbados.¹⁹ Thibedeau and TTEK are debarred until 2025 for collusion.²⁰ On December 14, 2020, Rosenkrantz, Thibedeau, and TTEK filed a suit against the IDB in the federal district court for the District of Columbia asserting claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contract.²¹ The plaintiffs alleged that the IDB committed breaches of the IDB's internal administrative debarment procedures by blocking the plaintiffs' access to records that the plaintiffs believed were necessary to defend themselves against debarment, among other claims.²² The IDB moved to dismiss the lawsuit, arguing that the IDB was immune from suit under the International Organizations Immunities Act of 1945, 22 USC §§ 288-288i.²³ The district court granted the IDB's motion to dismiss.²⁴ The plaintiffs appealed to the DC Court of Appeals, where the appeal remains pending.²⁵

¹ Hannah Brockhaus, "In anti-corruption law, Pope Francis seeks to quash Vatican 'envelope' culture with ban on gifts over \$50," *Catholic News Agency* (Apr. 29, 2021), <https://www.catholicnewsagency.com/news/247446/in-anti-corruption-law-pope-francis-seeks-to-quash-vatican-envelope-culture-with-ban-on-gifts-over-50>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*; The Holy See, "Apostolic Letter Issued 'Moto Proprio' by the Supreme Pontiff," *L'Osservatore Romano*, Weekly Edition in English (May 7, 2021).

LEGISLATIVE UPDATES BY COUNTRY

The year 2021 was not a major year for new anti-corruption legislation around the globe. One new anti-corruption measure was enacted in April 2021: Pope Francis issued a series of anti-corruption directives that apply to Vatican personnel. In Germany, however, a bill that would have established corporate criminal liability, including for corruption and bribery offenses, was dropped this year after approximately three years of drafting and legislative debate. That German bill had been drafted in 2019, after a report from the OECD Working Group on Bribery expressed concern that Germany had not done enough to crack down on corrupt companies. Also in 2021, the OECD Working Group on Bribery specifically criticized Poland for its lack of progress in implementing legislative reforms to combat foreign bribery. As with the German system, one of the OECD Working Group's concerns involves Poland's legal framework for prosecution of corporate criminal conduct, which requires the conviction of an individual person before a proceeding against a corporation may go forward. After a visit from the Working Group, Poland put forward an Action Plan seeking to address the criticisms.

I. Vatican Anti-Corruption Law

In April 2021, Pope Francis issued a series of directives aimed at curbing corrupt practices among Vatican personnel. In particular, there is now a ban on Vatican employees accepting personal gifts with a monetary value of over 40 euros (approximately \$50). The directive states that Vatican officials must not "accept or solicit, for oneself or for subjects other than the entity in which they serve, for reasons or on the occasion of one's office, gifts, presents[,] or other benefits of a value exceeding 40 euros."¹

The law is reportedly part of an effort to quash the Vatican "envelope" culture in which large monetary donations are made to bishops and cardinals working in the Roman Curia.² Such gifts have reportedly been attributed to corruption in the Church and used between high-level Church officials to seek favors.³

The law was added to the General Regulation of the Roman Curia along with other requirements designed to ensure that Vatican personnel who handle the Vatican's economic affairs are not involved in financially corrupt or illegal behavior.⁴ Other requirements include a directive that the cardinals leading dicasteries or other offices, and senior management and administrators of the Holy See and Vatican City State, whose jobs require handling money, make certain disclosures. Specifically, they are required to sign a document every two years attesting that they and their finances are not connected to crime and that they do not hold shareholdings or interests in companies that operate "with purposes and in sectors contrary to the Social Doctrine of the Church."⁵ They must also declare that they do not hold any cash or investments, including shareholdings or interests, in companies and businesses on a list of jurisdictions that the Secretariat of the Economy has identified as "non-

⁶ *Id.*

⁷ Philip Pulella, "Pope makes anti-corruption spending rules mandatory in Vatican," *Reuters* (June 1, 2020), <https://www.reuters.com/article/uk-vatican-contracts-idUKKBN23826Q>.

⁸ Sophia Habbe & Christian Pelz, "Corporate Sanctions Act Dropped," *Noerr* (Oct. 6, 2021), <https://www.noerr.com/en/newsroom/news/corporate-sanctions-act-dropped>.

⁹ Ralf van Ermingen-Marbach and Finn Zeidler, "The German Corporate Sanctions Act—Heralding a New Era for Enforcement in Germany," *Compliance & Enforcement* (Apr. 14, 2020).

¹⁰ *Id.*

¹¹ Sophia Habbe & Christian Pelz, "Corporate Sanctions Act Dropped," *Noerr* (Oct. 6, 2021), <https://www.noerr.com/en/newsroom/news/corporate-sanctions-act-dropped>.

¹² *Id.*

¹³ See OECD, "Implementing the OECD Anti-Bribery Convention," Phase 4 Report: Germany (2018), at 5.

¹⁴ Adrian Sandberg, "Proposed German corporate legislation introduces respondeat superior, compliance defense, and cooperation credit," *The FCPA Blog* (June 16, 2021), <https://fcpublog.com/2021/06/16/proposed-german-corporate-legislation-introduces-respondeat-superior-compliance-defense-and-cooperation-credit/>.

¹⁵ Ralf van Ermingen-Marbach & Finn Zeidler, "The German Corporate Sanctions Act—Heralding a New Era for Enforcement in Germany," *Compliance & Enforcement* (Apr. 14, 2021), <https://wp.nyu.edu/compliance-enforcement/2020/04/14/the-german-corporate-sanctions-act-heralding-a-new-era-for-enforcement-in-germany/>.

¹⁶ See OECD, "Poland's lack of progress in implementing reforms to boost fight against foreign bribery remains a serious concern" (Jun. 22, 2021), <https://www.oecd.org/newsroom/poland-s-lack-of-progress-in-implementing-reforms-to-boost-fight-against-foreign-bribery-remains-a-serious-concern.htm>.

cooperative . . . for tax purposes," or in countries considered at high risk for money laundering or terrorist financing.⁶ The declarations will be held in the Secretariat of the Economy's employee files and a copy will be kept in the Secretariat of State.

The directives follow a promulgation by Pope Francis in May 2020 regarding procurements that included highly detailed procedures for awarding contracts for goods and services.⁷

2. German Corporate Sanctions Act Dropped

The Corporate Sanctions Act, a German bill that would have established corporate criminal liability in Germany, including for corruption and bribery offenses, was dropped in October 2021 after approximately three years of drafting and legislative debate.⁸ Originally drafted by the German Federal Ministry of Justice and Consumer Protection in 2019, the bill would have fundamentally changed accountability under German law by introducing the idea of corporate criminal liability (a concept that is firmly established in many other jurisdictions).⁹ The bill specifically called for prosecuting and sanctioning companies if (i) one of their managers committed a corporate criminal offense such as fraud or bribery; or (ii) another person committed such an offense while performing duties on behalf of the company when management could have prevented that by taking appropriate compliance measures.¹⁰

The bill reportedly failed because of debate regarding the handling of internal investigations. The bill contemplated a separation between the investigators and the company's defense counsel, meaning that the results of the internal investigation would not have been covered by the legal privilege of the German Code of Criminal Procedure—and thus could have been seized by the public prosecutor's office for further investigative measures.¹¹ There was opposition by the Christian Democratic Union (CDU) political party stemming from the concern that this provision would have dissuaded companies from investigating corporate misconduct rather than being incentivized to root it out.¹²

It remains to be seen whether a new bill will be introduced. The Corporate Sanctions Act had been developed in the wake of a 2018 report from the OECD Working Group on Bribery that expressed concern that Germany had not done enough to crack down on corrupt companies.¹³ Currently, German authorities rely on a regulatory regime to impose fines on delinquent corporate entities through the Administrative Offense Act.¹⁴ Under that regime, corporations can only be fined up to a maximum of 10 million euros, which may be insufficient in certain instances (for example, when levied against large corporations).¹⁵

3. OECD Criticism of Poland Over Lack of Progress in Anti-Corruption

In June 2021, the OECD Working Group on Bribery issued a press release criticizing Poland's lack of progress in implementing legislative reforms to combat foreign bribery.¹⁶ The criticism followed an OECD virtual mission to Poland in November 2020 in which members of the OECD met with high-level officials in

¹⁷ See OECD, “Poland should urgently implement reforms to boost fight against foreign bribery and preserve the independence of prosecutors and judges” (Nov. 12, 2020), <https://www.oecd.org/corruption/anti-bribery/poland-should-urgently-implement-reforms-to-boost-fight-against-foreign-bribery-and-preserve-independence-of-prosecutors-and-judges.htm>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See OECD, “Poland must make urgent legislative reforms to combat foreign bribery” (Mar. 22, 2018), <https://www.oecd.org/corruption/poland-must-make-urgent-legislative-reforms-to-combat-foreign-bribery.htm>.

²¹ See OECD, “Poland’s lack of progress in implementing reforms to boost fight against foreign bribery remains a serious concern” (Jun. 22, 2021), <https://www.oecd.org/newsroom/poland-s-lack-of-progress-in-implementing-reforms-to-boost-fight-against-foreign-bribery-remains-a-serious-concern.htm>.

²² *Id.*

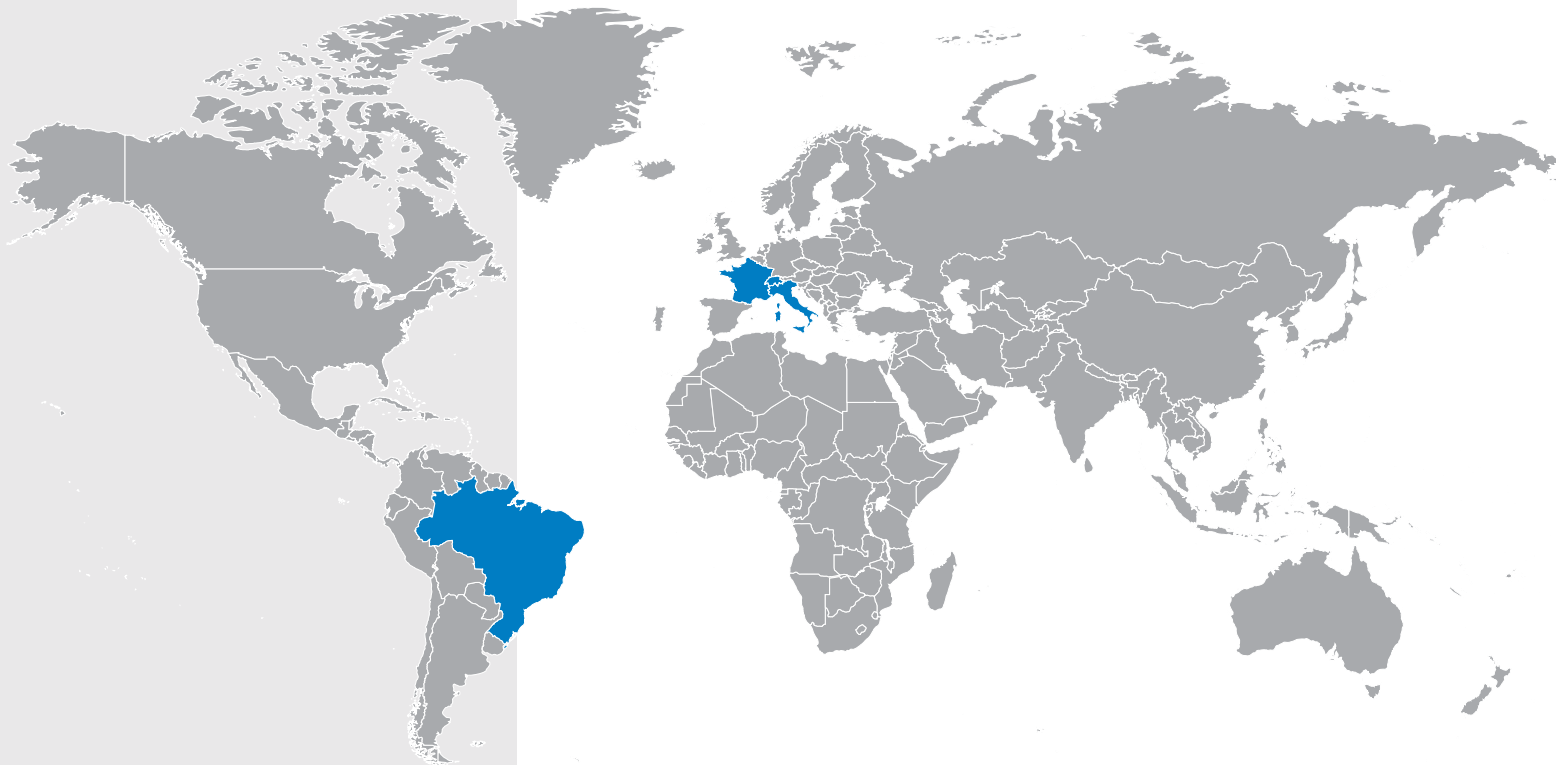
the Polish justice system, including the Secretary of State in the Ministry of Justice, Vice Minister for Foreign Affairs, Deputy Prosecutor General, Deputy Commander-in-Chief of Police, and Deputy Chief of the Central Anti-Corruption Bureau.¹⁷

Chief among the Working Group’s concerns is Poland’s existing legal framework related to the prosecution of corporate criminal conduct, which requires the conviction of an individual person before a proceeding against a corporation is allowed to commence.¹⁸ Following the Working Group’s virtual visit, Marcin Warchol, the Secretary of State in the Ministry of Justice, agreed with the Working Group’s concerns, stating, “We share the Working Group on Bribery’s view that there is an urgent need to implement effective tools for corporate criminal liability. The existing legal framework relating to legal persons, which requires the conviction of a natural person before kicking off the proceedings against companies, can lead to factual impunity of legal persons. We appreciate the support of the Working Group for proposed legislative amendments to ensure full compliance of our law with the OECD Anti-Bribery Convention.”¹⁹

Other concerns of the Working Group include the failure to remove an “impunity” provision in Poland’s Penal Code which allows perpetrators of foreign and domestic bribery to escape liability if they self-report the offense before the authorities learn about it from other sources.²⁰ Additionally, Poland has failed to increase fines for companies to “ensure effective, proportionate, and dissuasive sanctions” and has not enacted legislation to protect whistleblowers of foreign bribery from retaliatory disciplinary action.²¹

Following the November Working Group visit, Poland submitted an action plan addressing these criticisms. The OECD noted that the plan was a “step in the right direction,” though emphasized the need for “concrete activities, specific deadlines, and measurable indicators” to determine the plan’s effectiveness.²²

ENFORCEMENT TRENDS BY COUNTRY



BRAZIL

The long-standing investigation into Petroleo Brasileiro SA (Petrobras), the Brazilian state-owned oil company, came to a conclusion this year, with Petrobras fulfilling its commitment to pay \$853.2 million to US and Brazilian authorities. Of that amount, 80% went to the Brazilian government, 10% went to the SEC as a civil fine, and 10% went to the DOJ as a criminal fine.

The years-long Petrobras investigation, however, continues to have widespread ramifications. For example, documents recently disclosed by a court in Brazil revealed how a unit of commodities-trading company Glencore Plc allegedly paid Petrobras officials in 2010 and 2011 to secure maritime fuel supply contracts. The bribes were allegedly paid to Petrobras traders by intermediaries and by a former trader at Singapore-based Chemoil Energy, which Glencore Plc took over, and who pleaded guilty in March 2021 to conspiring to manipulate the fuel oil market.

In February 2021, Brazil announced that the anti-corruption unit responsible for “Operação Lava Jato,” or “Operation Car Wash,” (the name given to the long-running investigation into bribery and corruption involving Petrobras) had been officially shut down. The team initially began its work in 2014 and since then helped send numerous Latin American political and business leaders, including former presidents, to jail. Overall, Operation Car Wash’s data reflected that the team

was responsible for more than 290 arrests, more than 270 convictions, and more than \$800 million in ill-gotten gains being returned to the Brazilian state. Although the particular anti-corruption unit responsible for Operation Car Wash will no longer exist, some of its prosecutors were to be transferred to the Brazilian federal prosecutor's organized crime unit, where they could continue their work.

CHINA

General Secretary of the Chinese Communist Party Xi Jinping has been emphasizing anti-corruption efforts for nearly a decade, and during that time numerous national leaders and politicians have been ensnared in the far-reaching efforts. For example:

- In September 2021, state-backed media reported that Yin Jiaxu, former chairman of China North Industries Group, had been targeted by anti-corruption bodies and was accused of illegally obtaining memberships to golf clubs and accepting large sums of money and real estate.
- In October 2021, it was announced that, following a 17-month investigation, a case against former Vice Minister of State Security Sun Lijun had been sent to prosecutors. Although details were not provided, Sun was accused of, among other misdeeds, embezzling an unspecified amount of funds, accepting large gifts, and engaging in “pay-for-play” schemes.
- Also in October 2021, the Chinese Communist Party's anti-corruption body announced that Fu Zhenghua, China's former Justice Minister and Deputy Police Chief, and the man previously in charge of a special investigation that brought down another powerful Chinese official as part of an anti-corruption campaign, was himself under investigation for “serious violations of party discipline and law.” Further details were not provided.

These investigations are some of the most recent in a lengthy string of anti-corruption investigations within China that have also resulted in the targeting of millions of officials, as well as the country's entertainment industry and entrepreneurs.

ITALY

In March 2021, a long-running investigation and prosecution by the Milan public prosecutor into oil giants Royal Dutch Shell (Shell) and Eni S.p.A (Eni) and various related individuals resulted in an acquittal of both companies and the individual defendants. The case related to a license award to explore OPL 245, a defined deep-water offshore area approximately 150 kilometers from the Niger delta. OPL 245 was originally assigned in 1998 by the Nigerian government to a Nigerian entity, Malabu Oil & Gas, and has a long and contentious history, but the rights to OPL 245 were eventually transferred by the Nigerian government to Shell and Eni in 2011.

The Italian prosecutors had alleged that the dealmakers were aware that nearly \$1.1 billion of the \$1.3 billion purchase price paid to the Nigerian government would be paid as bribes. They noted the unusual nature of the acquisition, including that it sought



to bypass certain requirements under Nigerian law related to oil exploration licenses, and that the price paid by the two oil companies to obtain the OPL 245 license was far below commercial terms because Shell and Eni were essentially purchasing the license from Malabu Oil & Gas' real owner Dan Etete, a convicted money-launderer and the Nigerian Minister of Petroleum when Malabu Oil & Gas was initially granted the OPL 245 license in 1998. Prosecutors had sought custodial sentences for the individuals tried, who included Shell and Eni executives, and sought to confiscate approximately \$1.09 billion from the defendants. The court acquitted Eni, Shell, and their executives and intermediaries, ruling that while corruption may have taken place, the oil companies and their defendants were not involved and that there was no evidence of an express agreement between Eni, Shell, and the Nigerian government to engage in corruption.

Although the defendants were acquitted, rulings in Italy can be appealed and only become enforceable once they are final. Thus, Italian prosecutors and the Nigerian government have now appealed the acquittals of both Shell and Eni and various past and present managers. In addition, Italy's Justice Ministry ordered an inquiry in July 2021 into the conduct of two prosecutors involved in the case who reportedly did not file documents that would have supported Eni's position.

SOUTH KOREA

In 2021, the South Korean government established the Corruption Investigation Office for High-Ranking Officials (CIO), an investigative body with the power to investigate corruption by current or former officials, including but not limited to by the President, the Speaker and all members of the National Assembly, the Chief Justice and all other Justices of the Supreme Court, all judges and prosecutors, and certain higher-ranking police officials, as well as these officials' family members.

Since then, the CIO has already initiated several investigations, including:

- In May 2021, the CIO raided the Seoul Metropolitan Office of Education over alleged hiring irregularities involving five teachers and Seoul Education Superintendent Cho Hee-yeon, who is accused of abusing his authority by pressing for a special employment process for the teachers, who were fired after being convicted of violating the Public Official Election Act.
- In July 2021, the CIO raided and searched the home of a Presidential Secretary for Civil Affairs and Justice, Lee Gwang-cheol, to obtain evidence relating to a charge of abuse of power for allegedly orchestrating an illegal exit ban and other crimes that targeted former Vice Minister of Justice Kim Hak-ui. In addition, the CIO was reportedly looking into senior prosecutors suspected of imposing the illegal exit ban on Kim, who was prevented from leaving the country in March 2019 while at Incheon International Airport.



- In August 2021, it was reported that the CIO was considering an investigation into an unidentified incumbent lawmaker affiliated with the main opposition People Power Party for allegedly receiving four payments totaling 20 million won (approximately \$17,300) in 2016 and 2017 from a former municipal council member and their family in exchange for influencing the lawmaker's party to support the council member's 2018 election campaign.

These various investigations illustrate the breadth of the CIO's authority and suggest that the CIO will be active in pursuing investigations and prosecutions for alleged misconduct by public officials.

APPENDIX I

**THE FOREIGN CORRUPT
PRACTICES ACT**

THE FOREIGN CORRUPT PRACTICES ACT

The FCPA contains provisions that directly prohibit bribery, known as the “anti-bribery provisions,” and provisions that prohibit the failure to reflect the true nature of transactions in a company’s accounts, known as the “books and records provisions.” The FCPA also contains “internal controls” provisions, requiring an issuer to maintain adequate internal controls to provide assurance that transactions are properly authorized and accurately recorded. Together, these provisions prohibit both bribery of foreign officials and accounting practices that may conceal such activity. Importantly, however, the books and records and internal controls provisions require a company to account accurately for the disposition of assets and to maintain controls to ensure that it can do so, even if no improper payment has been made.

The FCPA’s provisions are broadly worded and subject, in certain instances, to competing interpretations. Companies seeking to comply with the provisions must rely on the few decided cases, the DOJ and the SEC guidance, and established enforcement practice. While this structure can be a recipe for confusion, the discussion below is intended to provide a straightforward description of these provisions and answers to frequently asked questions.

THE FCPA’S ANTI-BRIBERY PROVISIONS

The FCPA’s anti-bribery provisions prohibit an offer of payment, promise to pay, or authorization of payment, of any money or anything of value to any foreign official or to any other person (i.e., a third party) while knowing that any portion of the thing of value will be offered, given, or promised, directly or indirectly, to a foreign official with corrupt intent for the purpose of influencing an official to obtain or retain business, or to direct business to any person.

The FCPA contains certain limitations on who may be prosecuted under this provision and a few substantive affirmative defenses.

These statutory elements, limitations, and defenses are discussed in more detail below.

I. Jurisdiction

FCPA jurisdiction is broad. It extends to all US companies or persons and their agents, as well as to foreign companies that are registered with the SEC, and foreign companies or persons that act in furtherance of an improper payment or offer while in the United States.

Territorial-based jurisdiction extends to any “issuer,” “domestic concern,” officer, director, employee, or agent of such issuer or domestic concern, or stockholder acting on behalf of such issuer or domestic concern, that makes use of any

¹ 15 U.S.C. § 78dd-1(a); id. § 78dd-2(a). Interstate commerce includes making use of the mail, telephones, email, and any form of interstate travel. See, e.g., *United States v. Brika*, 487 F.3d 450, 455 (6th Cir. 2007) (telephone); *United States v. Hausmann*, 345 F.3d 952, 959 (7th Cir. 2003) (interstate mail and wire communications systems); *Doe v. Smith*, 429 F.3d 706, 709 (7th Cir. 2005) (email and internet).

² *Id.* § 78c(a)(8).

³ *Id.* § 78dd-2(h).

⁴ See *United States v. Ho*, 984 F.3d 191, 199-200 (2d Cir. 2020).

⁵ See 15 U.S.C. § 78dd-3(a).

⁶ See 15 U.S.C. § 78dd-1(g); id. § 78dd-2(i).

⁷ See DOJ and SEC, *A Resource Guide to the Foreign Corrupt Practices Act, Second Edition* (July 2020), at 29 (hereinafter Resource Guide).

instrumentality of interstate commerce in furtherance of any improper payment or offer of payment.¹ An “issuer” is any person—American or foreign—who either issues securities within the United States or is required to file reports with the SEC.² A “domestic concern” is a US citizen, national, resident, or a corporation or other business entity with its principal place of business in the United States or organized under the laws of the United States.³ Note that the domestic concern need not be the ultimate beneficiary for the FCPA to apply.⁴ (“Rather, the statute precludes officers and directors of domestic concerns from paying bribes to foreign officials ‘in order to assist such domestic concern in obtaining . . . business for . . . any person.’”)

Another type of territorial-based jurisdiction extends to foreign citizens and foreign companies (or, more specifically, foreign companies that are not issuers) that commit any act in furtherance of an improper payment or offer in the territory of the United States.⁵

Finally, the FCPA’s anti-bribery provisions include an “alternative jurisdiction” that applies, based on US nationality alone, to acts outside the United States in furtherance of an improper payment or offer by any of the following: (1) any issuer organized under the laws of the United States; (2) US persons who are officers, directors, employees, agents, and stockholders of such issuer and are acting on behalf of such issuer; (3) any other corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States; or (4) any other citizen or national of the United States.⁶ Thus, US companies and citizens are subject to the FCPA regardless of where the act in furtherance of an improper payment or offer takes place and if the act takes place overseas, even if no means of interstate commerce is used.

Questions about the scope of jurisdiction often arise in the context of a company’s liability for conduct of foreign subsidiaries. A company can be liable for its subsidiary’s improper payments under two theories: (1) because the parent sufficiently participated in the payment by authorizing the payment or providing funds “knowing” that the funds would be used for an improper purpose, or (2) because the subsidiary’s acts in making the payments can be attributed to the parent under traditional agency principles. DOJ and the SEC endorsed both theories of parent liability in their 2012 joint Resource Guide to FCPA enforcement.⁷

DOJ and the SEC have shown a willingness to hold a parent company liable for its subsidiary’s actions solely based on the corporate relationship. In 2013, for example, both agencies reached non-prosecution agreements (NPAs) with Ralph Lauren Corporation for alleged bribes paid by an Argentine subsidiary to expedite customs clearances. The government did not allege actual knowledge or participation by the parent in the subsidiary’s conduct. Rather, liability appeared to be premised on the fact that Ralph Lauren Corporation was the sole owner of the subsidiary and had appointed its general manager.

This is one example of a foreign subsidiary being considered an “agent” of its parent, a relationship that could trigger FCPA liability for both the foreign subsidiary and the parent corporation. The statute makes “agents” of issuers as well as “agents”

⁸ *In re Alcoa Inc.*, Securities Exchange Act Release No. 71261 (Jan. 9, 2014).

⁹ Resource Guide at 28.

¹⁰ Under 15 U.S.C. § 78dd-1(e), the attorney general is obligated to have in place an opinion procedure by which DOJ provides "responses to specific inquiries by issuers concerning conformance of their conduct" with the FCPA. The opinion releases are available on the Department's website.

¹¹ See *Opinion Release 14-02*.

¹² *Id.*

¹³ Resource Guide at 30; see, e.g., *SEC v. Alliance One Int'l, Inc.*, No. 1:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010) (\$19.5 million in penalties and disgorgement paid by successor company and foreign subsidiaries).

¹⁴ Resource Guide at 30.

¹⁵ See *id.* at 29.

¹⁶ Dep't of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (June 2020).

¹⁷ See FCPA Corporate Enforcement Policy, Justice Manual § 9-47.120.

of domestic concerns subject to the FCPA. In addition, under US common law principles of vicarious liability, a corporation can be held liable for the conduct of its agent. For example, in 2014, the SEC held Alcoa Inc. liable for alleged improper payments by its subsidiaries, despite making "no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme."⁸ The SEC's finding of liability was based on the level of control Alcoa exercised over its subsidiaries, including its appointment of key leadership for the subsidiaries, its development of business and financial goals for them, and its coordination of legal, audit, and compliance functions. This approach is consistent with the statement in the *Resource Guide* that "[t]he fundamental characteristic of agency is control."⁹

A company may also be held liable for, or suffer other consequences from, the prior illegal acts of a company that it acquires or with which it becomes associated as the result of a merger. In a 2014 Opinion Release,¹⁰ DOJ made clear that the mere act of acquisition cannot create liability where none existed before.¹¹ DOJ explained that a US company that wished to acquire a foreign target would not be liable for that target's past extraterritorial conduct if the prior conduct had no connection to the United States, putting it beyond US jurisdiction in the first place.¹² But where potential liability existed prior to an acquisition, the acquiring company can be held liable for the past conduct of its acquisition.

DOJ and the SEC devote substantial space to this topic in their *Resource Guide*, in which they explain that actions against the acquiring or successor company are generally reserved for cases "involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition."¹³ They are less likely to take action against an acquiring company that discovered and quickly remediated violations.¹⁴ Consequently, the *Resource Guide* recommends that companies conduct extensive due diligence prior to acquisition (or, where that is not possible, after acquisition) and quickly and effectively integrate the target company into the parent's compliance program and internal controls.¹⁵ Guidance from DOJ's Criminal Division echoes this recommendation.¹⁶ The FCPA Corporate Enforcement Policy provides that successor companies that uncover wrongdoing in connection with a merger or acquisition can get credit for voluntary self-disclosure, cooperation, and remediation if done in accordance with the terms of the Policy.¹⁷

The Second Circuit has held that jurisdiction cannot be established simply based on a foreign national entering into a conspiracy to violate the FCPA with a US person. In an August 2015 decision, the district court in *United States v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. 2015), held that a person who is not himself subject to the FCPA cannot be charged as a co-conspirator or an accomplice to an FCPA violation. In *Hoskins*, the government alleged that, from 2002 through 2009, Alstom Power, Inc. (Alstom US), a company headquartered in Connecticut, was engaged in a bribery scheme to secure a \$1.18-billion project to build power stations for Indonesia's state-owned and state-controlled electricity company. From 2001 through 2004, defendant Lawrence Hoskins, a UK national, was employed by Alstom UK, a British company, and assigned to work for Alstom Resource Management SA, a French

¹⁸ 123 F. Supp. 3d at 321 (citing *United States v. Castle*, 925 F.2d 831, 833 (5th Cir. 1991)).

¹⁹ *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

²⁰ *Id.* at 96–97.

²¹ *Id.* at 98.

²² *United States v. Hoskins*, No. 3:12-cr-00238, Doc. 583 (Jury Verdict) (D. Conn. Nov. 8, 2019).

²³ See *Resource Guide* at 36 (citing *United States v. Firtash*, 392 F. Supp. 3d 872 (N.D. Ill. 2019)).

company, in France. The government claimed that Hoskins participated in the bribery scheme by approving and authorizing payments to individuals hired to pay bribes to Indonesian officials in order to influence the award of the power stations contract. The government alleged multiple theories of jurisdiction over Hoskins, who was not American and did not act within the United States. Among other theories of jurisdiction, the government alleged that even if Hoskins was not an agent of Alstom US, he conspired with others to violate the FCPA. The district court rejected that argument, reasoning that “where Congress chooses to exclude a class of individuals from liability under a statute, ‘the Executive [may not] . . . override the Congressional intent not to prosecute’” those parties by charging them for conspiracy to violate that statute.¹⁸ The government appealed the decision to the Second Circuit.

On appeal, the Second Circuit affirmed in part and reversed in part the district court’s decision.¹⁹ The Second Circuit concluded that Hoskins (a foreign national) could not be liable for conspiring to violate (or violating) the FCPA without a showing that he was acting as an employee, officer, director, or agent of Alstom US when he engaged in the prohibited conduct or that he took action in furtherance of the violation while in the United States.²⁰ But the Second Circuit reversed the district court’s ruling insofar as it prohibited the government from attempting to establish that Hoskins was liable as an agent of Alstom US for conspiring with foreign nationals who committed relevant acts while in the United States.²¹ The Second Circuit’s opinion establishes that there is a limit on the use of federal conspiracy charges to expand the scope of FCPA prosecutions, although agency remains a basis for establishing jurisdiction over foreign nationals. Hoskins was subsequently convicted at trial, including under the agency theory.²² However, on February 26, 2020, the district court acquitted Hoskins as to the agency theory charges, while upholding his convictions for money laundering. After a thorough review of the facts and legal standard for establishing agency, the court held that the Government had failed to present evidence upon which a rational jury could conclude that Hoskins was an agent of Alstom US. The government appealed the district court’s ruling (and Hoskins filed a cross-appeal) and the case remains pending before the Second Circuit.

Although the *Hoskins* decision is controlling in the Second Circuit, DOJ and the SEC have observed that at least one district court from another circuit has rejected the reasoning of the *Hoskins* court, leaving an open question as to how the FCPA’s reach will be interpreted in other circuits in cases involving charges of conspiratorial liability.²³

²⁴ H.R. Rep. No. 95-640, at 4 (1977).

²⁵ *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991); see also *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181–83 (2d Cir. 2003) (A “bad or wrongful purpose and an intent to influence a foreign official to misuse his official position” satisfy the element of corrupt intent.).

²⁶ 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

²⁷ 582 F. Supp. 2d at 540.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 597 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016).

³¹ Andrew Ceresny, *ACI's 32nd FCPA Conference Keynote Address* (Nov. 2015), <https://www.sec.gov/news/speech/ceresny-fcpa-keynote-11-17-15.html>.

³² *Id.*

³³ *Resource Guide* at 14–15.

³⁴ *Id.* at 14.

³⁵ *Id.*

2. Corrupt Intent

The FCPA requires that the pertinent acts be committed “corruptly.” The Act’s legislative history reflects that the payments “must be intended to induce the recipient to misuse his official position.”²⁴ “An act is ‘corruptly’ done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”²⁵

In *United States v. Kozeny*, a federal district court considered whether a defendant may obtain a jury instruction that corrupt intent could be absent because the bribe was the result of extortion.²⁶ The court agreed that “true extortion” can be a viable defense to an FCPA charge and held that, where a defendant presents sufficient evidence on that point, the court should instruct the jury as to what constitutes true extortion such that a defendant cannot be found to have the requisite corrupt intent.²⁷ The *Kozeny* court was not called upon to decide the precise parameters of “true extortion” but concluded that it must involve more than a simple demand for payment.²⁸ Citing the FCPA’s legislative history, the court stated: “While the FCPA would apply to a situation in which a ‘payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,’ it would not apply to one in which payment is made to an official ‘to keep an oil rig from being dynamited,’ an example of ‘true extortion.’”²⁹

3. Anything of Value

The FCPA does not define “anything of value,” but the term has been “construed broadly” to include a variety of benefits, such as offers of employment, travel expenses, and charitable contributions.³⁰ In 2015, the SEC’s then-Director of Enforcement emphasized that “anything of value” is a “broad term” that is not limited to cash or tangible gifts but includes less traditional items of value that have been given in order to influence foreign officials.³¹ He observed that the SEC has brought bribery charges in cases involving contributions to charities affiliated with foreign government officials, the provision of no-show jobs to the spouse of a foreign official, payment of a honeymoon of a foreign official’s daughter, and the provision of student internships to family members of a foreign government official.³² Similarly, the *Resource Guide* states that “[a]n improper benefit can take many forms,” including not only cash but also travel expenses and expensive gifts.³³ The *Resource Guide* further states that “the FCPA does not contain a minimum threshold amount for corrupt gifts or payments.”³⁴ What may be considered a modest payment in the United States could be viewed as a larger and more significant amount in a foreign country.³⁵

In addition to cash and cash equivalents (e.g., stock, stock options), things of value in the FCPA context have included travel and entertainment (e.g., 2013 DOJ *Diebold* matter); charitable contributions (e.g., 2004 SEC *Schering-Plough* matter); college scholarships (e.g., 1993 DOJ McDade prosecution); the services of a prostitute (e.g., DOJ *Girard* and *Marmolejo* matters); offers of future employment (e.g., DOJ *Girard* matter); and offers of employment to friends and family of an official (e.g., 2016 DOJ and SEC *JP Morgan Chase* matter).

³⁶ See *Resource Guide* at 16; see also Opinion Release 10-02 (declining to take enforcement action where requestor undertook adequate due diligence of recipient and imposed significant controls on the grant); Opinion Release 97-02 (declining to take enforcement action where facts demonstrated that donation would be given directly to a government entity – “and not to any foreign government official” – for the purpose of building a school).

³⁷ *In re Eli Lilly and Company*, Securities and Exchange Commission No. 22576 (Dec. 12, 2012).

³⁸ 15 U.S.C. § 78dd-1(a).

³⁹ See H.R. Rep. 95-640 (Sept. 28, 1977) (“[I]n the majority of bribery cases . . . some responsible official or employee of the US parent company had knowledge of the bribery and either explicitly or implicitly approved the practice . . . [S]uch persons could be prosecuted.”); see also Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 414, 98th Cong., 1st Sess. (1983), at 38 (Memorandum from Deputy Attorney General Edward C. Schmults) (describing standard for implicit authorization under the FCPA, noting that one may implicitly authorize a corrupt payment merely by pursuing a course of conduct that conveys an intent that an illicit payment be made).

Charitable contributions raise a particularly difficult issue. DOJ and the SEC have both advised that legitimate charitable donations do not violate the FCPA.³⁶ Yet enforcement practice reflects that the government will closely scrutinize donations made to charitable organizations or for educational purposes to ensure that any officials requesting donations, or otherwise associated with the donees, have no possible role in reviewing matters for, or providing preferential treatment to, the donating business. For example, in 2012, the SEC brought an FCPA enforcement action against Eli Lilly & Co. alleging that a subsidiary of the pharmaceutical company made \$39,000 in donations to a Polish charity.³⁷ The SEC claimed the donation had been made at the request of a government official who had influence over pharmaceutical purchases in Poland.

4. Authorization of Unlawful Payments

The FCPA prohibits not only the making, but also the “authorization” of any payment or giving of anything of value to a foreign official.³⁸

The FCPA does not define the term “authorization,” and as with many aspects of the statute, the case law is undeveloped. The legislative history makes clear that authorization can be implicit or explicit.³⁹

Note that it is not necessary that a company affirmatively authorize improper payments by its agents, vendors, distributors, or subcontractors for liability to attach. Simple knowledge of such payments will suffice, and, critically, knowledge is defined broadly enough to include even well-founded suspicions as described in the next subsection.

Certain factual situations raise unique questions about the “authorization” of a third-party improper payment. Distributors typically purchase goods and re-sell them to other end-users rather than facilitate a company’s direct sales as an agent or representative. Because of this distinction, any illegal payments a distributor makes after taking title to the goods generally cannot be attributed to the original seller, absent a prior specific conspiratorial agreement to make the payment or an ongoing relationship between the seller and the distributor in which the seller knowingly benefits from the illicit activity. For example, in Opinion Release 87-01, DOJ took no action on a US company’s sale of a product to a foreign company that planned to resell the product to its government on terms to be negotiated. The US company represented that it was not aware of any illegal payment plans.

Nevertheless, distributor relationships are not immune to risk. Where a company is aware or reasonably suspects that its distributor is offering or making improper payments to government officials, the company can be liable for the distributor’s actions. For example, in 2013, Weatherford International settled charges that stemmed in part from a distributor arrangement. The government alleged that Weatherford offered up to \$15 million in “volume discounts” to a distributor in an unnamed Middle Eastern country, believing that the discounts would be used to pay illegal bribes to employees of the national oil company.

⁴⁰ 15 U.S.C. § 78dd-1(f)(2)(B).

⁴¹ See *Resource Guide* at 23 (highlighting the FCPA's legislative history to show that the Act was intended to cover actors who exhibit "conscious disregard," "willful blindness," or "deliberate ignorance" of known circumstances that "should reasonably alert them of the 'high probability' of an FCPA violation"); *United States v. Kozeny*, 667 F.3d 122, 132 (2d Cir. 2011) (affirming jury instruction that stated that "[w]hen knowledge of existence of a particular fact is an element of the offense, such knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact").

⁴² See 15 U.S.C. § 78dd-1(f)(1)(A); *Resource Guide* at 20-21.

⁴³ 15 U.S.C. § 78dd-1(f)(1)(A).

⁴⁴ 15 U.S.C. § 78dd-1(a)(2).

In addition, foreign governments often require that a US contractor hire a local entity to do some portion of the work on a contract. A company should carefully monitor and document such arrangements because a corrupt subcontractor easily could pad its subcontract price to include improper payments. A US company, as the original source for those payments, therefore, may be liable if some portion is subsequently offered or paid to a foreign official. Accordingly, margins should be reasonable.

5. Knowing

In addition to prohibiting "authorizing" payments by a third party, the FCPA prohibits providing something of value to a third party while knowing that the third party will in turn provide it to a government official. The statute defines the term "knowing" broadly. Knowledge of a relevant circumstance exists "if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."⁴⁰ Willful blindness to circumstances indicating a high probability of unlawful activity will satisfy the knowledge requirement.⁴¹

Accordingly, while one might believe that it is safest to know as little as possible about what service partners and third parties do with the payments they receive, exactly the opposite is true. Companies therefore should be alert to possible warning signs, such as, for example, when a government official directs the use of a specific third party; where a provider's services are unclear or ill-defined; or where payments are made through non-traditional channels. Under the FCPA liability framework, US companies should closely monitor and document their third-party relationships to ensure that they are not viewed as taking a "head-in-the-sand" approach should payments ultimately be redirected to government officials.

6. Offers or Promises

The Act prohibits not only improper payments but also offers or promises to make such payments; thus, the payment need not actually be made in order for a violation to occur.

7. Foreign Official

Under the FCPA, related case law, and DOJ and SEC guidance, the term "foreign official" includes elected and appointed government officials; officials of international organizations such as the International Monetary Fund, the World Bank, and the Red Cross; and employees of any "government instrumentality," which can include state-owned enterprises that provide what might otherwise be thought of as commercial services.⁴² The FCPA also defines "foreign official" as including "any person acting in an official capacity" for or on behalf of a foreign government.⁴³ Finally, the FCPA's anti-bribery provision also extends to foreign political parties, foreign political party officials, and candidates for foreign political office.⁴⁴

⁴⁵ *United States v. Esquenazi*, 752 F.3d 912 (11th Cir.), cert. denied, 135 S. Ct. 293 (2014).

⁴⁶ *Id.* at 926.

⁴⁷ *Id.*; see also *United States v. Duperval*, 777 F.3d 1324, 1333 (11th Cir. 2015) (applying the same tests).

⁴⁸ See, e.g., *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); *United States v. Carson*, No. 09-cr-00077 (JVS), 2011 WL 5101701 (C.D. Cal. May 18, 2011), and see *Resource Guide* at 20-21.

In a 2014 decision, the Eleventh Circuit focused on two critical features to determine whether a state-affiliated entity qualifies as a “government instrumentality”: (1) government control and (2) public function.⁴⁵ Assessing either of the features is a fact-intensive exercise, but the court identified several factors that will often affect the analysis.

Regarding government control, the court considered a non-exhaustive list of six factors: (1) the foreign government’s formal designation of the entity; (2) whether the government had a majority ownership interest; (3) the government’s authority to appoint or remove the entity’s principals; (4) the extent to which the entity’s profits are returned to the public treasury; (5) whether the entity would perform at a loss absent government subsidies; and (6) the length of time that the other factors indicated government control.⁴⁶

With respect to whether a state-affiliated entity performs a public function, the court considered these non-exhaustive factors: (1) whether the entity enjoys a monopoly over its goods or services; (2) the extent of government subsidies for the entity; (3) whether the entity’s goods and services are available to the public at large; and (4) whether the public and government perceive the entity as performing a governmental function.⁴⁷

The Eleventh Circuit’s holdings closely track the past approach of DOJ and the SEC as seen in their prior enforcement actions.⁴⁸

Members of royal families also present particular difficulty. Often, such individuals have no official role in government but occupy important ceremonial roles and wield significant influence. In Opinion Release 12-01, DOJ set out the following factors for assessing whether a royal is a foreign official: (1) the degree of control or influence the individual has over the levers of governmental power, execution, administration, finances, and the like; (2) whether the foreign government characterizes the individual as having governmental power; and (3) whether and under what circumstances the individual may act on behalf of, or bind, a government. Applying these factors, DOJ concluded that the royal family member at issue in Opinion Release 12-01 was not a foreign official because he had no official or unofficial role in his country’s government and no authority to bind the relevant governmental decision makers.

Thus, consultants and unofficial advisors to government officials, or others outside the formal government apparatus, may be deemed to be government officials under certain circumstances, particularly where they have decision-making authority or significant influence with respect to governmental actions. For example, in the 2006 *Statoil ASA* matter, Statoil was charged with making improper payments to the president of the National Iranian Oil Company. DOJ did not allege, however, that this position made him a foreign official, arguing instead that he was an “advisor to the Iranian Oil Minister” and a “very important guest”; that his family “controlled all contract awards within oil and gas in Iran”; and that Statoil had tested his influence by having him send a message back to Statoil through the Iranian Oil Minister.

⁴⁹ Opinion Release 20-01 (Aug. 14, 2020); see, e.g., Opinion Release 09-01 (Aug. 3, 2009) (declining to take any enforcement action, in part, because the item of value would be “provided to the foreign government, as opposed to individual government officials”); Opinion Release 97-02 (Nov. 5, 1997) (declining to take enforcement action where donation would “be made directly to a government entity - and not to any foreign government official”).

⁵⁰ Press Release, SEC, SEC Charges Stryker Corporation with FCPA Violations (Oct. 24, 2013) (charging U.S.-based corporation for donation to public university in Greece to fund laboratory of public hospital doctor who allegedly agreed to provide business to corporation).

⁵¹ *United States v. Kay*, 359 F.3d 738, 754 (5th Cir. 2004) (*Kay I*).

⁵² See *id.* at 750–55.

⁵³ 359 F.3d at 756.

⁵⁴ If the person or entity is a not a US person or issuer, the interstate commerce nexus is unnecessary. Rather, such a defendant can be liable for any act within the United States in furtherance of an unlawful payment.

The FCPA “does not prohibit payments to foreign governments or foreign government instrumentalities.”⁴⁹ However, a payment to a government entity may be improper where it substantially benefits a particular government official.⁵⁰

8. Improper Purpose

To violate the FCPA, a promise, payment, or offer to a foreign official must be given for one of four purposes: (1) to influence any act or decision of such foreign official in his official capacity; (2) to induce such foreign official to do or omit to do any act in violation of the lawful duty of such official; (3) to secure any improper advantage; or (4) to induce such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

These purposes encompass nearly every act a foreign official might take that could benefit the party making the promise, payment, or offer. The first applies when the foreign official has some sort of discretion within the laws of the pertinent foreign country and the promise, payment, or offer is made in order to influence the exercise of that discretion. The second comes into play when a foreign official breaks the laws of the pertinent foreign country. The third purpose, “securing any improper advantage,” broadly concerns “something to which the company concerned was not clearly entitled, [such as] an operating permit for a factory which fails to meet the statutory requirements.”⁵¹ An advantage that is not readily available to other competitors and that is secured by a payment could be deemed to fall within the scope of this provision.⁵² The fourth purpose focuses on the foreign official’s use of his or her influence within the foreign government. For example, in the 2006 *Statoil ASA* matter, US authorities brought an enforcement action against a foreign oil company that entered into a \$15 million consulting agreement with an Iranian official, the purpose of which was to induce the official to use his influence to assist the company in obtaining a contract.

9. To Obtain or Retain Business

The leading case on this issue is *Kay I*, in which the Fifth Circuit held that this statutory requirement was satisfied by payments designed “to secure illegally reduced customs and tax liability” because lower tax payments would “more generally help” a domestic payor obtain or retain business for some person in a foreign country.⁵³ Thus, the “obtain or retain business” provision will be read broadly.

10. Use of Interstate Commerce in Furtherance of an Unlawful Payment

The FCPA’s anti-bribery provisions require a nexus between an issuer’s or a domestic concern’s use of interstate commerce and the unlawful payment.⁵⁴ In most cases this requirement is easily met—for example, by email or telephonic communications relating to the payments or by the wiring of money or other payment mechanisms. Importantly, DOJ reads the provision as encompassing a much broader range of circumstances. An example is the 2008 *AGA Medical Corporation* matter, which involved the payment of improper “commissions” to doctors and patent agents in China in connection with sales of and patent approvals for certain medical devices. While the charging documents

⁵⁵ *SEC v. Straub*, 921 F. Supp. 2d 244, 262–64 (S.D.N.Y. 2013).

⁵⁶ *Kay I*, 359 F.3d at 756 (“Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country.”).

⁵⁷ 15 U.S.C. § 78dd-1(b).

⁵⁸ See *Kay I*, 359 F.3d at 750–51,

described email communications relating to the payments, DOJ also alleged that shipping the products to China qualified as the use of interstate commerce in furtherance of the unlawful payment. More recently, a federal district court held that even email correspondence sent and received in foreign locations may satisfy the interstate commerce requirement if the messages were routed through US-based servers.⁵⁵

DEFENSES TO AN ANTI-BRIBERY PROSECUTION

The breadth of the FCPA is reinforced by the relatively narrow nature of the exceptions and affirmative defenses to liability.⁵⁶ The recognized statutory exceptions and defenses are:

- **Facilitating Payments:** The FCPA does not apply to any payment to secure the performance of a routine governmental action.
- **Lawful Under Local Law:** It is an affirmative defense that an action is permitted by the law of the official’s country. This defense applies only to formal law, not the local custom.
- **Reasonable and Bona Fide Expenses:** It is an affirmative defense that an expense was a reasonable and bona fide business expense, such as reasonable travel for a product demonstration.

I. Facilitating Payments

The FCPA does not apply “to any facilitating or expediting payment to a foreign official, political party, or party official, the purpose of which is to expedite or to secure the performance of a routine governmental action.”⁵⁷ This so-called “facilitating” or “grease” payment exception is meant to cover routine, nondiscretionary “ministerial activities performed by mid- or low-level foreign functionaries,”⁵⁸ such as:

- obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- processing governmental papers;
- providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods;
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; or
- actions of a similar nature so long as the official’s decision does not involve whether, or on what terms, to award new business to, or to continue business with, a particular party.

⁵⁹ See *Resource Guide* at 26.

⁶⁰ *Kay I*, 359 F3d at 747.

⁶¹ *Id.*

⁶² *In re Layne Christensen*, Securities Exchange Act Release No. 73437 (Oct. 27, 2014).

⁶³ 15 U.S.C. § 78dd-1(c)(1).

15 U.S.C. § 78dd-1(f). By carving out these narrow categories of payments for “routine government action” from the FCPA’s coverage, Congress sought to differentiate between those acts “that induce an official to act ‘corruptly,’ i.e., actions requiring him ‘to misuse his official position’ and his discretionary authority,” and those acts that are “essentially ministerial [and] merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.”⁵⁹

Those who seek to justify a payment under the “facilitating payment” exception should focus on the purpose of the payment and whether the official in question must exercise any discretion or judgment in deciding whether to take the requested action. A payment that convinces an official to bestow his good graces upon a company is suspect, whereas a payment that merely expedites a routine action to which the company is otherwise entitled is less problematic. Companies that permit such payments should ensure that they are reviewed and approved in advance by in-house or other counsel and that they are recorded properly in their books and records.

In their *Resource Guide*, DOJ and the SEC emphasize that the size of a payment does not determine whether it qualifies for the facilitating payment exception.⁶⁰ For example, in a 2009 matter brought against oilfield company Helmerich & Payne, Inc., DOJ cited a series of infrequent payments to Venezuelan customs officials, each of which was less than \$2,000 and which, together, totaled only \$7,000. In that case, however, the payments were allegedly made to avoid customs regulations and inspections rather than to obtain routine, non-discretionary action. The *Resource Guide*, however, also notes that especially large payments are less likely to be true facilitating payments.⁶¹

Even if a payment arguably fits within the exception for facilitating payments, issuers must be careful to ensure the transactions are properly recorded as such. In the 2014 *Layne Christensen* matter, the SEC faulted the company for some payments as small as \$4 where the payments were mischaracterized as “honoraires,” “commissions,” and “service fees,” leading to books and records violations.⁶²

Finally, it should be noted that the UK Bribery Act of 2010 does not contain a facilitating payments exception as described in detail below. The scope of the UK Bribery Act is quite broad, covering not only UK concerns but any companies conducting business in the United Kingdom, even where the charged conduct occurred elsewhere. Thus, companies subject to both the FCPA and UK Bribery Act may not be in a position to take advantage of the “facilitating payments” exception to the FCPA.

2. Lawful Under Local Law

Under the FCPA, it is an affirmative defense that “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”⁶³ Note that the payments must be legal under the written laws or regulations of the foreign country and that such authorization must be express.

⁶⁴ See 582 F. Supp. 2d at 538.

⁶⁵ *Id.* at 539.

⁶⁶ No. 1:15-cr-00706, Doc. 584 (Trial Transcript) at 133-34 (S.D.N.Y. Aug. 3, 2017)

⁶⁷ 15 U.S.C. § 78dd-1(c)(2).

⁶⁸ See Opinion Release 82-01 (approved reasonable travel, meals, and entertainment); Opinion Release 81-02 (approved provision of product samples to government officials for testing and quality assurance); Opinion Release 83-02 (approved travel and entertainment expenses for official's wife) (note, however, that more recent enforcement actions suggest that companies should not pay any expenses for an official's family); Opinion Release 85-01 (approved payment of travel period closely related to the length of time required to demonstrate the product); Opinion Release 07-02 (approving expenses paid directly to providers for domestic air travel and other expenses of delegation of six junior to mid-level foreign officials for educational program at company's US headquarters); and Opinion Release 07-01 (approving domestic expenses for a four-day trip by a six-person delegation of the government of an Asian country).

⁶⁹ See Opinion Releases 07-02, 12-02.

⁷⁰ See Opinion Release 83-02 (approving payment of less than \$5,000 to pay for the wife of a foreign official to travel with the official while in the United States visiting company sites).

While a country's laws may acknowledge the existence of certain payments – for example, by including a provision in the tax code for how to treat them – this defense requires something greater: an explicit authorization for the payment itself.

Kozeny addressed the scope of this affirmative defense. In that case, the defendant was alleged to have paid bribes in Azerbaijan related to obtaining business with SOCAR, the state oil company. The defendant argued that the alleged payments were legal under local law because he had reported the payments to Azeri authorities, and under Azeri law, the payor of a bribe is relieved from punishment if he makes such a report.⁶⁴ The court disagreed, concluding that the Azeri legal provision may waive punishment but does not render the payment itself lawful. “[T]here is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality.”⁶⁵

More recently, in *United States v. Ng Lap Seng*, the court rejected an argument that a defendant may put forth an affirmative defense where a foreign country's anti-bribery laws are silent on whether a particular kind of payment is unlawful. The court held that this interpretation of the statute was inconsistent with the plain meaning of the FCPA's text, was not supported by a majority of sources addressing the affirmative defense, and would lead to impractical results.⁶⁶

3. Promotional Expenses

It is an affirmative defense that the payment or thing of value “was a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to . . . the promotion, demonstration, or explanation of products or services; or . . . the execution or performance of a contract . . .”⁶⁷ This provision creates a limited exception for expenses associated with ordinary product demonstration and testing by companies seeking government contracts or for ongoing inspections related to the execution of such a contract.

DOJ Opinion Releases on this subject make clear that any expenditures must be closely tailored to the payor's legitimate goals. For example, in connection with a product demonstration, the host may pay for foreign officials' non-extravagant travel, lodging, and meals.⁶⁸

DOJ's Opinion Releases also permit some digression for the officials' entertainment so long as they do not resemble added “perks” for the officials. It must be clear from the overall expense plan that the trip is for the purposes outlined in the statute and that the vast majority of expenses are advancing those ends. In Opinion Release 07-02, for example, DOJ approved payment for a modest four-hour city sightseeing tour for the six visiting foreign officials. In general, airfare should be economy class, but business class travel may be appropriate for higher-ranking officials.⁶⁹ Finally, although there may be situations in which an official's family members may be included, that is rarely appropriate and should probably be avoided.⁷⁰

⁷¹ *Resource Guide* at 15.

The body of guidance from Opinion Releases and enforcement actions regarding educational trips provide a sound framework to consider gifts and hospitality generally. Hospitality and gifts may be extended if they are reasonable, have a sound business purpose, and are not intended to influence a government official to use his authority improperly to the business advantage of the company. These common-sense guidelines dictate that reasonable entertainment expenses (e.g., meals) are usually acceptable if connected to conducting business. Similarly, low-value tangible gifts (e.g., marketing items with company logos such as pens, caps, cups, and shirts) may be given, provided such gifts are acceptable under the applicable government rules of the official's home country and are permitted by the US company's ethics policies. DOJ and the SEC have advised that "[i]tems of nominal value" are less likely to curry improper influence, while "[t]he larger or more extravagant the gift . . . the more likely it was given with an improper influence."⁷¹

Hospitality, travel, and entertainment that are unconnected to bona fide business activities or that include luxurious or extravagant expenses potentially violate the FCPA's anti-bribery provisions. In 2013, both DOJ and the SEC brought enforcement actions against Diebold, Inc., for providing leisure trips to Las Vegas and Disneyland, entertainment, and gifts to Chinese and Indonesian officials. Similarly, in 2014 the SEC charged that Bruker Corporation provided a series of non-business and leisure side-trips to Chinese officials at state-owned enterprises.

THE FCPA'S BOOKS AND RECORDS AND INTERNAL CONTROLS PROVISIONS

The books and records provisions of the FCPA work in tandem with the anti-bribery provisions. They require public companies to account accurately for and report expenditures, as well as to maintain accurate records to support accounting entries and expenditures. The internal control provisions require that an issuer devise and maintain internal controls that allow for this accurate record keeping.

These provisions apply regardless of whether any improper payments have been made and have been used as the basis for liability by DOJ and the SEC in matters where they have not (and arguably could not have) brought anti-bribery charges.

I. Substantive Requirements

The books and records and internal controls provisions require that an issuer:

- A. Make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
- B. Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

⁷² See 15 U.S.C. § 78m(b)(5); 15 U.S.C. § 78m(b)(4).

⁷³ *SEC v. Oracle Corp.*, No. CV-12-4310 (N.D. Cal. Aug. 16, 2012).

⁷⁴ *United States v. FalconStor Software, Inc.*, No. 1:12-mj-00615-VWP (E.D. N.Y. June 27, 2012).

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (2) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. § 78m(b)(2). These provisions make clear that issuers must compile records in accordance with generally accepted accounting standards. These requirements are not based on any sense of "materiality" as that term is generally used in securities laws. Rather, the requirement is grounded in the concept of reasonableness and accuracy – what a business manager would reasonably want and expect in the day-to-day operation of a business.

Knowing violation of the books and records or internal controls requirements can trigger both civil and criminal liability.⁷²

Because liability under the books and records or internal controls provisions does not depend on an improper payment, these provisions may be, and often are, used to sanction a company in cases involving suspected improper payments in which, for whatever reason, the government is unable to prove, or chooses not to pursue, an anti-bribery charge. For example, the SEC brought a settled civil enforcement action against Oracle Corporation where an Indian subsidiary of Oracle created slush funds for the purpose of paying future bribes to foreign government officials even though there were no bribes offered or currently contemplated.⁷³ Companies should avoid all arrangements that cannot be or are not openly recorded in the books.

Indeed, recent enforcement actions have reflected how the enforcement agencies use the books and records provision to reach accounting misconduct associated with corrupt conduct outside the FCPA's reach. In a landmark 2012 case, the SEC brought charges against FalconStor Software, Inc. related to bribes allegedly paid to private sector employees of a JP Morgan Chase subsidiary in exchange for lucrative contracts. According to the SEC, the bribes were inaccurately recorded in FalconStor's books as "compensation," "sales promotion," and "entertainment" expenses. The SEC charged FalconStor under the FCPA's books and records provision for failing to accurately record the expenses associated with the bribes on the company's books and records. FalconStor agreed to pay \$2.9 million to settle the charges.⁷⁴

⁷⁵ *In the Matter of the Goodyear Tire & Rubber Co., Respondent*, Release No. 3640 (Feb. 24, 2015).

⁷⁶ *SEC v. Andrew Miller*, No. 3:15-cv-1461-YGR (LB) (N.D. Cal. Jan. 27, 2016).

⁷⁷ No. 2:21-cv-1433 (D. Nev. Aug. 2, 2021)

⁷⁸ *United States v. LATAM Airlines Group S.A.*, No. 0:16-60195-CR-DTKH (S.D. Fla. July 25, 2016).

⁷⁹ See 15 U.S.C. § 78m(b)(2).

In 2015, the SEC brought charges against Goodyear Tire & Rubber Company for violating the FCPA's books and records provision by paying more than \$3.2 million in bribes to government officials and employees of private companies. These bribes were falsely recorded in the books and records of Goodyear's subsidiaries as legitimate business expenses. Goodyear agreed to pay more than \$16 million to settle the SEC's charges.⁷⁵

The Goodyear and *FalconStor* matters both involved allegations of the failure to properly record payments associated with commercial bribery rather than official corruption. The SEC went one step further in the 2015 Polycom matter. There, the SEC applied the FCPA's books and records provision to the accounting of benefits paid to a company's own employee. The SEC alleged that Polycom's former CEO used almost \$200,000 of company money to pay for personal meals, entertainment, travel, and gifts, and Polycom falsely recorded these personal expenses as business expenses in its books and records.⁷⁶ Similarly, in *SEC v. Live Ventures Inc.*,⁷⁷ the SEC charged an issuer and its executive officers with violations of the FCPA's books and records provisions for alleged involvement in a scheme to falsify financial results and artificially inflate the issuer's value. There was no allegation of foreign bribery.

The theory of liability pursued by the SEC in these matters continues to potentially expand the scope of conduct subject to scrutiny under the FCPA's books and records provisions. These resolutions also highlight certain inadequate expense reporting processes – i.e., Polycom allowed its CEO to approve his own expenses and to book and charge airline flights without providing any description of their purpose – of which companies may want to take note and ensure the robustness of their own internal controls in the area of expense reporting.

In the 2016 *LATAM Airlines* matter, DOJ brought criminal books and records charges against LATAM (the successor to LAN Airlines) based on underlying conduct that arguably did not involve official corruption. In that case, a South American airline entered into a sham consulting contract with a government official. Rather than perform services under the contract, the official paid a portion of the contract's proceeds to union officials in order to induce the union to acquiesce to more favorable terms in negotiations with the airline. The applicability of the anti-bribery provisions in these circumstances, where the official is making a corrupt payment and may not be acting in his official capacity, is not clear. Yet DOJ brought criminal charges under the books and records and internal controls provisions in light of the fact that the sham consultant agreement and associated payments were not accurately recorded. LATAM Airlines entered into a deferred prosecution agreement and agreed to pay a \$12 million criminal penalty.⁷⁸

2. Applicability

The books and records and internal controls provisions apply only to issuers – that is, entities that have a class of securities registered pursuant to 15 U.S.C. § 78l and entities that are required to file reports with the SEC pursuant to 15 U.S.C. § 78o(d).⁷⁹

⁸⁰ See *SEC v. Hohol*, No. 2:14-CV-00041(RTR) (E.D. Wis. Jan. 14, 2014).

⁸¹ 15 U.S.C. § 78m(b)(6).

⁸² See, e.g., *SEC v. Panalpina, Inc.*, No. 4:10-cv-4334 (S.D. Tex. Nov. 4, 2010) (settled enforcement action against a foreign company that paid bribes for issuers and provided inaccurate invoices to support the improper payments).

⁸³ *SEC v. Siemens Aktiengesellschaft*, No. 1:08-cv-02167 (D.D.C. Dec. 12, 2008).

⁸⁴ See, e.g., *United States v. MacAllister*, 160 F.3d 1304, 1307 (11th Cir. 1998) (the United States may prosecute an extraterritorial conspiracy if there is an overt act within the United States in furtherance of the conspiracy).

⁸⁵ *Securities and Exchange Commission v. Gordon J. Coburn and Steven E. Schwartz*, Case No. 2:19-cv-5820 (D.N.J. filed February 15, 2019).

There is no “jurisdictional” requirement for civil liability for failure to maintain adequate books and records or internal controls pursuant to 15 U.S.C. § 78m(b)(2). Any “issuer” within the meaning of the statute must comply with the statute’s requirements to maintain accurate books and records and adequate internal controls, wherever the books and records may be kept.

Where a subsidiary’s financial results are consolidated with a parent issuer’s financial statements, the FCPA’s requirements have been found to apply to books and records or internal control deficiencies occurring at the subsidiary. Thus, inaccurate books and records or internal control failures at the subsidiary level can trigger civil liability for the parent issuer without any US nexus (beyond issuer status of the parent).⁸⁰ Even where an issuer owns 50 percent or less of the voting power of a subsidiary, it must make “good faith” efforts to “use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with” the FCPA.⁸¹

But the jurisdictional limits of this section have not been fully tested in the courts; thus, for example, it is not entirely clear whether it would apply to a foreign non-issuer defendant who acts entirely outside the United States to knowingly falsify an issuer’s books and records. The government is likely to argue, however, that a US prosecution of such conduct would fall within established principles of extraterritorial jurisdiction, insofar as Congress clearly intended this provision to have extraterritorial reach and that the conduct at issue inherently has an impact on the United States (or the US securities market) because it involves the books and records of an issuer.⁸²

DOJ relied on the criminal prohibition on circumventing internal accounting controls and falsifying books to bring criminal charges against Siemens AG, a foreign issuer directly subject to this provision.⁸³ Specifically, Siemens AG pleaded guilty to failing to address internal controls and books and records problems in the face of information that it had grave issues with its internal controls and with accuracy in books and records as a result of its ongoing engagement in bribery. No US jurisdictional nexus was alleged. In addition, one of Siemens AG’s foreign subsidiaries, Siemens Argentina, pleaded guilty to conspiracy to knowingly falsifying and causing to be falsified the books and records of an issuer (i.e., of its parent corporation, Siemens AG), in violation of 18 U.S.C. § 371 (the conspiracy statute). To satisfy the jurisdictional requirements of a conspiracy charge, DOJ alleged two meetings in the US and a bank transfer of bribe funds that went through a US correspondent bank account.⁸⁴

By their terms, books and records and internal controls provisions apply only to issuers – and not individuals – but individuals have been charged with either criminal or civil violations of the books and records or internal controls provisions in a number of recent cases under various theories of vicarious liability such as aiding and abetting. Individuals also can be subject to civil liability as control persons. For example, in 2019, the SEC and DOJ charged two of Cognizant Technology Solutions Corp.’s executives with knowingly violating and conspiring to violate the FCPA’s anti-bribery and accounting provisions.⁸⁵ In 2012, a former managing director of Morgan Stanley pleaded guilty to conspiracy to circumvent internal controls in connection with a

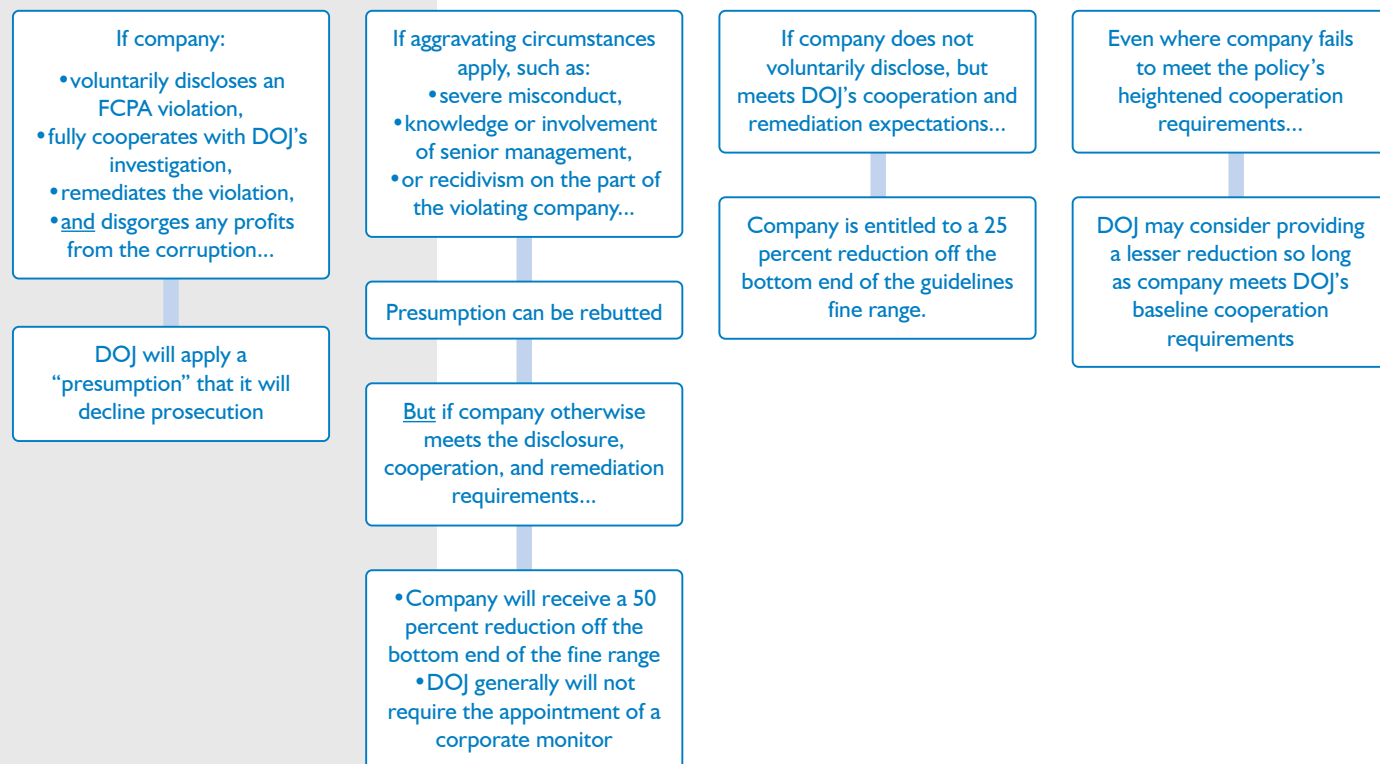
⁸⁶ *United States v. Garth Peterson*, No. 12-224 (JBW) (E.D.N.Y. April 25, 2012).

⁸⁷ *SEC v. Paul W. Jennings*, No. 1:11-cv-00144 (D.D.C. Jan. 24, 2011).

⁸⁸ *SEC v. Nature's Sunshine Products, Inc.*, Douglas Faggioli and Craig D. Huff, No. 09CV672 (D. Utah July 31, 2009).

scheme to bribe a Chinese official.⁸⁶ In 2011, the former CEO of Innospec, Inc. was charged civilly with aiding and abetting violations of the books and records and internal controls provisions, circumventing internal controls, falsifying books and records, making false statements to accountants, and signing false certifications.⁸⁷ And in 2009, two executives of Nature's Sunshine Products were charged civilly, as control persons of the company, with violations of the books and records and internal controls provisions.⁸⁸

RESOLUTION OF FCPA INVESTIGATIONS



Government investigations into suspected corporate FCPA violations typically result in either a negotiated resolution between the enforcement agency and the company under investigation or a decision by the agency not to take action, often called a "declination" in cases where the enforcement agency has determined there was a violation of the law. A corporation, like an individual, could exercise its trial rights and put the government to its burden of proof, but corporations have rarely done so.

Any resolution of a potential violation other than a declination typically carries a hefty fine or civil penalty, in addition to the extensive costs associated with conducting an internal investigation and/or defending against government inquiries, harm to reputation, imposition of a compliance program meeting specific requirements (or a compliance monitor overseeing a company's FCPA compliance program for a term of years), and the risk of imprisonment. Depending on the circumstances, resolutions of investigations may also carry collateral consequences for the company and more recent updates to that policy.

⁸⁹ See FCPA Corporate Enforcement Policy, Justice Manual § 9-47.120.

DOJ and the SEC have both asserted in speeches and other public pronouncements that voluntary disclosure and cooperation with the government's investigation receive significant weight in their determination of an appropriate resolution. In addition, the FCPA Corporate Enforcement Policy of DOJ's Criminal Division provides certain benefits to companies that fully cooperate with FCPA investigations and engage in timely and appropriate remediation, and even greater benefits to companies that take the extra step of voluntarily self-disclosing misconduct.

I. DOJ FCPA Corporate Enforcement Policy

The FCPA Corporate Enforcement Policy, as amended in November 2019, describes the conditions under which DOJ will confer favorable credit during the negotiation of a corporate resolution of an alleged FCPA violation.⁸⁹

Under the policy, DOJ will apply a "presumption" that it will decline prosecution of any company that voluntarily discloses an FCPA violation, fully cooperates with DOJ's investigation, remediates the violation, and disgorges any profits from the corruption. As discussed in detail in the below sections, the policy defines DOJ's expectations in each of these areas, including providing a definition of cooperation that is expressly more stringent than what DOJ requires to provide cooperation credit in other non-FCPA enforcement situations. The presumption can be rebutted by aggravating circumstances, including severe misconduct, knowledge or involvement of senior management, or recidivism on the part of the violating company.

The enforcement policy also provides for limited credit in situations where a company does not qualify for a declination under the policy. Where aggravating circumstances make a declination inappropriate but a company otherwise meets the disclosure, cooperation, and remediation requirements, the policy provides that the company will receive a 50 percent reduction off the bottom end of the fine range recommended under the federal sentencing guidelines and that DOJ generally will not require the appointment of a corporate monitor.

Where a company does not voluntarily disclose, but meets DOJ's cooperation and remediation expectations, a company is entitled to a 25 percent reduction off the bottom end of the guidelines fine range. Even where a company fails to meet the policy's heightened cooperation requirements, the policy provides that DOJ may consider providing a lesser reduction so long as the company meets DOJ's baseline cooperation requirements.

The FCPA Corporate Enforcement Policy, like the 2016 FCPA pilot program from which it grew, is intended to encourage corporate self-disclosure and cooperation by making the benefits of such conduct transparent. Skeptics may suggest that the significant charging discretion possessed by prosecutors could blunt the effect of DOJ's quantification of cooperation credit and related guidance in the enforcement policy. The federal sentencing guidelines range forms the basis of any federal criminal fine from which a reduction under the enforcement policy will be calculated. The guidelines range is calculated based on scope of the wrongdoing and the facts and circumstances

of a case, both of which may be subject to interpretation in any given case. In practice, this means that in some cases DOJ's discretion over the scope and factual basis of a disposition could be more important than the promised "discount" under the policy. To use an extreme example, a prosecutor seeking a \$10 million fine could resolve the case based on conduct supporting a fine of that size. Or, if a company is due a 50 percent discount under the enforcement policy, the prosecutor could seek resolution of the case based on broader or more severe conduct that supports a \$20 million fine. Even if that fine is reduced to \$10 million by the discount, the result would be the same regardless of the cooperation credit. While prosecutors will rightly note that they are bound by law, what the evidence shows, and a company's willingness to resolve a case in a negotiated manner, skeptics could equally insist that companies often have little choice but to seek a negotiated resolution and that the constraints of the enforcement policy still leaves significant play in the joints as to the resulting fine amount.

2. Types of Negotiated Resolutions

Broadly speaking, there are three ways that the government will resolve an FCPA investigation with a company through a negotiated resolution: (1) a non-prosecution agreement; (2) a deferred prosecution agreement; or (3) a negotiated entry of a judgment against the company, either a guilty plea for a criminal charge or, in a civil case, an administrative cease-and-desist order or entry of a civil injunctive order.

The basics of a non-prosecution and deferred prosecution agreement are the same in both civil and criminal contexts. An NPA is a letter of agreement between the government and the defendant. As part of the NPA, the defendant corporation typically must agree not to contest the relevant facts, waive the statute of limitations, and agree to certain compliance undertakings for a specific period, usually two to three years. In exchange, the government agrees not to pursue charges if the company completes the undertakings and commits no additional wrongdoing during the NPA's term.

A DPA operates much the same as an NPA, except that in a DPA the government files the agreement with a court along with formal charges against the corporation, and the case is stayed for the duration of the DPA. Generally, DOJ and the SEC reserve NPAs for cases involving less egregious conduct, though there is little practical difference between the two types of resolutions. Both carry the critical advantage that they avoid a final judgment entered against the company for an FCPA violation.

In some cases, the agreement will require certain remediation, including improvements to a company's internal controls or the appointment of an independent compliance monitor, at the company's expense, for some period of time (typically two or three years). The independent monitor is charged with making recommendations for FCPA compliance with which the company generally must comply and with reporting the state of the company's compliance to the government. An independent monitor can be an expensive and burdensome proposition for a company subject to it. In other cases, the government will refrain from imposing an outside compliance monitor, but will require a company to self-review and self-report on its FCPA compliance for a period of time after a settlement, typically for two or three years.

⁹⁰ *United States v. Hewlett-Packard Polska, SP. ZO.O.*, No. 14-cr-00202 (N.D. Cal. April 9, 2014).

⁹¹ See generally Principles of Federal Prosecution of Business Organizations, Justice Manual §§ 9-28.000 et seq.

The SEC has required reporting obligations in some of its negotiated resolutions rather than an appointed monitor. While different in scope from an independent monitor, this “monitor-light” requirement may nevertheless impose a significant burden. It sacrifices a measure of independence, requiring a company to provide the SEC with a detailed description of its compliance program. The review and preparation associated with the written reports likely will require a significant expenditure of corporate resources. More importantly, this new remedial measure imposes an affirmative duty to disclose both actual violations as well as any “credible evidence” of a potential FCPA violation.

Another important factor in negotiated resolutions is which entity takes the charge. Companies have typically sought to have the subsidiary that was directly involved in the misconduct, rather than the parent company, formally enter into the settlement. In other cases, parent companies have entered into a less severe resolution than a subsidiary, e.g., a parent agreeing to a DPA while the subsidiary pleads guilty, or a subsidiary entering into a settlement while the parent is not charged at all. For example, in the 2014 investigation of Hewlett-Packard’s operations in Russia, Poland, and Mexico, the foreign subsidiaries each entered into settlements with DOJ, while the parent company agreed to undertakings with DOJ as part of its subsidiaries’ settlements (and settled a related matter with the SEC) but entered into no criminal deal of its own.⁹⁰

Such resolutions can reflect a compromise of sorts between the enforcement authorities’ aggressive approach to vicarious liability through subsidiaries and corporate parent companies’ insistence that they should not be responsible for the actions of rogue individuals at foreign subsidiaries.

3. Declinations

A declination is a decision by the enforcement authority to forgo charges notwithstanding a finding that misconduct occurred. In general, DOJ will decline to prosecute an FCPA matter if the facts and the law will not support a prosecution, or if other discretionary factors counsel against a prosecution.⁹¹

As detailed above, DOJ’s FCPA Corporate Enforcement Policy defines the circumstances under which DOJ will decline prosecution even if it has found otherwise prosecutable FCPA-related misconduct: a company that self-discloses the misconduct; cooperates with the investigation; remediates the circumstances that led to the violation; and agrees to disgorge ill-gotten gains will presumptively receive a declination that can be rebutted only if aggravating circumstances, such as widespread or severe misconduct, or recidivism, are present. Because this type of resolution requires the company to pay money to the SEC or DOJ, some commentators consider it to be a fourth form of negotiated resolution rather than a pure “declination.”

The SEC does not have any comparable policy, but the SEC and DOJ provided some guidance on circumstances that may lead to a declination in the 2020 *Resource Guide*. The agencies offered six anonymized examples of past declinations. The examples shared several common features that largely track the commonalities among the recent declination letters:

⁹² See *Resource Guide* at 79-81.

⁹³ See 15 U.S.C. §§ 78ff(c)(1), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571.

⁹⁴ See *Resource Guide* at 13; see *United States v. Kay*, 513 F.3d 432, 446-51 (5th Cir. 2007).

⁹⁵ *Kay*, 513 F.3d at 448; *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003).

⁹⁶ See *Resource Guide* at 13-14.

- either a voluntary disclosure or the provision of the results of an internal investigation to the government;
- prompt and thorough internal investigations;
- cooperation with the government's investigation; and
- significant remedial action, such as improved training and internal controls and termination of employees and business partners involved in wrongdoing.

Other factors included the small size of improper payments and potential profits and the strength of the company's preexisting compliance program.⁹²

4. Penalties

For individuals, the penalties for a criminal violation of the FCPA include imprisonment. Individuals may be sentenced to up to five years' incarceration per violation.⁹³ Notably, individuals cannot be held criminally liable unless they commit a "willful" violation. The term "willfully" is not defined in the FCPA, but it has generally been construed by courts to mean an act committed voluntarily and purposefully, and with a bad purpose.⁹⁴ As stated by the Supreme Court in *Bryan v. United States*, 524 US 184, 191-92 (1998), "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" Both the Fifth and Second Circuits have held that, although the defendant must know generally that he was engaging in unlawful conduct, the FCPA does not require the government to prove that a defendant was specifically aware of the FCPA or knew that his conduct violated that particular statute.⁹⁵

Corporations, in contrast, can be held criminally liable even absent a showing of a "willful" violation, as long as there is proof of a corrupt intent.⁹⁶ In addition to imprisonment, violations of the FCPA's provisions can also result in significant monetary penalties for both corporations and individuals. Both DOJ and the SEC can and do regularly seek monetary sanctions in the form of criminal fines or civil penalties, respectively, on companies resolving alleged violations of the FCPA. In addition, foreign authorities may also impose financial penalties as part of global resolutions of charges of foreign bribery. Monetary sanctions can be significant. For example, in 2020, Airbus agreed to pay more than \$3.9 billion to resolve charges of foreign bribery and violations of the Arms Export Control Act with authorities in the United States, France, and the UK; and Goldman Sachs agreed to pay more than \$2.9 billion as part of a global resolution of foreign bribery charges.

Monetary penalties for FCPA violations flow from the statutory language that authorizes them, and their amount is informed by the federal sentencing guidelines, which provide non-binding recommendations about the amount of a criminal fine based on various factors relating to the offense. The maximum statutory penalties per violation of the anti-bribery provisions are a \$2,000,000 criminal fine and a \$16,000

⁹⁷ 15 U.S.C. §§ 78dd-2(g)(1), 78dd-3(e)(1), 78ff(c)(1); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).

⁹⁸ 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fine provisions).

⁹⁹ *Resource Guide* at 54.

civil penalty for a corporate entity.⁹⁷ For individuals, the maximum criminal fine per violation is \$250,000, and the maximum civil penalty per violation is \$16,000.⁹⁸ Because these fine amounts are per violation and many payment schemes can involve multiple technical violations, in practice the government has significant discretion in setting the fine amount, and the fine amount is subject to negotiation. In addition, a criminal fine of up to twice the gross amount of pecuniary gain may be levied under the Alternative Fines Act and federal sentencing guidelines.

There are three tiers of civil penalties for violations of the books and records provisions, depending on a series of aggravating factors. The penalties range from \$7,500 to \$160,000 per violation for individuals and \$75,000 to \$775,000 per violation for corporate entities, or may be calculated based upon the gross amount of the pecuniary gain. In addition, the SEC typically seeks disgorgement of any ill-gotten gains. Violations of the books and records provisions are civil violations unless they are committed willfully, in which case they are punishable as criminal offenses. Criminal violations carry maximum penalties of a \$25 million fine per violation for entities and a \$5 million fine per violation and 20 years' incarceration for natural persons.

5. Other Collateral Consequences

The resolution of an FCPA investigation can also trigger collateral consequences outside the four corners of the settlement. These consequences are most likely to flow from a guilty plea or acknowledgment of criminal misconduct. For example, a criminal conviction may raise the possibility of suspension and debarment from participating in government contracts. FCPA settlements may also draw collateral lawsuits (e.g., shareholder lawsuits) relating to the alleged misconduct.

A company considering a resolution of an FCPA investigation should carefully identify and analyze potential collateral consequences prior to entering into the agreement.

6. Cooperation, Voluntary Disclosure, and Remediation

In the context of the FCPA (and other corporate crime), DOJ and the SEC view "voluntary disclosure" as meaning a timely disclosure to the government of misconduct. To receive full credit, the government has stressed that a disclosure must both be made soon after the company discovers the wrongdoing and not be delayed until the government's own discovery of the wrongdoing is otherwise imminent. In such circumstances, DOJ or the SEC may not view the disclosure as voluntary.

DOJ and the SEC encourage companies to come forward with violations of the FCPA and promise leniency in exchange. They write in the *Resource Guide*, for example, that they "place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters."⁹⁹

¹⁰⁰ *United States v. Aibel Group Ltd.*, No. H-07-05-S (S.D. Tex. Nov. 12, 2008).

In recent enforcement actions and other public statements, both DOJ and the SEC emphasized the credit they gave to companies that self-disclosed their misconduct; conversely, they also pointed out that companies that did not self-disclose would receive harsher penalties and, at least with the SEC, may lose the ability to earn any cooperation credit.

Recent DOJ guidance and its Corporate Enforcement Policy, discussed above, reflect an effort to further quantify the potential benefits from cooperation, disclosure, and remediation: If a company meets certain requirements in all three categories, DOJ will either decline prosecution or grant a 50 percent reduction off the bottom-end of DOJ's calculation of the federal sentencing guidelines range. If a company cooperates and remediates but fails to self-disclose, DOJ will grant a 25 percent reduction.

Our analysis of recent FCPA settlements with both DOJ and the SEC confirms that there is an observable reduction in the monetary penalty for corporations that are given full disclosure credit compared to companies engaged in similar conduct that are not given that credit.

Nonetheless, the rewards of voluntary disclosure in the FCPA context are not as clear-cut as those under certain other programs, such as DOJ Antitrust Division's amnesty program, which can confer amnesty on a company that is "first in" to report participation in illegal antitrust activity.

Whether voluntary disclosure is advisable in any given situation is highly fact specific. As noted above, self-reporting companies likely receive some additional benefit, but often it is not clear how much. A company that makes a voluntary disclosure is more likely to obtain a deferred or non-prosecution agreement than a company that does not disclose. But there may be many circumstances in which such an agreement will not be afforded even though there has been a disclosure. And, while preferable to a guilty plea, deferred or non-prosecution agreements do not provide ironclad insulation against future criminal prosecution. Indeed, a 2008 FCPA prosecution came about because the company – Aibel Group Ltd. – was found to have violated an earlier FCPA deferred prosecution agreement from 2004.¹⁰⁰ Furthermore, voluntary disclosure does not guarantee protection against substantial monetary penalties.

There can also be significant additional downsides to voluntary disclosures. First, they frequently result in potential FCPA violations becoming public before they are resolved, often through SEC filings that are reported in the press. Such publicity can lead to shareholder suits and reputational damage. Second, self-reporting can increase a company's legal costs as a result of the ensuing DOJ or SEC investigation into the disclosed misconduct.

DOJ and the SEC typically require additional investigation in the wake of a disclosure, sometimes encompassing business units or geographic areas well beyond those involved in the potential violations initially identified and disclosed. Indeed, in its 2014 settlement with Bruker Corporation, the SEC specifically cited, as an example of the company's cooperation, the fact that it had expanded the scope of its internal

investigation at the agency's request. Because disclosure typically will not be rewarded without cooperation with the following investigation, a decision to voluntarily disclose should be made in light of the potential costs associated with cooperation.

Cooperation, like voluntary disclosure, entails promised benefits along with significant potential costs. As with voluntary disclosure, DOJ and the SEC have extolled the virtues of cooperation and emphasized that it can play an important factor in a favorable resolution. Indeed, many corporate resolutions attribute a modest fine amount in part to the defendant's cooperation. Our analysis of past DOJ resolutions likewise confirms that there is some benefit in that companies who received formal cooperation credit under the federal sentencing guidelines often receive a further "discount" below the recommended fine.

Of course, the potential benefits of cooperation must be weighed against the related drawbacks. First, cooperation can be costly. DOJ and the SEC have set a high bar for cooperation in FCPA cases, frequently citing cooperation as including resource-heavy undertakings, such as creating a topical collection of documents, providing translation of foreign language documents, making internationally based witnesses available, and providing real-time updates to the government. DOJ's FCPA Corporate Enforcement Policy explicitly recognizes that these expectations exceed the cooperation DOJ ordinarily requires of corporate defendants in order to receive cooperation credit in other matters.

Second, cooperation can enhance the disruptive impact of the investigation. Especially since DOJ announced its focus on individual criminal liability in corporate cases in the 2015 Yates Memo, DOJ (and to a lesser extent the SEC) has made identifying individual wrongdoers and developing evidence against them explicit requirements of cooperation. While in some circumstances a company may feel victimized by a perpetrator of misconduct and be perfectly willing to aggressively assist in their prosecution, there are other circumstances where a company may have legitimate concerns about developing evidence for the prosecution of its employees. Individual employees also may be less willing to cooperate in an internal investigation knowing that it is undertaken in part with the purpose of identifying evidence to prosecute a fellow employee.

Third, cooperation can also entail risk in waiving attorney-client privilege or work product protections over an internal investigation and the materials generated during it. Although both DOJ and the SEC insist that they will not ask companies to waive privilege, both often make requests that could risk a waiver if not handled carefully, such as requests for witness interview downloads or attribution of facts to specific sources. Moreover, the courts, not DOJ or the SEC, will decide whether a company's cooperation waived privilege in the context of potential collateral litigation.

Notwithstanding the above risks, however, most companies have found that once FCPA-related misconduct comes to the attention of authorities, they have little choice but to attempt to cooperate to the government's satisfaction. The length of and disruption caused by an investigation conducted entirely by the government without a

¹⁰¹ See *Resource Guide* at 58-62.

¹⁰² Dep't of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (June 2020).

company's assistance, along with the draconian penalties available to the government where a resolution is not the product of cooperation or negotiation, are typically more than sufficient motivation for a company to choose the cooperation path instead.

As with cooperation, adequately remediating an FCPA violation can be a difficult endeavor. In settlement papers that have discussed remediation, DOJ and the SEC have each commended companies that have improved their compliance programs and taken appropriate steps to discipline the employees involved in the misconduct. But what constitutes as adequate remediation is highly case specific.

As DOJ's 2016 settlement with Embraer shows, DOJ can have very specific actions in mind when the time comes for rewarding remedial measures. In announcing the Embraer settlement, DOJ acknowledged that the company had disciplined several employees but faulted the company for incomplete remediation because it failed to discipline a senior executive who was aware of bribery discussions over email and was responsible for overseeing the employees involved in those discussions. As a result, DOJ gave Embraer only partial credit for remediation.

Although DOJ and the SEC have made clear that an adequate compliance program must be tailored to the company's specific circumstances and risks, recent statements have further described their expectations as to an effective compliance regime.

The *Resource Guide* identifies seven "hallmarks" of an effective FCPA compliance regime:

- commitment from senior management and a clearly articulated policy against corruption;
- code of conduct, policies, and procedures that clearly prohibit corruption;
- responsibility invested in an executive with adequate "oversight, autonomy, and resources";
- a risk-based approach;
- training and other communication sufficient to ensure knowledge of the policy;
- incentives and disciplinary measures to ensure compliance with the policy; and
- performing third-party due diligence.¹⁰¹

The Criminal Division's published criteria for the "Evaluation of Corporate Compliance Programs" provide further detail regarding how DOJ will evaluate a company's compliance program.¹⁰² Those criteria are organized around three primary questions:

- (1) Whether the corporation's compliance program is well designed (for maximum effectiveness in preventing and detecting wrongdoing);

¹⁰³ *Id.*

¹⁰⁴ 18 U.S.C. § 1956(a)(1).

¹⁰⁵ *Id.* at §§ 1956(c)(7)(D), 1956(c)(7)(A), 1957(f)(3), and 1961(1)(B).

(2) Whether the program is being applied earnestly and in good faith, including whether it is adequately resourced and empowered to function effectively; and

(3) Whether the corporation's compliance program works in practice (at the time of the offense and at the time of the charging decision).¹⁰³

These questions are designed to help prosecutors determine an appropriate resolution, whether there should be a monetary penalty, and compliance obligations moving forward. The more robust a corporation's compliance program is in addressing these three questions, the more likely it is that a corporation can quickly identify internal misconduct and receive full credit for voluntarily disclosing that misconduct to DOJ and the SEC.

OTHER FEDERAL STATUTES THAT OFTEN APPLY TO FOREIGN CORRUPTION

A number of other federal criminal statutes can apply to foreign bribery, including:

- **Mail and Wire Fraud.** DOJ also has used the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to prosecute foreign bribery. These statutes are extremely broad and can apply in certain circumstances to conduct not reached by the FCPA.
- **Money Laundering Statutes.** The federal money laundering statutes make it a felony to conduct a financial transaction knowing that the funds are the proceeds of "specified unlawful activity."¹⁰⁴ The term "specified unlawful activity" expressly includes "any felony violation of the Foreign Corrupt Practices Act" and mail and wire fraud.¹⁰⁵ Accordingly, financial transactions that involve the proceeds of an FCPA violation (e.g., profits derived from an illicit payment) or improper payments to an agent that aid or abet money-laundering activities under 18 U.S.C. § 2 may give rise to criminal liability beyond that imposed by the FCPA itself.
- **The Travel Act.** The Travel Act, 18 U.S.C. § 1952, prohibits the use of foreign travel or the instruments of interstate commerce to further "unlawful activity," including activity made criminal by the state in which the offense was committed. Because many states prohibit commercial bribery, the Travel Act, unlike the FCPA, often reaches foreign commercial bribery.

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APPENDIX II

**THE FOREIGN CORRUPT
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¹ 15 U.S.C. § 78dd-1.

² *Id.* § 78dd-2.

³ *Id.* § 78dd-3.

⁴ *Id.* §§ 78c(a)(8), 78dd-1(a).

⁵ *Id.* § 78dd-2(h).

⁶ *Id.* § 78dd-3(a)(1)-(3).

⁷ *Id.* §§ 78dd-1; 78dd-2; 78dd-3.

⁸ 15 U.S.C. § 78m(b)(2)

⁹ *A Resource Guide to the US Foreign Corrupt Practices Act (Resource Guide)* at 44.

FAQ I

Who is subject to the FCPA?

Potentially anyone. The anti-bribery provisions identify three classes of possible offenders: “issuers,”¹ “domestic concerns,”² and all other persons.³ An “issuer” is any natural person, company, government, or political subdivision, agency, or instrumentality of government that issues or proposes to issue any security within the United States or files reports with the SEC.⁴ A “domestic concern” is a US citizen, national, or resident or a business entity that either has its principal place of business in the United States or is organized under US law.⁵ The third, catch-all section applies to everyone else (such as foreign non-issuers, including non-US nationals), if acting within the territory of the United States.⁶ The anti-bribery provisions also apply to “agents” acting on behalf of issuers, domestic concerns, or other covered persons or entities.⁷

Liability under the books and records and internal controls provisions is limited to “issuers,”⁸ although corporations and individuals can be held liable for aiding and abetting or causing an issuer’s violations of the books and records provisions.⁹

¹⁰ 15 U.S.C. § 78c(a)(8).

¹¹ See 15 U.S.C. § 78dd-3(a).

¹² *United States v. Syncor Taiwan, Inc.*, No. 02-cr-1244 (C.D. Cal. Dec. 5, 2002), ECF No. 1.

¹³ See *United States v. Patel, et al.*, No. 1:09-cr-00335 (D.D.C. June 6, 2011).

¹⁴ See *United States v. Hoskins*, 902 F.3d 69, 97-98 (2d Cir. 2018).

¹⁵ *United States v. Hoskins*, No. 3:12-cr-00238 (D. Conn. 2019).

¹⁶ *United States v. Hoskins*, 3:12-cr-99238-JBA, 2020 WL 914302, at *1 (D. Conn. Feb. 26, 2020); *United States v. Hoskins*, No. 20-842(L) (2d Cir. July 13, 2020).

FAQ 2

Can the US government prosecute foreign companies under the FCPA?

Yes. Foreign companies that issue securities in the US or that are required to file reports with the SEC are considered “issuers” and are treated like any US issuer would be.¹⁰ Prosecution of foreign companies has been a growing enforcement trend. To date, several of the largest FCPA enforcement actions, measured by dollar volume of total penalties and disgorgements, have been brought against foreign companies.

Furthermore, even non-issuer foreign companies and individuals are subject to the FCPA if they commit any act in furtherance of an improper payment while within the territory of the United States.¹¹ The DOJ has advanced aggressive theories to support jurisdiction over such defendants. For example, in the 2002 Syncor Taiwan matter, DOJ asserted jurisdiction over a foreign non-issuer company based on one of its officers sending an email while in the US that contained a budget referring to the improper payments, thereby committing a relevant act “while in the United States.”¹² But in 2011, a federal court rejected an even more aggressive theory that a British national had acted within the US when he mailed from London to the US a purchase agreement related to an alleged bribery scheme.¹³

Also, the US Court of Appeals for the Second Circuit has held that a foreign defendant not otherwise subject to the FCPA can be charged under the FCPA if the defendant acts as an agent of a company that is subject to the FCPA, such as an agent of a US subsidiary of a foreign corporation.¹⁴ In *Hoskins*, the defendant was working for an Alstom SA subsidiary based in France but was charged and ultimately convicted by a jury of FCPA violations on the theory that he was working as the agent of Alstom’s US subsidiary when he engaged in a conspiracy to pay bribes to officials in Indonesia.¹⁵ However, the trial court granted Hoskin’s motion for acquittal on all the FCPA charges, which decision was appealed to the Second Circuit.¹⁶ As of this writing, the Second Circuit has yet to issue its ruling, but the Court’s decision will likely provide further clarification as to the extraterritorial reach of the FCPA and the requisite criteria for determining an agency relationship sufficient to establish FCPA liability for foreign defendants not otherwise subject to the Act.

¹⁷ *Resource Guide* at 29.

¹⁸ *Id.* at 29-32.

¹⁹ DOJ Criminal Division, *Evaluation of Corporate Compliance Programs* at 9 (June 2020).

²⁰ *Id.*

²¹ *United States v. Latin Node, Inc.*, No. 09-cr-20239 (S.D. Fla. Mar. 23, 2009), ECF No. 1.

²² eLandia Int'l, Inc., Annual Report (Form 10-K), (Apr. 2, 2009).

²³ Press Release, "US Dep't of Justice, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay \$2 Million Criminal Fine" (Apr. 7, 2009).

²⁴ *United States v. Salvoch*, No. 10-cr-20893 (S.D. Fla. Dec. 17, 2010), ECF No. 3; *United States v. Vasquez*, No. 10-cr-20894 (S.D. Fla. Dec. 17, 2010), ECF No. 3; *United States v. Granados, et al.*, No. 10-cr-20881, (S.D. Fla. Dec. 14, 2010), ECF No. 3.

FAQ 3

Are companies liable for the prior illegal acts of companies they purchase?

Yes, in some circumstances. DOJ and the SEC state in their *Resource Guide* that successor liability will generally be limited to circumstances where the successor company continued the misconduct or failed to stop it.¹⁷ A company may mitigate its risk by conducting due diligence prior to an acquisition or merger or, sometimes, immediately following an acquisition or merger, but that is not a legal defense, and the company still may be legally susceptible to criminal prosecution.¹⁸ Further, as stated in DOJ guidance regarding the evaluation of corporate compliance programs under the principles of federal prosecution of business organizations, a well-designed compliance program should include comprehensive due diligence of any acquisition targets, as well as a process for timely and orderly integration of the acquired entity into existing compliance program structures and internal controls, and the extent to which a company subjects its acquisition targets to appropriate scrutiny indicates whether its compliance program is, as implemented, able to effectively enforce internal controls and remediate misconduct.¹⁹ Factors that DOJ will evaluate include the breadth and quality of the due diligence process, the compliance function's degree of involvement in mergers and acquisitions, and the extent to which the company tracks and remediates misconduct and ensures the implementation of compliance policies and procedures, as well as post-acquisition audits, in the acquired entity.²⁰

Even where enforcement authorities do not take direct action against the acquiring company, actions against the acquired subsidiary can still have significant consequences for all parties. In 2007, eLandia International Inc. discovered after the fact that its recently acquired subsidiary, Latin Node Inc., had paid as much as \$2.2 million in bribes to officials in state-owned telecommunications firms in Honduras and Yemen.²¹ As a result of the ensuing investigation and remediation, Latin Node's viability was weakened, and the company was eventually wound down.²² Although the acquiring company, eLandia, was ultimately spared a criminal charge of its own, it was obligated to pay the defunct Latin Node's fine and, of course, saw its investment wiped out.²³ In addition, several executives of Latin Node were convicted of FCPA violations, and three of them received terms of imprisonment.²⁴

²⁵ 15 U.S.C. § 78dd-1(a).

²⁶ See *Resource Guide* at 16.

²⁷ 15 U.S.C. § 78dd-1(a)(3).

²⁸ *Id.* at § 78dd-1(a)(2)(B).

²⁹ *Id.* at § 78dd-1(a)(3).

³⁰ *Id.* at § 78dd-1(a)(2)(B).

FAQ 4

Can a company make a charitable contribution at the request of a foreign official?

Yes, but it should be very careful when doing so. Past enforcement actions have relied on such contributions as evidence of an improper payment.²⁵ Still, DOJ and the SEC have recognized that *bona fide* charitable contributions are permissible.²⁶

At a minimum, companies should conduct due diligence into the charity, take care to document the purpose of the donation, and evaluate whether the circumstances suggest the contribution will go to the charity and not to any government official.²⁷

FAQ 5

Can a company be liable for the acts of a third party?

Yes. The FCPA prohibits the “authorization” of improper payments, which could include payments made by agents and business partners.²⁸

Furthermore, the FCPA specifically prohibits payments to third parties “while knowing” that all or a portion of the payment will be used as an illegal bribe.²⁹ And a person’s awareness “of a high probability of the existence of [a] circumstance” is sufficient to demonstrate knowledge of the circumstance; thus, a company can be liable for willful blindness toward the conduct of a third party acting on its behalf.³⁰

³¹ See also Opinion Release 97-01 (documenting depth of due diligence).

FAQ 6

What provisions should an agreement with a third party contain to minimize risk?

An agreement should take into account the specific circumstances of any relationship, but, as a general matter, a company entering into an agreement with a foreign representative should consider the elements outlined in DOJ's Opinion Release 81-01, the Department's most comprehensive pronouncement on the subject:

1. Payments made (a) by check or bank transfer, (b) to the foreign representative by name, (c) at its business address in-country (or where services were rendered), and (d) upon the written instructions of the foreign representative.
2. A representation of the representative's familiarity with and commitment to adhere to the FCPA, including a requirement for the representative to notify the company of any request it receives for improper payments.
3. A representation that no member of the entity is a government official, an official of a political party, a candidate for political office, a consultant to a government official, or affiliated with a government official.
4. The agreement is lawful in the foreign country.
5. Any assignment by the representative of any right, obligation, and/or services to be performed under the agreement must be approved in writing by the company.
6. The company can terminate the agreement where the representative has violated any of its provisions.
7. The company is permitted to disclose the agreement, including to the foreign government.
8. Adequate controls over reimbursable expenses, including potentially audit rights.
9. A representation that the representative is well established with sufficient resources to perform the work. The agreement should also refer to the company's selection criteria for representatives, such as years in operation, size and adequacy of support staff, business outlook, reputation, professional and/or technical expertise, and familiarity with and willingness to adhere to the FCPA.³¹

In addition to those anti-bribery focused provisions, DOJ and SEC enforcement actions have emphasized that an agreement with a foreign representative should also include specific detail about the services that the representative should provide.

³² Resource Guide at 19.

³³ Press Release, SEC, “SEC Charges Stryker Corporation with FCPA Violations” (Oct. 24, 2013).

³⁴ Resource Guide at 19.

FAQ 7

If necessary, how should a company make an overseas payment?

Ideally, by wire transfer to a business partner’s bank account in its home country or the location where the work was done. DOJ and the SEC insist on visibility and transparency in payments made to agents and other business partners abroad.

Therefore, wire transfers are preferable to checks because they provide proof that funds were sent to an agent’s primary business account. If checks are used, they should be retained to show the place of deposit. Companies should ensure that payments to business partners are accurately recorded in their books, and domestic parents should require their subsidiaries to follow US accounting rules regarding business expenditures.

FAQ 8

Can a company make a payment, contribution, or donation to a foreign government entity?

Yes, but it should be very careful when doing so. The FCPA prohibits payments to government officials but not to government entities themselves.³²

Nonetheless, a payment to a government entity may be improper where it appears that it is substantially benefitting a particular government official. For example, in 2013, the SEC brought an enforcement action against medical device manufacturer Stryker Corporation. Among the alleged improper payments was a \$200,000 donation to fund a Greek public university laboratory for a public official with influence over the purchase of Stryker products.³³

There is also a risk that any payment to a foreign government may be improperly diverted to an individual official. Accordingly, any payments to government entities should be made to accounts clearly identified as such, in the country where the government operates, and supported by clear documentation, including written direction of the government entity. *Compare* Opinion Release 06-01 (approving payments to customs department of an African nation as part of an incentive program to improve anti-counterfeiting measures) and Opinion Release 97-02 (permitting \$100,000 donation to a government entity to build a school) *with* Opinion Release 98-01 (stating DOJ’s intention to initiate a criminal investigation if proposed payments of “fine[s]” and “modalities” were made to foreign officials rather than to an agency account).

It is important to exercise caution when making payments, contributions, or donations to foreign governments, even when acting with the best of intentions. As DOJ and the SEC warn, “companies contemplating contributions or donations to foreign governments should take steps to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials.”³⁴

³⁵ See Opinion Release 84-01.

³⁶ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

³⁷ 359 F.3d at 755

³⁸ Id. at 748.

³⁹ See id at 761.

FAQ 9

Can a US company do business with an entity in which a foreign official is a participant?

Yes, but it should exercise great care in doing so. A US company does not violate the FCPA merely by doing business with an entity in which a foreign official is a passive owner.

In general, to avoid violating the FCPA, a foreign official's participation in such an entity should be legal under the laws of the official's country and transparent to the official's government, and the official should not participate in any decision or transaction involving the US company.

DOJ has issued a number of opinion releases addressing this issue. For example, in Opinion Release 08-01, DOJ took no enforcement action where a US company entered into a joint venture with an entity in which a foreign official was a principal because the US company had (1) conducted extensive due diligence and made disclosures; (2) obtained representations and warranties that its joint-venture partner had not violated and would not violate anti-corruption laws; and (3) retained a broad contractual right to terminate the joint venture agreement in the event of a violation of anti-corruption laws. Upon similar prophylactic measures, DOJ took no action when a US firm sought to establish an agency agreement with a foreign company whose principals were related to and managed the affairs of a foreign country's head of state.³⁵

FAQ 10

Does the FCPA forbid corrupt payments to obtain a business advantage, such as a lower tax rate or customs duty?

Yes. The FCPA forbids corrupt payments to influence foreign officials to use their positions to assist "in obtaining or retaining business."³⁶ This prohibition is not limited to commercial transactions between a US company and a foreign government, such as the award or renewal of contracts. After a lengthy analysis of the statute's legislative history, the Fifth Circuit reasoned in *Kay I* that the FCPA prohibits payments "intended to assist the payor either directly or indirectly, in obtaining or retaining business,"³⁷ and that it "encompass[es] the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states."³⁸ The court thus concluded that payments to Haitian officials to understate quantities of imported grain to reduce import taxes violated the FCPA.³⁹

⁴⁰ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

⁴¹ See, e.g., Press Release, "Dep't of Justice, Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$25.2 Million Criminal Penalty" (Oct. 22, 2013); Press Release, SEC, "SEC Charges Diebold with FCPA Violations" (Oct. 22, 2013).

⁴² See *Resource Guide* at 28 (citing *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962)).

⁴³ See Principles of Federal Prosecution of Business Organizations, Justice Manual § 9-28.300; SEC Enforcement Manual at 98.

⁴⁴ 15 U.S.C. § 78m(b)(2).

⁴⁵ 18 U.S.C. § 2

⁴⁶ 15 U.S.C. § 78u-3(a).

⁴⁷ 15 U.S.C. § 78m(b)(5)

⁴⁸ See, e.g., Press Release, "DOJ, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA" (Apr. 25, 2012).

FAQ 11

May a company sponsor an educational trip for a foreign official or provide other hospitality?

Yes, but only under strict conditions. The FCPA itself provides an affirmative defense for "reasonable and *bona fide* expenditures, such as travel and lodging expenses" when directly connected with a legitimate promotion or product demonstration, or when required as part of contract performance.⁴⁰

Nevertheless, expenses should be reasonable, relate to legitimate educational or training needs, and not suggest an attempt to induce favorable treatment with regard to the company's business. Indeed, both DOJ and the SEC have brought actions related to travel and entertainment expenses that have not met these guidelines.⁴¹

FAQ 12

Is having an adequate compliance program a defense to corporate criminal liability for the actions of an employee violating company policy?

No. DOJ and the SEC take the position that, under principles of agency law, any action taken to benefit the company, even if also taken to benefit an employee and even if against company policy, can be attributed to the company.⁴²

While there is no formal defense for having an adequate (or superlative) compliance program (as there is under the UK Bribery Act), DOJ and SEC guidance provides that the effectiveness of a company's pre-existing compliance program may be a factor in making charging decisions or assessing the amount of a potential monetary sanction.⁴³

FAQ 13

Can an individual be prosecuted for conduct prohibited under the books and records or internal controls provisions?

Yes. By their terms, the books and records and internal controls provisions apply to issuers only.⁴⁴ But natural persons can be subject to criminal or civil liability as aiders and abettors;⁴⁵ for causing an issuer's books and records violations;⁴⁶ and for knowingly falsifying books and records or circumventing or failing to implement adequate internal controls.⁴⁷ They also can be subject to civil liability as control persons. In recent years, DOJ and the SEC have brought several cases against individuals under the books and records provisions.⁴⁸

⁴⁹ *Resource Guide* at 4.

⁵⁰ *Id.* at 4.

⁵¹ *Id.* at 4-5.

⁵² See FCPA Corporate Enforcement Policy, Justice Manual § 9-47.120.

⁵³ See SEC Enforcement Manual at 26.

FAQ 14

Who enforces the FCPA?

DOJ and the SEC have joint enforcement responsibility.⁴⁹

- DOJ has all criminal enforcement responsibilities for violations of the anti-bribery and books and records provisions of the FCPA.⁵⁰
- The SEC has civil enforcement responsibility for violations of the anti-bribery provisions committed by issuers (or agents of issuers, including individuals) and violations of the books and records provisions.⁵¹

FAQ 15

Under what circumstances will DOJ or the SEC decline to take enforcement action despite finding that misconduct occurred?

Declination decisions are highly fact specific. DOJ's FCPA Corporate Enforcement Policy states that DOJ will decline prosecution where a company voluntarily discloses misconduct, cooperates with the investigation, remediates the issues that led to the misconduct, and disgorges any ill-gotten profits, except in cases with aggravating circumstances, such as widespread misconduct or recidivism.⁵²

The SEC has issued no comparable policy, but available guidance suggests that it will similarly take disclosure, cooperation, remediation, and the severity of the conduct into account.⁵³

⁵⁴ See 15 U.S.C. §§ 78ff(c)(1), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571.

⁵⁵ 18 U.S.C. § 3571(d).

⁵⁶ See generally US Sentencing Guidelines (2018).

⁵⁷ See FCPA Corporate Enforcement Policy, Justice Manual § 9-47.120.

⁵⁸ See generally SEC Enforcement Manual.

FAQ 16

How are monetary FCPA penalties calculated?

The statute provides specific maximum penalty amounts per violation: \$2,000,000 criminal fine and a \$16,000 civil penalty for a corporate entity.⁵⁴ In addition, a criminal fine of up to twice the gross pecuniary gain may be levied under the Alternative Fines Statute.⁵⁵

As a practical matter, the fact that each violation may be a separate basis for a fine gives the enforcement agencies wide discretion in setting the amount of a monetary sanction. In many corporate settlements, the final amount paid is subject to negotiation between the settling defendant and the enforcing agency.

The amount of a criminal fine imposed as a result of an FCPA violation is ostensibly based on a calculation of the recommended fine under the federal sentencing guidelines, which provide federal courts with non-binding guidance governing criminal penalties arising from federal crimes. The guidelines contain a formula for calculating a corporation's criminal fine that takes into account the nature of the crime, the amount of benefit obtained, and culpability factors such as the size of the organization, the company's policies, and involvement of senior management.⁵⁶

In many cases, following negotiation, a settling defendant will receive a "discount" off DOJ's calculation of the recommended Guidelines range. The FCPA Corporate Enforcement Policy is intended to make this discount process transparent and predictable by specifying the conditions that will lead to a reduction in penalty.⁵⁷

The SEC has not provided formal guidance regarding the amount of a monetary penalty in any given case. In addition, the SEC often seeks disgorgement of ill-gotten gains.⁵⁸

FAQ 17

Are there benefits to voluntary disclosure?

Yes, but the extent of the benefits is highly fact specific. DOJ and the SEC encourage companies to make voluntary disclosures of wrongdoing and promise that such self-reporting will be rewarded with a lesser penalty. Our analysis of recent settlements reflects that there has been an observable benefit to self-disclosure, though the extent of the benefit is difficult to quantify as many other factors may affect the ultimate size of a penalty and the nature of any resolution.

The benefits to voluntary disclosure must be weighed against the potential downsides to disclosure, including possible public disclosure of an ongoing investigation and the possibility of additional investigation directed by the government following any disclosure.

⁵⁹ See FCPA Corporate Enforcement Policy, Justice Manual § 9-47.120.

⁶⁰ See Principles of Federal Prosecution of Business Organizations, Justice Manual § 9-28.720.

FAQ 18

What counts as “cooperation” with the government investigation?

There is no magic formula for cooperating, but recent DOJ and SEC pronouncements and resolutions, including the FCPA Corporate Enforcement Policy, identify a number of concrete steps a company under investigation can take for which the government may give cooperation credit:

- timely self-reporting of misconduct;
- providing real-time reports about findings of the company’s internal investigation, including making proactive (rather than reactive) disclosures to the government;
- making overseas witnesses available;
- attributing facts to specific sources, if consistent with the attorney-client privilege;
- voluntarily producing relevant documents;
- translating foreign-language documents;
- providing topical collections of documents;
- preparing and producing factual chronologies;
- conducting voluntary risk assessments or reviews of other areas of the company’s business;
- assisting the government in overcoming challenges posed by foreign data privacy laws and blocking statutes;
- providing evidence regarding the individuals involved in the misconduct; and
- providing all known facts relevant to potential third-party criminal activity.⁵⁹

The FCPA Corporate Enforcement Policy reflects that these expectations for cooperation exceed the requirements provided for corporate cooperation credit in other criminal matters.

Beyond the FCPA realm, DOJ has also announced a general policy that providing relevant information about all individuals substantially involved in or responsible for misconduct is a prerequisite to receiving any cooperation credit.⁶⁰

⁶¹ See FCPA Corporate Enforcement Policy, Justice Manual § 9-47.120.

FAQ 19

What counts as “remediation” of a violation or potential violation of the FCPA?

DOJ has identified a number of factors as relevant to its assessment of remedial actions, including many that are focused on ongoing compliance, such as whether the company:

- demonstrates thorough analysis of the root cause of the misconduct;
- has an established culture of compliance, including an awareness among employees that criminal conduct is not tolerated;
- dedicates sufficient resources to compliance, including maintaining experienced and adequately compensated compliance personnel;
- maintains an independent compliance function;
- performs an effective risk assessment and tailors its compliance program based on the assessment;
- performs regular audits of its compliance function;
- maintains an appropriate reporting structure for compliance personnel within the company;
- appropriately compensates and promotes compliance personnel within the company as compared to other employees;
- appropriately disciplines employees for violations and has a disciplinary system that allows for disciplining supervisors who oversee individuals responsible for misconduct;
- allows for compensation to be altered based on disciplinary infractions or a failure to adequately supervise;
- considers any additional steps necessary to signal the importance of accepting responsibility for misconduct and measures to reduce misconduct risks; and
- appropriately maintains business records and prohibits improper destruction of such records.

DOJ highlights certain of these factors in its FCPA Corporate Enforcement Policy.⁶¹

⁶² Principles of Federal Prosecution of Business Organizations, Justice Manual § 9-28.710; SEC Enforcement Manual at 69-71.

⁶³ See 18 U.S.C. §§ 1952, 1341, 1343.

⁶⁴ See Press Release, DOJ, Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015).

FAQ 20

Does cooperation require waiving attorney-client privilege?

No. Both DOJ and the SEC have policies that they will not compel a company to waive privilege.⁶² Nonetheless, cooperation often involves some communication about the findings of the company's internal investigation, which must be handled with care to avoid inadvertent waiver of privilege or work product protections.

FAQ 21

Can a US company engage in foreign bribery if it does not involve the bribing of a foreign official?

No. Although that conduct is not prohibited by the FCPA, other federal criminal statutes, including the Travel Act and the mail and wire fraud statutes, likely would apply to it.⁶³ The 2015 FIFA indictments for corrupt payments involving the international soccer organization show that US law enforcement can and will use other federal criminal statutes to investigate and prosecute alleged international wrongdoing, such as commercial bribery, outside the reach of the FCPA.⁶⁴

APPENDIX III

**THE UNITED KINGDOM
BRIBERY ACT**

STATUTE AND ELEMENTS OF OFFENCES UNDER THE UK BRIBERY ACT

The UK Bribery Act (UKBA or the Act) includes four principal offences: (1) bribing another person; (2) being bribed; (3) bribing a foreign public official; and (4) failure to prevent bribery. The statute also places certain limitations on who may be charged and sets forth penalties for violations.

This chapter first explains the background of the UKBA, then takes the reader through the definitions necessary to understand the statute, and finally describes the elements of the offences under the Act in detail. As with the FCPA, the UKBA is broadly worded and there continues to be almost no case law interpreting its provisions. In contrast to the FCPA, there remains little enforcement practise or formal guidance to fill out the meaning of the statute. In many cases, there will be little, if any, concrete guidance about the likely application of the UKBA and companies potentially subject to its jurisdiction must tread carefully to ensure compliance. This chapter also provides companies within UKBA jurisdiction with helpful background and context from which they can assess and better address compliance with the UKBA.

1. Background

The UKBA was passed on 8 April 2010. It came into force on 1 July 2011 and applies to conduct that occurred on or after that date. Over a decade on from the commencement date, there have been only a relatively small number of cases prosecuted under the UKBA, and most of those have not been contested. Guidance from the courts on the interpretation of the UKBA is therefore very scant.

The UKBA is essentially a codifying statute. Most of the offences “created” by the UKBA existed previously, but in disparate and archaic forms. The UKBA was intended to simplify the outdated language and arrange the offences into one statutory location.

However, the UKBA did create a new offence, the corporate offence of failing to prevent bribery (section 7). This offence is discussed in more detail below.

2. Definitions

The UKBA uses several specific terms, which it defines and of which it provides examples to assist the reader with understanding how the offences should be construed.

Function or activity to which the bribe relates (section 3)

The offences in the UKBA refer to “relevant functions or activities.” A function or activity is relevant for the purposes of the UKBA if the function or activity is one of the following:

- public nature;
- connected with a business;

- performed in the course of a person's employment; or
- performed by or on behalf of a body of persons (whether corporate or unincorporated).

A person performing the function or activity must also be:

- performing the function or activity with the expectation that it is being performed in good faith;
- performing the function or activity with the expectation that it is being performed impartially; or
- in a position of trust by virtue of performing it.

A function or activity is a relevant function or activity even if it has no connection with the United Kingdom and is performed in a country or territory outside the United Kingdom.

Essentially, all functions or activities of a commercial or public nature are relevant for the purposes of the UKBA. The Act would cover actions of public servants, employees, contractors, agents, and most other types of business or governmental relationships.

Improper performance to which bribe relates (section 4)

A relevant function or activity is performed improperly if it is performed in breach of a relevant expectation, such as the performance of the function in good faith or with impartiality. A relevant function is also to be treated as being performed improperly if there is a failure to perform the function or activity and that failure itself is a breach of a relevant expectation.

Expectation test (section 5)

Where the UKBA refers to "expectations," the test for that expectation is what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

Where the conduct concerned is to be performed outside of the United Kingdom and is not subject to the law of any part of the United Kingdom, any local custom or practice will be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned. In this regard, written law means law contained in a written constitution, or provision made by or under legislation, which is applicable to the country or territory concerned. Written law may also mean any judicial decision, which is applicable as law and is evidenced in published written sources.

3. Offences under the UKBA

There are four main offences under the UKBA:

- bribing another person (section 1);
- being bribed (section 2);
- bribing a Foreign Public Official (FPO) (section 6); and
- failing to prevent bribery (section 7).

Jurisdictional reach (section 12)

Any offence committed under section 1, 2, or 6 that occurs within the United Kingdom is subject to the jurisdiction of the UKBA, irrespective of the nationality of the individual committing the offence.

To the extent that acts potentially constituting offences under sections 1, 2, or 6 take place outside of the United Kingdom, the UKBA applies if and to the extent that the individual alleged to have undertaken those acts has a “close connection” with the United Kingdom. A close connection essentially encompasses British citizens or other individuals who have some type of British nationality, or who are ordinarily resident in the United Kingdom. In relation to corporate entities, this means bodies incorporated under the law of any part of the United Kingdom or Scottish partnerships.

Any organisation that is a “relevant commercial organisation” under the Act, i.e., it is either a British incorporated entity or an overseas incorporated entity that carries out a business or part of a business in the United Kingdom, is subject to section 7 of the UKBA regardless of the location of the alleged bribery. There is no definition of “carrying on a business,” but it is likely that having a branch or office in the United Kingdom or holding board or management meetings in the United Kingdom would bring an organisation within the ambit of section 7.

4. Elements of Offences

For ease of reading, we use the language of the UKBA when discussing bribers (P) and recipients or intended recipients of bribes (R). In relation to the section 7 offence of failing to prevent bribery, which is a corporate offence, we again use the language of the UKBA when discussing the corporate entity (C) and its associated persons (A).

Bribing another person (section 1)

The UKBA provides that bribing another person is an offence. As discussed above, this offence applies to commercial bribery as well as to bribery of government officials. The UKBA details two cases of bribery, which it criminalizes:

- **Case One** is where P offers, promises, or gives a financial or other advantage to another person and P intends the advantage either to (1) induce a person to perform improperly a relevant function or activity, or (2) reward a person for the improper performance of such a function or activity.
- **Case Two** is where P offers, promises, or gives a financial or other advantage to another person and P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

In relation to Case One, it is irrelevant whether the person to whom the advantage is offered, promised, or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

In both cases, it does not matter whether the advantage is offered, promised, or given by P directly or through a third party.

The offence is deliberately widely drawn and covers both the actual payment of bribes, as well as offers (genuine or otherwise) of payment of bribes. In addition, it covers payment or offers both before and after the corrupt action is contemplated.

The corrupt action does not need to actually occur, nor does the recipient or intended recipient of the bribe have to accept the bribe and/or intend to take the corrupt action that P desires.

This offence can be committed by a commercial organisation as well as by individuals. The general English criminal law of identification would apply in this instance. To establish a commercial organisation's guilt, the prosecution would have to show that the offence had been committed by an individual who can be identified as the directing mind and will of the organisation, and that in committing the offence, he or she had been acting on behalf of the organisation. Recent case law has affirmed that the English courts will strictly interpret the question of which individuals can be identified as the directing mind and will of an organisation. This onerous requirement is the primary reason for the comparatively low rate of corporate prosecutions in the United Kingdom.

Being bribed (section 2)

The UKBA provides four ways in which a person or commercial organisation can be guilty of an offence of being bribed:

- **Case One** is where R requests, agrees to receive, or accepts a financial or other advantage intending that, as a consequence, a relevant function or activity should be performed improperly (whether by R or by another person).
- **Case Two** is where R requests, agrees to receive, or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

- **Case Three** is where R requests, agrees to receive, or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
- **Case Four** is where, in anticipation of or in consequence of R requesting, agreeing to receive, or accepting a financial or other advantage, a relevant function or activity is performed improperly by R or by another person at R's request or with R's assent or acquiescence.

As with the section 1 offence, the section 2 offence is intended to be very wide. The four cases detailed are intended to cover all conceivable permutations of requesting or accepting bribes.

In all cases, it is irrelevant whether R requests, agrees to receive, or accepts (or is to request, agree to receive, or accept) the advantage directly or through a third party or whether the advantage is (or is to be) for the benefit of R or another person.

In Cases Two to Four, it is irrelevant whether R knows or believes that the performance of the function or activity is improper.

In Case Four, where a person other than R is performing the function or activity, it is irrelevant whether that person knows or believes that the performance of the function or activity is improper.

Bribery of FPOs (section 6)

Under the UKBA, a person who bribes an FPO is guilty of an offence if it is P's intention to influence the FPO in his or her capacity as a foreign public official. P must also intend to obtain or retain business, or an advantage in the conduct of business.

P bribes the FPO if, and only if:

A. directly or through a third party, P offers, promises, or gives any financial or other advantage;

(i.) to the FPO; or

(ii.) to another person at the FPO's request or with the FPO's assent or acquiescence; and

B. the FPO is neither permitted nor required by the written law applicable to the FPO to be influenced in his or her capacity as a foreign public official by the offer, promise, or gift.

References in the UKBA to "influencing the FPO in his or her capacity as a foreign public official" mean influencing the FPO in the performance of his or her functions as such an official, which includes:

- any failure to exercise those functions; and
- any use of the FPO's position as such an official even if not within the FPO's authority.

Who is an FPO?

An FPO is an individual who:

- A. holds a legislative, administrative, or judicial position of any kind, whether appointed or elected, of a country or territory outside of the United Kingdom (or any sub-division of such a country or a territory);
- B. exercises a public function;
 - (i.) for or on behalf of a country or territory outside of the United Kingdom;
 - (ii.) for any public agency or public enterprise of that country or territory; or
- C. is an official or agent of a public international organisation.

What is a public international organisation?

A public international organisation is an organisation whose members are any of the following:

- (i.) countries or territories;
- (ii.) governments of countries or territories;
- (iii.) other public international organisations; or
- (iv.) a mixture of any of the above.

What written law is applicable?

The written law applicable to the FPO is:

- A. where the performance of the functions of the FPO which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom;
- B. where paragraph (A) does not apply and the FPO is an official or agent of a public international organisation, the applicable written rules of that organisation; or
- C. where paragraphs (A) and (B) do not apply, the law of the country or territory in relation to which the FPO is a foreign public official so far as that law is contained in;
 - (i.) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned; or
 - (ii.) any judicial decision which is so applicable and is evidenced in published written sources.

The definition of bribery of an FPO provided by the UKBA is not entirely straightforward. However, as with the other offences under the UKBA, the intention is to create a wide offence that covers what would ordinarily be thought of as bribery of an FPO to induce or reward corrupt behaviour.

This offence can be committed by a commercial organisation as well as by individuals.

Failure of commercial organisations to prevent bribery (section 7)

The only section of the Act that was truly a new addition to the law of the United Kingdom is the so-called "section 7" offence, which expands the law of corporate criminal responsibility in this sphere.

The offence is drafted as follows:

A "relevant commercial organisation" (C) is guilty of an offence under this section if a person (A) associated with C bribes another person intending:

- A. to obtain or retain business for C; or
- B. to obtain or retain advantage in the conduct of business for C.

Who is an "associated person"?

The UKBA (in section 8) defines an associated person (A) as someone who performs services for or on behalf of C.

The capacity in which A performed services for or on behalf of C is irrelevant, as is the legal nature of the relationship. The UKBA provides three examples of an associated person: an employee, an agent, or a subsidiary. The UKBA expressly states that the question of whether or not A is a "person who performs services for or on behalf of C" is to be determined by reference to all the relevant circumstances, not merely by reference to the nature of the legal relationship between A and C.

However, if A is an employee of C, it will be presumed that A is a person performing services for or on behalf of C, unless it can be shown to the contrary.

It is necessary for the prosecution to demonstrate that:

- A is or would be guilty under section 1 (bribing another person) or section 6 (bribery of an FPO), whether or not A has been prosecuted for such an offence; or
- A would be guilty of such an offence if the Act were applicable to him or her.

What is a "relevant commercial organisation"?

The Act defines a "relevant commercial organisation" to which section 7 applies as:

- a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether within the United Kingdom or elsewhere);
- any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom;
- a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether within the United Kingdom or elsewhere); or
- any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

Penalties (section 11)

An individual who is found guilty of an offence under section 1 (bribing another person), section 2 (being bribed), or section 6 (bribing an FPO) is liable to a maximum term of imprisonment of 10 years, an unlimited fine, or both.

A commercial organisation guilty of an offence under sections 1, 2, or 6 is liable to an unlimited fine. Similarly, any commercial organisation guilty of a section 7 offence is liable to an unlimited fine.

Although the maximum fine that can be imposed is unlimited, to date the fines imposed under the UKBA have typically been much smaller than fines handed out by the US authorities in FCPA matters, except for a small number of larger settlements entered into by multinational companies.

In practice, levels of fines in the UK are determined by reference to the Sentencing Guidelines (Guidelines) that govern punishment of corporate crime. The Sentencing Council for England and Wales publishes these Guidelines for the sentencing of offenders convicted of committing offences of fraud, bribery, and money laundering. The Guidelines identify several factors that must be considered by judges when arriving at an appropriate level of fine. These include (but are not limited to):

- the level of culpability;
- the amount of harm done;
- previous convictions;
- level of cooperation with the authorities;
- attempts to conceal the wrongdoing; and
- whether there has been a change in management and/or the compliance program since the offending was uncovered.

Under the Guidelines, a fine can be adjusted upward to ensure that it removes all gain obtained by the offending, punishes the corporate entity, and ensures the appropriate level of deterrence. The Guidelines are clear that there should be a “real economic impact,” to emphasize to management and shareholders the need to operate within the law. Indeed, if deemed the most appropriate outcome, the fine can be so large as to put the company out of business, as recognized in the deferred prosecution agreement (DPA) entered into by Sarclad Ltd., in which the UK Serious Fraud Office (SFO) cited the company’s cooperation as a key factor in its decision not to press the court for such a fine.

In addition, the general law on confiscation of the proceeds of crime, as set out in the Proceeds of Crime Act 2002, will also apply, as will the law on compensation of victims, as set out in section 130 of the Powers of Criminal Courts (Sentencing) Act 2000.

Liability of senior officers (section 14)

As set out above, the general English law of corporate identification will apply to determine whether corporate entities committed the offences under sections 1, 2, or 6. In addition, where the prosecution can prove a criminal offence on the part of the company, and a senior officer of the company (who must have a “close connection” to the United Kingdom) has consented or connived in the commission of the offence, that senior officer, as well as the company, is guilty of the offence and liable to be proceeded against and punished accordingly. This is the case even if the senior officer did not himself pay or receive a bribe.

AFFIRMATIVE DEFENCES

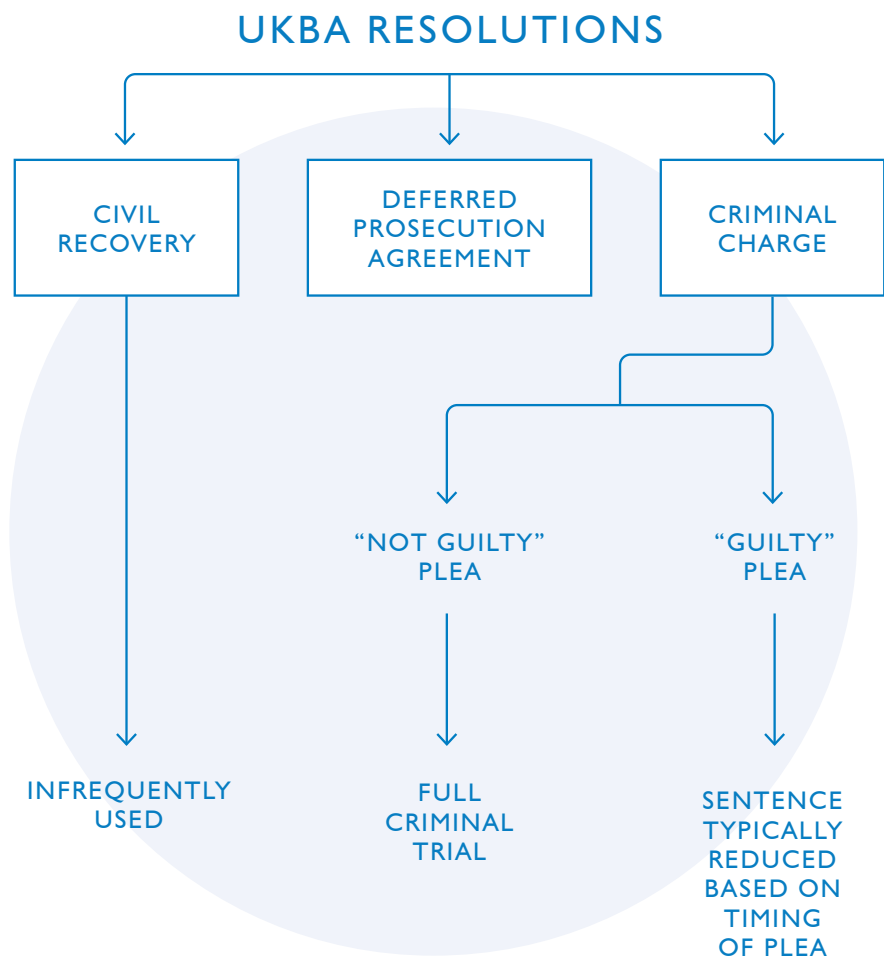
Aside from the defence under section 7, there are very few affirmative defences under the UKBA. Those that do exist (section 13) relate to the proper exercise of any function of a member of the intelligence services or the armed forces when engaged in active service. With the exception of section 7, these defences do not apply to commercial organisations.

Section 7 contains an affirmative defence against a charge of failure to prevent bribery under which a relevant commercial organisation can show that it has adequate procedures in place designed to prevent persons associated with it from committing bribery offences.

The Ministry of Justice has, as required by section 9 of the UKBA, published guidance for commercial organisations as to the procedures that ought to be put in place to prevent persons associated with the commercial organisations from committing bribery. In 2018, Skansen Interiors Ltd. (Skansen), a small interior design company operating within the United Kingdom, was prosecuted for failure to prevent bribery under section 7 of the UKBA and became the first company to assert the adequate procedures defence. However, Skansen was ultimately found guilty, as it had only limited policies and procedures in place and they were geared towards company values rather than specific policies for anti-bribery and corruption compliance; furthermore,

none mentioned the UKBA. As this was a jury trial, there was no judgment or judicial comment. Consequently, the case did not provide much by way of additional guidance on the meaning of “adequate procedures” under section 7. However, Camilla de Silva, then-joint head of Bribery and Corruption at the SFO, subsequently stated that although “[t]he starting point is about having bespoke compliance procedures in place...it is more about the substance of the procedures and about them actually working in the first place.” In theory, if a commercial organisation complies with the guidance and has specific and effective anti-bribery and anti-corruption procedures, it ought to have a defence to any allegation of a section 7 offence.

RESOLUTION OF UKBA INVESTIGATIONS



There are a number of ways in which criminal investigations, including those relating to allegations of infringements of the UKBA, can be resolved.

5. Charge

A criminal charge begins the legal process. The Code for Crown Prosecutors provides a two-stage test for whether an accused should be charged with a criminal

offence. First, a prosecutor must be satisfied that there is sufficient evidence against the accused for there to be a realistic prospect of conviction. Second, the prosecutor must also be satisfied that the prosecution is in the public interest. There are a number of factors that are listed in the Code to determine the public interest.

Once charged, the accused must decide whether to plead guilty or not.

6. Guilty plea

If a defendant pleads guilty at the earliest available opportunity, he or she will, according to the Sentencing Guidelines, receive a reduction in any sentence of one-third. A sliding scale is then applied to the reduction given, reducing to a one-tenth discount if the defendant pleads guilty at the door of the court or after the trial has begun.

7. Not guilty plea

If a defendant pleads not guilty, a full criminal trial will ensue. The offences under sections 1, 2, and 6 of the UKBA can be tried in either the Magistrates' Court or the Crown Court, depending on the severity of the offence. The Crown Court has greater sentencing powers than the Magistrates' Court, but it is possible to be convicted by magistrates and referred to the Crown Court for sentencing, if the magistrates consider that their powers are insufficient. A section 7 offence can only be tried in the Crown Court.

8. Deferred prosecution agreement

DPAs were introduced in February 2014 through Schedule 17 of the Crime and Courts Act 2013. They are intended to allow a corporate offender to make reparations for criminal conduct, without a criminal conviction (and its attendant consequences) being imposed. DPAs are concluded subject to the approval of a judge, who must be satisfied that the DPA is in the interests of justice and its terms are fair, reasonable, and proportionate.

The DPA Code of Practice (the Code) sets out when and how prosecutors will use DPAs. The SFO has so far concluded 12 such agreements – Rolls-Royce, Standard Bank, Sarclad Ltd., Guralp Systems Ltd., Airline Services Ltd., Airbus SE., Amec Foster Wheeler Energy Ltd. and two further DPAs with companies that have not yet been publicly named (corruption matters); Tesco Stores Ltd. (an accounting matter); G4S Care and Justice Services (UK) Ltd., and Serco Geografix Ltd. (matters involving both fraud and false accounting); – and the jurisprudence is still developing. The Crown Prosecution Service (CPS) is yet to enter into a DPA in respect to a corruption related offence.

It is a discretionary matter as to whether a corporate offender will be invited to negotiate a DPA with the prosecutor – and it is for the prosecutor, not the company, to seek to initiate those discussions. However, the Code and the SFO's Operational Handbook (Operational Handbook), provide some guidance on what factors the prosecutor will consider when deciding whether to initiate DPA discussions.

Generally, to be eligible for a DPA, the corporate offender will need to have self-reported the alleged criminal conduct and will need to cooperate fully with the investigation. It has been suggested that it is for these reasons that Petrofac Ltd, the oil and gas services company, was prosecuted for failing to prevent bribery in 2021 rather than being considered for a DPA. Petrofac did not self-report its conduct and was reportedly viewed by the SFO as uncooperative at the start of its investigation. However, as Petrofac pleaded guilty there is limited information in the public domain about the extent to which this is indeed the case.

The Operational Handbook includes Corporate Co-operation Guidance, which provides indicators of good practice to assist SFO staff in assessing the cooperation of a corporate entity. The Code also provides some guidance on cooperation. Further, a DPA will be more likely if a company has no previous convictions, has already implemented a full compliance program, or if the criminal conduct occurred long in the past and/or was the result of rogue activities by employees.

In October 2020, the SFO published further guidance on its general approach to DPAs from the Operational Handbook. The detailed guidance does not mark any significant change to the SFO's existing approach but provides welcome detail about:

- the SFO's approach to negotiating a DPA;
- how the statement of facts and agreement that underpin any DPA should be approached;
- how the standard terms will usually be imposed;
- how the financial penalty will be calculated; and
- the SFO's disclosure obligations when entering into a DPA.

Notwithstanding the transparency afforded by the Code and the Operational Handbook, it could be suggested that the United Kingdom's overall approach to DPAs has been inconsistent. It is noteworthy, for example, that the 2017 Rolls-Royce DPA did not stem from a self-disclosure of misconduct. However, officials stated that the company's extraordinary co-operation with the government's investigation played a part in the nature of the resolution.

Similarly, a key component of the 2019 Serco Geografix Ltd. (SGL) DPA was the undertakings provided by Serco Group PLC, the parent company, which "mirror the requirements imposed on SGL by the DPA." In approving the DPA, the court noted that without the undertakings, it was unlikely that the goals of the DPA would have been achieved, because SGL itself was a dormant company. In comparison, however, a potential DPA between Skansen Interiors Limited (Skansen) and the CPS was rejected in 2018. This was despite Skansen self-reporting the conduct. The DPA was ostensibly refused on the basis that Skansen was a dormant company and so lacked the means to pay any penalty imposed. The former CEO of Skansen's parent

company, however, stated that the parent company had been willing to “pick up any conditions of a DPA” on Skansen’s behalf. It is unclear why there should have been such a discrepancy between the SFO’s treatment of SGL and the CPS’ treatment of Skansen.

9. Civil recovery

Prosecuting authorities have the power under the Proceeds of Crime Act 2002 to decline to bring criminal charges, and instead bring an action in the civil courts to recover the proceeds of alleged criminal activity. Previous directors of the SFO made use of these powers on occasion, most notably in 2012 against the parent company of Mabey & Johnson Ltd.

The SFO’s current public position is that it will continue to make use of civil recovery orders as an alternative to criminal charges under the right circumstances. Although the SFO has mainly focused on bringing criminal charges, in November 2020, the SFO entered into an agreement with Julio Faerman (implicated in Brazil’s Operation Car Wash) to recover nearly £1.2m following an investigation into his UK assets.

The SFO also has the power, under the Criminal Finances Act 2017, to ask a court for the imposition of an account freezing order (AFO). If granted by a court, AFOs freeze money held in a bank account. If a court is satisfied that the funds in such an account represent the proceeds of crime, or are intended for use in a crime, then these funds can ultimately be forfeited. A freedom of information request revealed that as of 1 February 2020 the SFO had only obtained seven AFOs, in one instance seizing approximately £1,500,000. It remains to be seen if the SFO will utilize this power more widely in the future.

APPENDIX IV

**THE UNITED KINGDOM
BRIBERY ACT FAQs**

APPENDIX IV: UKBA FAQs

FAQ 22

What are the important differences between the FCPA and the UKBA?

Setting aside the differences based on jurisdiction, there are several key differences between the UKBA and the FCPA. First, the UKBA criminalizes bribery of commercial organisations as well as bribery of government officials. Second, liability under the UKBA also extends to the recipient of the bribe and not just the individual or organisation giving the bribe. Third, the UKBA holds commercial organisations strictly liable for failing to prevent bribery, but also provides an affirmative defence to the crime if the organisation can show that it had adequate procedures designed to prevent bribery in place at the time. Finally, whereas the FCPA has a stand-alone offence for accounting violations comprised of either having inadequate books and records or internal controls violations, the UKBA does not have an equivalent offence.

FAQ 23

Is a non-UK company subject to the UKBA?

Yes, depending on the circumstances. Where the alleged misconduct occurred within the United Kingdom, the conduct is subject to the UKBA.

Further, for the corporate offence of Failure to Prevent Bribery, the UKBA applies to all acts of a “relevant commercial organisation,” which includes both a British incorporated entity and any company that “carries on a business or part of a business” in the United Kingdom.

The Bribery Act 2010 Guidance issued by the Ministry of Justice provides that courts should apply a “common sense approach” when interpreting whether an organisation “carries on a business or part of a business” in the United Kingdom. However, there is no case law addressing the concept and its broad wording suggests that it may apply to any organisation that does business in the United Kingdom.

In addition, the Bribery Act applies to UK nationals or individuals with a “close connection” to the UK, regardless of where they are in the world. As a result, if a person meeting the nationality test under the UKBA commits an offence under the UKBA and he or she is the “directing mind and will of the company” (i.e., sufficiently senior), that company could also be liable under the UKBA.

FAQ 24***What is the offence of failure to prevent bribery, and does it differ from a bribery offence under the UKBA?***

The so-called “section 7” offence of failure to prevent bribery applies to “commercial organisations,” i.e., corporations, where a person or other corporation that performs services on behalf of the defendant commercial organisation bribes another person with the intent to obtain or retain business or a commercial advantage for the defendant commercial organisation.

The purpose of the offence is to broaden corporate liability under the UKBA beyond liability for actions taken by people who can be identified as the “directing will or mind of the company,” the general test for corporate criminal liability under English common law.

Unlike the substantive bribery offences, the section 7 failure to prevent bribery offence applies only to corporations, and it includes an affirmative defence for maintaining adequate procedures designed to prevent bribery being committed on the corporation’s behalf. However, the offences do not differ with respect to penalties, which may consist of unlimited fines, confiscation, and/or compensation.

It is important to remember that in order for the authorities to make out a section 7 offence, it must be demonstrated that the associated person is or would be guilty of a substantive offence under section 1 or section 6 of the UKBA.

FAQ 25***Can a corporation be liable for acts of third parties under the UKBA?***

Yes, section 7 of the UKBA applies to the actions of any persons “associated with” a corporation. A person is associated with a corporation if he or she performs services on the corporation’s behalf. However, in order for the company to be liable for the acts of the associated party, the bribe must be paid by the associated person to help the company win or retain business. Thus, suppliers could fall within the scope of the offence to the extent that they are performing services for or on behalf of the company and not simply acting as the seller of goods. Where a supply chain is involved, it is likely that the organisation will only exercise control over its relationship with its contractual counterparty, rather than all the sub-contractors or entities further down the supply chain. Nonetheless, to mitigate its own risks, the organisation may still consider requesting that its contractual counterparty adopt a similar approach to anti-bribery procedures with the next party in the chain.

FAQ 26***Is a corporation liable for the acts of its joint venture (JV) partners under section 7 of the UKBA?***

Potentially, yes.

Consider a JV Partnership made up of JV Partner A and JV Partner B. The key question for determining if JV Partner A creates liability for JV Partner B is whether (1) JV Partner A or its employees or agents are performing services for JV Partner B, and (2) the bribe was paid for JV Partner B's benefit. If the employees or agents of JV Partner A paid bribes only for the benefit of JV Partner A and not JV Partner B, then, generally speaking, JV Partner B will not be liable for the acts of JV Partner A or its employees or agents.

FAQ 27***Are fines the only penalties that a corporation must consider in assessing exposure under the UKBA?***

No. In addition to unlimited fines, the United Kingdom has strict laws around the confiscation of proceeds of crime as set out in the Proceeds of Crime Act 2002, which may result in the disgorgement of any proceeds that prosecutors can demonstrate are associated with a violation of the UKBA. Further, a court sentencing a corporation for a violation of the UKBA will consider whether it is appropriate to order the payment of compensation to victims under the Powers of Criminal Courts (Sentencing) Act 2000. A corporation will also face mandatory debarment from public contracts across the UK and EU if convicted of an offence under Sections 1, 2, or 6. Debarment is discretionary for a conviction under section 7.

FAQ 28***Who enforces the UKBA?***

The United Kingdom's SFO is the principal prosecution authority that enforces the UKBA's international remit. The Crown Prosecution Service has also successfully brought prosecutions under the UKBA but these have generally been limited to purely domestic offences. In 2014, the United Kingdom adopted a new framework for corporate bribery prosecutions and, in 2014, the SFO secured its first corporate conviction for a UKBA violation. In 2015, the SFO reached its first DPA with a corporate defendant. Since then, a total of nine DPAs relating to corrupt activity have been reached.

FAQ 29***What are the maximum fines that can be assessed for violations of the UKBA?***

The fines for violations of the UKBA are unlimited.

FAQ 30***How is corporate criminal liability treated under the UKBA?***

Under general principles of English criminal law, corporate criminal liability is more limited than under US criminal law. Corporate criminal liability requires that:

- a person who can be identified as the directing mind and will of the organisation committed the offence; and
- that person was acting on behalf of the corporation when committing the offence.

Therefore, a corporation can be criminally liable for individuals within the organisation who make a bribe or are bribed so long as the two requirements noted above are met. Recent case law has affirmed that the English courts will consider carefully issues of delegated responsibility and corporate governance when deciding who can legally be identified as the directing mind and will of an organisation.

Under section 7, a corporation can also be criminally liable if any person associated with the corporation and acting on its behalf, regardless of seniority, bribes to benefit the company. If that occurs, the company will be held strictly liable for those acts absent demonstrating that it had adequate procedures in place. Employees of a company are assumed to be associated persons of the company.

OUR ANTI-CORRUPTION CAPABILITIES

MAP OF OUR WORLDWIDE ANTI-CORRUPTION REPRESENTATIONS



Jenner & Block defends global companies against FCPA and UKBA claims and advises in all phases of compliance with relevant anti-corruption laws. We provide a range of services, from designing staff training and developing internal controls, to compliance counseling, conducting internal investigations, and negotiating with the US, UK, and other regulators and prosecutors. We conduct anti-bribery investigations for major corporate clients around the world and have counselled companies regarding FCPA, UKBA and local law compliance matters.

The hallmark of a strong anti-corruption practice is keeping clients out of trouble in the first place: by working with in-house lawyers and business people to develop appropriate internal controls that meet the specific needs of the company and that detect and prevent violations; by designing and/or conducting regular training of company personnel; by structuring, advising on and conducting anti-corruption due diligence, whether for third-party service providers or in the context of acquisitions; and by counseling on the resolution of specific compliance issues as they arise in day-to-day business operations.

Our lawyers have developed anti-corruption compliance programs for major multinational companies across numerous sectors of the economy, including defense industries, financial institutions, oil and gas, media companies, government contractors of all kinds, and retail establishments, among others. We have provided training to tens of thousands of corporate personnel as well as for smaller businesses with fewer than 500 employees.

When issues arise, our clients benefit from Jenner & Block's world-class reputation and skill in conducting internal investigations. Our range and depth of experience enables us to conduct internal investigations with care and rigor, ensuring that our clients have obtained the facts they need and that the investigation will withstand the strictest of scrutiny by regulators. At the same time, we understand how to operate flexibly and expeditiously, as well as the need to conduct investigations efficiently and with sensitivity to the needs of our clients' business operations. Jenner & Block also provides our clients with seasoned judgment to assess the veracity and gravity of the allegations and to make informed decisions under difficult, often time-sensitive circumstances. We advise clients on the most effective methods to mitigate the impact of any alleged misconduct, including the potential benefits and risks of voluntary disclosure when appropriate.

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COMPLIANCE, AND
DEFENSE TEAM

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