Anti-Corruption

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IN THIS ISSUE

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NEWS

DOJ PUBLISHES NEW GUIDANCE ON EVALUATING CORPORATE COMPLIANCE PROGRAMS

The Criminal Division of the U.S. Department of Justice (DOJ) recently released a new guidance document titled "The Evaluation of Corporate Compliance Programs," which updates a prior version of the guidance first issued in February 2017 (previously analyzed here). The new guidance provides additional insights into how the DOJ will assess the effectiveness of a company's overall compliance program in an enforcement action, focusing on the program's design, implementation and effectiveness.

Under the DOJ's Justice Manual (formerly called the U.S. Attorney's Manual), federal prosecutors will consider several principles when investigating and deciding whether to charge corporate entities. These factors, commonly known as the Filip Factors, include two that focus on a company's compliance program: (1) "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision," and (2) the company's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one."

The intent of the new guidance—which is a DOJ policy and not a binding law or regulation—is to provide more detail on how federal prosecutors will probe a company's compliance program under these factors in the process of investigating and resolving an enforcement matter. More specifically, the guidance is intended "to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations)."

The new guidance largely focuses on the same topics that the previous version had included as relevant in evaluating a corporate compliance program. Of note, however, the new guidance is twice the length of the February 2017 version and was compiled with input from across the DOJ unlike the previous version, which was released by only the Criminal Division's Fraud Section. Additionally, the new guidance is structured around three overarching questions that prosecutors are expected to ask in evaluating compliance programs:

- Is the compliance program well-designed? This part of the guidance discusses various hallmarks of a well-designed compliance program relating to risk assessment, written policies and procedures, training and communications, confidential reporting structure and investigation process, third-party management, and mergers and acquisitions.
- Is the compliance program effectively implemented? This second part details features of effective implementation of a compliance program, including commitment by senior and middle management, autonomy and resources, and incentives and disciplinary measures.
- Does the compliance program actually work in practice? This final part of the DOJ guidance discusses metrics of whether a compliance program is operating effectively, exploring a program's capacity for continuous improvement, periodic testing, review, investigation of misconduct, and analysis and remediation of underlying misconduct.

Companies should review the guidance and evaluate their compliance programs in light of it to ensure that they are prepared before a problem arises, including to prevent misconduct or, at a minimum, detect it at an early stage.

Because it provides general insight into the government's expectations of how a corporate compliance program should operate in practice, the guidance has broader utility than just applying to ongoing enforcement actions, including for companies that have not identified a problem. Indeed, Assistant Attorney General Brian A. Benczkowski, who announced the updated guidance, explicitly stated in his announcement: "[A] company's compliance program is the first line of defense that prevents the misconduct from happening in the first place. And if done right, it has the ability to keep the company off our radar screen entirely." Companies should review the guidance and evaluate their compliance programs in light of it to ensure that they are prepared before a problem arises, including to prevent misconduct or, at a minimum, detect it at an early stage.

ANOTHER REGULATOR TOSSES ITS HAT INTO THE ANTI-CORRUPTION RING: A RECENT CFTC ENFORCEMENT ADVISORY ADDRESSES FOREIGN CORRUPT PRACTICES

The Commodity Futures Trading Commission (CFTC) Division of Enforcement recently issued an enforcement advisory (available here and previously analyzed by Sidley here) on self-reporting Commodity Exchange Act (CEA) violations that are carried out through foreign corrupt practices. The CFTC is an independent U.S. federal agency that regulates the derivatives markets, including futures contracts in commodities and financial products. Its Division of Enforcement prosecutes violations of the CEA and CFTC regulations, such as fraudulent conduct in the trading of futures contracts. The advisory is another reminder to companies and individuals to maintain a culture of compliance in light of the breadth of agencies—domestic and abroad—with increased enforcement focused on prosecuting corrupt conduct.

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Similar to current DOJ policy, the advisory provides cooperation credit, specifically to companies and individuals that are not required to register with the CFTC who voluntarily self-report CEA violations involving foreign corrupt practices and appropriately remediate the conduct at issue. The disclosing person must fully cooperate with the Division's investigation. In return, and absent aggravating circumstances, the Division of Enforcement will apply a presumption that it will not recommend a civil monetary penalty as part of its resolution with the offending company or individual.

The advisory is particularly notable in that it indicates an expansion of the CFTC's enforcement reach under what it views as its broader fraud authority granted by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. Applying potential violations of the CEA to alleged corruptive conduct also represents a new and interesting overlap with other U.S. regulators. And it indicates an increasingly high likelihood of cooperation between the CFTC and the DOJ and the Securities and Exchange Commission (SEC), respectively, which have been actively investigating and charging companies and individuals with FCPA violations in connection with corrupt conduct for some time.

…the CFTC Enforcement Advisory is a reminder to all market participants, whether trading derivatives or solely cash market products, to consider how their conduct might be subject to CFTC scrutiny.

Since the advisory was released earlier this year, two companies have publicly disclosed CFTC investigations into possible CEA violations involving foreign corrupt practices carried out in connection with commodities trading. Some of the conduct at issue in each relates to "Operation Car Wash," which began as an investigation by Brazilian authorities into allegedly corrupt fuel trading deals between Petrobras Brasileiro S.A., the Brazilian state oil company, and certain commodities traders who arranged fuel trades at prices that differed from market rates. Petrobras disclosed in May that the CFTC has begun an inquiry into certain trading activities related to Operation Car Wash. Additionally, Glencore Plc, an international commodity trader, made a similar disclosure at the end of April, becoming the first company to publicly disclose an investigation by the CFTC related to potential corrupt practices since this advisory.

We expect further details to emerge about the extent and impact of the CFTC's enforcement after the CFTC concludes these first investigations into alleged corrupt practices linked to commodities. In the meantime, the CFTC Enforcement Advisory is a reminder to all market participants, whether trading derivatives or solely cash market products, to consider how their conduct might be subject to CFTC scrutiny. The advisory also reinforces the importance of a robust compliance program, a strong culture of compliance and ethical behavior, and quickly identifying and remedying misconduct, should it arise.

IN THE INTERIM

4/2/2019: Master Halbert, a government official in the Federated States of Micronesia Department of Transportation, Communications and Infrastructure, pleaded guilty to one count of conspiracy to commit money laundering. According to the DOJ criminal complaint, between 2006 and 2016, Halbert accepted bribes from an unnamed Hawaii-based engineering and consulting company to help the company obtain and retain approximately $8 million of Micronesian government contracts. Halbert is scheduled to be sentenced on July 29.

https://www.justice.gov/opa/pr/micronesian-government-official-pleads-guilty-money-laundering-scheme-involving-fcpa

5/9/2019: Telefônica Brasil S.A., a Brazil-based telecommunications provider, agreed to pay approximately $4.1 million in civil penalties to the SEC to resolve alleged violations of the FCPA internal accounting controls and recordkeeping provisions. According to the SEC cease-and-desist order, Telefônica failed to devise and maintain sufficient internal accounting controls over the company's "hospitality program" for the 2014 World Cup and 2013 Confederations Cup. The company provided tickets and hospitality benefits to 93 government officials for the World Cup and 34 government officials for the Confederations Cup. Though the benefits were given directly to government officials who "were significant to the company's business interests," the company recorded the payments for "general advertising and publicity purposes." The SEC also found that Telefônica lacked sufficient internal controls to prevent this type of conduct. Telefônica agreed to the settlement without admitting or denying the SEC's findings.

https://www.sec.gov/litigation/admin/2019/34-85819.pdf

5/13/2019: Frank James Lyon, the owner of a Hawaii-based engineering and consulting company, was sentenced to 30 months in prison after pleading guilty in January to one count of conspiracy to violate the anti-bribery provisions of the FCPA. According to the DOJ press release, Lyon conspired with others to provide cash, vehicles, entertainment and other gifts

to Micronesian government officials and Hawaii state officials in exchange for assistance in obtaining and retaining more than $10 million in government contracts.

https://www.justice.gov/opa/pr/us-executive-sentenced-prison-role-conspiracy-violate-foreign-corrupt-practices-act

5/16/2019: The Independent Commission Against Corruption (ICAC), Hong Kong's anti-corruption agency, announced that it charged former J.P. Morgan Securities (Asian Pacific) Limited investment banking vice chair Catherine Leung Kar-cheung with two charges of offering an advantage to an agent in violation of Section 9(2)(b) of the Prevention of Bribery Ordinance. According to the ICAC press release, Kar-cheung offered to hire the son of the chairman of a logistics company so that the chairman would favor J.P. Morgan when choosing an investment bank to handle the company's initial public offering.

https://www.icac.org.hk/en/press/index_id_731.html

5/30/2019: Jose Manuel Gonzalez-Testino, an executive who controlled several U.S.-based companies, pleaded guilty for his role in the Petroleos de Venezuela S.A. (PDVSA) foreign bribery scheme. The case involved bribes paid to officials of PDVSA, Venezuela's state-owned and state-controlled energy company, and its Texas-based subsidiary. Gonzalez-Testino pleaded guilty in a Houston federal court to one count of conspiracy to violate the FCPA, one count of violating the FCPA and one count of failing to report foreign bank accounts.

https://www.justice.gov/opa/pr/business-executive-pleads-guilty-foreign-bribery-charges-connection-venezuela-bribery-scheme

6/3/2019: The UK Serious Fraud Office (SFO) announced a £850,000 (~$1 million) fine for FH Bertling Ltd, a German shipping and logistics company, for its role in an alleged bribery scheme to secure freight-forwarding contracts in Angola. The SFO charged F.H. Bertling and several executives with making corrupt payments to an employee of Sonangol, the Angolan state oil company, to secure shipping contracts. In total, 13 individuals were charged as part of the SFO's investigation, nine were convicted of one or more charges and four were acquitted.

https://www.sfo.gov.uk/2019/06/03/fh-bertling-sentenced-for-20m-angolan-bribery-scheme/

6/20/2019: Meng Hongwei, the first Chinese citizen to lead Interpol, pleaded guilty in China to taking $2 million in bribes during a hearing at China's Tianjin No. 1 Intermediate People's Court. Meng admitted to helping companies "make illegal gains" from 2005 to 2017. Chinese authorities arrested Meng last September, and Meng resigned from his post a month later, two years into his four-year term. At the time of his arrest, China's Ministry of Public Security announced that Meng was under investigation for accepting bribes and other "willful" crimes.

6/21/2019: Roger Richard Boncy and Joseph Baptiste were found guilty after a two-week jury trial in the U.S. District Court of Massachusetts for their participation in a scheme to bribe Haitian officials in exchange for business advantages for their investment firm. According to the evidence presented at trial, Boncy and Baptiste solicited bribes from undercover FBI agents posing as potential investors in connection with a proposed project to develop a port in the Môle St. Nicolas area of Haiti. During a recorded meeting at a Boston-area hotel, Boncy and Baptiste told the agents that they would funnel the bribes to Haitian officials through a non-profit entity controlled by Baptiste to secure Haitian government approval for the project. Both men were convicted of one count of conspiracy to violate the FCPA and the Travel Act. Baptiste was also convicted of one count of violating the Travel Act and one count of conspiracy to commit money laundering.

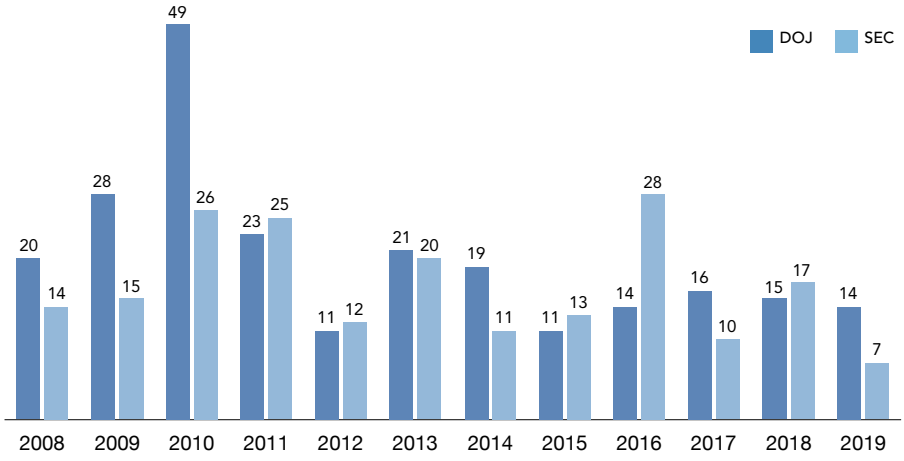
https://www.justice.gov/opa/pr/two-businessmen-convicted-international-bribery-offenses-0

6/25/2019: TechnipFMC plc (TFMC), a global provider of oil and gas services headquartered in London, agreed to pay criminal penalties of more than $296 million to resolve FCPA violations in Brazil and Iraq. TFMC is the product of a 2017 merger between two predecessor companies, Technip S.A. and FMC Technologies, Inc. The charges arose from two independent bribery schemes: a scheme by Technip to pay bribes to Brazilian officials, and a scheme by FMC to pay bribes to Iraqi officials. Zwi Skornicki, a former Technip consultant, also pleaded guilty in connection with the Brazilian bribery scheme. According to admissions and court documents, Technip conspired with others, including Singapore-based Keppel Offshore & Marine Ltd., to violate the FCPA by making more than $69 million in corrupt payments to Brazilian companies associated with Skornicki, including Petrobras, the Brazilian state-owned oil company. Admissions and court documents also established that FMC conspired to violate the FCPA by paying bribes to at least seven Iraqi government officials through a Monaco-based intermediary company. For its conduct, TFMC entered into a deferred prosecution agreement with the DOJ charging the company with two counts of conspiracy to violate the anti-bribery provisions of the FCPA. In addition, Technip USA, Inc., a TFMC subsidiary, pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA.

https://www.justice.gov/usao-edny/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-criminal-fines

FCPA GOVERNMENT INVESTIGATIONS AND CORPORATE SETTLEMENTS

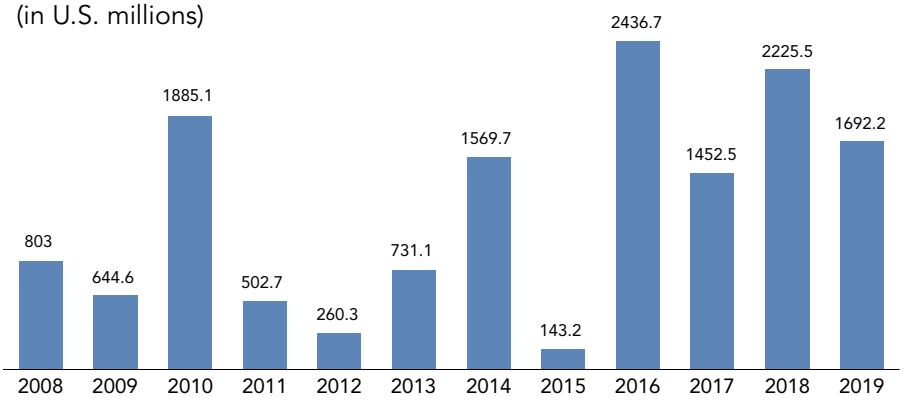
FCPA-Related Cases*



* New criminal or civil cases (settled or contested) instituted by year
** Based upon public disclosures of investigations

Corporate FCPA-Related Penalties*

(in U.S. millions)



* Includes disgorgement; does not include non-U.S. fines

THE FCPA/ANTI-CORRUPTION PRACTICE OF SIDLEY AUSTIN LLP

Our FCPA/Anti-Corruption practice, which involves over 90 of our lawyers, includes creating and implementing compliance programs for clients, counseling clients on compliance issues that arise from international sales and marketing activities, conducting internal investigations in more than 90 countries and defending clients in the course of SEC and DOJ proceedings. Our clients in this area include Fortune 100 and 500 companies in the pharmaceutical, healthcare, defense, aerospace, energy, transportation, advertising, telecommunications, insurance, food products and manufacturing industries, leading investment banks and other financial institutions.

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