Anti-Corruption

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NEWS

2019 YEAR IN REVIEW

2019 marked another significant year for Foreign Corrupt Practices Act (FCPA) enforcement with more than $2.8 billion in related corporate penalties, which excludes significant amounts paid to foreign authorities in global resolutions. Contributing to this annual total, which was the highest amount of penalties since the enactment of the FCPA, were two resolutions — involving Swedish telecommunications company Ericsson and Russian telecommunications company Mobile TeleSystems — that are among the top four corporate penalties of all time.

Corporate resolutions varied significantly in size in 2019. While the top five corporate resolutions in 2019 involved penalties ranging from $230 million to over $1 billion, the average penalty for the remainder of the corporate FCPA resolutions in 2019 was less than $15 million, indicating that the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) are pursuing corruption at all levels. The DOJ also declined to bring charges in two investigations in which the two corporations agreed to disgorge illicit profits, prejudgment interest and penalties totaling approximately $38 million.

This level of enforcement is unlikely to change in 2020. The number of prosecutors in the DOJ's FCPA unit remains at the highest historical level, and the new head of the FCPA unit, Christopher Cestaro, is a veteran prosecutor and former supervisor within the unit.

In addition to the continued robust corporate enforcement of the FCPA, the DOJ's and SEC's focus on holding individuals accountable under the FCPA remained strong in 2019. The DOJ and SEC charged over 50 individuals in 2019, the highest annual amount of all time. The DOJ also announced more guilty pleas (30) than any prior year. As Assistant Attorney General Brian A. Benczkowski stated in a speech on December 4, 2019: "This number of individual prosecutions in 2019 is not an outlier or a statistical anomaly. Rather, it is part of the Department's continued dedication to holding individual wrongdoers accountable across the board." The data strongly supports Benczkowski's remarks, as the 2019 individual enforcement numbers built on 2017 and 2018, which have the next highest annual numbers of individual FCPA charges and guilty pleas.

In the courtroom, 2019 saw three FCPA jury trials, which resulted in convictions of four individuals. This number of trials is a record, as there was only one FCPA trial in 2018, one in 2017, and none during the previous four years. 2019 also saw a rare FCPA federal court of

appeals decision by the Second Circuit holding that the recent Supreme Court ruling in *McDonnell v. U.S.* related to a domestic bribery statute did not impose a limitation on the breadth of the FCPA.

The DOJ made several noteworthy and formal announcements regarding its policies with respect to FCPA enforcement, reflecting a continuation of the DOJ's trend to make transparency of its enforcement policies and practices a top priority. In April 2019, the DOJ released new guidance titled "The Evaluation of Corporate Compliance Programs," which provides additional insights into how the DOJ assesses the effectiveness of a company's overall compliance program in an enforcement action. The DOJ also released the first updates to its FCPA Corporate Enforcement Policy since November 2017, as well as guidance on evaluating a corporation's inability to pay criminal fines.

These enforcement trends, along with other updates and insights, are discussed in detail below.

MAJOR CORPORATE ANTI-CORRUPTION ENFORCEMENT ACTIONS

Mobile TeleSystems

Russia's largest mobile telecommunications company, agreed to pay U.S. authorities $850 million in a settlement to resolve allegations that the company bribed government officials in Uzbekistan.

On March 6, 2019, Mobile TeleSystems PJSC, Russia's largest mobile telecommunications company, agreed to pay U.S. authorities $850 million in a settlement to resolve allegations that the company bribed government officials in Uzbekistan. According to the DOJ, between 2004 and 2012, Mobile TeleSystems made multiple payments to shell companies owned by an Uzbek official, Gulara Karimova, and charities connected with Karimova in exchange for entrance into and continued operation in the Uzbek telecom market. In addition to paying a criminal fine and disgorgement, as part of its deferred prosecution agreement with the DOJ, Mobile TeleSystems agreed to the imposition of an independent compliance monitor for three years, to implement new internal controls and to cooperate with DOJ investigations. Mobile TeleSystems also agreed to pay a civil fine in its SEC settlement.

Fresenius Medical Care AG & Co. KGaA

On March 29, 2019, German dialysis firm Fresenius Medical Care AG & Co. KGaA agreed to pay $231 million to settle pending FCPA allegations with U.S. authorities. According to the DOJ, Fresenius paid bribes to "publicly employed health and/or government officials" from 2007 to 2016 to obtain and retain business opportunities in Angola and Saudi Arabia. Additionally, the SEC alleged that Fresenius "knowingly and willfully failed to implement" reasonable internal accounting controls and maintain accurate books and records of transactions for its business dealings in Angola, Saudi Arabia, Morocco, Spain, Turkey and countries in West Africa. After discovering the misconduct in 2012, Fresenius conducted an internal investigation, took remedial measures and self-disclosed to the DOJ and SEC. Fresenius entered into a non-prosecution agreement with the DOJ, agreeing to pay a criminal penalty of more than $84 million and to have a compliance monitor imposed for two years. In its resolution with the SEC, Fresenius will pay $147 million in disgorgement and pre-judgment interest.

TechnipFMC plc

On June 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.

Ericsson

A multinational networking and telecommunications company headquartered in Stockholm, Sweden, agreed to pay more than $1 billion to resolve anti-corruption investigations by the DOJ and SEC.

On December 12, 2019, Telefonaktiebolaget LM Ericsson (Ericsson), a multinational networking and telecommunications company headquartered in Stockholm, Sweden, agreed to pay more than $1 billion to resolve anti-corruption investigations by the DOJ and SEC. More specifically, Ericsson agreed to pay over $520 million to resolve the DOJ's investigation into violations of the FCPA arising out of the company's scheme to make and improperly record tens of millions of dollars in improper payments around the world. According to court documents, over a 16-year period, Ericsson conspired with others to violate the FCPA by engaging in a scheme to pay bribes, to falsify books and records and to fail to implement reasonable internal accounting controls. Ericsson used third-party agents and consultants to make bribe payments to government officials and/or to manage off-the-books slush funds. These agents were often engaged through sham contracts and paid pursuant to false invoices, and the payments to them were improperly accounted for in Ericsson's books and records. The resolutions cover criminal conduct in China, Djibouti, Indonesia, Kuwait and Vietnam. For its conduct, Ericsson entered into a deferred prosecution agreement with the DOJ in connection with a criminal information charging the company with conspiracy to violate various provisions of the FCPA. As part of the deferred prosecution agreement, Ericsson has agreed to continue to cooperate with the DOJ in any ongoing investigations and prosecutions relating to the conduct, to enhance its compliance program and to retain an independent compliance monitor for three years.

In the related SEC matter, Ericsson agreed to pay disgorgement and prejudgment interest totaling approximately $540 million. The SEC's complaint alleged that from 2011 through 2017, Ericsson subsidiaries obtained business valued at approximately $427 million by using third parties to bribe officials in China, Djibouti and Saudi Arabia. In addition to the conduct described above, Ericsson had third parties pay for lavish trips and entertainment for government officials or their family members. In exchange for these bribes, Ericsson received lucrative contracts from state-owned telecommunications entities in these countries.

NOTABLE INDIVIDUAL ANTI-CORRUPTION ENFORCEMENT ACTIONS

Trial and Conviction of a Former Senior Executive at Alstom S.A., a French Power and Transportation Company

A former senior executive at Alstom S.A. (Alstom), a French power and transportation company, was found guilty for his role in a multiyear, multimillion-dollar foreign bribery scheme.

On November 8, 2019, after a much-anticipated two-week trial, a former senior executive at Alstom S.A. (Alstom), a French power and transportation company, was found guilty for his role in a multiyear, multimillion-dollar foreign bribery scheme and a related money laundering scheme. The conviction of Lawrence Hoskins reinforced the broad reach of the FCPA, as Hoskins, a British citizen who worked in France and never set foot in the United States during his tenure at Alstom, was charged in 2013 related to conduct that occurred from 2002 to 2004. Hoskins' conviction is also particularly significant given a U.S. Court of Appeals for the Second Circuit ruling last year that rejected part of the expansive view of the

FCPA's jurisdiction that the DOJ had initially asserted in Hoskins' case. While the Second Circuit ruling remains a significant judicial check on the DOJ's interpretations of the FCPA, Hoskins' conviction indicates that the ruling has significant practical limitations.

Hoskins was charged in connection with the DOJ's prosecution of Alstom, which resulted in a $770 million corporate settlement in 2014.

Hoskins was charged in connection with the DOJ's prosecution of Alstom, which resulted in a $770 million corporate settlement in 2014. Prior to the trial, Hoskins was alleged to have approved the selection of, and authorized payments to, consultants knowing that a portion of the money was intended to influence Indonesian officials. Because Hoskins' actions did not occur in the United States and Hoskins never worked for Alstom's American subsidiary, the DOJ charged Hoskins with conspiring to violate the FCPA based on its longstanding theory that conspiracy and aiding and abetting allow it to prosecute foreign nationals for FCPA violations even if those individuals otherwise would not be subject to liability under the FCPA.

The Second Circuit rejected that expansive view of the FCPA's jurisdiction in August 2018. The Second Circuit held that an individual cannot be guilty as a co-conspirator or accomplice if he or she is incapable of committing the crime as a principal. More specifically, the Second Circuit reasoned that because the FCPA omits jurisdiction over foreign nationals who act outside of the United States and are not officers, directors, employees, agents or stockholders of an issuer or a domestic concern, Hoskins cannot instead be charged as a co-conspirator or accomplice to an FCPA violation. The court went on, however, to state that if prosecutors are able to show that Hoskins acted as an agent of Alstom's American subsidiary (which is a domestic concern under the FCPA), then there would not be improper extraterritorial application of the FCPA to his conduct. After that ruling, the DOJ relied on the theory that although Hoskins worked for Alstom's parent company in Paris, he also acted as an agent of Alstom's American subsidiary for purposes of jurisdiction under the FCPA.

The DOJ succeeded in presenting evidence to show that Hoskins acted as an agent for Alstom's American subsidiary when he helped arrange bribes in Indonesia. Hoskins was convicted of 11 of 12 counts, including six counts of violating the FCPA.

During Hoskins' trial, the DOJ succeeded in presenting evidence to show that Hoskins acted as an agent for Alstom's American subsidiary when he helped arrange bribes in Indonesia. Hoskins was convicted of 11 of 12 counts, including six counts of violating the FCPA, three (out of four) counts of money laundering and two counts of conspiracy. According to the evidence presented at trial, Hoskins engaged in a conspiracy to pay bribes to officials in Indonesia, including a high-ranking member of the Indonesian Parliament and the president of the state-owned electricity company, in exchange for assistance in securing a $118 million contract to provide power-related services for the citizens of Indonesia. Hoskins and his co-conspirators were successful in securing the project and subsequently made payments to two consultants for the purpose of bribing the Indonesian officials.

Other Individuals Convicted After Jury Trials: Baptiste, Boncy and Lambert

Hoskins' trial was only one of four trials for the DOJ's FCPA unit. In the first trial of the year, Joseph Baptiste, founder and president of the National Organization for the Advancement of Haitians, a Maryland-based nonprofit, and Roger Boncy, CEO of Hispaniola Invest, LLC, were convicted on June 20, 2019 following a two-week jury trial. The FBI, acting on a tip, conducted a sting operation in Boston in which two FBI agents posed as potential investors in a Haitian port project. The agents arranged to provide Baptiste and Boncy with payments to be used to bribe Haitian government officials after the money was funneled through Baptiste's nonprofit. Both Baptiste and Boncy were found guilty of conspiracy to violate the FCPA and the Travel Act. Baptiste was additionally convicted of violating the Travel Act and conspiracy to commit money laundering. Boncy was acquitted of the latter charges.

A few months later, on November 8, 2019, Mark Lambert, former president of Transportation Logistics Inc. (TLI), a Maryland company that provides transportation services for nuclear materials, was found guilty of violating the FCPA and related fraud and conspiracy charges for his role in bribing a Russian official. According to the evidence presented at trial, over the course of several years, Lambert conspired with others at TLI to make fraudulent payments to Vadim Mikerin, a Russian official at JSC Techsnabexport (TENEX), a subsidiary of Russia's

State Atomic Energy Corporation. TENEX is the sole supplier and exporter of Russian uranium and uranium enrichment services to nuclear facilities worldwide. In exchange for the payments, funneled through offshore bank accounts associated with shell companies, TLI secured contracts with TENEX. Following a three-week trial, the jury convicted Lambert of four counts of violating the FCPA, two counts of wire fraud and one count of conspiracy to violate the FCPA and wire fraud.

CHANGES IN ANTI-CORRUPTION POLICIES

DOJ Publishes Guidance on Evaluating Corporate Compliance Programs

The Criminal Division of the DOJ released a new guidance document titled "The Evaluation of Corporate Compliance Programs," which provides additional insights into how the DOJ assesses the effectiveness of a company's overall compliance program in an enforcement action, focusing on the program's design, implementation and effectiveness.

In April 2019, the Criminal Division of the DOJ 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 updated guidance provides additional insights into how the DOJ assesses 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, 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 April 2019 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 April 2019 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.

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 Benczkowski stated when announcing the updated guidance: "[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."

Updates to FCPA Corporate Enforcement Policy

The DOJ released the first updates to its FCPA Corporate Enforcement Policy (the Policy) since November 2017.

On March 8, 2019, the DOJ released the first updates to its FCPA Corporate Enforcement Policy (the Policy) since November 2017 when then-Deputy Attorney General Rod Rosenstein announced the Policy, which creates a presumption of a declination in an FCPA enforcement action if a company meets certain standards for voluntary self-disclosure, full cooperation and timely and appropriate remediation. The Policy — including the recent updates — also provides companies with guidance about the steps to take when evaluating anti-corruption concerns or pursuing a declination or cooperation credit in an ongoing investigation.

The revised Policy incorporates several of the changed practices that DOJ officials have previously announced or previewed. Specifically, the new Policy formalizes the following key changes.

- *To receive credit for voluntary self-disclosure, companies do not need to disclose all relevant facts about all individuals involved in the wrongdoing.* Rather, the revised Policy clarifies that a company must only disclose relevant facts about "individuals *substantially* involved in *or responsible for* the violation of law."

  This change is in line with Rosenstein's prior public comments. In November 2018, Rosenstein stated that "investigations should not be delayed merely to collect information about individuals whose involvement was not substantial." Rather, the DOJ's focus is "on the individuals who play significant roles in setting a company on a course of criminal conduct."
- *The incentives and credits outlined in the Policy now explicitly apply in the merger and acquisition (M&A) context.* Since 2018, prosecutors have been starting to apply the Policy's principles where misconduct is discovered through due diligence in the M&A process. The Policy's application in the M&A context avoids chilling acquisition activity by law-abiding companies that might otherwise walk away from worthwhile investments due to the risk of FCPA enforcement. Under the revised Policy, a company that uncovers wrongdoing, voluntarily self-discloses the misconduct and meets the other criteria in the Policy — including implementing an effective compliance program at the acquired entity — will receive a presumption of a declination.
- *The DOJ substantially updated its criteria for "timely and appropriate remediation" by changing its guidance on business communication and retention of business records.* In the 2017 Policy, the DOJ required implementation of compliance programs that "prohibit[ed] employees from using software that generates but does not appropriately retain business records or communications." This provision was criticized by the white collar community because it essentially excluded any company that relied on ephemeral messaging apps such as WhatsApp and WeChat — which are commonly used in international business dealings — from receiving full cooperation credit.

  The DOJ relaxed this prohibition in the revised Policy. Rather than prohibiting use of ephemeral messaging systems, the Policy now requires companies to implement "appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations."

- *The DOJ added a clarifying footnote to the Policy's de-confliction requirement,* which provides that in order to qualify for maximum credit for full cooperation, a company must de-conflict witness interviews and other investigatory activities for its internal investigation with the DOJ's investigatory steps. In a new footnote, the DOJ clarified that although the DOJ may *request* the company delay an investigatory action for a limited period of time for de-confliction purposes, the DOJ "will not take any steps to affirmatively direct a company's internal investigation efforts."

The updates to the Policy reflect the continuation of the DOJ's efforts to provide greater transparency in its FCPA enforcement practices.

DOJ Releases Guidance on Evaluating a Corporation's Inability to Pay to Criminal Fines

The DOJ issued new guidance titled "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty," which applies in criminal resolutions where a corporation agrees to a proposed criminal fine or monetary penalty, but also asserts that it is unable to pay that fine.

On October 8, 2019, the DOJ issued new guidance to its prosecutors titled "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty," which applies in criminal resolutions where a corporation agrees to a proposed criminal fine or monetary penalty, but also asserts that it is unable to pay that fine. Procedurally, the guidance explains that as a threshold matter, before prosecutors are able to consider an inability to pay argument, the parties must first reach an agreement as to both the form of a corporate criminal resolution and the appropriate monetary penalty, irrespective of inability to pay considerations.

Then, in assessing a corporation's ability to pay argument, the guidance requires prosecutors to consider a range of factors, including the corporation's alternative sources of capital, collateral consequences resulting from the imposition of a criminal fine that exceeds the corporation's ability to pay and victim restitution. Attached to the guidance is an ability-to-pay questionnaire with a checklist of financial information that corporations must provide if making an ability to pay argument. Among other requests, the questionnaire requires documentation regarding (1) recent cash flow projections, (2) operating budgets and projections of future profitability, (3) capital budgets and projections of annual capital expenditures, (4) proposed changes in financing or capital structure, (5) acquisition or divestiture plans, (6) restructuring plans, (7) claims to insurers, (8) related or affiliated party transactions, (9) encumbered assets and (10) liens on the corporation's assets.

The UK Serious Fraud Office Publishes Corporate Co-Operation Guidance

On August 6, 2019, the UK Serious Fraud Office (SFO) published a section in its internal Operational Handbook titled "Corporate Co-operation Guidance" (the Co-operation Guidance), which applies to SFO investigations, including investigations under the UK Bribery Act. While each case will be assessed on its particular facts and circumstances, the Co-operation Guidance provides some welcome clarity as to the SFO's approach to an issue that can place companies in a difficult position, including with respect to documents over which the company may have a claim to privilege.

The SFO will take into account cooperation as a relevant consideration in its charging decisions, including in anti-corruption investigations, as previously set out in the Guidance on Corporate Prosecutions and the Deferred Prosecution Agreements Code of Practice (the DPA Code). The Guidance on Corporate Prosecutions provides that a factor tending against prosecution is the extent to which the management of a company under investigation has adopted a "genuinely proactive approach" in that investigation. The Co-operation Guidance expands on the SFO's expectations in this regard, stating that "co-operation means providing assistance to the SFO that goes above and beyond what the law requires." This includes identifying suspected wrongdoing and the individuals who may be responsible, "regardless of their seniority or position in the organisation," and reporting to the SFO "within a reasonable time of the suspicions coming to light."

The Co-operation Guidance seeks to clarify the SFO's position in respect of various other key investigative themes:

- **Data gathering and production:** This section contains detailed provisions on good general practices, such as preserving relevant digital and hard copy material, obtaining and providing material promptly to the SFO, providing lists of custodians and the locations of documents and providing material in a useful and structured way. The SFO also expects companies to identify relevant material in the possession of third parties and provide relevant material held abroad where it is in the possession or under the control of the organization.
- **Generally asserting privilege:** With respect to privileged material, the Co-operation Guidance provides that companies should submit a schedule of material withheld, as well as the basis for asserting privilege. The SFO makes clear that it may challenge a claim to privilege over relevant material where it considers it appropriate to do so.

  Importantly, the Co-operation Guidance provides that companies will not be penalized if they choose not to waive privilege. However, if a company elects to withhold privileged material, it will not attain the corresponding factor against prosecution in the DPA Code.
- **The company's dealings with individual witnesses and suspects:** The SFO expects to be consulted before the company or its lawyers interview any potential witnesses or suspects to avoid prejudicing the investigation. Companies should also refrain from tainting a potential witness' recollection by showing the witness previously unseen documents or other witnesses' accounts of the relevant facts.
- **Asserting privilege over interview memoranda:** While the SFO's assurance that companies will not be penalized for making a genuine claim to privilege is to be welcomed, companies will nevertheless have to decide whether the benefit of disclosure to attain the maximum cooperation credit from the SFO outweighs any potential prejudice to the company. Although there is no affirmative obligation to waive privilege, it is a factor that the SFO can (and will) take into account when considering whether a company is eligible for a deferred prosecution agreement.

  If a company claims privilege over interview memoranda, it will be expected to provide certification by independent counsel that the material in question is privileged. The SFO's expectation that companies obtain these certifications from independent counsel may create a dilemma for multinational corporations that are subject to parallel proceedings in the United States in cases where interview memoranda reflect accounts of witnesses in that jurisdiction.

  If a company claims privilege over interview memoranda, it will be expected to provide certification by independent counsel that the material in question is privileged. The SFO's expectation that companies obtain these certifications from independent counsel may create a dilemma for multinational corporations that are subject to parallel proceedings in the United States in cases where interview memoranda reflect accounts of witnesses in that jurisdiction. U.S. rules of privilege generally afford protection to interview memoranda. However, depending on the circumstances, a claim to privilege over such documents under English law may be less clear-cut.

  A further issue arises with respect to limited waiver of privilege, which is typically upheld by the English courts, in contrast to the position in the United States. So even where a company obtains independent certification of its documents, it will still have to balance the potential advantages in seeking cooperation credit from the SFO by providing the documents against the risk of third parties in any subsequent proceedings in the United States claiming that privilege in those documents has been lost as a result of such disclosure. This issue is accentuated by the fact that to obtain cooperation credit, the SFO expects companies to provide relevant material held abroad where it is in their possession or control.
- **The SFO's powers of compulsion:** The Co-operation Guidance provides that even where an organization is cooperating, there may be circumstances in which the SFO will nevertheless use its powers of compulsion to obtain relevant material. Compliance with compulsory process does not necessarily indicate cooperation, but, equally, the SFO's use of compulsion will not automatically mean it considers a company to be noncooperative.

OTHER DEVELOPMENTS

The Second Circuit Rejects McDonnell's Application to the FCPA

In McDonnell v. U.S., the Supreme Court interpreted a domestic public-sector bribery statute (18 U.S.C. Section 201) that makes it a crime for a public official to demand, seek, receive, accept or agree to receive or accept anything of value in exchange for "being influenced in the performance of any official act." Prosecutors argued that former Virginia Gov. Robert F. McDonnell violated this statute by accepting loans and gifts in exchange for various favors, including organizing meetings with other government officials and hosting events. The Supreme Court, however, rejected prosecutors' arguments for a broad reading of the domestic bribery statute, holding instead that prosecutors must prove that a bribe had been paid in exchange for an "official act" under that statute. The Supreme Court further elaborated that an "official act" needs to be a decision, action or agreement on some "question, matter, cause, suit, proceeding or controversy" involving a "formal exercise of governmental power" that is "pending" or "may be brought" before the official.

Ng Lap Seng, who was convicted in 2017 (after the *McDonnell* ruling) on charges related to a scheme to bribe United Nations officials to obtain support for a real estate project in Macau, argued on appeal that the FCPA was subject to the more onerous requirements of proof outlined in *McDonnell* and required proof of an "official act." The Second Circuit rejected Seng's arguments, reasoning that the text of the FCPA differed materially from the statute at issue in *McDonnell* and that the FCPA targeted a broader category of bribery than the domestic bribery statute. Specifically, the Second Circuit noted that the FCPA criminalizes giving a foreign official anything of value to corruptly obtain any of the following quid pro quos:

The Second Circuit reasoned that the text of the FCPA differed materially from the statute at issue in McDonnell and that the FCPA targeted a broader category of bribery than the domestic bribery statute.

- "influencing any act or decision of such foreign official in his official capacity"
- "inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official"
- "securing any improper advantage"
- "inducing 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"

The Second Circuit stated that "[w]hile the first FCPA [quid pro] quo referencing an 'act or decision' of a 'foreign official in his official capacity' might be understood as an official act, the FCPA does not cabin 'official capacity' acts or decisions to a definitional list akin to that for official acts under [§ 201]." (Seng also made arguments related to the corrupt intent and the obtain or retain business elements of the FCPA that the Second Circuit summarily rejected.)

The Second Circuit's opinion, while binding only on the district courts in that circuit, affirms the practice of prosecutors that violations of the FCPA's bribery provisions do not face the additional limitations that apply to domestic, public-sector bribery.

IN THE INTERIM

10/1/2019: The DOJ closed its investigation into Eni, an Italian oil and gas company, for alleged corruption in Nigeria and Algeria. In a statement on its website, Eni stated that "neither the company nor its management was involved in any alleged corrupt activities in relation to the OPL 245 transaction in Nigeria." Eni, alongside Royal Dutch Shell plc, has faced allegations of bribery around the acquisition rights to the OPL 245 offshore oil block in Nigeria. Eni was also the subject of a DOJ investigation into gas pipeline contracts that were awarded to Eni's former subsidiary in Algeria. In 2017, an Italian judge ordered Eni and Shell to stand trial on corruption charges brought by public prosecutors in Milan stemming from allegations related to the Nigerian transaction, and that proceeding is ongoing. In a statement released shortly after the company's announcement, the DOJ clarified that it did not close the investigation due to a lack of evidence and said the investigation could be re-opened if circumstances change.

https://www.eni.com/en-IT/media/press-release/2019/10/eni-us-department-of-justice-closes-investigation-into-enis-nigerian-and-algerian-activities.html

10/30/2019: The DOJ announced that Cyrus Ahsani and Saman Ahsani, the former CEO and COO of Monaco-based oil and gas consultancy Unaoil, have pleaded guilty for their roles in a scheme to corruptly facilitate millions of dollars in bribe payments to officials in multiple countries. According to the DOJ press release, the Ahsani brothers each pleaded guilty on March 25 to one count of conspiracy to violate the FCPA for conspiring to facilitate bribes on behalf of companies in foreign countries to secure oil and gas contracts. According to court documents, from approximately 1999 to 2016, the Ahsani brothers conspired with others, including multiple companies and individuals, to make millions of dollars in bribe payments to government officials in Algeria, Angola, Azerbaijan, the Democratic Republic of Congo, Iran, Iraq, Kazakhstan, Libya and Syria. Additionally, court documents stated that the Ahsani brothers laundered the proceeds of their bribery scheme to promote and conceal the schemes and to cause the destruction of evidence to obstruct investigations in the United States and elsewhere.

https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials

11/8/2019: As discussed above, Lawrence Hoskins, a former senior executive with Alstom S.A., was found guilty for his role in a multi-year, multimillion-dollar foreign bribery scheme and a related money laundering scheme after a two-week trial.

https://www.justice.gov/opa/pr/former-senior-alstom-executive-convicted-trial-violating-foreign-corrupt-practices-act-money

11/14/2019: The DOJ filed an indictment in the Southern District of New York charging Jerry Li and Mary Yang with bribing Chinese officials for ten years and covering it up by lying to the SEC and destroying evidence. According to the indictment, Yang, the former head of external affairs for a Chinese company, allegedly collected $772,000 in reimbursement during a six-month period in 2012 "for purportedly entertaining 4,312 government officials at 239 meals, or more than one meal per day." Between 2007 and 2016, the company's external affairs department reimbursed its employees "more than $25 million for entertaining and gift giving to Chinese Government officials." During the SEC's investigation, Li, the company's former head and managing director, allegedly made false statements during sworn testimony and installed a "wiping application" on his company computer "to erase files from the laptop in a manner that would render the deleted files unrecoverable." The SEC has also filed a civil complaint against Li for his role in orchestrating the above-described bribery scheme in China, which included: "(i) bribing officials through payments of cash, gifts, travel, meals and entertainment; (ii) falsifying expense reports for those payments; and (iii) circumventing the company's internal accounting controls to conceal the bribes."

11/18/2019: Jeffrey Shiu Chow, the former lawyer of Keppel Offshore & Marine who helped the DOJ prosecute his ex-employer for FCPA violations in Brazil, was sentenced to time served and probation after pleading guilty to conspiracy to violate the FCPA in August 2017. Chow told the court he realized that Keppel Offshore was overpaying an agent so that the agent could pay bribes to Brazilian officials who could help Keppel Offshore obtain business from Petrobras, Brazil's state-owned oil company. Chow also admitted to preparing contracts used to fund the bribe payments. For his conduct, Chow was sentenced to one year of probation and fined $75,000. In December 2017, Keppel Offshore admitted to paying approximately $55 million in bribes to Brazilian officials during a decade-long scheme. Keppel Offshore and its U.S. subsidiary agreed to pay total penalties of more than $422 million to resolve corruption charges with authorities in the United States, Brazil and Singapore.

11/20/2019: The DOJ unsealed an indictment in a Brooklyn federal court charging Jose Carlos Grubisich, the former CEO of Braskem S.A., a publicly traded Brazilian petrochemical company, for his role in a massive bribery and money laundering scheme involving Braskem and its parent company, Odebrecht S.A. (Odebrecht). As alleged in the indictment, between approximately 2002 and 2014, Grubisich and his co-conspirators created a slush fund by making payments from Braskem's bank accounts in Brazil, New York and Florida pursuant to fraudulent contracts with offshore shell companies secretly controlled by Braskem. The shell companies then funneled the slush funds to a department within Odebrecht that was responsible for making bribe payments on Braskem's behalf. As CEO of Braskem, Grubisich participated in negotiating and approving the bribes to government officials, including the payments to ensure that Braskem retained a contract for a significant petrochemical project in Brazil and that Braskem could obtain favorable pricing in contract negotiations with Petrobras. Grubisich also agreed to falsify Braskem's books and records by causing Braskem to record the payments to the offshore shell companies controlled by Braskem as "commissions" and by signing false certifications submitted by Braskem to the SEC. In 2016, Odebrecht and Braskem pleaded guilty and agreed to pay $3.5 billion in global penalties.

https://www.justice.gov/usao-edny/pr/former-ceo-braskem-indicted-his-role-bribery-scheme

11/22/2019: Samsung Heavy Industries Co. Ltd., a Korean engineering company that specializes in shipbuilding, offshore platform construction and other construction and engineering services, agreed to pay $75 million in penalties to resolve misconduct under the FCPA in Brazil. According to court documents, Samsung conspired to pay approximately $20 million in commission payments over a six-year period to a Brazilian intermediary, knowing that portions of the money would be paid as bribes to officials at Petrobras. The payments were made in connection with a drill ship that Samsung was selling to a Houston-based offshore drilling company. Samsung understood that the Houston company would only exercise its option to purchase the drill ship if it secured a contract with Petrobras. Consequently, the payments Samsung directed to the Petrobras officials were made to cause Petrobras to enter into a contract to charter the drill ship. The DOJ filed a single-count criminal information in the Eastern District of Virginia for conspiracy to violate the anti-bribery provisions of the FCPA. Samsung and the DOJ also entered into a three-year deferred prosecution agreement, which provided, in part, that half of the total penalties would be paid to Brazilian authorities.

https://www.justice.gov/opa/pr/samsung-heavy-industries-company-ltd-agrees-pay-75-million-global-penalties-resolve-foreign

11/25/2019: As discussed above, Mark Lambert, former president of Transportation Logistics Inc. (TLI), a Maryland-based transportation company that provides services for the transportation of nuclear materials to customers in the United States and abroad, was found guilty for his role in a scheme to bribe an official at a subsidiary of Russia's State Atomic Energy Corporation and on related fraud and conspiracy charges.

https://www.justice.gov/opa/pr/former-president-transportation-company-found-guilty-violating-foreign-corrupt-practices-act

11/26/2019: Alstom Network UK Ltd (Alstom) was ordered to pay €16.4 million (~$21.2 million) for conspiracy to corruptly obtain a contract to supply trams in Tunisia, ending a decade-long investigation by the SFO of the Paris-based company. According to the SFO press release, Alstom was convicted in April 2018 of conspiracy after paying Construction et Gestion Nevco Inc. (Nevco) to secure a contract with Transtu, the company responsible for running the Tunis metro. To meet internal compliance checks and to make the Nevco agreement appear legitimate, Alstom produced paperwork as "evidence" of services rendered. In reality, Nevco was simply a conduit for bribes.

https://www.sfo.gov.uk/2019/11/25/sfos-alstom-case-concludes-with-sentencing-of-alstom-network-uk-ltd/

12/6/2019: As discussed above, Telefonaktiebolaget LM Ericsson (Ericsson), a multinational networking and telecommunications company headquartered in Stockholm, Sweden, has agreed to pay over $1 billion to resolve anti-corruption investigations by both the DOJ and the SEC.

https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case

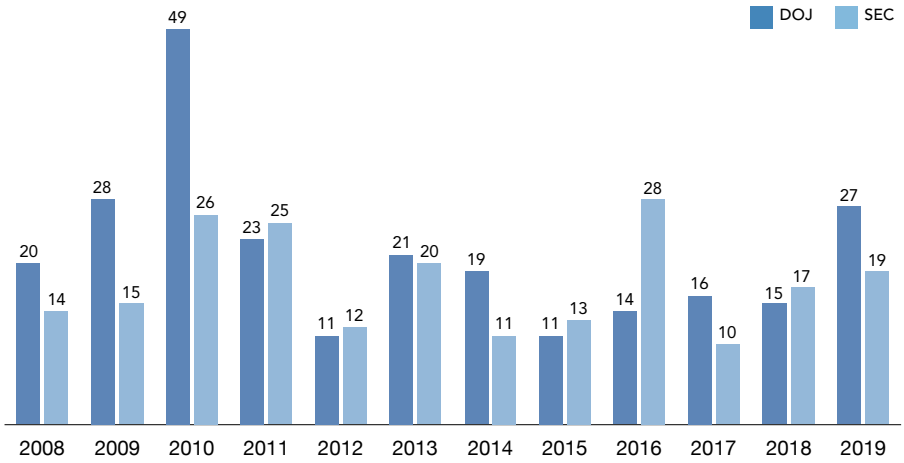
https://www.sec.gov/news/press-release/2019-254

12/16/2019: The SEC announced charges against former Goldman Sachs Group Inc. executive Tim Leissner for paying unlawful bribes to various government officials to secure lucrative contracts for Goldman Sachs. According to the SEC order, beginning in 2012, Leissner used a third-party intermediary to bribe high-ranking government officials in Malaysia and the UAE. The order found that these bribes enabled Goldman Sachs to obtain lucrative business, including underwriting $6.5 billion in bond offerings, from 1Malaysia Development Berhard (1MDB), a Malaysian government-owned investment fund. The order further found that Leissner personally received approximately $43.7 million in illicit payments for his role in facilitating the bribe scheme. Leissner consented to the SEC order finding that he violated the anti-bribery, internal accounting controls and books and records provisions of the FCPA and agreed to be permanently barred from the securities industry. The SEC order requires Leissner to pay disgorgement of $43.7 million, which will be offset by amounts paid pursuant to a forfeiture order as part of a resolution in a previously instituted parallel criminal action by the DOJ.

https://www.sec.gov/news/press-release/2019-260

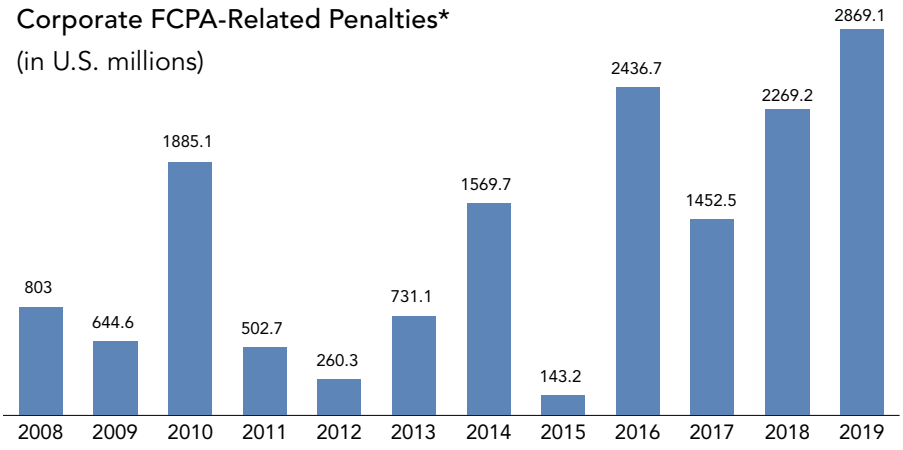
FCPA GOVERNMENT INVESTIGATIONS AND CORPORATE SETTLEMENTS

FCPA-Related Cases*



* New criminal or civil cases (settled or contested) instituted by year

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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