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The Broad Reach of the Foreign Corrupt Practices Act

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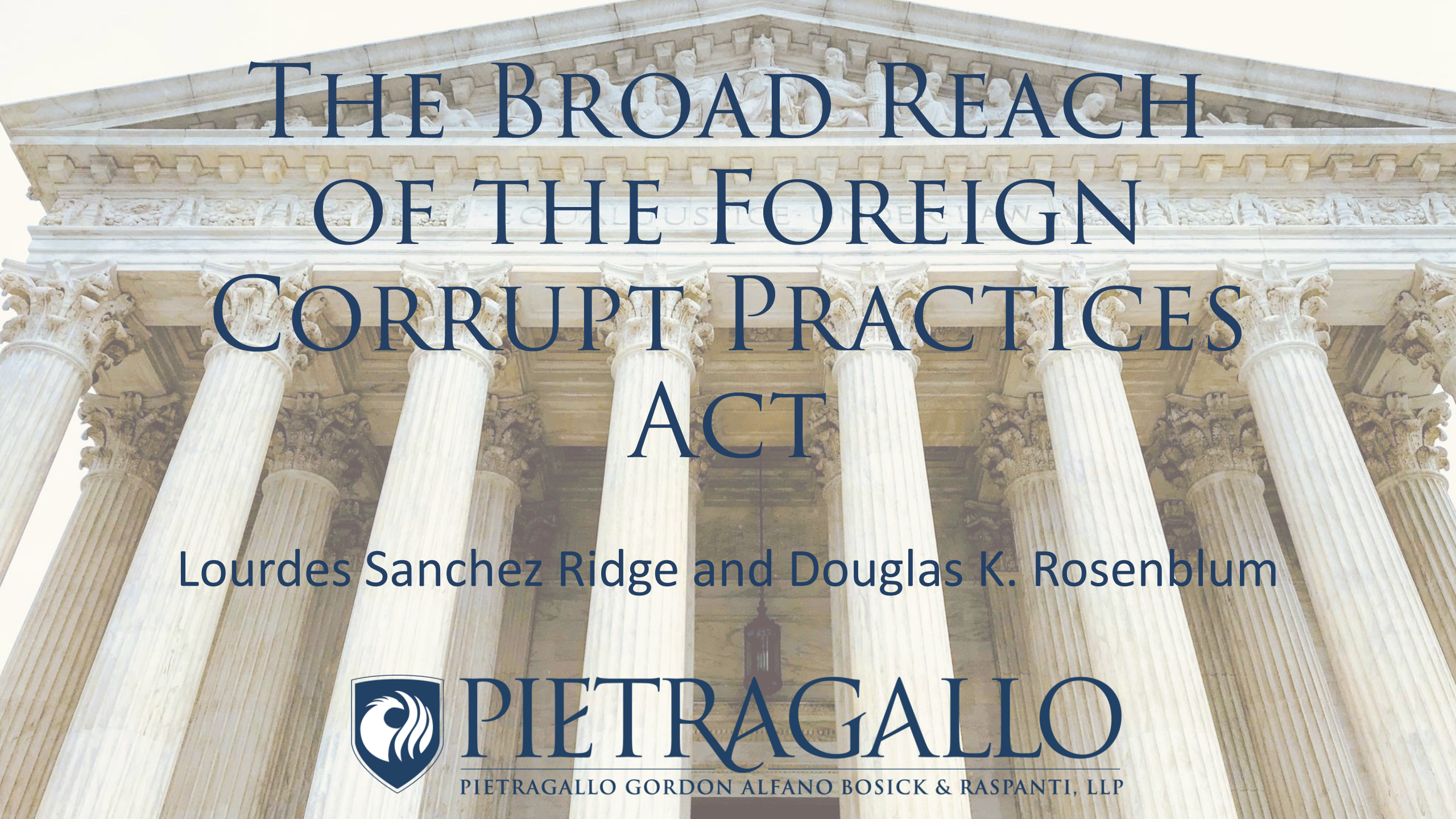

The Broad Reach of the Foreign Corrupt Practices Act

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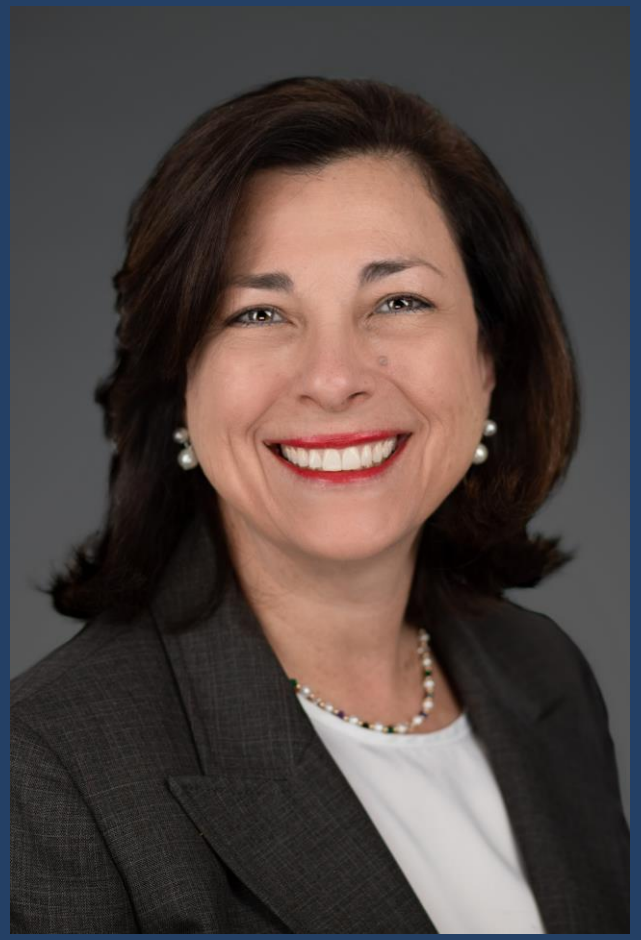
Today's Speakers



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Foreign Corrupt Practices Act

- Signed into law on December 19, 1977 by President Carter
- 2 key enforcement provisions:
  - Prohibition on bribery of foreign officials
    - 15 U.S.C. § 78dd-1(a)
  - Accounting and reporting provisions for companies registered with the Securities and Exchange Commission
    - "books and records" provision
    - 15 U.S.C. § 78m

The Broad Reach of the Foreign Corrupt Practices Act

- FCPA applies to U.S. companies and citizens acting abroad; AND
- FCPA applies to foreign companies with an American presence/subsidiary

Prohibition on bribery of foreign officials

- 15 U.S.C. § 78dd-1(a)
- It shall be unlawful for any issuer of registered securities to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to:
  - A foreign official
  - A foreign political party
  - A candidate seeking office as a foreign official

Purpose of Payment

- Influencing any act or decision of such foreign official/party/candidate in their official capacities;
- Inducing such foreign official/party/candidate to do or omit to do any act in violation of the lawful duty of such official/party/candidate; or
- Securing any improper advantage.

Exception

- The prohibition shall 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 by a foreign official/party/candidate
  - Difficult to establish
  - Fact specific
  - Case law not well developed

Routine Governmental Action

- Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country
- Processing governmental papers, such as visas and work orders
- Providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country
- Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration

Books and Records

- 15 U.S.C. § 78m
- Every company issuing securities is required to:
  - 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;
  - Devise and maintain a system of internal accounting controls.
- When engaging in inappropriate payments, for example, the company's books and records will not accurately reflect transactions
- Internal controls should prevent bribery

Parallel Proceedings

- Bribery provision is generally the subject of criminal investigation by DOJ
- DOJ pilot program: disclosure and cooperation
- Yates memo
- Privilege issues
- In the end, corporations don’t go to jail; people do

Parallel Proceedings

- Books and records violations are generally the subject of civil investigation by SEC
- Administrative proceeding vs. civil suit
- Injunctive relief
- Civil monetary penalties
- Disgorgement

  Kokesh v. SEC, decided unanimously by U.S. Supreme Court on June 5, 2017

  Disgorgement is a penalty and is subject to a 5-year statute of limitations.

Why is knowledge of the FCPA important?

- Increased prosecutions in US
- Increased prosecutions and cooperation with U.S. by other countries – Italy, Latin America, UK
- Increased prosecutions of individuals
- Increased monetary fines
- Collateral consequences
  - debarment, reputational damage, monitorship, loss of export privileges, etc.
- Recent example
  - Walmart, Petrobras

What to do if an FCPA issue arises?

Internal Investigation

- Why?
  - DOJ's expectation that company will perform and disclose the results of investigation
  - Credits
- How?
  - Gather evidence/talk to witnesses
  - Lock down evidence
  - Document every step of the investigation
- Considerations
  - In-house or outside counsel
  - Data privacy in different countries
  - Whether to disclose violation voluntarily
    - New DOJ policy – declination of prosecution
  - Whether to cooperate with government
    - Disclosure of privileged material - waiver
  - Hand over individuals

Avoid FCPA issues before they arise

- Third-Party/M&A Due Diligence
  - Checklist

Checklist

A questionnaire should address the following issues and should be tailored to the industry and circumstances:

1. Is it necessary to hire a third party affiliate?
2. Is the country the company seeking to do business in ranked low in the corruption index compiled by Transparency International?
3. Is the third party affiliate a government official or is closely related to a government official?
    a) If the third party affiliate is a company, the same question should be asked of each owner/partner/director/joint venture of the company until all entities identified are individuals or government entities.
4. Has the third party affiliate or any of its owners been convicted of a crime?
5. Has the third-party affiliate or any of its owners ever filed for bankruptcy?
6. Is the third party competent and have experience?
7. Does the third party have the required staff to perform the services?
8. Does the third party have a legitimate physical address?

Checklist Continued

9. Did any member of the foreign country recommend the third party affiliate?
10. Does the third party have a good reputation in the community (investigate public database, U.S. embassy, reputable people in the community and industry, Dun & Bradstreet Report, U.S. Chamber of Commerce, etc.)?
11. Is the compensation reasonable and customary in the country?
12. What are the banking and credit references of the third party affiliates?
13. Has the third party affiliate requested anything out of the ordinary, such as to be paid through a third party, third country or in cash or to be sent false invoices?

Compliance Plans

- **Tone at the top**
  - State policy clearly – "thou shall not …"
  - Compliance Officer report to Board
  - Risk assessment
  - Training
  - Discipline measures
  - Monitoring/auditing
    - Annually or bi-annually review and update the policies;
    - Examine the systems that are in place to implement the policy;
    - Review a sample of the records that shows how the plan is working;
    - Interview employees to obtain feedback on the practical aspect of the plan;
    - Implement changes if necessary.
  - Reporting - hotlines/emails/text/dropbox

Robust Compliance Programs

- International commerce is filled with legal potholes and quicksand
- A compliance program for a purely domestic concern is not sufficient for a company engaging in international commerce
- Compliance must be integral to the corporation – not just a paper that sits on a shelf that no one reads

New Government Guidance

- On April 30, 2019, DOJ published new guidance on corporate compliance programs
  - https://www.justice.gov/criminal-fraud/page/file/937501/download
  - Government uses this guidance in determining "whether to bring charges, and negotiating plea or other agreements"
  - Three "fundamental" questions prosecutors should ask:
    - Is the corporation's compliance program well designed?
    - Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?
    - Does the corporation's compliance program work in practice?

Takeaways

- If you represent or work for an American company that operates abroad, the FCPA should be front of mind
- If you represent or work for a foreign company that operates in the United States, the FCPA should be front of mind
- FCPA covers corrupt payments AND improperly maintaining books and records
- Effective compliance programs and training are the best tools to prevent FCPA violations and prosecutions
- Corporations don’t go to jail; people do

Questions

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guest column

Expected FCPA Enforcement in Latin America

by LOURDES SÁNCHEZ RIDGE

Will the Trump administration's changes in corruption enforcement policies decrease prosecutions of companies and individuals doing business in Latin America? Not likely.

Despite the public perception that the Trump administration is relaxing its antibribery Foreign Corrupt Practices Act (FCPA) enforcement efforts, in the last couple of years we have seen an increase in FCPA enforcement against individuals and companies doing business in Latin America. For decades the United States has had very little cooperation from certain Latin American countries. In recent years, though, there have been massive public demonstrations against corruption in the region. For instance, in Mexico, mass demonstrations against corruption drew tens of thousands of people to the streets, culminating in the election of leftist Andrés Manuel López Obrador. Likewise, in Brazil, where there have been violent protests in the past two years. Unstable governments, institutionalized government corruption, and government-controlled industries have traditionally created fertile ground for corruption in these countries. The citizens of these countries have believed for years, and continue to believe, that the major cause of their economic woes and unstable governments is due to corruption. (*Corruption Perceptions Index 2017*, Transparency Int'l (Feb. 21, 2018), https://bit.ly/2LABx5m.) These citizens' protests in Latin America have been a significant catalyst for many of these countries to enact anticorruption legislation and aggressively prosecute bribery. This anticorruption climate, in conjunction with new US policies that enhance cooperation among the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) and foreign countries, has made it easier for DOJ and the SEC to investigate violations of the FCPA and creates a grand opportunity for the United States to increase its FCPA enforcement efforts. Companies and individuals doing business in Latin America should be aware of these new policies and take appropriate measures to successfully avoid investigation or prosecution in the United States. This paper contains significant changes in laws and prosecutions in Latin America and changes in enforcement tactics and policies in the United States that may lead to an increase in FCPA prosecutions.

Significant Changes in Latin America

Brazil began its wave to combat corruption with the introduction of the Clean Company Act of 2014. This Act holds companies responsible for the corrupt acts of its employees. (*Brazilian Clean Company Act*, GAN Integrity (Nov. 2015), https://bit.ly/2JpqtFE.) Under this Act and the Criminal Organizations Act, Brazil has recovered more than $3 billion in penalties and jailed top government and business leaders—including its former president, Lula da Silva. A task force was formed, called Operation Java Lato (Car Wash), that prosecuted transnational companies such as Petrobras, Odebrecht/Braskem, J&F, Rolls Royce, and Embraer. These investigations and prosecutions revealed significant corruption throughout many countries in Latin America and caused many prosecutions. Due to these prosecutions, Brazilian companies are now starting to take compliance with anticorruption laws more seriously and are learning from their US counterparts on developing more robust compliance programs. As a result of Brazil's aggressive enforcement against corruption, DOJ has investigated 30 companies.

In 2017 Mexico passed Mexico's General Law of Administrative Responsibility. Under this law, corporations are subject to criminal liability. This law prohibits bribery of public officials as well as private parties, including grease payments. Although it is too soon to tell whether this new law will be enforced appropriately, President Andrés Manuel López Obrador ran his political campaign

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on eliminating corruption. Only time will tell whether he is committed to honoring his campaign promise.

In 2016 Colombia enacted the Colombia's Transnational Bribery Act (Ley 178). This is the first foreign bribery statute in Colombia. It holds companies liable for violations committed by their employees. It is expected that new laws will be enacted protecting whistleblowers, requiring companies to identify individuals involved in bribery, and eliminating house arrest for those convicted of corruption. In 2018, Colombia's enforcement agency, "Supersociedades," prosecuted its first company under this Act and recovered $1.8 million in penalties. It also prosecuted a company for refusing to provide information about a separate company's involvement in a bribery scheme. This prosecution resulted in a $50,000 fine. Additionally, in 2017, Colombia's former National Director of Anti-Corruption, Luis Gustavo Moreno Rivera, was arrested, convicted, and sentenced to five years in prison for soliciting a bribe from an official that Mr. Moreno Rivera's agency was investigating for bribery. Mr. Moreno Rivera took the bribery in Florida. In Colombia, Mr. Moreno Rivera cooperated with the prosecutor in unveiling a massive corruption scheme in the judiciary and congressional branches. Mr. Moreno Rivera was then extradited to the United States, prosecuted for money-laundering and FCPA violations, and sentenced on January 2, 2019, to four years in prison. (Jay Weaver, *Ex-Colombian Official Gets Four Years in U.S. Prison for Taking Bribe in Mall Bathroom*, Miami Herald (Jan. 2, 2019, 6:46 PM), https://hrld.us/2YhkHKf.) Supersociedades is currently investigating 12 companies for foreign bribery. (Jarrod Demir, *Colombia Investigating 12 Companies for Foreign Bribery: Report*, Colombia Reps. (May 7, 2018), https://bit.ly/2VXuqb6.)

In 2018 Argentina's new law, "Law on Corporate Criminal Liability," took effect, imposing criminal liability on corporations and their parent companies for bribery. (Canosa Abogados, *Argentina: Law No. 27401: Corporate Criminal Liability*, Mondaq (Dec. 5, 2018), https://bit.ly/2JClphp.) There have been several high-profile prosecutions, including the former president of Argentina, Cristina Kirshner, who is awaiting trial for accepting millions of dollars in bribes in exchange for government contracts. (Agence France-Presse, *Cristina Kirchner to Go on Trial for Corruption After Chauffeur's Notebooks Reveal Bribes Paid to Businessmen*, The Telegraph (Dec. 20, 2018, 9:31 PM), https://bit.ly/2JbrIOM.)

Unfortunately, despite national and international outcry against corruption in these countries, Guatemala and Venezuela have failed to heed to the public outrage. In Guatemala, on January 8, 2019, President Jimmy Morales demanded the expulsion and disbandment of Peru's anticorruption commission, Comisión Internacional Contra la Impunidad en Guatemala (CICIG). The president's motivation, it is believed, is due to the Commission's investigation of him. (*El gobierno de Guatemala ordena la expulsión de la Cicig*, BBC News Mundo (Jan. 8, 2019), https://bbc.in/2Ly97c8.). In the United States, the DOJ has recently prosecuted numerous individuals for FCPA violations. In particular, it prosecuted a scheme where Venezuela's former national treasurer received over $1 billion of bribes from a television billionaire mogul. The foreign official was sentenced to 10 years in prison in the United States. (Vivian Sequera et al., *Venezuela Ex-treasurer Who Took $1 Billion in Bribes Sentenced to 10 Years*, Reuters (Nov. 27, 2018, 12:55 PM), https://reut.rs/2PnydqO/.) The television owner was charged with FCPA violations on November 20, 2018; that case is still pending. (*Venezuelan Billionaire News Network Owner, Former Venezuelan National Treasurer and Former Owner of Dominican Republic Bank Charged in Money Laundering Conspiracy Involving over $1 Billion in Bribes*, U.S. Dep't of Justice (Nov 20, 2018), https://bit.ly/2H9yw6J.)

New US Policies

Since 2016 there have been significant changes in US enforcement policies on foreign bribery. At first blush it may seem that these changes benefit companies and individuals, but in practice, they may not. In 2016 Deputy Attorney General Rod Rosenstein announced an FCPA pilot program. This program was incorporated into the *US Attorneys Manual*. (U.S. Dep't of Justice, *U.S. Attorney's Manual Insert*, https://bit.ly/2VchKJ7.) Under the new policy, the DOJ may decline prosecution of any company that voluntarily self-discloses, fully cooperates with an FCPA investigation on a timely basis, identifies individuals who are "substantially" involved in the misconduct, remediates misconduct, and disgorges ill-gotten profits. The DOJ, though, has the final say as to whether the company has met the requirements for declination. In the first 18 months of the pilot program, at least 30 companies voluntarily disclosed FCPA violations. (Press Release, U.S. Dep't of Justice, Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://bit.ly/2HeIFjX.) That is a 67 percent increase from the previous 18 months. Since the inception of the pilot program in 2016 until the present, DOJ has issued declination letters to only 11 corporations. (*Declina-*

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particularly true with regard to the use of driver's license suspensions as punishment for nonpayment. The suspension of a driver's license when an individual is unable to pay fines and fees is particularly invidious. A driver's license suspension not only makes it difficult for an individual to take care of basic needs such as caring for children or grocery shopping, it also often renders the person unable to work, which further impedes the individual's ability to pay down fines and fees. Frequently, the individual drives despite the suspension, which can result in other charges, incurring additional fines and fees and furthering a vicious cycle of mounting debt and prolonged involvement with the criminal justice system. Several states, including Florida, Illinois, Oregon, Minnesota, and Montana, are considering reforms to limit suspensions as a punishment for failure to pay. The ABA has been able to express support for some of these bills, citing the Guidelines.

This reform, even if successful, is the tip of the iceberg. Much more work is needed to ensure that no individual is punished in our courts solely for being poor. The Guidelines provide a roadmap for policymakers, who should regularly evaluate and improve the administration of fines and fees in their jurisdictions.

The *ABA Ten Guidelines on Court Fines and Fees* are available on the website of the ABA Standing Committee on Legal Aid and Indigent Defendants under Public Defense Policies.■

Guest Column

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tions, U.S. Dep't of Justice (Feb. 15, 2019), https://bit.ly/2H4NgUc.) Because of its success at encouraging companies to self-disclose, the pilot program is now permanent and has been expanded to other criminal violations. Even though there is an opportunity for companies to receive a declination from the government if they self-disclose, there are no guarantees and the decision is contingent on the subjective criteria of the DOJ. Therefore, companies need to fully understand the new policy and ascertain whether the policy as actually practiced will benefit them before determining to self-disclose.

Additionally, in May 2018 the DOJ announced a new policy against "piling on" fines and penalties resulting from the same misconduct but prosecuted by different jurisdictions. This policy requires US prosecutors to coordinate and cooperate with other domestic and international prosecuting agencies in an effort to avoid duplicative fines and disproportionate and inefficient enforcement. The policy, which is also incorporated into the *US Attorneys Manual*, seeks more equitable global outcomes for companies. DOJ also announced that it will give credit to those companies that identify employees who have "substantial involvement" in a bribery scheme. Prior to this policy, DOJ gave credit to companies that disclosed any "relevant facts about the individuals involved in corporate misconduct." Although it may seem that this new policy aims at targeting only those individuals who are the real violators of the statute, a company may find itself self-disclosing and then realizing that DOJ's definition of "substantial involvement" is at odds with its own definition, thereby not obtaining the credit anticipated. Again, this policy may seem beneficial to corporations and individuals, but with the support and assistance of Latin American countries that are aggressively enforcing anticorruption laws, we may see more FCPA prosecutions in the region and more fines recovered by the United States.

Latin American countries that are actively and seriously prosecuting bribery are looking towards the United States as a model in adopting compliance plans, enacting laws similar to the FCPA, and adopting prosecution tactics. Although the U.S.'s new policies and practices seem to relax FCPA enforcement efforts, they may, in reality, increase FCPA prosecutions in Latin America. With this prosecutorial and cooperative momentum in Latin America and the new US policies, those doing business in Latin America will need to understand the new laws and enforcement practices in those countries as well as the new policies and enforcement practices in the United States before determining a course of action. ■

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

Guidance Document
Updated: April 2019

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

(Updated April 2019)

Introduction

The "Principles of Federal Prosecution of Business Organizations" in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include "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 the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. *See* U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, the memorandum entitled "Selection of Monitors in Criminal Division Matters" issued by Assistant Attorney General Brian Benczkowski (hereafter, the "Benczkowski Memo") instructs prosecutors to consider, at the time of the resolution, "whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future" to determine whether a monitor is appropriate.

This document is meant 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).

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make an individualized determination in each case. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three "fundamental questions" a prosecutor should ask:

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

(Updated April 2019)

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?" In other words, is the program being implemented effectively?
3. "Does the corporation's compliance program work" in practice?

See JM § 9-28.800.

In answering each of these three "fundamental questions," prosecutors may evaluate the company's performance on various topics that the Criminal Division has frequently found relevant in evaluating a corporate compliance program. The sample topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue.[1] Even though we have organized the topics under these three fundamental questions, we recognize that some topics necessarily fall under more than one category.

I. Is the Corporation's Compliance Program Well Designed?

The "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct." JM 9-28.800.

Accordingly, prosecutors should examine "the comprehensiveness of the compliance program," JM 9-28.800, ensuring that there is not only a clear message that misconduct is not tolerated, but also policies and procedures – from appropriate assignments of responsibility, to training programs, to systems of incentives and discipline – that ensure the compliance program is well-integrated into the company's operations and workforce.

A. Risk Assessment

The starting point for a prosecutor's evaluation of whether a company has a well-designed compliance program is to understand the company's business from a commercial perspective, how the company has identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks.

Prosecutors should consider whether the program is appropriately "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business" and "complex regulatory environment[]." JM 9-28.800.[2] For example, prosecutors should consider whether the company has analyzed and addressed the varying risks presented by, among other factors, the location of its operations, the industry sector, the competitiveness

of the market, the regulatory landscape, potential clients and business partners, transactions with foreign governments, payments to foreign officials, use of third parties, gifts, travel, and entertainment expenses, and charitable and political donations.

Prosecutors should also consider "[t]he effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment" and whether its criteria are "periodically updated." *See, e.g.*, JM 9-47-120(2)(c); U.S.S.G. § 8B2.1(c) ("the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct").

Prosecutors may credit the quality and effectiveness of a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction in a low-risk area. Prosecutors should therefore consider, as an indicator of risk-tailoring, "revisions to corporate compliance programs in light of lessons learned." JM 9-28.800.

- **Risk Management Process** – What methodology has the company used to identify, analyze, and address the particular risks it faces? What information or metrics has the company collected and used to help detect the type of misconduct in question? How have the information or metrics informed the company's compliance program?

- **Risk-Tailored Resource Allocation –** Does the company devote a disproportionate amount of time to policing low-risk areas instead of high-risk areas, such as questionable payments to third-party consultants, suspicious trading activity, or excessive discounts to resellers and distributors? Does the company give greater scrutiny, as warranted, to high-risk transactions (for instance, a large-dollar contract with a government agency in a high-risk country) than more modest and routine hospitality and entertainment?

- **Updates and Revisions** – Is the risk assessment current and subject to periodic review? Have there been any updates to policies and procedures in light of lessons learned? Do these updates account for risks discovered through misconduct or other problems with the compliance program?

B. Policies and Procedures

Any well-designed compliance program entails policies and procedures that give both content and effect to ethical norms and that address and aim to reduce risks identified by the company as part of its risk assessment process. As a threshold matter, prosecutors should examine whether the company has a code of conduct that sets forth, among other things, the

company's commitment to full compliance with relevant Federal laws that is accessible and applicable to all company employees. As a corollary, prosecutors should also assess whether the company has established policies and procedures that incorporate the culture of compliance into its day-to-day operations.

- **Design** – What is the company's process for designing and implementing new policies and procedures, and has that process changed over time? Who has been involved in the design of policies and procedures? Have business units been consulted prior to rolling them out?

- **Comprehensiveness** – What efforts has the company made to monitor and implement policies and procedures that reflect and deal with the spectrum of risks it faces, including changes to the legal and regulatory landscape?

- **Accessibility** – How has the company communicated its policies and procedures to all employees and relevant third parties? If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees' access?

- **Responsibility for Operational Integration** – Who has been responsible for integrating policies and procedures? Have they been rolled out in a way that ensures employees' understanding of the policies? In what specific ways are compliance policies and procedures reinforced through the company's internal control systems?

- **Gatekeepers** – What, if any, guidance and training has been provided to key gatekeepers in the control processes (*e.g.*, those with approval authority or certification responsibilities)? Do they know what misconduct to look for? Do they know when and how to escalate concerns?

C. Training and Communications

Another hallmark of a well-designed compliance program is appropriately tailored training and communications.

Prosecutors should assess the steps taken by the company to ensure that policies and procedures have been integrated into the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners. Prosecutors should also assess whether the company has relayed information in a manner tailored to the audience's size, sophistication, or subject matter expertise. Some companies, for instance, give employees practical advice or case studies to address real-life scenarios, and/or guidance on how to obtain ethics advice on a case-by-case basis as needs arise.

Prosecutors should also assess whether the training adequately covers prior compliance incidents and how the company measures the effectiveness of its training curriculum.

Prosecutors, in short, should examine whether the compliance program is being disseminated to, and understood by, employees in practice in order to decide whether the compliance program is "truly effective." JM 9-28.800.

- **Risk-Based Training** – What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees, including training that addresses risks in the area where the misconduct occurred? Have supervisory employees received different or supplementary training? What analysis has the company undertaken to determine who should be trained and on what subjects?

- **Form/Content/Effectiveness of Training** – Has the training been offered in the form and language appropriate for the audience? Is the training provided online or in-person (or both), and what is the company's rationale for its choice? Has the training addressed lessons learned from prior compliance incidents? How has the company measured the effectiveness of the training? Have employees been tested on what they have learned? How has the company addressed employees who fail all or a portion of the testing?

- **Communications about Misconduct** – What has senior management done to let employees know the company's position concerning misconduct? What communications have there been generally when an employee is terminated or otherwise disciplined for failure to comply with the company's policies, procedures, and controls (*e.g.*, anonymized descriptions of the type of misconduct that leads to discipline)?

- **Availability of Guidance** – What resources have been available to employees to provide guidance relating to compliance policies? How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?

D. Confidential Reporting Structure and Investigation Process

Another hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct. Prosecutors should assess whether the company's complaint-handling process includes pro-active measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers. Prosecutors should also assess the company's processes for handling

investigations of such complaints, including the routing of complaints to proper personnel, timely completion of thorough investigations, and appropriate follow-up and discipline.

Confidential reporting mechanisms are highly probative of whether a company has "established corporate governance mechanisms that can effectively detect and prevent misconduct." JM 9-28.800; *see also* U.S.S.G. § 8B2.1(b)(5)(C) (an effectively working compliance program will have in place, and have publicized, "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation").

- **Effectiveness of the Reporting Mechanism** – Does the company have an anonymous reporting mechanism, and, if not, why not? How is the reporting mechanism publicized to the company's employees? Has it been used? How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information?

- **Properly Scoped Investigations by Qualified Personnel** – How does the company determine which complaints or red flags merit further investigation? How does the company ensure that investigations are properly scoped? What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and properly documented? How does the company determine who should conduct an investigation, and who makes that determination?

- **Investigation Response** – Does the company apply timing metrics to ensure responsiveness? Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?

- **Resources and Tracking of Results** – Are the reporting and investigating mechanisms sufficiently funded? How has the company collected, tracked, analyzed, and used information from its reporting mechanisms? Does the company periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses?

E. Third Party Management

A well-designed compliance program should apply risk-based due diligence to its third-party relationships. Although the degree of appropriate due diligence may vary based on the size

and nature of the company or transaction, prosecutors should assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transactions.

Prosecutors should also assess whether the company knows its third-party partners' reputations and relationships, if any, with foreign officials, and the business rationale for needing the third party in the transaction. For example, a prosecutor should analyze whether the company has ensured that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the work, and that its compensation is commensurate with the work being provided in that industry and geographical region. Prosecutors should further assess whether the company engaged in ongoing monitoring of the third-party relationships, be it through updated due diligence, training, audits, and/or annual compliance certifications by the third party.

In sum, a company's third-party due diligence practices are a factor that prosecutors should assess to determine whether a compliance program is in fact able to "detect the particular types of misconduct most likely to occur in a particular corporation's line of business." JM 9-28.800.

- **Risk-Based and Integrated Processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?

- **Appropriate Controls** – How does the company ensure there is an appropriate business rationale for the use of third parties? If third parties were involved in the underlying misconduct, what was the business rationale for using those third parties? What mechanisms exist to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?

- **Management of Relationships** – How has the company considered and analyzed the compensation and incentive structures for third parties against compliance risks? How does the company monitor its third parties? Does the company have audit rights to analyze the books and accounts of third parties, and has the company exercised those rights in the past? How does the company train its third party relationship

managers about compliance risks and how to manage them? How does the company incentivize compliance and ethical behavior by third parties?

- **Real Actions and Consequences** – Does the company track red flags that are identified from due diligence of third parties and how those red flags are addressed? Does the company keep track of third parties that do not pass the company's due diligence or that are terminated, and does the company take steps to ensure that those third parties are not hired or re-hired at a later date? If third parties were involved in the misconduct at issue in the investigation, were red flags identified from the due diligence or after hiring the third party, and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues?

F. Mergers and Acquisitions (M&A)

A well-designed compliance program should include comprehensive due diligence of any acquisition targets. Pre-M&A due diligence enables the acquiring company to evaluate more accurately each target's value and negotiate for the costs of any corruption or misconduct to be borne by the target. Flawed or incomplete due diligence can allow misconduct to continue at the target company, causing resulting harm to a business's profitability and reputation and risking civil and criminal liability.

The extent to which a company subjects its acquisition targets to appropriate scrutiny is indicative of whether its compliance program is, as implemented, able to effectively enforce its internal controls and remediate misconduct at all levels of the organization.

- **Due Diligence Process** – Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What is the M&A due diligence process generally?

- **Integration in the M&A Process** – How has the compliance function been integrated into the merger, acquisition, and integration process?

- **Process Connecting Due Diligence to Implementation** – What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process? What has been the company's process for implementing compliance policies and procedures at new entities?

II. Is the Corporation's Compliance Program Being Implemented Effectively?

Even a well-designed compliance program may be unsuccessful in practice if implementation is lax or ineffective. Prosecutors are instructed to probe specifically whether a compliance program is a "paper program" or one "implemented, reviewed, and revised, as appropriate, in an effective manner." JM 9-28.800. In addition, prosecutors should determine "whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts." JM 9-28.800. Prosecutors should also determine "whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it." JM 9-28.800; *see also* JM 9-47.120(2)(c) (criteria for an effective compliance program include "[t]he company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated").

A. Commitment by Senior and Middle Management

Beyond compliance structures, policies, and procedures, it is important for a company to create and foster a culture of ethics and compliance with the law. The effectiveness of a compliance program requires a high-level commitment by company leadership to implement a culture of compliance from the top.

The company's top leaders – the board of directors and executives – set the tone for the rest of the company. Prosecutors should examine the extent to which senior management have clearly articulated the company's ethical standards, conveyed and disseminated them in clear and unambiguous terms, and demonstrated rigorous adherence by example. Prosecutors should also examine how middle management, in turn, have reinforced those standards and encouraged employees to abide by them. *See* U.S.S.G. § 8B2.1(b)(2)(A)-(C) (the company's "*governing authority* shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight" of it; "[*h*]*igh-level personnel* … shall ensure that the organization has an effective compliance and ethics program" (emphasis added)).

- **Conduct at the Top** – How have senior leaders, through their words and actions, encouraged or discouraged compliance, including the type of misconduct involved in the investigation? What concrete actions have they taken to demonstrate leadership in the company's compliance and remediation efforts? How have they modelled proper behavior to subordinates? Have managers tolerated greater compliance risks in pursuit of new business or greater revenues? Have managers encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties?

- **Shared Commitment** – What actions have senior leaders and middle-management stakeholders (*e.g.*, business and operational managers, finance, procurement, legal, human resources) taken to demonstrate their commitment to compliance or compliance personnel, including their remediation efforts? Have they persisted in that commitment in the face of competing interests or business objectives?

- **Oversight** – What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?

B. Autonomy and Resources

Effective implementation also requires those charged with a compliance program's day-to-day oversight to act with adequate authority and stature. As a threshold matter, prosecutors should evaluate how the compliance program is structured. Additionally, prosecutors should address the sufficiency of the personnel and resources within the compliance function, in particular, whether those responsible for compliance have: (1) sufficient seniority within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board's audit committee. The sufficiency of each factor, however, will depend on the size, structure, and risk profile of the particular company. "A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization." Commentary to U.S.S.G. § 8B2.1 note 2(C). By contrast, "a small organization may [rely on] less formality and fewer resources." *Id.* Regardless, if a compliance program is to be truly effective, compliance personnel must be empowered within the company.

Prosecutors should evaluate whether "internal audit functions [are] conducted at a level sufficient to ensure their independence and accuracy," as an indicator of whether compliance personnel are in fact empowered and positioned to "effectively detect and prevent misconduct." JM 9-28.800. Prosecutors should also evaluate "[t]he resources the company has dedicated to compliance," "[t]he quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk," and "[t]he authority and independence of the compliance function and the availability of compliance expertise to the board." JM 9-47.120(2)(c); *see also* JM 9-28.800 (instructing prosecutors to evaluate whether "the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law"); U.S.S.G. § 8B2.1(b)(2)(C) (those with "day-to-day operational

responsibility" shall have "adequate resources, appropriate authority and direct access to the governing authority or an appropriate subgroup of the governing authority").

- **Structure** – Where within the company is the compliance function housed (e.g., within the legal department, under a business function, or as an independent function reporting to the CEO and/or board)? To whom does the compliance function report? Is the compliance function run by a designated chief compliance officer, or another executive within the company, and does that person have other roles within the company? Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance responsibilities within the company? Why has the company chosen the compliance structure it has in place?

- **Seniority and Stature** – How does the compliance function compare with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company's strategic and operational decisions? How has the company responded to specific instances where compliance raised concerns? Have there been transactions or deals that were stopped, modified, or further scrutinized as a result of compliance concerns?

- **Experience and Qualifications** – Do compliance and control personnel have the appropriate experience and qualifications for their roles and responsibilities? Has the level of experience and qualifications in these roles changed over time? Who reviews the performance of the compliance function and what is the review process?

- **Funding and Resources** – Has there been sufficient staffing for compliance personnel to effectively audit, document, analyze, and act on the results of the compliance efforts? Has the company allocated sufficient funds for the same? Have there been times when requests for resources by compliance and control functions have been denied, and if so, on what grounds?

- **Autonomy** – Do the compliance and relevant control functions have direct reporting lines to anyone on the board of directors and/or audit committee? How often do they meet with directors? Are members of the senior management present for these meetings? How does the company ensure the independence of the compliance and control personnel?

- **Outsourced Compliance Functions** – Has the company outsourced all or parts of its compliance functions to an external firm or consultant? If so, why, and who is responsible for overseeing or liaising with the external firm or consultant? What level of access does the external firm or consultant have to company information? How has the effectiveness of the outsourced process been assessed?

C. Incentives and Disciplinary Measures

Another hallmark of effective implementation of a compliance program is the establishment of incentives for compliance and disincentives for non-compliance. Prosecutors should assess whether the company has clear disciplinary procedures in place, enforces them consistently across the organization, and ensures that the procedures are commensurate with the violations. Prosecutors should also assess the extent to which the company's communications convey to its employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct. *See* U.S.S.G. § 8B2.1(b)(5)(C) ("the organization's compliance program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct").

By way of example, some companies have found that publicizing disciplinary actions internally, where appropriate, can have valuable deterrent effects. At the same time, some companies have also found that providing positive incentives – personnel promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership – have driven compliance. Some companies have even made compliance a significant metric for management bonuses and/or have made working on compliance a means of career advancement.

- **Human Resources Process** – Who participates in making disciplinary decisions, including for the type of misconduct at issue? Is the same process followed for each instance of misconduct, and if not, why? Are the actual reasons for discipline communicated to employees? If not, why not? Are there legal or investigation-related reasons for restricting information, or have pre-textual reasons been provided to protect the company from whistleblowing or outside scrutiny?

- **Consistent Application** – Have disciplinary actions and incentives been fairly and consistently applied across the organization? Are there similar instances of misconduct that were treated disparately, and if so, why?

- **Incentive System** – Has the company considered the implications of its incentives and rewards on compliance? How does the company incentivize compliance and ethical behavior? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied) as a result of compliance and ethics considerations? Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel?

III. Does the Corporation's Compliance Program Work in Practice?

The Principles of Federal Prosecution of Business Organizations require prosecutors to assess "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." JM 9-28.300. Due to the backward-looking nature of the first inquiry, one of the most difficult questions prosecutors must answer in evaluating a compliance program following misconduct is whether the program was working effectively at the time of the offense, especially where the misconduct was not immediately detected.

In answering this question, it is important to note that the existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense. *See* U.S.S.G. § 8B2.1(a) ("[t]he failure to prevent or detect the instant offense does not mean that the program is not generally effective in preventing and deterring misconduct"). Indeed, "[t]he Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees." JM 9-28.800. Of course, if a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively.

In assessing whether a company's compliance program was effective at the time of the misconduct, prosecutors should consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company's remedial efforts.

To determine whether a company's compliance program is working effectively at the time of a charging decision or resolution, prosecutors should consider whether the program evolved over time to address existing and changing compliance risks. Prosecutors should also consider whether the company undertook an adequate and honest root cause analysis to understand both what contributed to the misconduct and the degree of remediation needed to prevent similar events in the future.

For example, prosecutors should consider, among other factors, "whether the corporation has made significant investments in, and improvements to, its corporate compliance

program and internal controls systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future." Benczkowski Memo at 2 (observing that "[w]here a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will not likely be necessary").

A. Continuous Improvement, Periodic Testing, and Review

One hallmark of an effective compliance program is its capacity to improve and evolve. The actual implementation of controls in practice will necessarily reveal areas of risk and potential adjustment. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the applicable industry standards. Accordingly, prosecutors should consider whether the company has engaged in meaningful efforts to review its compliance program and ensure that it is not stale. Some companies survey employees to gauge the compliance culture and evaluate the strength of controls, and/or conduct periodic audits to ensure that controls are functioning well, though the nature and frequency of evaluations may depend on the company's size and complexity.

Prosecutors may reward efforts to promote improvement and sustainability. In evaluating whether a particular compliance program works in practice, prosecutors should consider "revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47-120(2)(c) (looking to "[t]he auditing of the compliance program to assure its effectiveness"). Prosecutors should likewise look to whether a company has taken "reasonable steps" to "ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct," and "evaluate periodically the effectiveness of the organization's" program. U.S.S.G. § 8B2.1(b)(5). Proactive efforts like these may not only be rewarded in connection with the form of any resolution or prosecution (such as through remediation credit or a lower applicable fine range under the Sentencing Guidelines), but more importantly, may avert problems down the line.

- **Internal Audit** – What is the process for determining where and how frequently internal audit will undertake an audit, and what is the rationale behind that process? How are audits carried out? What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis? How have management and the board followed up? How often does internal audit conduct assessments in high-risk areas?

- **Control Testing** – Has the company reviewed and audited its compliance program in the area relating to the misconduct? More generally, what testing of controls, collection and analysis of compliance data, and interviews of employees and third-parties does the company undertake? How are the results reported and action items tracked?

- **Evolving Updates** – How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices? Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training? What steps has the company taken to determine whether policies/procedures/practices make sense for particular business segments/subsidiaries?

- **Culture of Compliance** – How often and how does the company measure its culture of compliance? Does the company seek input from all levels of employees to determine whether they perceive senior and middle management's commitment to compliance? What steps has the company taken in response to its measurement of the compliance culture?

B. Investigation of Misconduct

Another hallmark of a compliance program that is working effectively is the existence of a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company's response, including any disciplinary or remediation measures taken.

- **Properly Scoped Investigation by Qualified Personnel** – How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?

- **Response to Investigations** – Have the company's investigations been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?

C. Analysis and Remediation of Any Underlying Misconduct

Finally, a hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.

Prosecutors evaluating the effectiveness of a compliance program are instructed to reflect back on "the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47.120(3)(c) ("to receive full credit for timely and appropriate remediation" under the FCPA Corporate Enforcement Policy, a company should demonstrate "a root cause analysis" and, where appropriate, "remediation to address the root causes").

Prosecutors should consider "any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program." JM 98-28.800; *see also* JM 9-47-120(2)(c) (looking to "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred" and "any additional steps that demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risk").

- **Root Cause Analysis** – What is the company's root cause analysis of the misconduct at issue? Were any systemic issues identified? Who in the company was involved in making the analysis?

- **Prior Weaknesses** – What controls failed? If policies or procedures should have prohibited the misconduct, were they effectively implemented, and have functions that had ownership of these policies and procedures been held accountable?

- **Payment Systems** – How was the misconduct in question funded (*e.g.*, purchase orders, employee reimbursements, discounts, petty cash)? What processes could have prevented or detected improper access to these funds? Have those processes been improved?

- **Vendor Management** – If vendors were involved in the misconduct, what was the process for vendor selection and did the vendor undergo that process?

- **Prior Indications** – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations? What is the company's analysis of why such opportunities were missed?

- **Remediation** – What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?

- **Accountability** – What disciplinary actions did the company take in response to the misconduct and were they timely? Were managers held accountable for misconduct that occurred under their supervision? Did the company consider disciplinary actions for failures in supervision? What is the company's record (*e.g.*, number and types of disciplinary actions) on employee discipline relating to the types of conduct at issue? Has the company ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue?

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[1] Many of the topics also appear in the following resources:

- Justice Manual ("JM")
  - JM 9-28.000 Principles of Federal Prosecution of Business Organizations, Justice Manual ("JM"), *available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.
  - JM 9-47.120 FCPA Corporate Enforcement Policy, *available at* https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
- Chapter 8 – Sentencing of Organizations - United States Sentencing Guidelines ("U.S.S.G."), *available at* https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN.

- Memorandum entitled "Selection of Monitors in Criminal Division Matters," issued by Assistant Attorney General Brian Benczkowski on October 11, 2018, *available at* https://www.justice.gov/criminal-fraud/file/1100366/download.
- Criminal Division corporate resolution agreements, *available at* https://www.justice.gov/news (DOJ's Public Affairs website contains press releases for all Criminal Division corporate resolutions which contain links to charging documents and agreements).
- A Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Guide") published in November 2012 by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.
- Good Practice Guidance on Internal Controls, Ethics, and Compliance adopted by the Organization for Economic Co-operation and Development ("OECD") Council on February 18, 2010 *available at* https://www.oecd.org/daf/anti-bribery/44884389.pdf.
- Anti-Corruption Ethics and Compliance Handbook for Business ("OECD Handbook") published in 2013 by OECD, United Nations Office on Drugs and Crime, and the World Bank *available at* https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

[2] As discussed in the Justice Manual, many companies operate in complex regulatory environments outside the normal experience of criminal prosecutors. JM 9-28.000. For example, financial institutions such as banks, subject to the Bank Secrecy Act statute and regulations, require prosecutors to conduct specialized analyses of their compliance programs in the context of their anti-money laundering requirements. Consultation with the Money Laundering and Asset Recovery Section is recommended when reviewing AML compliance. *See* https://www.justice.gov/criminal-mlars. Prosecutors may also wish to review guidance published by relevant federal and state agencies. *See* Federal Financial Institutions Examination Council/Bank Secrecy Act/Anti-Money Laundering Examination Manual, *available at* https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm).

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Are You FCPA Compliant?

by Douglas K. Rosenblum, Esquire, CFE and Marc S. Raspanti, Esquire

In today's international marketplace, it is critical to keep in mind the reach of American federal statutes which have significant impact on foreign jurisdictions. The Foreign Corrupt Practices Act ("FCPA"), enacted in 1977, contains two key provisions: (1) a prohibition on bribery of foreign officials, and (2) accounting and reporting provisions for companies registered with the Securities and Exchange Commission ("SEC"). 15 U.S.C. §§ 78dd-1-3. The Department of Justice ("DOJ") has increasingly made headlines using this powerful law.

The anti-bribery provision of the FCPA criminalizes the "offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to foreign officials for the purpose of obtaining or retaining business. Id. at § 78dd-1(a). There is an exception for payments or gifts made "to expedite or secure the performance of a routine governmental action." Id. at §78dd-1(b). The statute also provides two interesting affirmative defenses. Defendants may be excused from liability if (1) the payment was legal under the written laws of the recipient's country; or (2) the payment was a "reasonable and bona fide expenditure" toward specific, enumerated ends. Id. at § 78dd-1(c).

Prosecutions of FCPA matters generally run on parallel tracks. The U.S. Department of Justice investigates individuals and corporations for potential criminal violations, while the SEC investigates and pursues those same individuals and entities for civil remedies including monetary fines, debarment, and disgorgement.

A Helpful FCPA Checklist

If your company operates overseas, it is time and money well spent to review the following aspects of your business:

1. Identify the nature of your business and all sectors in which you operate;
2. Identify all nations in which you operate and/or engage in commerce;
3. Research the Corruptions Perception Index published by Transparency International (a global coalition with the mission to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society) for each nation in which you operate and/or engage in commerce (available at www.transparency.org);
4. Identify all public/governmental agencies to whom you market and/or sell products and services;
5. Inventory the strengths and weaknesses of your corporate internal controls;
6. Identify all executives and employees responsible for compliance with federal statutes and regulations;
7. Revisit record keeping and accounting procedures for all international transactions to ensure accurate characterization of all expenditures;
8. Implement an anonymous hotline for employee concerns with measurable follow-up and accountability for addressing each call in a timely manner;
9. Revisit the content of employee compliance training on an annual basis; and
10. Develop an ongoing relationship and exchange of information with knowledgeable external legal counsel.

The Anti-Bribery Provisions of the FCPA are Far-Reaching

The FCPA has gained notoriety because of its expansive jurisdiction. The anti-bribery provisions of the FCPA apply to "issuers" as well as "domestic concerns." Under 15 U.S.C. § 78dd-1, issuers are companies publicly traded on any of the American exchanges. "Domestic concerns" under § 78dd-2 are not traded publicly, but are American citizens, entities, nationals, residents of the United States, entities organized under the laws of the United States, or entities with a principal place of business in the United States. Regardless of whether the alleged act in furtherance of a corrupt payment occurred within the borders of the United States or abroad, issuers and domestic concerns are subject to the FCPA.

Foreign nationals are also subject to the FCPA in certain circumstances. Foreign citizens or entities organized under the laws of another country are subject to the jurisdiction of the FCPA if they commit acts within the borders of the United States in furtherance of a corrupt payment. Although jurisdiction in these cases is clear, it can be difficult for the United States to satisfy a monetary judgment or extradite responsible corporate officers.

The FCPA is powerful in its scope and jurisdiction, but it is not a strict liability statute. The government must prove that the defendant paid, offered to pay, or promised to pay corruptly. The statute itself does not define this state of mind. A Resource Guide to the United States Foreign Corrupt Practices Act published by the Criminal Division of the DOJ and the Enforcement Division of the SEC on November 14, 2012 provides guidance. In that Guide, the government makes clear that in passing the FCPA, Congress adopted the meaning of corruptly ascribed to the term in the domestic bribery statute found at 18 U.S.C. § 201: "an intent or desire to wrongfully influence the recipient." See H.R. Rep. No. 95-640, at 7. The government must prove this mental state of the defendant beyond a reasonable doubt in order to secure a criminal conviction under the FCPA.

The analysis of potential FCPA violations is highly fact-specific. The government has made clear that it will not prosecute cases of isolated, de minimus expenditures on meals, taxi fares, or promotional materials. However, some facts will certainly raise red flags: gift of vehicles, furs, and expensive trips, for example. Repeated gifts and/or secret gifts add to the circumstantial evidence that those items were transferred with an illicit purpose or were, at the very least, more than just a token demonstration of respect or gratitude that is permissible under the law.

Public Companies Have Heightened Exposure Under the Act

The accounting and reporting prong of the FCPA applies to issuers, their subsidiaries, and affiliates. The statute applies both civil and criminal liability to entities who misstate financial records, falsely certify books and records, and/or fail to implement properly designed internal controls. Many of these requirements are the same as those found in the Sarbanes-Oxley Act and related regulations. The distinction, however, between civil and criminal liability under this prong is the intent requirement of "willfulness."

Publicly traded companies file financial statements each year that are audited by independent accounting firms. For those companies who blindly rely on those auditors, and believe additional scrutiny is not needed, think again. Generally, § 10 of the Exchange Act, 15 U.S.C. § 78j-1, requires external auditors to report any perceived illegalities to the appropriate levels of management within the subject company. However, if the company does not take appropriate steps to investigate and/or correct those issues, the auditor must notify the SEC. Revisiting the above checklist on a routine basis could prove to be a useful tool to avoid such situations.

FCPA Enforcement Against Companies Has Increased in 2019

The DOJ has shown no signs of slowing down its FCPA enforcement in 2019. During the first quarter alone, the DOJ brought three enforcement actions under the FCPA and collected a total of $1.1 billion from those actions. By the start of August 2019, the DOJ and SEC had brought a total of seven FCPA enforcement actions. Notable 2019 FCPA cases include:

1. Walmart, Inc.: The SEC charged Walmart with failing to operate a sufficient anti-corruption compliance

program for over ten years. Agreeing to pay over $144 million to settle the SEC's charges and over $138 million to settle the DOJ's charges, Walmart paid a combined total of over $282 million.
2. Fresenius Medical Care AG & Co.: This products and services provider agreed to pay the SEC and DOJ over $231 million to resolve FCPA violations in numerous countries over almost ten years.
3. Mobile TeleSystems PJSC: After violating FCPA provisions in Uzbekistan, this telecommunications provider agreed to pay a settlement of $850 million.

Individuals Face the Possibility of Imprisonment; Companies Do Not

Debarment and hefty fines can serve as powerful deterrents for business organizations. However, organizations act through their directors, executives, and responsible corporate officers, and those individuals are also subject to the jurisdiction of the FCPA.

In September of 2015, former Deputy Attorney General Sally Quillian Yates published a memo detailing a shift in DOJ policy. In that memo, the DOJ required that corporations identify all individuals involved in any aspect of alleged misconduct, regardless of their status or seniority, in order for the corporation to receive any credit for its cooperation with the government.

Previously, all too often the government resolved criminal investigations of corporate entities with a corporate plea or deferred prosecution agreement, a civil settlement agreement, a stiff fine, and perhaps the installment of a compliance monitor within the company. The civil settlement agreements often included releases of owners, officers, directors, and employees of the same corporations. Those days are done according to the now famous "Yates Memo."

Not too long after, on August 12, 2015 the government announced the prosecution of Vicente Garcia. Mr. Garcia is a United States citizen and former head of Latin American sales for technology giant SAP. The case included an SEC administrative cease and desist action, coupled with a criminal information filed by the DOJ alleging conspiracy to violate the FCPA. Garcia received a twenty-two-month prison sentence after pleading guilty to one count of conspiracy to violate the FCPA. He admitted to conspiring with others to bribe three Panamanian government officials, and he personally received over $85,000 in kickbacks for arranging the bribes. Prior to that plea, Garcia also entered into a settlement with the SEC, where he agreed to pay $85,965 plus prejudgment interest.

Garcia's prosecution was only the beginning of the Yates Memo aftermath. While 2015 featured only eleven individual FCPA prosecutions, that number jumped to twenty-seven in 2016. Despite a slight decrease in 2017 to twenty-one individual FCPA prosecutions, it increased once again in 2018 to twenty-five. Of the twenty-five individual FCPA prosecutions in 2018, the DOJ brought twenty-one of the actions and the SEC brought only four. Additionally, twelve out of the twenty-five actions arose from new matters, while the rest stemmed from already-existing actions. Ultimately, the Yates Memo sparked a considerable increase in individual FCPA prosecutions, and 2019 projects to be no different.

Through the first half of 2019, the DOJ and SEC have announced seven individual FCPA actions, filed an additional four, and secured three guilty pleas. Specifically, the DOJ is heavily tracking money laundering and conspiracy to commit money laundering crimes. In February, Gordon J. Coburn and Steven E Schwartz, two former executives of Cognizant Technology Solutions Corporation, were charged for their roles in bribing an Indian government official. While Cognizant agreed to pay $25 million to settle its FCPA charges, the prosecution of Coburn and Schwartz is still ongoing, as they face charges of violating and conspiring to violate the FCPA's anti-bribery and accounting provisions.

The DOJ has also filed FCPA indictments against two government officials in 2019: Gulnara Karimova and Master Halbert. Karimova, daughter of Uzbekistan's former president, had accepted bribes from at least three different

companies. Those companies, including MTS, Vimplecom Ltd., and Telia Co. AB, have already settled their charges arising from the bribes. Halbert, an FSM transportation official, allegedly accepted bribes in exchange for airport management contracts.

In May, Jose Manuel Gonzalez Testino plead guilty 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. Testino was linked to the Petroleos de Venezuela S.A. (PDVSA) foreign bribery scheme after admitting to paying at least $629,000 in bribes to secure business advantages for his companies. Notably, Testino is the sixteenth individual to enter a guilty plea in connection with the government's investigation into PDVSA. Twenty-one total individuals have been charged in relation to this matter. With the government's ongoing investigations into corporations and individuals alike, the second half of 2019 will likely show that individual FCPA prosecutions continue to trend upward.

An Effective Compliance Program is Critical

In April 2019, the DOJ continued to emphasize corporate compliance by releasing new guidance on the effectiveness of corporate compliance programs. This updated guidance is available online at https://www.justice.gov/criminal-fraud/page/file/937501/download.

The fundamental questions prosecutors ask when assessing a corporate compliance program are as follows:

4. Is the corporation's compliance program well designed?
5. Is the program being applied earnestly and in good faith? In other words, is the program being implemented effectively?
6. Does the corporation's compliance program work in practice?

Takeaway

Adherence to the 10-point checklist will not guarantee a pass by the DOJ and SEC, but it will provide you and your organization with the knowledge base necessary to react in an effective and efficient manner with minimal disruption of your operations.

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