PROGRAM MATERIALS
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FCPA Investigation Resolutions – When is Final Truly Final?

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FCPA Investigation Resolutions- When is Final Truly Final?

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Agenda

- We will be exploring:
  - Risks of continuing liability after a negotiated settlement
    - Newly developing area of claims under the US Federal Victims of Crime Compensation laws
    - Follow-on enforcement actions by non-US authorities and nongovernmental authorities
    - Civil litigation
  - Emerging enforcement trends and best practices for evaluating and mitigating further liability

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Overview

- Entering into a resolution of an FCPA case with the Department of Justice or the Securities and Exchange Commission does not mean that the matter is reached its conclusion and is “closed.”

- Companies can continue to face serious risks of further liability

- In recent years, the definition of “victims” in these cases has developed and taken a different shape

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Statutory Background

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- Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1
- Mandatory Victims' Rights Act ("MVRA"), 18 U.S.C. § 3663A
- Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771

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The FCPA

- The FCPA has three distinct requirements:
  - **Anti-bribery:** Prohibits the payment of bribes to a foreign (non-U.S.) official for the corrupt purpose of obtaining or retaining business
  - **Books and Records:** Public companies must keep books and records in reasonable detail that fairly and accurately reflect the transactions and circumstances of the company
  - **Internal Controls:** Public companies must devise and maintain a system of internal controls that provides reasonable assurance of accurate books and records and GAAP compliant financial statements

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The Anti-Bribery Provision

The statute prohibits:

- Giving ***or*** offering ***or*** promising or authorizing
- Directly ***or*** indirectly
- Anything of value
- To any foreign official, political party, ***or*** political candidate
- Corruptly
- In order to assist in obtaining ***or*** retaining business.

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The FCPA Applies to Companies and Individuals

- Who is subject to the FCPA?
  - All U.S. companies (whether public or private)
  - All U.S. citizens and residents (anywhere in the world)
  - Foreign companies with a presence in the U.S.
  - Foreign companies listed on one of the U.S. stock exchanges (including ADRs)
  - **Officers, directors, employees or agents, in the U.S. or abroad, of any of the above**
  - **Any person or entity that commits any act in furtherance of a corrupt payment in the U.S.**
  - U.S. companies may be liable for acts of foreign subsidiaries, JV partners, or other parties deemed to be acting as its agents

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The FCPA Applies to Foreign Private Companies

- A U.S. subsidiary of a foreign company is liable under FCPA as a "domestic concern."

- If foreign entities/individuals have a connection to the U.S., they can also be liable under the FCPA:

  - Physical presence in the U.S. to conduct the transaction at issue;
  - Use of U.S. financial system/instrumentalities in connection with payments;
  - Assist or abet U.S. domestic companies to engage in corrupt practices.

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MVRA

- The purposes of the MVRA is to make victims whole based on the wrongs committed by a defendant
  - Crime of violence
  - An offense against property that is committed by fraud and deceit
  - An offense relating to tampering with consumer products
  - An offense relating to theft of medical products
  - Any offense in which an identifiable victim has suffered a physical injury or pecuniary loss

- The Act provides that “identified” victims may be entitled to an order of restitution for certain losses suffered as a result of the commission of an offense as part of a criminal sentence or part of a plea agreement

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CVRA

- Includes a statutory bill of rights for victims of federal crimes
  - (1) the right to be reasonably protected from the accused;
  - (2) the right to notice of public court proceedings;
  - (3) the right not to be excluded from any public court proceeding;
  - (4) the right to be reasonably heard at any public court proceeding involving release, plea, sentencing, or parole;
  - (5) the reasonable right to confer with government attorneys prosecuting the case;
  - (6) the right to restitution as provided by law;
  - (7) the right to proceedings free from unreasonable delay; and
  - (8) the right to be treated with fairness and with respect

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“Victims”

- Victims under these statutes include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

- An individual or corporation may apply and seek restitution for losses they suffer as a result of violations of law involving fraud or deceit.

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VICTIMS' RIGHTS

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USA v. Oz Africa Management GP, LLC ("Och-Ziff")

- No. 1:16-cr-00515-NGG, (E.D.N.Y)
- In 2016, Och-Ziff, a hedge fund, pled guilty to one count of conspiracy in violation of the FCPA
- Och-Ziff entered into a deferred prosecution agreement with the DOJ and SEC and admitted to violations of the FCPA's anti-bribery provisions and paying a total of $412 million

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USA v. Oz Africa Management GP, LLC ("Och-Ziff")

- In 2018, a group of Och-Ziff investors sought confirmation of their status as victims and requested an award of $1.8 billion in restitution
- In 2018, the government informed claimants that they were not victims under the statute
- In 2019, a court ordered that a group of Och-Ziff's former investors qualified as victims under the MVRA because they were not parties to the bribery

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Och-Ziff

- Staggering differences in opinions on appropriate restitution amounts

Investors	$421.8 Million
DOJ	$151 million
Och-Ziff	$37 million

- In October 2020, a final list of victims who qualify for restitution was compiled

- The final restitution total submitted to the Court for approval comprises of
  - $138,826,000 including over $1.8 million for victims

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What this could mean

- Certainty surrounding the “conclusion” of an FCPA matter has been thrown into question
- Any person or entity connected with a project or deal involved in an FCPA resolution will be motivated to think about how they can present themselves as a victim
- Entities will need to balance the benefits of settling FCPA liability with the government against an array of possible claimants seeking restitution

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State-Owned Corporations

- In several instances, state-owned entities have sought relief in U.S. courts although the DOJ's stance is that state-owned corporations are not afforded the right to restitution under CVRA

- *U.S. v. Ortega*

- *In re: Impresa Publica De Hidrocarburos Del Ecuador*

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U.S. v. Ortega

- No. 18-CR-20685 (SDFL)
- A former executive director at Venezuelan state-owned oil company, PDVSA, pleaded guilty to one count of conspiracy to commit moneylaundering and admitted to accepting millions in bribes
- Third-party claimant, PDVSA, filed a Motion for Victim Status and Restitution
- The U.S. government has argued that PDVSA does not qualify as a victim and was complicit in the bribery and money laundering schemes. DOJ has also argued that "person" does not include the sovereign
- PDVSA has claimed that no case has concluded that a corporate victim's asserted "culture of corruption" or generalized corruption can alone foreclose restitution under the MVRA

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In re: Empresa Publica De Hidrocarburos Del Ecuador

- No. 20-11-11430 (11th Cir.)
- Underlying case: 4:19-mc-02534 (S.D. Texas)

- PetroEcuador is a state-owned oil and gas company in Ecuador. The DOJ focused on bribery schemes involving PetroEcuador government officials. The individuals charged were those who made the bribes to the officials.

- The Eleventh Circuit affirmed that PetroEcuador did not qualify as a victim under the CVRA and MVRA because several of its employees were involved in the underlying bribery scheme

- The Eleventh Circuit concluded that PetroEcuador was a state-owned instrumentality which did not benefit from the protections of the statute

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NON-U.S. ENFORCEMENT TRENDS

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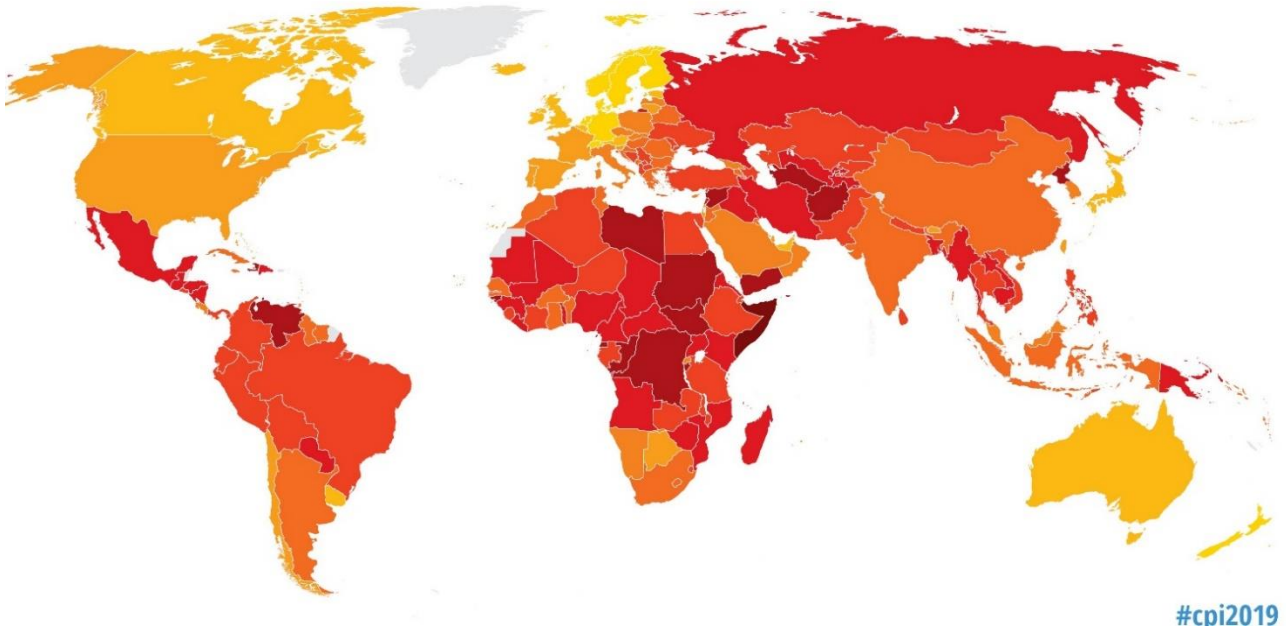
FCPA Hot Spots
2019 CORRUPTION PERCEPTIONS INDEX



Scale

1 [least corrupt] to
180 [most corrupt]

1.	**New Zealand**
12.	**United Kingdom**
23.	**United States**
56.	**Mauritius**
70.	**South Africa**
80.	**Ghana**
96.	**Tanzania**
106.	**Côte D'Ivoire**
123.	**Gabon**
137.	**Uganda**
146.	**Nigeria**
168.	**DRC**
180.	**Somalia**

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Enforcement Trends
FCPA Top 10 List

- DOJ has obtained huge settlements. **9 out of 10 are foreign companies.**
  1. Airbus SE (Netherlands/France)(2020) – $3.9 billion
  2. Petrobras (Brazil)(2018) – $1.78 billion
  3. Ericsson (Sweden)(2019) – $1.06 billion
  4. Telia (Sweden)(2017) – $1.01 billion
  5. MTS (Russia)(2019) – $850 million
  6. Siemens (Germany)(2008) – $800 million
  7. VimpelCom (Netherlands)(2016) – $795 million
  8. Alstom (France)(2014) – $772 million
  9. Société Générale S.A. (France)(2018) – $585 million
  10. KBR / Halliburton (U.S.)(2009) – $579 million

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Globalization of Foreign Anti-Corruption Enforcement

Company	Year	Sanction	Sanctioning/Investigating Countries
Airbus	2020	$3.9 billion	France United Kingdom United States
Samsung Heavy Industries Co. Ltd	2019	$75.5 million	Brazil United States
Petrobras	2018	$1.78 billion	Brazil United States
Keppel Offshore & Marine Ltd.	2017	$422 million	Brazil Singapore United States
Telia Company AB	2017	$1.01 billion	Netherlands Sweden United States
Embraer SA	2016	$205 million	Brazil United States
Siemens AG	2008-2016	$2.3 billion	Germany Greece Israel Italy Nigeria Switzerland United States World Bank

MDBs JOIN ANTI-CORRUPTION FIGHT

- Multilateral Development Banks (MDBs), led by the World Bank, have their own sanctions regimes
  - Main feature is debarment—the exclusion of a company/individual from participating in the bank's programs
  - Others MDBs are generally required to cross-debar an entity that has been debarred by any other MDB for more than I year
  - Parents, subsidiaries, affiliates, and successors may also be debarred and cross-debarred
  - Debarments average 3 years, but can be much longer
    - SNC Lavlin Inc. and 100 of its affiliates debarred by World Bank in 2013 for 10 years
- MDBs assert jurisdiction over parties involved in any way in projects involving MDB financing
  - Some parties may not even know the projects in which they are involved involve MDBs

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MDB Enforcement Trends

- MDB enforcement is very active, but has slowed somewhat over the last 18 months
  - FY 2020, World Bank Group debarred 46 individual/entities and recognized 72 cross debarments from other MDBs
  - FY 2019 debarred 81 individuals/entities; FY 2018 debarred 151 entities
  - World Bank Group had 66 open investigations at end of FY 2020
- In response to covid-19 pandemic, MDB's have made new $ multi-billion commitments
  - Historically, 25% of all World Bank projects raise some allegation of corruption
  - Likely to be a significant number of new cases growing out of covid relief

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Africa Development Bank (AfDB) Enforcement

- The AfBD wants to be an active enforcer and has made anti-corruption enforcement a "strategic policy" goal
- The AfDB's first enforcement in May 2014 followed the highly publicized Bonny Island FCPA case in Nigeria
  - Fines totaling $23.7 million collected from KBR, Technip, JGC Corp., and Snamprogetti
- AfDB is the most active MDB enforcer other than the World Bank
  - Majority of cross-debarment cases come from AfDB
  - Sub-Saharan Africa has been focus of MBD projects for many years
    - Focus of covid relief efforts
  - Africa continues to be a focus of FCPA enforcement, so AfDB will continue to get some "easy" cases

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CIVIL CLAIMS

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Potential Civil Claims That Flow From FCPA violations

FCPA does not provide for a private right of action. *Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990), cert. den., 498 U.S.1086 (1991) case dismissed.*

Civil litigation following or parallel to settlement with Department of Justice and the Securities and Exchange Commission can come in three forms:

- Securities Fraud Class Actions
- Shareholder Derivative Actions
- Books and Records Cases

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Securities Fraud Class Actions

- A securities class action is brought by shareholders against the corporations and/or its officers and directors alleging that the shareholders suffered economic loss as a result of the violations of the securities laws, including material misrepresentations.

- *Doshi v. General Cable Corp., et. al., No. 2:17-cv-25 (WOB)-CJS), 2019 WL 1965159 (E.D. Ky. Apr. 30, 2019)*

- *Key claims – ultimately dismissed by the Court*
  - *Misstatements about policies and ethics*
  - *Misstatements about the efficacy of internal controls*
  - *Omissions regarding market risks*

- *Das v. Rio Tinto LC, 332 F. Supp. 3d 786 (S.D.N.Y. 2017)- Dismissed*

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Securities Fraud Class Actions (cont'd)

- *In re Braskem S.A. Sec. Litig., 246 F. Supp. 3d 731 (S.D.N.Y. 2017)*
  - *Lack of disclosure must make other disclosures materially misleading to investors*

- *Court agreed with shareholders that the company's statements regarding the price bases for what was paid for certain raw materials was actionable. Survived a Motion to Dismiss*
- *Company advanced ambiguous reasons for low purchase price, and failed to mention a side agreement that the company proceeded with the deal by paying substantial bribes.*

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Securities Fraud Class Actions (cont'd)

- FCPA related Securities Actions that pass the Motion to Dismiss, can be extremely lucrative:
  - *Petrobras settled for $3 billion dollars in 2018*
  - *Cobalt International Energy settled for $389.6 million*
  - *FCPA securities suit against Avon settled for $62 million.*

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Shareholder Derivative Actions

- Frequently filed…..less frequently successful

- A lawsuit brought by shareholders on behalf of the corporation against individuals who have injured the corporations interest.

- FCPA related derivative suits typically assert claims against individual directors and officers for breaches of fiduciary duty, alleging that they failed to implement policies and controls to insure compliance with the FCPA, a breach of oversight duties, also waste and unjust enrichment.
    - *In re Caremark Int'l Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996) (Caremark duties are deliberately structured to make it hard for plaintiff's to win)*

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Shareholder's Derivative Actions (Cont'd)

- Motion to Dismiss – Granted
  - Qualcomm – SEC issued Cease and Desist Order alleging that the Company was violating the FCPA by hiring relatives of foreign officials and that the Company lacked sufficient internal controls.
  - Shareholders filed suit against the Board and CFO alleging that they consciously disregarded "red flags" and breached their fiduciary duty and engaged in waste and unjust enrichment.
  - Court granted Qualcomm's Motion to Dismiss – Shareholders did not adequately allege demand futility.
  - Demand futility – The idea that a shareholder's demand to a board of directors to bring suit, a prerequisite to bringing a shareholder's derivative action, would be useless.
    - Demand requirement obligates a plaintiff to ask the Board to bring suit on behalf of the corporation before filing a derivative suit or to show that such a demand would be futile.

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Shareholder's Derivative Action (cont'd)

- Walmart – Motion to Dismiss DENIED
  - Company learned in 2005 and 2006 about potential FCPA violations.
  - 2011 filing, Company left investors with the impression that the Company first learned of the FCPA violations in 2011.
  - 2012 – share price decreased dramatically.
  - Court denied Walmart's Motion to Dismiss finding that the omission of the events in 2005 and 2006 were misleading and left the investor with an impression that would be untrue.

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Books and Records Cases

- Walmart-
- 15 lawsuits filed in Arkansas and Delaware in connection with the massive bribery and corruption scandal in Mexico
  - Section 220 of the DE General Corp Law allows plaintiffs access to books and records for a “proper purpose.”
  - Litigation on inspection aspect alone took 3 years to resolve
  - Generally speaking, Delaware General Corporations Law Section 220 provides shareholders with a limited right to inspect confidential corporate records if they can establish a “proper purpose” for the inspection and explain why each category of documents sought is “necessary and essential” to fulfill the stated purpose. As courts have long recognized, seeking to initiate litigation against company insiders constitutes a proper purpose under the law.

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Considerations for Limiting Civil Claims

- Suggestions for limiting claims following FCPA related resolutions or other FCPA related disclosures:
  - Robust and prompt Response to FCPA concerns
  - Carefully draft and review the language relating to any admissions in DPAs or resolutions entered into with government regulators
  - Negotiate strong language – “self-disclosure”, “extraordinary cooperation”, describe the role of audit committee and board in conducting internal investigation etc.
  - Careful consideration to language used when drafting disclosures pertaining to anti-corruption commitment, effectiveness to internal controls, risks faced in foreign markets, source of success.

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