# DUNNINGTON BARTHOLOW & MILLER LLP

#### FOREIGN CORRUPT PRACTICES ACT

#### FOR SMALL AND MEDIUM-SIZED

#### **BUSINESSES**

#### FCPA – THE BASICS – GENERAL (I)

- The Foreign Corrupt Practices Act (the "FCPA") was signed into law by President Jimmy Carter in 1977 in the wake of the Watergate years and the general attempt to "clean up" American foreign practices (reflected in such efforts as the Church Committee on CIA abuses). Tab I and Tab 2.
- The FCPA has become a major source of liability for US and foreign firms and individuals with total fines and penalties **exceeding \$6.4 billion** in 2020, or over 2.5 times the amount of the previous record in 2019, which had already been described as "by many measures, the most significant year ever in FCPA enforcement." Tab 3 and Tab 4.
- While the bulk of the fines have been targeted at large companies, the SEC has warned that small and medium-sized business should be vigilant in complying with the FCPA, as discussed below. The US authorities' war chest and successes may well lead them to put more teeth into their warnings.



#### FCPA –THE BASICS – OVERVIEW (II)

- The FCPA contains two basic provisions: an "anti-bribery" provision and a "books and records" provision. Tab 5 DOJ Resource Guide, at I.
- The anti-bribery provisions prohibit U.S. persons and businesses, U.S. and foreign public companies listed on stock exchanges in the United States or those which are required to file periodic reports with the Securities and Exchange Commission ("Issuers"), and certain foreign persons and businesses acting while in the territory of the United States, from making corrupt payments to foreign officials to obtain or retain business. *Id*.
- The accounting provisions require Issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls. *Id*.
- The FCPA is enforced by two separate agencies, the FCPA Units of the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"). One or the other agency may take the lead on any given case.
- In addition to monetary penalties, one of the most significant enforcement tools used by the DOJ is a "Deferred Prosecution Agreement" or "DPA." These agreements defer prosecution of FCPA violation for a given term, often three years, during which the defendant must undertake certain reforms, such as bolstering its internal controls and strengthening its compliance efforts, and pay the substantial fines that are usually part of any agreement. If the defendant complies with the DPA, at the end of the term the charges are dropped. In addition, defendants frequently enter into a "Cease and Desist Order" with the SEC, pursuant to which the companies agree to refrain from certain violations and take remedial action.



#### FCPA – THE BASICS – US V. HOSKINS (I)

- For the first twenty years of its existence, the FCPA was rarely invoked or applied. In 1998, Congress adopted certain amendments to the FCPA that rendered foreign companies liable under the FCPA anti-bribery provisions so that the FCPA now also applies to "foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States." Tab 6 DOJ FCPA Summary.
- The jurisdictional nexus to the United States has been very broadly defined, but a recent trend has been for Courts to narrow the most expansive interpretations of FCPA jurisdiction. Tab 7 United States v. Hoskins, 902 F. 3d 69 (2nd Cir. 2018).
- In Hoskins, the central question was whether a foreign national, who never set foot in the United States or worked for an American company during the alleged scheme, may be held liable, under a conspiracy or complicity theory, for violating FCPA provisions targeting American persons and companies and their agents, officers, directors, employees, and shareholders, and persons physically present within the United States. In other words, the question presented was whether a person can be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal. *Id.* at 76.



#### FCPA – THE BASICS – US V. HOSKINS (II)

The Court in Hoskins noted that the relevant provisions of the FCPA provide personal jurisdiction over the following persons:

- (I) American citizens, nationals, and residents, regardless of whether they violate the FCPA domestically or abroad;
- (2) most American companies, regardless of whether they violate the FCPA domestically or abroad;
- (3) agents, employees, officers, directors, and shareholders of most American companies, when they act on the company's behalf, regardless of whether they violate the FCPA domestically or abroad;
- (4) foreign persons (including foreign nationals and most foreign companies) not within any of the aforementioned categories who violate the FCPA while present in the United States. <u>United States v. Hoskins</u>, 902 F.3d at 85.
- However, the Court concluded that the FCPA statute <u>did not cover</u> a foreign national who acts outside the United States, but not on behalf of an American person or company as an officer, director, employee, agent, or stockholder. *Id.*
- Although Hoskins thus narrows the scope of FCPA liability, the statute remains extraterritorially applicable to foreign nationals who do act in an agency capacity on behalf of American business, as well as in the other circumstances noted above.

### FCPA -SMALL AND MEDIUM-SIZED BUSINESSES AND INDIVIDUALS

- While the most eye-popping agreements and judgments involve large, multinational corporations, small and mediumsized businesses are at risk for FCPA violations as well as large multinationals.
- In 2015, then Chief of the SEC FCPA Enforcement Unit, Karen Brockmeyer, stressed that they will also pursue small
  and medium-sized businesses that enter the international markets. Tab 7 Highlights from SEC Speaks 2015.
- Ms. Brockmeyer also stated that the SEC would focus on individual FCPA liability for putting teeth in the FCPA. Id.
- Recent developments in the US capital markets make Ms. Brockmeyer's comments particularly timely today.
- After a slow start, a special regulatory regime enacted under President Obama, Reg A+, has been growing sharply in popularity. Reg A+ Offerings increased 41% in 2019 and the trend is continuing. In March of 2020, the SEC reported that small and medium-sized companies are increasingly subjecting themselves to US reporting requirements, in particular through mechanisms such as Reg A+ and Reg CF offerings. Small issuers may not have considered the requirements of the FCPA and may not have the resources to retain the large law firms that focus on the high-profile cases with liability in the billions or hundreds of millions. This does not mean they should ignore FCPA risks if they engage in international business dealings.
- Big takeaway: small and medium-sized businesses do not necessarily need to break the bank with a gold-plated FCPA compliance program that a Fortune 500 company requires but should take the risks seriously and implement a serious, targeted, and cost-effective plan.

# FCPA SMALL AND MEDIUM-SIZED BUSINESSES SECURITIES LAW DEVELOPMENTS

- According to the SEC (Tab 8 March 2020 Reg A Lookback Study), as of December 31, 2019, the amount of capital raised under Reg A+ was reported as follows:
  - \$2.446 billion reported raised by 183 issuers in ongoing and closed offerings (average of \$13.4 million), including \$230 million in Tier 1 and \$2.216 billion in Tier 2 offerings;
  - \$9.095 billion sought across 382 qualified offerings (average of \$23.8 million), including \$759 million sought across 105 qualified Tier 1 offerings and \$8.336 billion sought across 277 qualified Tier 2 offerings (excluding withdrawn offerings);
  - \$11.170 billion sought across 487 filed offerings (average of \$22.9 million), some of which have not been qualified, including \$1.102 billion sought across 145 filed Tier 1 offerings and \$10.069 billion sought across 342 filed Tier 2 offerings (excluding withdrawn and abandoned offerings).
- Aggregate Regulation A financing levels between 2016 and 2019 were significantly higher than financing levels prior to the 2015 amendments, due to the increase in the offering limit and the number of offerings.
- In November 2020, the SEC harmonized the offering rules affecting small and medium-sized business <u>and raised the limits</u> on the dollar amounts of offerings to increase the attractive of the capital formation regime for smaller issuers. <a href="https://www.sec.gov/news/press-release/2020-273">https://www.sec.gov/news/press-release/2020-273</a>
  - Under Reg CF, issuers can raise up to \$5 million in a 12-month period. Under Reg A+, Tier 2 issuers can raise up to \$22.5 million and Tier I issuers can raise up to \$75 million.
  - As a result, there is likely to be even greater offering activity by small and medium-sized business under Reg CF and Reg A+, both or which require issuers to become reporting companies, heightening the importance of FCPA awareness and compliance.

### FCPA — SMALL AND MEDIUM-SIZED US AND FOREIGN BUSINESSES CASE STUDY (I)

- <u>Illustration</u>: In the Matter of Smith & Wesson, SEC Accounting and Audit Enforcement Release 3571/July 28, 2014. Tabs 7 and 7a.
  - From 2007 through early 2010, as part of a push to make sales in new and high risk markets overseas, a senior employee and other employees and representatives of Smith & Wesson made, authorized, and offered to make improper payments and/or to provide gifts to foreign officials in an attempt to win contracts to sell firearm products to foreign military and law enforcement departments.
  - During this period, Smith & Wesson's international business was in its developing stages and accounted for approximately 10% of the company's revenues.
  - Smith & Wesson's employees and representatives engaged in a systemic pattern of making, authorizing, and offering bribes while seeking to expand the company's overseas business.
  - Specifically, Smith & Wesson failed to establish an appropriate compliance program or devise and maintain an adequate system of
    internal accounting controls, which allowed the repeated improper offers and payments to continue undetected for years.
  - Much of Smith & Wesson's international business involves the sale of firearms to foreign law enforcement and military departments.
    - In addition to outright payments,
      - Smith and Wesson would offer free firearms to foreign officials, either directly or through agents, in order to win military and police department contracts.
      - Made payment for non-market lab testing costs
      - Made improper gifts

# FCPA — SMALL AND MEDIUM-SIZED US AND FOREIGN BUSINESSES CASE STUDY (II)

#### Smith & Wesson Case – Lessons

- First, it does not matter whether the bribes are successful. The making of an offer violating the FCPA generates liability under the Act. Smith & Wesson's schemes were unsuccessful in Indonesia, Turkey, Nepal, and Bangladesh. Overall, Smith & Wesson only consummated one transaction with profits of slightly more than 100,000. Yet the SEC required disgorgement of all profits, payment of \$1,000 in pre-judgment interest and a penalty of \$1.9 million, almost 20 times the profits generated by the one illegal transaction. Even a relatively small transaction can generate enormous liability. For a small to medium-sized company a \$2 million fine may be more painful than a \$200 million fine for a large company.
- Second, watch out for <u>red flags</u>: third party agents, gifts, entertainment, "service" payments being made in a sales contract.
- Third, assess the market before entry. Smith & Wesson ran into trouble because it expanded too quickly into markets it did not adequately understand. It did not perform any anti-corruption risk assessment and conducted virtually no due diligence of its third-party agents.
- Fourth, design and implement a system of internal controls or an appropriate FCPA compliance program.
  - Maintain internal controls for services and "gifts." Smith & Wesson failed to devise adequate policies and procedures with regard to commission payments, the use of samples for test and evaluation, gifts, and commission advances.
  - Require headquarter review of all arrangements involving agents, consultants, finders or similar individuals.
  - Implement appropriate training and supervision. Smith & Wesson ran into problems because of its flawed policies and procedures and the absence of adequate CPA-related training and supervision.
  - Avoid excessive concentration of authority in single person. The Smith & Wesson Vice President of International Sales had almost complete authority to conduct the company's international business, including the sole ability to approve most commissions. Smith & Wesson's FCPA policies and procedures and its FCPA-related training and supervision were also inadequate.

# FCPA — SMALL AND MEDIUM-SIZED US AND FOREIGN BUSINESSES CASE STUDY (III)

#### Smith & Wesson – Remediation

- Conduct internal investigation to assess current policies and practices, particularly use of third party agents, "entertainment" budgets, "gifts" and provision of services at no or low cost.
- Implement audit procedures to identify FCPA issues.
- Implement FCPA training and supervision program.
- Create robust controls on payments to third-party agents, gifts, and ancillary activities.
  - Require dual signatures, including one from US-based executive.
  - Resist "rushed" transactions pressure situations agent "has to be paid" or we will lose the deal.
- Enhance compliance policy and procedures.
  - Create compliance guide.
- Create a Business Ethics and Compliance Committee.
- These points are addressed in more detail in the concluding portion of this presentation focusing on the DOJ and SEC decision-making process in initiating and conducting enforcement activity.

### FCPA – FRANCE – FCPA APPLICATION TO FRENCH COMPANIES TOTAL S.A. CASE

- Traditionally, since the SEC and DOJ began applying the FCPA extraterritorially, very large corporations and transactions have been the focus of the regulators. One of the most well-known instances involved Total, S.A., a French oil and gas company that trades on the New York Stock Exchange.
  - In 2013, Total agreed to pay a \$245.2 million monetary penalty to resolve charges related to violations of the FCPA in connection with illegal payments made through third parties to a government official in Iran to obtain valuable oil and gas concessions. Tab F1 Unites States v. Total S.A. (2013).
  - Total was subject to the FCPA as an Issuer in the U.S., having had securities publicly traded on the New York Stock Exchange.
  - Between 1995 and 2004, at the direction of an Iranian official, Total corruptly made approximately \$60 million in bribes for the purpose of inducing an Iranian official to use his influence in connection with Total's efforts to obtain and retain lucrative oil rights in Iran. Total mischaracterized the unlawful payments as "business development expenses" when they were, in fact, bribes designed to corruptly influence a foreign official. Further, Total failed to implement effective internal accounting controls, permitting the consulting agreements' true nature and true participants to be concealed and thereby failing to maintain accountability for assets.
  - The U.S. Securities and Exchange Commission (SEC) entered into a cease-and-desist order against Total in which the company agreed to pay an additional \$153 million in disgorgement and prejudgment interest. Total also agreed with the SEC to comply with certain undertakings regarding its FCPA compliance program, including the retention of a compliance consultant.
- Although French enforcement authorities immediately announced that they had requested that Total, Total's Chairman and Chief Executive Officer, and two additional individuals be referred to the Criminal Court for violations of French law, we had to wait until 2018 for the French Criminal Court to condemn Total to a symbolic fine of 500,000 euros. All the individuals initially prosecuted, including Christophe de Margerie, Total's CEO, died before the end of the trial. The results in France are illustrative of the greater difficulty in imposing liability for corrupt foreign dealings under French as opposed to US law.
- Other major French companies have also entered into agreements or deferred prosecution agreements with U.S. authorities for violation under the FCPA: Unites States v. Technip S.A. (2010)(Tab F2); Unites States v. Alcatel-Lucent S.A. (2011)(Tab F3); Unites States v. Alstom S.A. (2014)(Tab F4).

# FCPA – FRANCE – FCPA APPLICATION TO FRENCH COMPANIES – AIRBUS

- France remains one of the most important jurisdictions world-wide for anti-corruption and anti-bribery activity.
- On January 31, 2020, Airbus SE, the European parent company of the Airbus aerospace conglomerate of Toulouse (France) based Airbus, S.A.S. (société par actions simplifiée) entered into a \$4 billion global settlement of bribery-related charges with U.S., French, and UK prosecutors. Tab F5.
- In the United States, a deferred prosecution agreement with the DOJ imposed a criminal penalty of \$2.09 billion the biggest FCPA enforcement action ever. The DOJ agreed to credit amounts paid to French prosecutor Parquet National Financier (PNF) up to \$1.8 billion. Airbus also paid the UK Serious Fraud Office €991 million (\$1.09 billion) to settle Bribery Act charges. In the United States, Airbus also paid a further criminal penalty of \$232.7 million to settle ITAR (International Traffic in Arms Regulations)-related charges, and forfeited to the DOJ a €50 million (\$55 million) bond in a civil forfeiture action for the ITAR-related conduct.
- While the Airbus case highlights the immense FCPA risks for large companies, it should also serve as a cautionary tale for small and medium-sized US businesses operating in France and similar French companies operating in the US.
- A \$5 million fine for a small to medium-sized business or its owners could be even more devastating that the \$4 billion paid by Airbus.

# FCPA – FRANCE –APPLICATION TO FRENCH INDIVIDUALS SAMUEL MEBIAME CASE

- Increasingly, the SEC and the DOJ are pursuing small businesses and individuals. *Unites States v. Samuel Mebiame* (2016) is illustrative. Tab F6. This case also highlights the FCPA risks present whenever small and medium-sized companies and individuals subject to the FCPA engage in transactions in the developing world.
  - In Mebiame, a dual citizen of Gabon and France was sentenced to 24 months in prison for his role in a conspiracy to pay bribes to senior government officials across Africa, in violation of the Foreign Corrupt Practices Act (FCPA). Tab F7 Unites States v. Samuel Mebiame (2016)
  - Mebiame was subject to the FCPA because he repeatedly traveled to the United States between 2007 and 2015, the period of the criminal acts, and used facilities in both New York and Florida to further the conspiracy. Mebiame met with co-conspirators in New York and received funds from co-conspirators in U.S. bank accounts he controlled. Id.
  - Mebiame worked as a "fixer" on behalf of a joint venture company owned by New York-based hedge fund Och-Ziff Capital Management Group LLC, which agreed to pay \$413 million in fines, and its business partner, a Turks and Caicos Islands-registered corporate entity controlled by a co-conspirator. In that role, Mebiame traveled extensively across Africa, Europe, and the U.S. and routinely made bribe payments to senior government officials in Africa. Id.
  - Mebiame's plea documents indicated that at least five senior officials in three countries, Niger, Chad, and Guinea, received corrupt payments and various illicit benefits from Mebiame. The officials, each of whom could influence the award of mining, oil and mineral concessions in their countries, received either cash payments, luxury vehicles, or extravagant travel including the private rental of an Airbus jet. The bribes paid by Mebiame to the officials were often masked through additional intermediaries or attorneys. Id.
  - Payments to intermediaries must always be closely scrutinized and subject to rigorous internal control and approval as such payments are the most frequent type of FCPA violation.

#### FCPA FRANCE – APPLICATION TO INDIVIDUALS – RECENT CASES

- Recent developments involving French companies also highlight FCPA risk to individuals and strategies for minimizing or addressing such risks.
  - Edward Thiessen (July 20, 2020), a former executive of Alstom S.A., was sentenced to time served for being part of a scheme to bribe officials in Indonesia to obtain contracts for Alstom from the state-owned power company. Judge Janet Bond Arterton of the Federal Court in Connecticut imposed a \$15,000 fine and no term of supervised release. Thiessen, Alstom's former Indonesia country president, cooperated with the DOJ following his guilty plea in 2015 to a single count of conspiracy to violate the SEC. This result shows that full cooperation with the DOJ and SEC is often the best strategy for targeted individuals. Tab F7.
  - Larry Pucket (April 13, 2020) a former Alstom sales manager in the United States was sentenced to two years of supervised release. Judge Janet Bond Arterton ordered him to perform 100 hours of community service and pay a \$5,000 fine. Pucket began cooperating with the DOJ in August of 2012 and continued cooperating until his sentencing, again underscoring the wisdom of cooperating with the U.S. authorities. Tab F8.
  - Lawrence Hoskins. (February 26, 2020)

# FCPA – FRANCE – FRENCH ANTI-BRIBERY REGULATIONS (THE *LOI SAPIN II*)(I)

- Companies doing business in France also need to be aware of the risks of liability under local anti-corruption and anti-bribery rules.
  - In 1997, France joined the Organization for Economic Co-Operation and Development (OECD) Anti-Corruption Convention.
  - France adopted anti-bribery legislation, essentially similar to FCPA, but for more than 17 years, French courts did not impose any convictions.
  - This is mostly due to the complexity of French criminal procedures and the difficulty of demonstrating corporate responsibility under French criminal law (as demonstrated in the Total case discussed above).
- Since 2000, several very large French companies entered into a variety of guilty pleas or deferred prosecution agreements (DPAs) with US authorities, pursuant to which these companies have billions in fines and other payments to the US treasury.
- As a consequence, in December 2016 the French legislature adopted a long-pending law, known as the Loi Sapin II, which went into effect progressively in 2017 (Tab F9).
  - The Loi Sapin II is a reaction to US success in prosecuting French companies under the FCPA. The tremendous successes of the SEC in 2019 and 2020 (resulting in payments of approximately \$9 billion) are likely to inspire further legislative action in France and elsewhere.
  - The Loi Sapin II only applies to corporations and only to allegations of oversea corruption or other crimes very similar to those prosecutable under the FCPA.
  - US businesses conducting operations in France should make sure to consult a French-qualified attorney to ensure that French anti-bribery law are respected.

# FCPA – FRANCE – FRENCH ANTI-BRIBERY REGULATIONS (THE LOI SAPIN II)(II)

- The Loi Sapin II creates a new Anticorruption Agency, called the AFA, to replace an existing agency, known as the SCPC, which was widely viewed as ineffective. (Tab F9 Chapitre Ier: De l'Agence française anticorruption (Articles I à 5))
- The law requires some medium and large-sized companies to adopt compliance programs pursuant to criteria to be developed by the AFA. Id.
- The new law also slightly extends the territorial reach of French anti-bribery laws to make them applicable to companies that "carry out all or part of their economic activity on French territory," and enhances whistleblower protection available under existing laws. (Tab F9 Articles 6 21)
- Loi Sapin II's most ambitious innovation by far is a series of amendments to the French Code of Criminal Procedure to permit
  negotiated outcomes generally similar to DPAs as practiced for many years in the United States. (Tab F9 Article 22)
  - a French corporation may enter into an agreement, known as a "Convention Judiciaire dans l'Intérêt Publique" (a "CJIP"), under which the company admits facts sufficient to show the commission of a relevant crime and agrees to a fine that may be as high as 30% of the company's annual turnover for the prior three years.
  - However, the procedure is very complex, as discussed in the following slide.

#### FCPA – FRANCE - LOI SAPIN II (III)

- First, the Loi Sapin II does not change a provision of French criminal law that often gives companies a "corporate defense" that it is not responsible for the acts of its agents. This is much more restrictive than the corresponding concept under the FCPA which renders corporations liable for acts of their agents. French businesses entering the U.S. market or using the U.S. banking and financial system, even for payments to recipients outside the U.S., should carefully evaluate the application of the FCPA to their activities.
- Second, the procedures are fairly complex and a maximum penalty based on a percentage of turnover may be higher than the maximum penalty applicable after trial.
- Third, and most importantly in the context of the political goal of the new law, French companies will in most instances still have to reckon with the threat of a separate US prosecution under the FCPA.
- Finally, the application of the non bis in idem principle in France (providing that French court cannot prosecute a company or an individual who has already been condemned for the same facts and whose sentence has been served) limits the actions that could be taken by French jurisdictions in terms of anti-corruption if the US or other authorities have already imposed a penalty on the French company.

#### FCPA - FRANCE - COORDINATION LOI SAPIN II/FCPA

- Nowadays, US prosecutors still remain an "ultimate arbiter" of non-US outcomes reached with respect to
  corporate acts subject to the FCPA. For example, a CJIP is not automatically viewed as sufficiently "adequate" to
  justify a total declination by US authorities. See Tab F10 Lutte contre la corruption: approche comparée entre
  "Deferred Prosecution Agreement" et Convention Judiciaire d'Intérêt Public.
- In the larger investigations and enforcement actions, the US and French enforcement authorities will likely coordinate their activities, as shown in the recent Airbus case discussed above. In addition, French companies often turn to the new CJPI procedure when under pressure by US authorities, and French authorities often use the procedure to negotiate with their US counterparts to reach coordinated multinational agreements where the two countries share the receipt of fines and other payments.
- However, small and medium-sized companies and individuals that may have been under the DOJ or SEC radars should be aware of the differences between the two regimes and should consult with both US and French counsel if their foreign activities have any connection to the United States.

#### FCPA – ITALY OVERVIEW

- Italian companies have been largely spared significant FCPA enforcement action. Since 1977, only four companies based in Italy have been prosecuted for FCPA violations. See The FCPA Unfairly Punishes Foreign Companies. Or Does it? Tab It. I.
- As a result, small and medium-sized businesses and their owners, whether US or Italian, might be tempted to disregard the topic and focus their attention elsewhere. This would be a mistake.
- The trends apparent in the other jurisdictions are evident in Italy as well. First, US authorities are becoming
  increasingly aggressive in their enforcement actions against individuals involved in corrupt schemes involving both
  the US and Italy.
- Second, as in many other countries, Italian legislation is becoming increasingly restrictive in its own right, forbidding even some activities that would be permissible under US anti-corruption laws. As noted, the enormous success of the DOJ and SEC in enforcing the FCPA (and the huge payments to the US treasury) may inspire further anti-corruption legislation.

# FCPA – ITALY – THE APPLICATION OF THE FCPA TO ITALIAN COMPANIES: DEUSTCHE BANK AND ITALIAN "BUSINESS DEVELOPMENT CONSULTANTS"

- Although there have been relatively few FCPA prosecutions of Italian companies, one of the most high profile recent cases had a significant Italian component.
- In January 2021, the DOJ entered into a \$130 million Deferred Prosecution Agreement with Deutsche Bank for, *inter alia*, conduct in Italy. Tab It.2.
  - Deutsche Bank contracted with third-party intermediaries, which it called "Business Development Consultants" or "BDCs," to obtain and retain business globally. The BDCs were approved by then high-level Deutsche Bank management and various regional committees.
  - Between in or about February 2007 and February 2016, Deutsche Bank maintained a BDC relationship with a regional Italian tax judge ("the Italian BDC") to bring clients to Deutsche Bank.
  - Furthermore, invoices and records of payments to the Italian BDC throughout his engagement were known by certain Managing Directors
    and employees of Deutsche Bank to be false, because certain employees assisted in the falsification of documents and Deutsche Bank made
    payments to the Italian BDC outside of the terms of its BDC contracts.
  - For example, under the Italian BDC's 2008 and later contracts, the Italian BDC was to be paid twice a year by Deutsche Bank. But records show that he was in fact paid more often than twice a year, received multiple payments for the same services, and sometimes received payments for no services at all. The Italian BDC was also paid at a higher commission rate than his contracts allowed. In addition, when one of the Italian BDC's 2010 invoices was challenged for lack of supporting services, the Italian BDC's business sponsor, who was a Deutsche Bank Director, falsely linked the introduction of three accounts for Deutsche Bank clients to the Italian BDC. Third, in or about 2011, Deutsche Bank continued to pay the Italian BDC for services, even though his contract had not been renewed for that year. Finally, between in or about 2012 and 2013, when the Italian BDC demanded more money than he was entitled to under his contract, Deutsche Bank agreed it would "find another agreement/job to sign and he can then invoice us" for the amounts he requested for those services.
  - The Italian BDC scheme highlights the importance of closely scrutinizing the role of third-party "consultants," "finders," "facilitators," and "agents." These are the types of problematic actors that small and medium-sized businesses are most likely to encounter in their dealings in Italy and elsewhere.

### FCPA – ITALY – THE APPLICATION OF THE FCPA TO ITALIAN COMPANIES: ENI S.P.A.

- As in France and elsewhere in Europe, the focus of the SEC and the DOJ has traditionally been on large companies. Only a handful of Italian companies are listed and trading on US exchanges (and thus subject to the FCPA "issuer" liability). The case of ENI S.p.A. is illustrative.
- In 2010, ENI S.p.A. (ENI) and Snamprogetti Netherlands B.V. (Snamprogetti B.V.) agreed to the entry of court orders by which, among other things, these companies were condemned to pay \$125 million in disgorgement of profits to settle the proceeding brought by the SEC in relation to a bribery scheme that had taken place between 1994 and 2004 and involved the highest Nigerian public officials (the "Nigerian Case.") See Tab. It.3.
- In addition to making such payments, ENI S.p.A. accepted a Cease and Desist Order prohibiting it from violating the recordkeeping and internal controls provisions in Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act). *Id*.
- ENI's co-defendant Snamprogetti B.V. also agreed to pay a criminal penalty worth \$240 million by entering into a deferred prosecution agreement with the DOJ, which had brought suit with respect to the same facts. *Id*.
- Similarly, on April 17, 2020, ENI S.p.A. settled a claim brought by the SEC with respect to a corrupt scheme that its 43% minority-owned subsidiary at the time, Saipem S.p.A. ("Saipem"), had allegedly implemented to be awarded contracts by Algeria's state-owned oil company (the "Algerian case"). Again, ENI was accused of violating the books and records provision. To settle this case, ENI agreed to pay \$24.5 million in disgorgement and prejudgment interest. See Tab. It.4.
- In both cases, because of the books and records provision, ENI had to bear the consequences of misconduct carried out by its subsidiaries. These cases represents paradigm situations in which the FCPA imposes liability that would be difficult to prosecute under Italian law. In the Algerian case, ENI and its executives were all acquitted definitively, while in the Nigerian case, ENI was not even charged with any crimes. See Tab.It.5 Decision of the Corte Suprema di Cassazione re Nigerian Case) and Italian and Tab. It. 6 L. Scollo Notes on the Decision of Corte d'Appello di Milano.

### FCPA – ITALY – THE APPLICATION OF THE FCPA TO ITALIAN COMPANIES: A COMPARATIVE ANALYSIS (ENI NIGERIA)

#### ENI - Nigerian Case

- <u>Facts.</u> ENI's subsidiary Snamprogetti S.p.A. owned 100% of Snamprogetti B.V. Snamprogetti B.V. entered into a joint venture with three other companies, which hired two intermediaries to bribe Nigerian government officials. In exchange for bribes, the joint venture was awarded contracts for the construction of gas production facilities.
- <u>U.S. authorities' approach</u>. The SEC took action against Snamprogetti B.V. on the grounds that it utilized the U.S. mails or other means or instrumentalities of interstate commerce to bribe foreign officials and violated the books and records provision of the FCPA. The DOJ brought suit against Snamprogetti B.V. on similar grounds. The SEC sued ENI S.p.A. on the ground that its internal controls failed to detect, deter, or prevent Snamprogetti B.V.'s misconduct.
- <u>Italian authorities' approach.</u> The Milan public prosecutor office did not take action against ENI nor Snamprogetti B.V. because Snamprogetti S.p.A., the company that controlled Snamprogetti B.V. at the time when the facts occurred, was considered to be the actual tortfeasor. In 2006, Snamprogetti S.p.A. had merged into Saipem S.p.A., which was eventually convicted.
- This case illustrates the aggressive approach of the DOJ and the SEC in pursuing entities up and down the chain of ownership. Many small and medium-sized businesses have multiple layers of corporate entities, particularly for their foreign dealings, and should be aware of the aggressive approach of the DOJ and SEC.

# FCPA – ITALY – THE APPLICATION OF THE FCPA TO ITALIAN COMPANIES: ENI S.P.A. CASE(S) – A COMPARATIVE ANALYSIS (ENI – ALGERIA)

#### ENI - Algerian Case

- Facts. The SEC alleged that ENI owned 43% interest in Saipem and controlled it. Moreover, the SEC alleged that Saipem hired an intermediary and entered into sham contracts with the intermediary to bribe Algerian public officials. The scheme was devised by one of Saipem's executives, who was later hired by ENI and became its CFO. When the executive in question was hired by ENI, he continued fostering this corrupt scheme. The SEC alleged that in return for the bribes paid, Saipem was awarded 7 contracts by the Algeria's state-owned oil company.
- <u>U.S. authorities' approach</u>. The SEC took action against ENI on the grounds that Saipem's unlawful payments were reported as licit brokerage fees in Saipem's financial statements, which were consolidated in ENI's. Also, because ENI's then CFO helped Saipem carry on the scheme, ENI was accused of failing to act in good faith to ensure that Saipem's accounting control system be effective.
- <u>Italian authorities approach</u>. The Milan public prosecutor office did charge ENI, but ENI was acquitted by both the court of first instance and the appellate court. In particular, Italian judges held that there was no evidence that ENI itself engaged in any corrupt schemes through its officers.
- This case illustrates the aggressive approach of the US authorities in pursuing accounting and internal control irregularities under the FCPA, holding companies, but any small or medium-sized businesses subject to SEC reporting requirements should take particular care to implement robust internal controls of its accounting procedures. In particular, small and medium-sized companies accessing the public securities markets through Reg A+ or Reg CF should take note of the FCPA requirements and implement a compliance program. See above.
- Similar to ENI, other Italian holding companies listed on a US exchange have faced charges in relation to their subsidiaries' misconduct under the book and records provision of the FCPA. See Tab It.7 Cease and Desist Order SEC v. Fiat S.p.A. et al.

### FCPA AND CORRUPTION – ITALY BACKGROUND

- Although the SEC and DOJ have not to date prosecuted a large number of Italian companies or companies doing business in Italy, small
  and medium sized businesses involved in Italy should be vigilant about compliance with Italian anti-corruption laws, which are becoming
  increasingly important.
- Two statutes are central to legislation on corruption currently in place in Italy.
  - Law n. 300 of 29/9/2000, which implemented the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"). The OECD Convention directed the signatory states to criminalize the conduct of natural and legal persons that provide undue benefits to foreign officials for the purpose of obtaining improper business-related advantages.
  - Law n. 190 of 6 November 2012, which implemented article 6 of the United Nations Convention against Corruption and articles 20 and 21 of the Criminal Law Convention on Corruption.
- Separately, the Italian legislator strengthened regulation against corruption by
  - Creating a new independent authority (the National Anti-corruption Authority, "ANAC") entrusted with (a) establishing general
    policies for preventing corruption, (b) entering into agreements with foreign anti-corruption authorities, and (c) overseeing some
    public contracts subject to particularly serious risks of corruption.
  - Adopting new article 322-bis of Italian Criminal Law Code (R.d. 19/10/1938 n. 1398;" cod. pen."). Natural persons engaging in bribery abroad are liable for corruption (articles 318, 319, and 321 cod. pen.) or solicited corruption (article 322 cod. pen.). Tab It. 8.1.
  - Enacting Legislative Decree n. 231 of 8 June 2001 ("D.lgs. 231/2001,") provides sanctions for legal persons involved in the commission of international bribery as well as the other crimes indicated therein. Tab It.9.

#### FCPA AND CORRUPTION – ITALY – BACKGROUND DEFINITION OF CORRUPTION UNDER THE COD. PEN. MAIN CORRUPTION CRIMES

#### 318 cod. pen. Corruption for discharging a duty related to the office

"A public official who has received money or any other benefit, or has accepted the promise thereof, unwarrantedly on their own behalf or on behalf of any third party in exchange for the performance of any of their duties or the exercise of any of their powers shall be sentenced to....."

#### 319. cod. pen. Corruption for an act contrary to the duties pertaining to the office

"A public official who has received money or any other benefit, or has accepted the promise thereof, unwarrantedly on their own behalf or on behalf of any third party in exchange for failing to perform or for delaying, or for having failed to perform or having delayed, an act related to their office or for performing or having performed an act contrary to the duties related to their office shall be sentenced to...."

**320 cod. pen. Corruption of a person charged with performing a public service** "The provisions contained in articles 318 and 319 shall apply to a person charged with the performance of a public service...."

#### 321 cod. pen. Sanctions for the briber

"The sanctions provided for in articles 318, 319..., and 320 in relation to the situations mentioned in articles 318 and 319, shall apply to the person who has promised or given money, or any other benefit, to the public official or the person charged with the performance of a public service...... Article 322 cod. pen. imposes lesser sanctions on bribers, public officials, and persons charged with the performance of a public service that try to engage in any of the courses of conduct described by articles 318, 319, and 321 without success.

Article 322-bis paragraph 2 cod. pen. sanctions those persons that engage in the courses of conduct described in articles 321 and 322 with respect to foreign public officials or persons that are charged with the performance of public services in foreign countries.

Under article 25 of the D.lgs. 23 I/OI, legal entities may be sanctioned for the commission of corruption crimes by a person in charge of the entity (or a direct report to such a person). The legal entity can avoid liability by proving that the tortfeasor did not act in its interest or by showing that it set forth measures for preventing the commission of such crimes. See **Articles 5**, paragraph 2 and 6 D.lgs. 231/01.



#### FCPA – ITALY KNOWING THE KEY DIFFERENCES BETWEEN THE FCPA AND THE ITALIAN LAW ON CORRUPTION TO AVOID TRAPS

- In particular, US companies doing business in Italy should be aware of some key differences between US and Italian law that may subject US companies to anti-corruption liability when their conduct would not necessarily be prohibited under the FCPA.
- Intent under Italian Law. Unlike the FCPA, Italian criminal law (namely, articles 318, 319, and 321 of the Cod. Pen.) does not require that the briber pursue a business-related advantage. For the defendants to be convicted, it is enough that the prosecutor proves that the defendants wanted to enter into a corrupt agreement.
- Such an agreement need not provide that public officials breach their duties. See Tab It. 10, F. Vigano I Delitti di Corruzione nell'Ordinamento Italiano.
- **Corruption of private parties.** Unlike the FCPA, under certain circumstances, Italian criminal law sanctions corrupt practices among private parties.
  - Article 2635 Cod. Civ. The briber and the private person bribed are criminally liable when the person receiving the bribe (or the promise thereof) holds an executive role within a private legal entity, and the bribe is being given in exchange for the performance of an act in breach of the duties the person bribed owes to the legal entity. The same rules apply when the person receiving the bribe is a direct report to an executive.
  - Article 2635-bis cod. civ. punishes the person who has tried to bribe one of the executives indicated in article 2635 cod. civ. when the bribe
  - has not been accepted ("solicited corruption").
    Under article 25-ter let. s-bis D.lgs. 231/01, legal entities can be held liable for the crimes established by 2635 and 2635-bis cod. civ. Tab. lt.8.2.
- As a practical matter, this means that US companies operating in Italy may face criminal liability for payments that would only result in civil penalties under US law. The difference is significant because of the risk of jail time for US executives as well as limitations D&O insurance policies for criminal conduct. Thus, as part of a US company's due diligence before entering the Italian market, it should consult with Italian counsel to evaluate the types of transactions it is contemplating and the potential bribery and similar risks it may face.

### FCPA – ITALY INTERNATIONAL TRENDS ON ANTI-CORRUPTION CONCERNING ITALY

- Italy participates in the Group of States against Corruption (the "GRECO") together with other 49 signatory nations, including France and the United States of America.
- GRECO's annual report for 2020, "Anti-corruption trends, challenges and good practices in Europe & the United States of America," (Tab It.11) and the 15 April 2020 guideline entitled "Corruption Risks and Useful Legal References in the context of COVID-19" (Tab It.12) identify critical areas which are to be given special attention by state policymakers.
- Of particular importance are the GRECO's 15 April 2020 guidelines on the risks of corruption in the context of COVID-19.
   These guidelines highlight increased corruption risks in the COVID-era that all small and medium -sized businesses should take particularly seriously:
  - First, the GRECO underscores the increased risks of "facilitation payments." Such payments have long been one of the central issues in the anti-corruption area, the battle against which constitutes a common theme in all the materials presented.
  - Second, there is a greater need for oversight of lobbyists and procurement officials in the health care sector.
  - Finally, the GRECO exhorts member states to strengthen protection of whistleblowers.
- The GRECO guidelines can perhaps best be seen as evidence of a harmonization of anti-corruption principles across national borders.

#### FCPA IN LATIN AMERICA - OVERVIEW

- Historically, the SEC and DOJ have been particularly focused on Latin America. In 2020, FCPA activity in or involving Latin America was the most broad-based in the world. One of the largest FCPA enforcement actions by dollar amount involved a Brazilian company, J&F Investimentos, S.A., that paid a criminal penalty of about \$256.5 million, and through its majority-owned subsidiary, JBS S.A., disgorgement and interest of about \$28.9 million.
- Recent enforcement activity in Latin America has highlighted the risks to small and medium-sized business and individuals.
- Sargeant Marine, Inc., a privately-owned U.S.-based bulk asphalt provider with fewer than 50 employees paid the DOJ \$16.6 million to resolve FCPA violations in three South American countries. The company paid "million of dollars in bribes" between 2010 and 2018 to officials in Brazil, Venezuela, and Ecuador to obtain contracts to purchase or sell asphalt to state oil companies.
- In addition, in 2020 the DOJ charged, indicted, or sentenced 11 individuals: Brazilian executives at J&F Investimentos, both US executive and Brazilian executives at Sargeant Marine, and other U.S. and Latin American citizens involved in bribery schemes in Venezuela, Ecuador, Argentina, and Colombia.
- At the same time, many Latin American countries are taking steps to implement stricter anti-corruption laws and to enforce those laws.
   For example, new laws have been passed in Argentina, Brazil, Colombia, and Mexico.
- While not all of these laws are being rigorously enforced yet, at least in some jurisdictions, such as Brazil, there has been a move in this direction and enforcement is likely to increase in the near future, particularly as local regulators assess the extraordinary successes of the SEC and DOJ in obtaining billions in fines, penalties and disgorgement. However, local anti-corruption laws have been met with criticism as being overly complicated and difficult to implement in practice. Therefore, it is not surprising that companies and individuals subject to US jurisdiction tend to focus their anti-corruption compliance programs first on the FCPA. But it is increasingly the case that the anti-corruption laws of other countries cannot be ignored or presumed ineffective.

#### LATIN AMERICA – FOCUS ON COLOMBIA

- As discussed, in recent years there has been an exceptionally high number of FCPA investigations and prosecutions involving Latin American companies and individuals, making an overview of the region as a whole virtually impossible.
- Because of Dunnington's resources and specific knowledge base, this portion of the FCPA presentation focuses on Colombia, which has historically confronted serious problems of corruption, bribery, and money laundering and is, in some ways, a microcosm of FCPA risks in Latin America. We also touch on other countries to illustrate broader trends in FCPA enforcement in Latin America.
- Colombia ranks roughly at the midpoint of Transparency International's corruption perception index: 96 out of 180 countries with a score of 37 out of 100. Despite this poor score, Colombia has been consistently taking steps in an effort to combat corruption. These include joining relevant international conventions, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2013), United Nations Convention Against Corruption (2006), and Inter-American Convention Against Corruption (1999).
- On May, 2013, the OECD launched accession discussions with Colombia and the OECD Secretary-General. In its review of the country, the OECD Working Group identified gaps in Colombian laws pertaining to the liability of corporations engaging in acts of international corruption. In these accession discussions, the OECD encouraged Colombia to implement the OECD Convention.
- On February 2, 2016, the Congress of Colombia passed the Transnational Corruption Act ("TCA") (Republica de Colombia, 2016, Ley 1778). This is the first law specifically targeting and sanctioning legal entities bribing foreign officials. As will be discussed in more detail below, the TCA and FCPA have different legal standards for corporate liability.



### ANTI-CORRUPTION LEGISLATION IN LATIN AMERICA THE CASE OF COLOMBIA

- Because of the legislative efforts throughout Latin America to create a body of domestic law that can effectively combat bribery and
  corruption, US companies entering Latin American markets should not only consider the business practices that can generate liability
  under the FCPA, but also local anti-corruption legislation that can impose liability separately from the FCPA.
- Colombia has enacted various domestic laws, such as Law 599 of 2002 (Criminal Code), which has been revised periodically to increase penalties, broaden the scope of crimes related to bribery and corruption, and extend some degree of liability to companies; authorizing criminal courts to order the interim suspension of a legal entity's operations, where such entity is devoted "totally or partially" to commit crimes, including corruption. A criminal court may also order the cancellation of the legal entity's inscription in the register of companies.
- There are two government entities to help fight corruption. In particular, the 1991 Constitution established the Procuraduría General de la Nación (in charge of disciplinary action against government officials) and the Contraloría General de la República (in charge of safeguarding public funds). The jurisdiction of these two entities includes investigating and imposing administrative sanctions on government officials who commit acts of corruption.
- Law 1474 of 2011 (Estatuto Anticorrupción) imposed stronger penalties and broadened the scope of crimes related to domestic and transnational corruption by individuals. The law created a regime of direct administrative liability for legal entities involved in transnational corruption. It vested authority within the Colombian government, through its Superintendence of Companies, to impose sanctions and fines on national as well as foreign parent companies of Colombian subsidiaries and foreign subsidiaries of Colombian companies of 200 minimum wages.

# ANTI-CORRUPTION LEGISLATION IN LATIN AMERICA THE CASE OF COLOMBIA

- Law 1778 of 2016 established an administrative procedure for the investigation and sanctioning of legal entities involved in acts of transnational bribery or corruption, not subject to and independent from parallel criminal proceedings. Such administrative liability is independent, and does not depend upon a previous finding of criminal liability by a criminal court against its officers or directors.
- The Superintendence of Companies enforces administrative sanctions imposed by the TCA as well as conducting investigations of alleged violations of the TCA, determines if the company violated the law, and if necessary, calculates and enforces the pertinent administrative penalties (República de Colombia, 2016, Ley 1778, artículos 5-22).
- Under the TCA, a company is administratively liable when:

"(I) a director, employee, contractor, or shareholder (whether or not they have the legal authority to bind the entity), (2) gives, offers, or promises, (3) to a foreign public official, (4) directly or indirectly, (5) money, any other good with monetary value, or any other benefit or prerequisite, (6) in exchange for the official to perform, omit, or delay any act related to the exercise of the official's functions, and (7) in relation to international business transactions"

### FCPA IN LATIN AMERICA – THE PROBLEM OF "GOVERNMENT OFFICIALS"

- Colombia, like many countries in Latin America, has a very centralized state sector that is present throughout the
  economy. One of the key issues is therefore understanding the implications of government involvement in the
  private sector to assess risks under the FCPA. See Colombian State Owned Business and the Implications of
  Doing Business in Colombia, Tab LA. I.
- The FCPA prohibits bribing a foreign official for the purposes of influencing any act or decision of the foreign official in his or her official capacity. I5 U.S.C. § 78dd-2(a)(I)(A)(i). A "foreign official" under the FCPA, among other factors, is any officer or employee of a foreign government, or any department, agency, or instrumentality of a foreign government. I5 U.S.C. § 78dd-2(h)(2). However, Congress has not defined what constitutes an "instrumentality of a foreign government." As a result, the proper qualification of a business partner is critical to assessing FCPA liability in Colombia and Latin America generally.
- The leading case in this area is *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014), discussed in detail on the following slide. See Tab LA.2

# FCPA IN LATIN AMERICA – THE PROBLEM OF "GOVERNMENT OFFICIALS" – US V. ESQUENAZI

- In US v. Esquenazi, Joel Esquenazi and Carlos Rodriguez co-owned Terra Telecommunications Corp. (Terra), a medium-sized Florida company that purchased phone time from foreign vendors and resold the minutes to customers in the United States. Mr. Esquenazi, Terra's majority owner, served as President and Chief Executive Officer. Mr. Rodriguez, the company's minority owner, served as Executive Vice President of Operations.
- Over a period of many years Esquenazi and Rodriguez bribed executives at Telecommunications D'Haiti, S.A.M. (Telco), initially as part of a scheme to reduce debt owed by Terra to Telco and then as an ongoing practice to obtain commercial advantages. As is frequently the case, the bribes were disguised among other things through the use of "consulting agreements." Esquinazi and Rodriguez were accordingly convicted of both conspiring to violate and substantively violating the FCPA and sentenced to 15 years and 7 years in jail, respectively, among the harshest penalties ever imposed for FCPA violations.
- On appeal, Esquinazi and Rodriguez did not contest the underlying facts but claimed that Telco was not an
  "instrumentality" of the state and that the individuals they bribed were not, therefore, government officials.

# FCPA IN LATIN AMERICA – THE PROBLEM OF "GOVERNMENT OFFICIALS" – US V. ESQUINAZI

- Five days after the jury convicted Esquinazi and Rodrigues, the Prime Minister of Haiti, Jean Max Bellerive, issued a statement declaring that "Telco has never been and until now is not a State enterprise." Esquenazi, 752 F.3d at 919. In a confusing second declaration, the Prime Minister also stated, "this does not mean that Haiti's public laws do not apply to Telco even if no public law designates it as such." Id.
- The question was thus squarely raised on appeal: was Telco an "instrumentality" of the state or not? To answer this question, the Court upheld the factors applied by the trial court, the "Esquinazi factors," that are now widely used to asses whether a foreign business is an "instrumentality of the state" and its employees, therefore, "government officials."
- The key Esquinazi factors to apply in determining whether a company is an "instrumentality" of the state are:
  - Whether its key officers and directors are government officials or are appointed by government officials.
  - Whether the government owns a majority of its shares or provides financial support such as subsidies, special tax treatment, loans
    or revenue from government mandated fees.
  - Whether the company exercises exclusive or controlling power to administer its designated functions.
  - Whether the Company is widely perceived and understood to be performing official or governmental functions. *Id.* at 927.

In the case of Telco, the trial court concluded and the I I<sup>th</sup> Circuit agreed that all the factors weighed in favor of a finding that Telco <u>was</u> an instrumentality of the State, emphasizing the final factor, namely the public perception and understanding of the business in question.

# FCPA IN LATIN AMERICA – THE PROBLEM OF "GOVERNMENT OFFICIALS"

- In Colombia, as throughout Latin America, the distinction between a government official and a private employee is blurred when state-owned companies are involved because not all employees of a state-owned company are government officials under local laws, whereas they could be considered such officials under the Esquenazi factors.
- For example, the Colombian government owns stock in a number of companies. Nevertheless, to know whether employees of a state-owned company are government officials requires a case-by-case analysis. According to the Colombian Constitutional Court, if the government owns more than 90% of company stock, Colombian law expressly provides that such company is an instrumentality of the government. Its managers would all be government officials. However, if the government owns less than 90%, the result is less clear.
- Consider the case of Colombia Telecomunicaciones (Telefoníca), a cable, phone, and internet company. The Colombian government owns
   32.5 percent of the stock of Telefoníca.
- Due to its stock ownership, the Colombian government has one seat on the board of directors. The Colombian government and the
  public perceive Telefonica as a private company, although Telefonica is part of the government. Nevertheless, Colombian courts have not
  yet ruled whether Telefonica is part of the government or if its employees are government officials.
- In Telefonica's case, the *Esquenazi* factors support two contradictory conclusions: that Telefonica is an instrumentality of the Colombian government because it is part of the government, and that Telefonica is <u>not</u> an instrumentality because the public and the government perceive that Telefonica does not perform a government function. Consequently, the Esquenazi factors are not clear enough to apply to many hard cases and may promote decisions in conflict with the laws of foreign countries.

# FCPA IN LATIN AMERICA – THE PROBLEM OF "GOVERNMENT OFFICIALS"

- The lack of clarity as to what "an instrumentality of a foreign government" is makes it possible that DOJ and the SEC may claim a US company is making illegal payments to a government official when, under local law and as a matter of local practice, the individual is considered to be a private employee. This situation is not unique and should be considered throughout Latin America in sectors where there is a strong state presence, such as the oil and gas or telecommunications industries.
- While these sectors are dominated by large companies, many small and medium-sized businesses play niche roles in serving segments of industries with a strong state presence or seek to penetrate relatively small countries (of which there are a number in Latin America) and find themselves confronted with the "government official" problem.
- The best protection against liability is to implement a robust FCPA compliance program and to consult early with a local lawyer. While it may not be possible to achieve absolute clarity, identifying the government official issue in advance could spare US investors or companies very unpleasant surprises, given the harsh nature of the FCPA penalties that can be imposed by the SEC or the DOJ.

### FCPA LIABILITY IN PRACTICE TRADITIONAL FOCUS ON LARGE LISTED COMPANIES - ALERE

- The case of Alere, Inc. illustrates some of the FCPA challenges of doing business in Colombia. During 2007 and 2008, Alere purchased a private Colombian distributer of Alere products called BioSystems, S.A., ultimately renaming it Alere Colombia in 2016. See Alere Cease and Desist Order, Tab LA. 3
- In conjunction with the acquisition, Alere installed Biosystems' former primary shareholder and owner as Biosystems' General Manager. Biosystems' customers included a set of entities known as an Entidad Promotora de Salud, or EPS, which provided health insurance services for their members. These entities were created as part of the Colombian government's efforts to provide universal health benefits to its citizens. Among other things, EPSs contracted for health services on behalf of their participants through a network of public, private, and their own health service providers. EPSs were both private and government-controlled. From at least 2006, Biosystems sold products to an EPS that operated as a private entity (the "Customer EPS"). Biosystems' contact at the Customer EPS was a management level employee ("the "Customer EPS Manager") responsible for, among other things, recommending and approving products including Biosystems' products for the Customer EPS to purchase and provide to its enrolled participants. The Colombia GM oversaw the Customer EPS account and dealt directly with the Customer EPS Manager.
- During 2011 through 2013, due to allegations of mismanagement at the Customer EPS, the Government of Colombia, acting through the Ministry of Health, took control and direction of the Customer EPS. During this time, the Customer EPS was an instrumentality of the Government of Colombia and its employees were officials of the Government of Colombia. From 2007 through at least 2012, Biosystems, at the direction of the Colombia GM, made improper payments totaling approximately \$275,000 to the Customer EPS Manager in order to obtain and retain business from the Customer EPS. Biosystems disguised these improper payments as payments for purported consulting services from the Customer EPS Manager's husband performing consulting services for Biosystems sufficient to justify the amount of payments received.
- In 2015, Alere's corporate management began an internal investigation into consulting payments at Biosystems and discovered the improper payments. The improper payments to the Customer EPS Manager were recorded as legitimate consulting expenses in Biosystems' books and records. Biosystems' books and 13 records were consolidated into Alere's books and records thereby causing Alere's books and records to be inaccurate. Alere also failed to devise and maintain an adequate system of accounting controls sufficient to prevent and detect the improper payments that occurred over several years.

### FCPA LIABILITY IN PRACTICE TRADITIONAL FOCUS ON LARGE LISTED COMPANIES - ALEXION

- The recent case of Alexion, in which a cease and desist order was entered on July 2, 2020, illustrates further FCPA pitfalls companies face in Latin America
- From 2013 to 2015, certain employees at Alexion Colombia created or directed third parties to create inaccurate financial records concerning payments to third parties, including patient advocacy organizations ("PAOs").
- For example, in 2014, in order to provide funds to a PAO, an Alexion Colombia senior manager directed a PAO to submit an invoice that falsely described that the funds would be used for "legal support" services. This inaccurate invoice allowed Alexion Colombia to approve the payment locally instead of obtaining approval for the payment through the global grant process, as required by Alexion's policies.
- Further, Alexion Colombia failed to maintain adequate books and records of certain of its financial transactions involving payments to third parties.
- As with Alere, the Alexion case illustrates the use of illegal payments to quasi-government officials disguised as legitimate payments and underscores that companies engaging in business in Latin America need to have robust internal controls and auditing procedures to ensure that corrupt payments are identified and not wrongly incorporated in a company's financials.
- While the SEC proceeded under the accounting and bookkeeping provisions of the FCPA, the disguised payments to quasi-government officials could also have been brought under the bribery prong of the FCPA, subject to the difficulties discussed in the slides on "The Problem of Government Officials" above.

# FCPA EXPANSION OF JUIRISDICTION OVER MEDIUM SIZED BUSINESSES AND INDIVIDUALS (I)

- The books and records provisions of the FCPA only apply to companies that are listed on a US stock exchange, whereas the corruption in Latin America primarily affects businesses that are unlisted. Perhaps in response to this dilemma, the US authorities have been increasingly aggressive against individual wrongdoers under the bribery prong of the FCPA.
- In September, 2020, the DOJ announced that Sargeant Marine Inc. a medium-sized, unlisted Florida asphalt company with fewer than 50 employees. "pleaded guilty and agreed to pay \$16.6 million to resolve foreign bribery charges stemming from conduct by the company and its employees and agents in Brazil, Venezuela and Ecuador." Tab LA.5 DOJ Release re Sargeant Marine and Executives.
- The total criminal penalty was actually \$90 million, but because of SMI's "inability to pay," the settlement amount was only \$16.6 million.
- According to the DOJ release: "Previously, a corporate executive for Sargeant Marine, Daniel Sargeant; two Sargeant Marine traders who were active in Brazil, Venezuela and Ecuador, Roberto Finocchi and Jose Tomas Meneses; an agent and a consultant who acted as bribe intermediaries in Brazil and Venezuela, Luiz Eduardo Andrade and David Diaz; and a former Venezuelan government official, Hector Nunez Troyano, who received some of the bribes, pled guilty. In addition, on September 10, 2020, a criminal complaint was unsealed in federal court in Brooklyn charging another former Venezuelan official with conspiracy to commit money laundering, in part for his alleged role in the Sargeant Marine Venezuela scheme."
- The above individual FCPA enforcement actions send a clear warning message to medium-sized businesses and represent a significant trend in Latin America towards the pursuit of individuals under the bribery prong of the FCPA.

# FCPA EXPANSION OF JURISDICTION OVER MEDIUM-SIZED BUSINESSES AND INDIVIDUALS (II)

- In May 2019, Armengol Alfonso Cevallas Diaz (an Ecuadorian citizen) and Jose Melquiades Cisneros Alarcon (an Ecuadorian citizen and permanent resident of the U.S.) were charged with conspiracy to violate the FCPA's anti-bribery provisions, conspiracy to commit money laundering, and numerous money laundering offenses. See Tab LA..6 DOJ Brings Additional Criminal Charges In Connection With PetroEcuador Bribery Scheme.
- According to the indictment Cevallos, Cisneros, and their co-conspirators "unlawfully enriched themselves by making corrupt payments to PetroEcuador [described as the state-owned oil company of Ecuador] officials in order to obtain and retain contracts from PetroEcuador for companies controlled by or associated with Cevallos and others.
- The PetroEcuador officials are described as Marcelo Reyes Lopez (an employee of PetroEcuador from 2012 2013), PetroEcuador Officials I (an employee of PetroEcuador from 2013 2016), and PetroEcuador Official 2 (an employee of PetroEcuador from 2012 2013).
- This indictment illustrates the expansive jurisdictional approach of the DOJ in enforcing the FCPA. The case involved the bribery of a foreign official by a foreign citizen on foreign soil, but the DOJ claimed jurisdiction because the Defendants "funneled" some of their payments through a US bank account. This case also illustrates how far from its original focus the FCPA has come. While the misuse of a US bank account should be subject to investigation and punishment, it is not at all clear the FCPA designed to clean up the foreign conduct of US entities is the appropriate vehicle.

### LOCAL ANTI-CORRUPTION ACTIONS AGAINST INDIVIDUAL DEFENDANTS

- Latin American countries are also attempting to crack down on corrupt individuals, with some success, as illustrated by the two cases below.
- In April of 2019, at the request of the Attorney General's Office, Omar Ambuila, an official of the National Tax and Customs Directorate, DIAN, was captured and taken into custody as a suspect in a wide-ranging corruption scheme within the DIAN that allowed the uncontrolled entry of contraband into Colombia through the port of Buenaventura. During the investigation by the Prosecutor's Office, multi-million dollar transfers to the United States, the purchase of high-end sports vehicles and expensive accessories, and the organization of lavish trips and by Omar Ambuila's family were uncovered. Omar Ambuila's wife and daughter were also detained as part of the investigation.
- In March, Carlos Bermeo, an official of the Office of the Attorney General of the Nation, and a prosecutor of the Special Jurisdiction of Peace, the "JEP," was captured and brought into custody after he was found to have received an envelope containing USD \$ 500,000.00 from former senator Luis Alberto Gil to prevent the extradition to the United States of a former FARC guerrilla, alias Jesús Santrich. Mr. Santrich planned to meet with Mexican cartels to organize the shipment of cocaine abroad, an illegal act that would presumably have occurred after the signing of the Havana peace accords between the government and the FARC on December 1, 2017 (the "Havana Accords"). Senator Gil and 4 other JEP officials were also captured and detained for more than a year in jail.
- As a result of the Bermeo, Santrich, Gil scandal, and other alleged irregularities at the JEP, a number of Colombian members of Congress have advocated for the dissolution of the JEP. Despite these protests, the JEP ordered the release of Jesús Santrich and blocked his extradition to the United States on the grounds that it had not been possible to verify whether the Santrich's criome was committed before or after the signing of the Havana Accords. The decision of the JEP rocked Colombia and caused the resignation of the then Attorney General of the Nation, Néstor Humberto Martínez.
- The above cases illustrate the conflicting trends small and medium-sized businesses are likely to encounter in Latin America: on the one hand, certain institutional forces are attempting to make legal and other changes to change an entrenched culture of corruption; on the other hand, old habits die hard, and actors and forces who have benefitted from corruption remain powerful. This overall culture heightens the risks and uncertainties of doing business in Latin America and further underscore that implementing a robust anti-corruption compliance program remains the most effective way to avoid liability under either the FCPA or local law.

### FOCUS ON THE DOJ AND SEC ADVANCE PREPARATION IS THE KEY TO AVOIDING LIABILITY

- With small and medium-sized business and their owners facing increased risk of liability for FCPA violations, understanding how the DOJ and SEC evaluate FCPA violations and make their investigative and enforcement decisions is increasingly important.
- Of course, implementing a robust FCPA compliance program before the DOJ or SEC begin taking action is the best means to avoid issues with the US authorities.
- Key protections from liability:
  - Develop a Company FCPA Compliance Policy to be distributed to all employees. Tab LM.I. Model Compliance Policy.
  - Ensure all employees have read and acknowledged the FCPA Compliance Policy.
  - Prepare and review among senior executive and legal team a detailed FCPA checklist. Tab LM.2. FCPA Compliance Checklist.
  - Consider seeking DOJ equivalent of no-action letter. Tab LM.3.
  - Consider seeking ISO certification. Tab LM.4, Tab LM.5.

### FOCUS ON THE DOJ AND SEC DOJ PILOT PROGRAM: A PERMANENT INCENTIVE FOR COMPLIANCE

- In 2016, the DOJ initiated a Pilot Program designed to encourage compliance and cooperation. The guiding principles of the Pilot Program have been incorporated now as permanent guidance in regard to compliance and cooperation. See Principles of Federal Prosecution of Business Organizations, set forth in Chapter 9-28.000 of the Justice Manual.
- These principles are discussed in detail in the following slide.



### FOCUS ON THE DOJ AND SEC – DOJ PRINCIPLES OF FEDERAL PROSECUTION

- Ten factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements:
  - i. the nature and seriousness of the offense, including the risk of harm to the public;
  - ii. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
  - iii. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
  - iv. the corporation's willingness to cooperate with the government's investigation, including as to potential wrongdoing by the corporation's agents;
  - v. 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 or resolution decision;
  - vi. the corporation's timely and voluntary disclosure of wrongdoing;
  - vii. the corporation's remedial actions, including any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution;
  - viii. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
  - ix. the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and

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x. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance. See Principles of Federal Prosecution of Business Organizations, set forth in Chapter 9-28.000 of the Justice Manual.

### FOCUS ON THE DOJ AND SEC DOJ CORPORATE ENFORCEMENT POLICY

• The FCPA Corporate Enforcement Policy (CEP), contained in the Justice Manual, provides that, where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances.



### FOCUS ON THE DOJ AND SEC SEC ENFORCEMENT POLICIES

- SEC's Enforcement Manual, published by SEC's Enforcement Division and available on SEC's website, sets forth information about how SEC conducts investigations, as well as the guiding principles that SEC staff considers when determining whether to open or close an investigation and whether civil charges are merited. In short, the SEC evaluates, Self-Reporting, Cooperation, and Remedial Efforts.
- The SEC identifies four broad measures of a company's cooperation:
  - i. self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
  - ii. self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins, and consequences of the misconduct, and promptly, completely, and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;
  - iii. remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
  - iv. cooperation with law enforcement authorities, including providing SEC staff with all information relevant to the underlying violations and the company's remedial efforts.

### FOCUS ON DOJ AND SEC DOJ AND SEC ASSESSMENT OF CORPORATE COMPLIANCE

- DOJ and SEC have no formulaic requirements regarding compliance programs. Rather, they employ a common-sense and pragmatic approach to evaluating compliance programs, making inquiries related to three basic questions:
- Is the company's compliance program well designed?
- Is it being applied in good faith? In other words, is the program adequately resourced and empowered to function effectively?
- Does it work in practice?
- That said, the DOI and SEC recognize certain hallmarks of effective Compliance Programs:
  - i. Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
  - ii. Code of Conduct and Compliance Policies and Procedures
  - iii. Oversight, Autonomy, and Resources
  - iv. Risk Assessment
  - v. Training and Continuing Advice
  - vi. Incentives and Disciplinary Measures
  - vii. Third-Party Due Diligence and Payments (i.e. disguised bribes)
  - viii. Confidential Reporting and Internal Investigation
  - ix. Continuous Improvement: Periodic Testing and Review
  - x. Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration
  - xi. Investigation, Analysis, and Remediation of Misconduct
- Each of the above hallmarks are treated in A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, SECOND EDITION (July 2020) by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, available at www.justice.gov.



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#### THANK YOU!

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#### Please click <u>HERE</u> for important documentation relevant to the presentation!

The following slides will provide you with the names of the Exhibits you will find at the link above!

- Tab 1 78dd-1 Prohibited foreign trade practices by issuers
- Tab 2 Church\_Committee\_report\_(Book\_I,\_Foreign\_and\_Military\_Intelligence)
- Tab 3 The 2020 FCPA Enforcement Index \_ The FCPA Blog
- Tab 4 2019-year-end-fcpa-update
- Tab 5 DOJ SEC FCPA Resource Guide
- Tab 6 Foreign Corrupt Practices Act DOJ summary overview
- Tab 7 United States v Hoskins
- 🔼 Tab 8 March 2020 Reg A Lookback Study
- Tab 9 SEC.gov \_ SEC Charges Smith & Wesson With FCPA Violations (1)
- Tab 10 Smith and Wesson SEC Order

- Tab F1. 2013-05-29-Total-dpa-filed
- Tab F2. 06-28-10-Technip-agreement
- 🔥 Tab F3. 02-22-11 Alcatel-dpa
- 🔼 Tab F4. Alstom Plea-Agreement-for-SA
- 🔏 Tab F5. airbus-dpa
- Tab F6. Mebiame-plea-order
- Tab F7. de\_6\_thiessen\_plea\_agreement
- Tab F8. de\_7\_puckett\_plea\_agreement
- 🔼 Tab F9. LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation 🛭
- 🔼 Tab F10. Lutte contre la corruption \_ approche comparée entre \_Deferred Prosecution Agreement\_ et Convention Judiciaire :

- Tab It.1 The FCPA unfairly punishes foreign companies. Or does it\_ The FCPA Blog
- Tab It.2 Deutsche Bank Deferred Prosecution Agreement
- Tab It.3 SEC Press Release re ENI S.p.A. enforcement action
- Tab It.4 Eni Cease and Desist Order
- Tab lt.5 Decision of the Corte Suprema di Cassazione re Nigerian case
- Tab It.6 Notes on the Decision of the Corte d'Appello di Milano
- Tab It.7 Fiat Cease and Desist Order
- 🔼 Tab lt.8.1. Cod. Pen.
- 🚹 Tab lt.8.2. Cod.Civ.
- Tab lt.9 D.lgs.231.01
- 🔼 Tab lt.10 Vigano
- Tab lt.11 GAR-2019-eng.pdf
- Tab It.12 I14.Greco(2020)4-eng-Corruption-Risks-and-Useful-References-in-the-context-of-COVID-19.docx

- 🔼 Tab LA.1 Colombian State-Owned Companies and the Implications of Doing Business in Colombia Under the FCPA \_ Business Law Today from ABA
- 🔼 Tab LA.2 US v Esquenazi
- Tab LA.3 Alere Cease and Desist Order
- Tab LA.4 Alexion Cease and Desist Order
- Tab LA.5 DOJ Release re Sargeant Marine Inc. and Executives
- ▶ Tab LA.6 DOJ Brings Additional Criminal Charges In Connection With PetroEcuador Bribery Scheme FCPA Professor
- Tab LM.1 Foreign Corrupt Practices Act Anti-Corruption Policy
- Tab LM.2 Foreign Corrupt Practices Act Compliance Checklist (1)
- Tab LM.3 Opinion Procedure Release August 2020
- Tab LM.4 iso.37001.slides.nov\_15
- Tab LM.5 13 ISO 37001 Who Will Certify You