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Contributing Editors:
Jonathan Pickworth & Jo Dimmock

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Contributing Editors
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PREFACE

We are pleased to present the seventh edition of *Global Legal Insights – Bribery and Corruption*. This book sets out the legal environment in relation to bribery and corruption enforcement in 28 countries and one region worldwide.

This edition sees the addition of new chapters relating to Belgium, Poland, Hong Kong and the Czech Republic, as well as an Asia-Pacific overview. In addition to addressing the legal position, the authors have sought to identify current trends in enforcement, and anticipated changes to the law and enforcement generally.

Incidents of bribery and corruption often involve conduct and actors in several different jurisdictions. As enforcement activity increases around the world, attention is being focused on particular problems companies face when they seek to resolve cross-border issues.

Coordinating with multiple government agencies can be challenging at the best of times, and can be even more difficult when dealing with bribery and corruption laws that have been amended or have just entered into force. Sometimes a settlement in one jurisdiction can trigger a further investigation in another. Stewarding a company through these sorts of crises involves not only dealing with today's challenges, but thinking about the next day, the next week, the next month, and beyond, on a global stage.

We are very grateful to each of the authors for the contributions they have made. We hope that the book provides a helpful insight into what has become one of the hottest enforcement topics of current times.

Jonathan Pickworth & Jo Dimmock
White & Case LLP
November 2019

USA

Douglas Jensen & Ashley Williams
White & Case LLP

Brief overview of the law and enforcement regime

The United States Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") investigate and prosecute business corruption worldwide under the US Foreign Corrupt Practices Act of 1977, as amended ("FCPA").[1] The FCPA, which prohibits bribery of non-US government officials and imposes certain accounting and internal controls requirements upon companies listed in the United States, has a broad geographical reach and creates significant exposure for both companies and individuals.

In recent years, the DOJ and SEC have aggressively pursued anti-corruption enforcement actions, and subjected both US and foreign companies, as well as their subsidiaries and agents, to FCPA scrutiny. Risks associated with such proceedings include not only the cost of investigations, civil and criminal penalties, and disgorgement of profits, but also threats to corporate reputation and management careers.

Overview of enforcement activity and policy during the last year

The application and interpretation of the FCPA continues to be driven more by the views of US enforcement officials than by the decisions of US courts or legislative bodies. Those US authorities continue to emphasise policies that increase the incentives for voluntary self-disclosures of apparent FCPA violations. In 2019, the DOJ put forth revisions to two major policies: (1) in March 2019, the DOJ updated its 2017 guidance on corporate compliance programs; and (2) in April 2019 the DOJ announced the latest revisions to its FCPA Corporate Enforcement Policy (stating that corporations that timely disclose, cooperate and remediate will enjoy a presumption that the DOJ will decline to prosecute and will not impose a monitor).

Enforcement actions in 2018 and 2019 demonstrated that global enforcement efforts remain strong. In June 2018, for example, US officials brought their first coordinated action with French authorities against Société Générale S.A. in a June 2018 action related to a scheme involving bribery of Libyan officials.[2] That action resulted in a total payment of $585 million, split equally between US and French authorities. In June 2019, the US announced a resolution with Technip FMC PLC (a British company) for conspiracy to violate the FCPA's anti-bribery provisions.[3] That resolution resulted in a combined total criminal fine of more than $296 million to resolve charges with both the DOJ and Brazilian law enforcement, with approximately $82 million in fines going to the DOJ, and $214 million going to Brazilian authorities.

Law and policy relating to issues such as facilitation payments and hospitality

The FCPA contains two sets of provisions; the anti-bribery provisions and the accounting

provisions. The FCPA's anti-bribery provisions apply to: (i) "issuers" of securities on US exchanges; (ii) "domestic concerns," namely, US citizens, nationals, residents, and business entities organised under US law; and (iii) persons other than issuers or domestic concerns who act within US territory in furtherance of a promise or payment prohibited under the FCPA.[4] Thus, any person, including foreign persons or entities who take any act in furtherance of the unlawful conduct in the US, could be liable for violations of the FCPA. The US government takes the position that if funds pass through a US bank or an email passes through US servers, that US connection would be sufficient to expose the participants to FCPA liability.

Bribery provision

Broadly speaking, the anti-bribery provisions prohibit the corrupt payment, authorisation, or offer to pay anything of value to a non-US government official, political party, party official or candidate for political office to influence an official act or decision for the purpose of obtaining, retaining, or directing business, or securing an improper advantage. Not only are direct payments to non-US government officials for a corrupt purpose unlawful, but corrupt payments to third parties (e.g., consultants, agents, or other intermediaries), if the person or entity making, authorising or offering the improper payment knows, or is aware of, a high probability that all or part of a payment will be offered, promised or given, directly or indirectly, to a non-US government official, are also violations of the FCPA. A violation of the anti-bribery provisions is punishable by substantial monetary fines and, for individuals, by imprisonment.

(i) *Facilitation Payments Exception*

The bribery provision contains an exception for "facilitating or expediting payments" made in furtherance of "routine governmental action".[5] These so-called "facilitation" payments are modest payments made to foreign officials to expedite the performance of routine, non-discretionary acts (e.g., processing visas, providing police protection or mail service, or supplying utilities like phone service, power, and water). Not only is this exception narrowly construed by U.S. enforcement authorities, but most other national anti-corruption laws do not recognize an exception for such payments.

(ii) *Hospitality*

The FCPA contains an affirmative defence based upon a reasonable and *bona fide* expenditure directly related to the promotion, demonstration or explanation of goods or services, or the performance of a relevant contract, including legitimate hospitality for government officials. According to the FCPA Resource guide, "hallmarks" of appropriate hospitality are when a gift is "given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law. . . . Items of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC."[6] Expensive or extravagant gifts (e.g., exotic travel, tickets to sporting events, watches, etc.) are more likely to be considered improper payments.

Accounting provisions

The accounting provisions of the FCPA apply only to "issuers" of securities on US exchanges and consist of the "books and records" and "internal controls" provisions.[7] In general, the provisions require: (i) making and maintaining books, records, and accounts that, in

reasonable detail, accurately and fairly reflect their transactions and use of assets; and (ii) devising and maintaining an adequate system of internal accounting controls to prevent and detect corruption. Thus, if a corporation paid a bribe but did not record the expenditure as a bribe in its books and records, it would be subject to additional, and often higher, penalties. The FCPA accounting provisions do not contain any materiality requirements, which means that any violation, no matter how trivial, could be prosecuted.

Under the FCPA, issuers are responsible not only for their own compliance with the accounting provisions but also for the failure of their majority- or wholly-owned subsidiaries, and subsidiaries that they otherwise control, to comply with these provisions. The SEC has taken the position that issuers' books and records necessarily include those of their consolidated subsidiaries. Thus, in practice, the SEC applies strict liability for accounting violations by a corporate parent, even if a parent's books and records are unknowingly inaccurate only because of its subsidiaries' inaccurate books and records. For instance, if a company's majority-owned subsidiary inaccurately characterises payments in a misleading way, such as describing a payment as a "consulting fee" when no work was performed, the company could still face FCPA prosecution for violation of the accounting provisions.

Individuals and companies can face both civil and criminal liability for violating the accounting provisions. Criminal liability can result from a knowing circumvention of, or failure to implement a system of, internal controls, or from a knowing falsification of any book, record, or account of an issuer.[8] Further, companies may be debarred from US federal contracts, and institutional investors may be barred from doing business with a corporation that is subject to an FCPA enforcement action. Although the same course of conduct can violate both the anti-bribery and accounting provisions of the FCPA, a violation of the accounting provisions may be found regardless of whether the anti-bribery provisions have been violated and *vice-versa*.

Scope of prohibitions and risk

The FCPA makes it illegal to directly or indirectly make, promise, authorise or offer anything of value to a non-US government official to secure an improper advantage, obtain or retain business, or direct business to any other person or entity.[9]

"Anything of value" is defined very broadly and can include, for example:

- gifts;
- travel, meals, lodging, entertainment, or gift cards;
- loans or non-arm's length transactions;
- charitable or political donations; or
- business, employment, or investment opportunities.

This prohibition includes payments to third-parties where the US person knows, or has reason to know, that the third-party will use any part of the payment for bribes. Thus, one of the areas of greatest risk to companies, particularly those that operate in jurisdictions known for widespread corruption, is the activity of agents. Corporations can be held liable for actions taken by their agents, including consultants, joint venture partners, customs brokers, distributors, "finders" or vendors, if the corporation authorises, has knowledge of, or turns a blind eye to corrupt payments by such agents.

Potential 'red flags' in relation to third-party agents include situations where:

- a government official recommends the third party;
- the third party has previously engaged in suspicious or illegal activities;

- the third party requests unusual payment arrangements, unusually high commissions, or success fees dependent on favourable government action; or the third party is a charity (even *bona fide*) affiliated with a foreign government or official(s).

Key issues relating to investigation, decision-making and enforcement procedures

Enforcement of FCPA Violations

In 2019, as in 2018, the DOJ and SEC have continued to bring significant numbers of enforcement actions against companies and individuals for FCPA violations. In 2018, the DOJ brought six corporate enforcement actions, resulting in nearly $597 million in corporate criminal fines, penalties, and forfeiture; charged 31 individuals; convicted one individual at trial; and secured guilty pleas from 18 individuals.[10] The DOJ also issued four declinations.

The SEC brought 13 corporate enforcement actions, and settled charges with three individuals. In the first three quarters of 2019, the DOJ brought four corporate enforcement actions, issued one declination, and charged 11 individuals. The SEC brought 12 enforcement actions, charged two individuals, and settled charges with two individuals.[11]

International law enforcement cooperation continues

Mobile Telesystems PJSC ("MTS") became the third FCPA enforcement action brought against a telecommunications company in connection with bribes paid to facilitate entry into the Uzbek market.[12] The DOJ and SEC announced settlements with MTS, Russia's largest telecommunications provider, in March 2019, with settlements totaling $850 million. The resolutions relate to a scheme to bribe Uzbek officials, including Gulnara Karimova, the daughter of the former president of Uzbekistan, a scheme similar to those which led to a 2016 resolution with VimpelCom Limited, a Netherlands-based company, for $795 million, and a 2017 resolution for $965 million with Telia Company AB, based in Sweden.[13]

DOJ's collaboration with Brazil has continued to be significant. In December of 2016, Odebrecht, the Brazilian construction conglomerate, entered into a guilty plea with the DOJ where it agreed to pay the US $253 million, with $3 billion going to Brazil and Switzerland (mostly Brazil).[14] In September 2018, Petrobas, a Brazilian oil company, agreed in a non-prosecution agreement to pay the US over $170 million and Brazil over $682 million.[15] In June 2019, TechnipFMC agreed to pay $214 million to Brazil and $82 million to the US for violations of the anti-bribery and conspiracy provisions of the FCPA.[16]

DOJ FCPA Corporate Enforcement Policy

In July 2018, the DOJ announced that successor companies that discover potential FCPA violations in connection with M&A transactions, and which subsequently disclose that conduct and provide cooperation to the DOJ, would be treated in accordance with the principles of the DOJ's FCPA Corporate Enforcement Policy (the "CEP"). That policy, which was incorporated into the US Attorney's Manual in November 2017, creates a presumption that companies will receive a declination of prosecution for FCPA violations, absent aggravating circumstances, when they voluntarily self-disclose the misconduct, fully cooperate with the DOJ, and timely and appropriately remediate the issue, subject to disgorgement of any ill-gotten gains.[17]

The approach marked an evolution from the guidance provided by the 2012 DOJ and SEC Resource Guide to the FCPA, which stated that the DOJ "may … decline to bring enforcement actions" against companies that undertake certain M&A best practices.

In March 2019, the DOJ revised the CEP. Notably, under the new guidance, the DOJ relaxed the requirements for full remediation credit. In the original CEP section discussing

the remediation actions companies should take in FCPA matters for business records, the guidance required that companies *prohibit* employees from using ephemeral messaging platforms in order to be eligible for full remediation credit. Under the March 2019 update, companies must ensure that guidance and controls are *appropriate*. Specifically, the guidance now states:

> [a]ppropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including *implementing appropriate guidance and controls* on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations (*emphasis added*).

Given the DOJ's past use of similar language in the Resource Guide to the FCPA, the agency will likely expect companies to design and implement controls over ephemeral messaging platforms that are tailored to a company's risk.

Corporate compliance programs

In April 2019, the DOJ released an update to its guidance document, "Evaluation of Corporate Compliance Programs". Companies may use the guidance to anticipate what enforcement authorities will evaluate during investigations and/or settlement proceedings.[18] The update is a restructured and more detailed version of its February 2017 predecessor. It is organised into three parts, tracking the "fundamental questions" the DOJ's Justice Manual directs prosecutors to ask in assessing corporate compliance programs: (1) is the compliance program well designed?; (2) is it implemented effectively and in good faith?; and (3) does it actually work in practice?

By identifying categories and a detailed catalogue of key questions, the guidance provides insight into what the DOJ considers to be the indicators of a well-designed and effective compliance program.

FCPA litigation

In *United States v. Seng*, the US Court of Appeals for the Second Circuit said in an August 2019 opinion that the FCPA is not limited to bribes paid in exchange for "official acts."[19] In 2017, a federal jury found Macao billionaire Ng guilty of violating and conspiring to violate the FCPA, as well as domestic bribery and money laundering, for bribing officials at the United Nations to win support for building a conference center in Macao.

Ng argued in his appeal that the DOJ failed to prove any "official act" had occurred in connection with the bribe payments and the jury should have been instructed to meet the standard laid out by the Supreme Court in *McDonnell*,[20] which overturned the conviction of former governor of Virginia Bob McDonnell on public corruption charges because prosecutors overstretched the meaning of an "official act" under the US federal bribery statute.

The Second Circuit distinguished *Ng* from *McDonnell*, noting that the FCPA prohibits giving "anything of value" for four specified actions: (i) influencing an act or decision of a foreign official; (ii) inducing a foreign official to do or omit to do any act; (iii) securing any improper advantage; or (iv) inducing the foreign official to influence an act of a foreign government. The Second Circuit held that the McDonnell standard does not extend to the FCPA.

In *United States v. Hoskins*, the Second Circuit affirmed a US district court's dismissal of part of the indictment against Hoskins, holding that a non-US citizen, national, or resident

could not be held criminally liable under theories of conspiracy or aiding and abetting a violation of the FCPA.[21] Although the Second Circuit's decision limited the government's efforts to expand the extraterritorial reach of the FCPA, it also ruled that Hoskins could be held liable as an agent, and the DOJ chose to pursue charges on those grounds. In August 2019, a US district court ruled that Hoskins, a British national and former executive of Alstom S.A., will have to stand trial for violating the FCPA and related offences. Thus, the actual limiting effect of the court's decision on the US government's extraterritorial application of the FCPA is questionable.

Although not an FCPA matter, in a case involving Libor-rigging charges against two former employees of Deutsche Bank, *United States v. Connolly,* a US district court judge found that the DOJ effectively outsourced a criminal investigation to the target of the investigation.[22] According to the decision, Gavin Black, a Deutsche Bank employee convicted of the charges, made a "rather convincing showing" that Deutsche Bank and its external counsel were "*de facto* the government".

The court questioned whether the government had truly run a parallel investigation, stating: "…there are profound implications if the Government, as has been suggested elsewhere, is routinely outsourcing its investigations into complex financial matters to the targets of those investigations, who are in a uniquely coercive position *vis-à-vis* potential targets of criminal activity."

Nevertheless, the indictment against Black was not dismissed, based on other factors relevant to the analysis (including that his statements were not introduced at trial). Given the recent emphasis on, and incentives for, corporate compliance, voluntary disclosure, and cooperation with government investigations, the ruling may serve as a warning to US enforcement authorities pursuing FCPA charges as well.

SEC litigation

The Ninth Circuit concluded in a whistleblower action that the FCPA is not a "rule or regulation" of the SEC, and that the anti-retaliation provisions of the Sarbanes-Oxley Act do not protect whistleblowers who make internal complaints about potential violations of the FCPA.[23] The court's ruling limits the available remedies for employees who claim to have suffered adverse employment actions in retaliation for reporting FCPA concerns.

Proposed reforms / The year ahead

In July 2019, representatives in the House of Representatives introduced the "Foreign Extortion Prevention Act", a bill seeking to "prohibit a foreign official from demanding a bribe". Currently, the FCPA only captures so-called supply-side bribery, i.e., the offering or provision of a bribe. The Foreign Extortion Prevention Act aims to address the demand-side of bribery. Although the likelihood of enactment is impossible to predict, enforcement of such a law would face jurisdictional hurdles as well as the presumption against extraterritoriality.

In the past year US authorities have highlighted themes such as the importance of corporate compliance, and providing companies with incentives for voluntary self-disclosure. The DOJ and SEC may bring enforcement actions in cases in which they deem a company's compliance program to be inadequate, relying on the FCPA's accounting provisions, as they did in the $282 million resolution with Walmart for violations of the FCPA's books and records and internal accounting provisions (resolving both criminal and civil charges).[24]

Going forward, US authorities will likely continue to focus on individual accountability, incentivising companies to self-disclose and cooperate with investigations, corporate compliance, multi-jurisdictional coordination, and international cooperation.

* * *

Endnotes

1. 15 U.S.C. §§ 78dd-1-78dd-3.
2. Press Release, US Dep't of Justice, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018).
3. Deferred Prosecution Agreement, *U.S. v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. Jun. 25, 2019). The DOJ also recognized the significant assistance provided by legal authorities in Australia, France, Guernsey, Italy, Monaco, and the United Kingdom; *see also* Press Release, Dep't of Justice, TechnipFMC PLC and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Criminal Fines to Resolve Foreign Bribery Case (Jun. 25, 2019).
4. 15 U.S.C. §§ 78dd-1-78dd-3.
5. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
6. US Dep't of Justice, Criminal Division & US Sec. and Exch. Comm'n, *FCPA: A Resource Guide to the US Foreign Corrupt Practices Act* (Nov. 2012) (hereinafter "Resource Guide").
7. 15 U.S.C. § 78m.
8. 15 U.S.C. §§ 78m(b)(4)-(5), 78ff.
9. There are a number of tools that US authorities may employ other than the FCPA to combat bribery and corruption. For instance, although the FCPA does not prohibit commercial bribery (bribery involving someone other than a government official), the Travel Act does. Specifically, the Travel Act prohibits the use of the US mail, or interstate or foreign travel, for the purpose of engaging in certain specified criminal acts, including but not limited to bribery. Other US mail and wire fraud statutes, anti-money laundering statutes, and tax laws can also establish corruption offences where FCPA offences are not present.
10. US Dep't of Justice, Fraud Section Year in Review 2018, at p. 5.
11. US Sec. and Exch. Comm'n, SEC Enforcement Actions: FCPA Cases, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.
12. See Letter to Gary DiBianco and Lanny Breuer, US Dep't of Justice (Feb. 22, 2019); Cease-And-Desist Proceedings, US Sec. and Exch. Comm'n, In the Matter of Mobile TeleSystems PJSC, Exchange Act Release No. 85261 (Mar. 6, 2019).
13. Press Release, US Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017); Press Release, US Dep't of Justice, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016).
14. Press Release, US Dep't of Justice, Odebrecht and Braskem Plead Guilty and Agree to

Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016).

15. Cease-And-Desist Proceedings, US Sec. and Exch. Comm'n, In the Matter of Petroleo Brasileiro S.A. – Petrobras, Exchange Act Release No. 10561 (Sept. 27, 2018).
16. Deferred Prosecution Agreement, *U.S. v. TechnipFMC plc*, No. 19-CR-278 (E.D.N.Y. June 25, 2019).
17. US Dep't of Justice, FCPA Corporate Enforcement Policy (Nov. 29, 2017) (hereinafter "CEP")
18. US Dep't of Justice, Evaluation of Corporate Compliance Programs (Apr. 2017) (hereinafter DOJ Evaluation Guidance); Press Release, US Dep't of Justice, Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (Apr. 30, 2019).
19. *United States v. Seng*, 934 F.3d 110 (2d Cir. 2019).
20. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).
21. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).
22. *United States v. Connolly*, No. 1:16-cr-00370-CM (S.D.N.Y May 2, 2019).
23. *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176 (9th Cir. 2019).
24. Letter to Karen P. Hewitt, US Dep't of Justice (June 20, 2019); Cease-And-Desist Proceedings, US Sec. and Exch. Comm'n, In the Matter of Walmart, Inc., Exchange Act Release No. 86159 (June 20, 2019); see also Press Release, Dep't of Justice, Walmart Inc. and Brazil-Based Subsidiary Agree to Pay $137 Million to Resolve Foreign Corrupt Practices Act Case (June 20, 2019).

Douglas Jensen
Tel: +1 212 819 8513 / Email: douglas.jensen@whitecase.com

Douglas Jensen has more than 30 years' experience as a white collar defence attorney, commercial litigator, criminal prosecutor and trial lawyer. He has successfully represented executives and corporations caught up in the major criminal and regulatory investigations pursued over the last decade by the US Department of Justice, the Securities and Exchange Commission and other government agencies. In all but a small number of cases, Douglas' clients have avoided the filing of any criminal charges, and in many instances have avoided regulatory charges. Douglas has also obtained favourable results for his clients in high-stakes civil litigations and arbitrations, conducted multiple internal investigations, and served as an independent monitor for corporations subject to government investigations.

Ashley Williams
Tel: +1 202 626 3631 / Email: ashley.williams@whitecase.com

Ashley Williams advises clients on potential exposure under the US Foreign Corrupt Practices Act and other anti-corruption laws, and US economic sanctions compliance. In these areas, Ms. Williams assists clients by conducting risk assessments, internal investigations, and due diligence on behalf of multinationals related to potential violations of anti-corruption and economic sanctions laws. Ms. Williams also assists clients in developing, implementing and improving effective anti-corruption compliance programs. Ms. Williams has represented large, multinational companies in civil and criminal investigations by the US Department of Justice and US Securities and Exchange Commission, and other enforcement authorities.

White & Case LLP

1221 Avenue of the Americas, New York, NY 10020-1095, USA
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