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ENFORCEMENT TRENDS

2019 FCPA Enforcement Highlights and Trends

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Enforcement of the FCPA remained aggressive in the third year of the Trump Administration. In 2019, the SEC and DOJ imposed a record-setting $2.9 billion in penalties. Although recent settlements largely appear to have been initiated under the Obama Administration, the Trump Administration has maintained Obama-era anti-corruption initiatives and policies.

The DOJ and SEC publicly disclosed five new corporate FCPA investigations in 2019, a reduction from the 13 investigations opened in 2018 and the average of 21 over the last decade. The decrease in the number of new investigations, coupled with the ongoing issuance of declinations, signals a trend toward closing long-term investigations and rewarding self-disclosure and remediation.

In this article, we analyze 2019's enforcement actions and SEC, DOJ and CFTC policy developments and enforcement trends.

See "DOJ Enforcers Tout Transparency, the Defense Bar Responds" (Dec. 11, 2019).

Enforcement Actions

Over the last decade, the SEC filed an average of 15 new actions per year, while the DOJ filed an average of 21 new actions. In line with these averages, in 2019, the SEC filed 17 actions and the DOJ filed 22 actions against entities and individuals. Notably, U.S. enforcement authorities levied nearly $3 billion in penalties over the past year. As in prior years, non-U.S. authorities have continued to investigate and prosecute corruption within their own borders and global law enforcement cooperation has contributed to several anti-corruption resolutions. The most notable corporate enforcement actions of 2019 are listed below.

Company	Date	Alleged Bribery	Realized/ Expected Profit	Total Settlement
Mobile TeleSystems PJSC (MTS)	03/2019	$420M	$2.4B	$850M
Fresenius Medical Care	03/2019	$30M*	$135M	$231.7M
Walmart	06/2019	$4.6M*	$119.6M*	$282.7M
Technip FMC PLC	06/2019	$69M*	$135.7M	$310.2M
Telefonaktiebolaget LM Ericsson	12/2019	$150M*	$458.4M	$1.06B

*Global figures have not yet been published

Four Key Enforcement Trends

1) Third Parties Remain Major Risk Factor

Historically, third parties have been the largest source of anti-corruption compliance risk and this trend has continued to play out in recent enforcement actions. In fact, 15 of the 19 companies penalized in 2019 for FCPA violations, and 149 of the 163 companies penalized in the last decade, involved third-party intermediaries. Violations generally result from bribes paid through shell companies or other third-party intermediaries acting on behalf of a company. Enforcement authorities continue to encourage companies to improve risk management with respect to third parties (*e.g.*, pre-retention/renewal due diligence and post-retention/renewal compliance monitoring).

See "Continuous Spend Monitoring for End-to-End Third-Party Risk Management" (Dec. 11, 2019).

2) Imposition of Corporate Monitorship

Independent compliance monitors have played a major role in settling DOJ anti-corruption enforcement actions against alleged corporate wrongdoers. Among other activities, corporate monitors conduct extensive investigations, test compliance remediation efforts and provide report to enforcement authorities.

In October 2018, the DOJ released new guidance signaling a potential plan to reduce the imposition of monitorships and clarified that a corporate monitor should be viewed as the exception rather than the rule. The objective of the guidance was to limit disruption to businesses and prevent the duplicative punishment of corporations. It will be important to monitor whether/how the guidance is implemented over the years ahead. Notably the DOJ imposed independent compliance monitors in connection with four of the largest FCPA settlements over the past year (MTS, Fresenius Medical Care, Walmart and Ericsson).

See "Adelle Elia of LBI Offers Insights on Working Effectively With a Monitor" (Jul. 24, 2019).

3) Law Enforcement Cooperation and Double Jeopardy

The DOJ and SEC frequently bring parallel criminal and civil charges. Pursuant to the Justice Department's "no piling on" policy, the DOJ credits the disgorgement of profits paid in connection with the resolution of the SEC action. For example, if the disgorgement amount assessed by the DOJ is greater than that assessed by the SEC, the company will be responsible for paying the disgorgement amount once to the SEC, with the balance to be paid to the DOJ.

In addition to crediting a company's payments to other U.S. regulatory agencies, the DOJ and SEC can consider and credit the penalties paid to cooperating non-U.S. authorities. For example, U.S. authorities imposed a penalty of $301 million for FCPA violations committed by Technip FMC, but only $87 million of that amount was paid to U.S. regulators, while the remainder was paid to non-U.S. regulatory authorities. Importantly, almost all of the FCPA settlements in 2019 involved coordination between U.S. and non-U.S. authorities, thus continuing the trend toward multi-jurisdictional enforcement.

See "How Companies Can Respond to the Boom in FCPA Enforcement Fueled by International Cooperation" (Oct. 30, 2019).

4) Emphasis on Individual Prosecutions

The DOJ's continued dedication to prosecuting individual misconduct has led to an increase in the number of individual prosecutions. According to remarks by Assistant Attorney General Brian Benczkowski, the DOJ announced charges against 34 individuals and obtained 30 guilty pleas for anti-corruption-related offenses in 2019, more than any other year in history. The increase in individual prosecutions appears to stem, in part, from the policy statements articulated in the CEP encouraging companies to self-report the misconduct of individual wrongdoers to obtain cooperation credit.

Importantly, individual prosecutions have formed a growing body of FCPA-related jurisprudence. The DOJ has consistently taken aggressive positions interpreting the FCPA, but those positions are only infrequently subject to judicial review. For example, in one November 2019 case, *U.S. v. Hoskins*, a jury found the senior vice president of a French company guilty of FCPA violations. Hoskins challenged the meaning of the previously undefined term "agent" under the FCPA and argued that he did not act as an employee, officer, director, or agent of the U.S. subsidiary in furtherance of an FCPA violation while in the United States. The DOJ argued that, even though Hoskins was employed by a non-U.S. company, Hoskins nevertheless acted as an agent of the company's U.S. subsidiary because his role in the bribery scheme was controlled by that subsidiary. The Connecticut District Court determined that an "agent" is "a person who agrees to perform acts or services for another person or company, known as the principal." The DOJ convinced a jury that Hoskins violated the FCPA, as an "agent" of the U.S. subsidiary, when he oversaw the retention of third parties with knowledge that that they would share a portion of their payments with foreign government officials to obtain business for the U.S. subsidiary. *Hoskins* supports ongoing efforts by the Justice Department to expand the extraterritorial reach of the FCPA.

DOJ Corporate Enforcement Policy Updates

Over the past year, the DOJ has continued to consistently apply and develop the CEP, which provides credit to companies that (1) voluntarily disclose misconduct, (2) fully cooperate with government authorities, and (3) timely and appropriately remediate violations.

In an effort to increase the transparency and certainty of this policy, the DOJ refined the CEP to further encourage voluntary self-disclosure. The DOJ's updates to the CEP afford companies a greater opportunity to receive credit for meaningful cooperation and assistance with the government's investigation and offer predictability in the government's response to self-reporting.

March 2019 Updates

On March 8, 2019, the DOJ announced changes to the CEP and adjusted the standards by which companies will receive credit for cooperating with criminal investigations under the FCPA.

Specifically, the DOJ:

1. entirely eliminated the requirement that companies prohibit the use of ephemeral messaging, messaging that disappears from a recipients screen after the message has been viewed, and will now grant a company remediation credit so long as the company "implement[s] appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms";
2. extended the presumption of declinations by limiting successor liability for companies undertaking a merger or acquisition that have conducted due diligence or post-acquisition audits and timely reported misconduct of the target company;
3. provided assurances that the DOJ will not direct a company's internal investigation efforts; and
4. adjusted the requirement for reporting individual wrongdoing to allow credit for disclosing a substantial number of individuals involved, instead of the previous requirement of disclosing all individuals involved.

See "DOJ's Guidance on Compliance Up Close: How Federal Prosecutors Assess Compliance Programs Now" (Oct. 16, 2019).

November 2019 Updates

On November 20, 2019, the DOJ announced additional updates to clarify expectations regarding the scope and timing of voluntary disclosures. First, under the prior CEP, to earn cooperation credit, companies were required to disclose "all relevant facts about all individuals substantially involved in or responsible for the violation of law." Under the November update, companies are now required to disclose all relevant facts known to it at the time of the disclosure, including facts as to "any individuals substantially involved in or responsible for the misconduct at issue."

In addition, the November 2019 updates simplify prior requirements that in order to receive cooperation credit, a company that is aware of relevant evidence not its possession must identify that evidence for the government. Together, these changes emphasize the DOJ's ongoing intent to encourage prompt disclosure and recognition that disclosures may occur as investigations are in progress.

The DOJ also made further refinements to its "M&A Due Diligence and Remediation" guidance to again confirm that the presumption of a declination will apply to companies that disclose misconduct by the "merged or acquired entity," so long as all other requirements are met. Significantly, the presumption of a declination will apply even when there are aggravating circumstances, such as "involvement by executive management of the company in the misconduct." These changes appear to reflect the government's desire to incentivize post-acquisition disclosures and reward companies that improve the compliance culture of investment targets.

Declinations Under the CEP

If a company fully satisfies the disclosure, cooperation and remediation prongs of the CEP described above, and there are no aggravating circumstances, the DOJ will apply an explicit presumption to resolve the case through a declination and will not prosecute. Companies that earn declinations may still be

required to pay disgorgement, forfeitures and restitution from the misconduct.

Since the FCPA Pilot Program was announced in 2016, the DOJ has reported 13 declinations under the program, with an average of three declinations per year and two declinations in 2019. Each one of these declinations was accompanied with disgorgement to the DOJ and/or SEC. For its part, the SEC has awarded 31 declinations over the same time period, with an average of seven declinations per year and five declinations in 2019. Notably, the U.S. governmental agencies do not publicize all of their declinations. Although self-reporting of potential FCPA violations does not guarantee a declination will be earned, senior Justice Department officials continue to emphasize the desire to apply the CEP consistently and transparently.

The DOJ's intention to provide consistency and transparency with the CEP is supported by the two most recent declinations in 2019. In February 2019, the DOJ announced that it would not prosecute Cognizant Technology Solutions Corporation (Cognizant) for FCPA violations, despite the fact that "certain members of senior management participated in and directed the criminal conduct at issue." The DOJ declined to prosecute based on its assessment of the CEP factors, including the fact that the company identified the misconduct; made voluntary and prompt self-disclosures; conducted a comprehensive investigation; enhanced compliance programs; lacked prior criminal history; and agreed to disgorge $19.4 million, the full amount of its savings and profits fairly attributable to the bribery. The DOJ credited the disgorgement by $16.4 million, the amount which Cognizant was required to pay to the SEC in its parallel civil action.

The second declination was issued in September 2019 to Quad/Graphics, Inc., despite bribery committed by the employees of the company's subsidiaries in China and Peru. The DOJ assessed the CEP factors and declined to prosecute because Quad/Graphics, Inc. identified and voluntarily disclosed the misconduct; conducted a thorough internal investigation; fully cooperated in the matter; lacked prior criminal history; fully remediated; and agreed to disgorge $6.9 million, the full amount of its ill-gotten profits, to the SEC.

These recent declinations demonstrate continued efforts by the government to consistently apply the CEP and provide clarity regarding outcomes for companies that voluntarily disclose misconduct.

See "Cognizant Settles With the SEC and Receives a DOJ Declination, but Top Executives Face Charges" (Mar. 6, 2019); "'A Slap on the Wrist': Former Cognizant COO Settles SEC Bribery Charges for $50,000" (Oct. 2, 2019); and "Quad/Graphics Self-Reports FCPA and Sanctions Violations, Earning a DOJ Declination and Small SEC Fine" (Oct. 16, 2019).

Updated Guidance for the "Evaluation of Corporate Compliance Programs" and Key Takeaways

On April 30, 2019, the DOJ's Criminal Division issued several updates and clarifications to its 2017 Evaluation of Corporate Compliance Programs (2019 ECCP Update). The new guidance emphasizes the DOJ's focus on creating a culture of compliance, a key factor in deciding whether a compliance program is effective, and requiring companies under

investigation to continuously evaluate, test and implement compliance programs.

The 2019 EECP Update identifies three fundamental questions prosecutors will consider when assessing a company's compliance program:

1. Is the corporation's compliance program well designed?
2. Is the program applied in good faith and implemented effectively?
3. Does the program work in practice?

To answer these questions and assess a corporate compliance program, the 2019 ECCP Update groups 12 topics of effective compliance programs and sample questions that prosecutors will consider at three different points in time: the time of misconduct; the time of deciding charges; and the time of resolution.

By adding this framework and supporting context, the 2019 ECCP Update reinforces compliance programs that are risk-based, tailored to company culture, and subject to ongoing comprehensive evaluation and adjusted implementation. Further, the 2019 ECCP Update provides new insight into the DOJ's current approach to corporate compliance and clarity for corporate best-practices.

Three key takeaways from the 2019 ECCP Update include:

1) Tone at the Top

An effective compliance program requires a company's top executives to demonstrate their leadership in corporate compliance and the remediation of misconduct. In addition to considering the standards set by top leaders, the DOJ will also consider the "tone from the middle," that is whether middle management enforced those standards or were held accountable for misconduct that occurred under their supervision.

2) Risk Assessment

A company's compliance program should be tailored to its assessment of risk for misconduct and updated accordingly. Although the DOJ has not clarified any preferred timing for the conduct of risk assessments, it has reemphasized that assessments should be an ongoing process of continuous improvement. The expectation is that companies conducting regular risk assessments will be best positioned to prevent misconduct and/or earn credit when defending against governmental inquiries.

See the ACR's guide to risk assessments: "Types of Assessments" (Jun. 26, 2019); "Techniques and Building a Team" (Aug. 7, 2019); and "Where to Look for Risk and Risk Ranking" (Sep. 4, 2019).

3) Third-Party Oversight

Third parties retained on behalf of companies continue to present the largest source of anti-corruption compliance risk. The 2019 Update indicates a renewed focus on oversight of third parties. The DOJ will consider, among other factors, the compensation and incentives provided by a company to its third parties against the business rationale for retaining a third party, pre-retention/renewal due diligence and post-retention/renewal monitoring efforts. In addition, the DOJ will consider a company's discipline and remediation of third-party misconduct,

e.g., whether the company terminated the third-party partner upon learning of misconduct and took steps to ensure the third-party partner is not improperly re-engaged.

See "Analyzing the DOJ's New Evaluation of Corporate Compliance Programs" (May 15, 2019).

SEC Whistleblower Awards

Regulation 21F of the Securities Exchange Act of 1934 (Exchange Act) provides incentives and protection to an individual who reports corporate misconduct and violations of the federal securities laws. On May 27, 2019, the SEC issued its first whistleblower award under Rule 21F-4(c), the provision designed to incentivize internal reporting by whistleblowers who also report to the SEC within 120 days. According to the SEC, the $4.5-million award was issued to a whistleblower whose tip "triggered the company to review the allegations as part of an internal investigation and subsequently report the whistleblower's allegations to the SEC and another agency." Since the SEC issued its first whistleblower award in 2012, it has awarded $381 million to 62 individuals.

See "Whistleblowers' Impact on Corporations and SEC Enforcement" (Nov. 13, 2019).

Enforcement Advisory From the CFTC

On March 6, 2019, CFTC published an Enforcement Advisory on Self Reporting and Cooperation for Commodity Exchange Act Violations Involving Foreign Corrupt Practices (Enforcement Advisory), adding the CFTC to the list of regulatory bodies committed to fighting foreign corruption. The Enforcement Advisory focuses on the CFTC's commitment to investigate and prosecute cases involving non-U.S. corrupt practices of fraud, manipulation and false reporting that negatively affect the integrity of the U.S. commodities and derivatives markets and violate the Commodity Exchange Act (CEA). Similar to the DOJ and SEC, the CFTC will recommend a resolution without a civil monetary penalty where the company voluntarily disclosed the misconduct.

In April 2019, Glencore, one of the world's largest commodity traders, released a statement that the CFTC is investigating whether the company and its subsidiaries violated parts of the CEA or regulations on corrupt practices related to commodities. This is the CFTC's first public investigation since the release of its Enforcement Advisory, though the CFTC has declined to comment or otherwise provide additional detail regarding the investigation. Because the CFTC has only recently released the Enforcement Advisory, and initiated its first public investigation mid-2019, it remains to be seen how the CFTC will coordinate with other regulatory agencies fighting foreign corruption. However, the CFTC has made it clear that it will work closely with the SEC and DOJ to fight corruption within global commodities markets and supply chains.

Companies that may be subject to the CEA should consider whether their current policies and practices are sufficient to address misconduct that might improperly manipulate U.S. commodities and derivatives markets.

See "CFTC's Director of Enforcement Explains Decision to Regulate Foreign Corruption" (May 29, 2019).

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