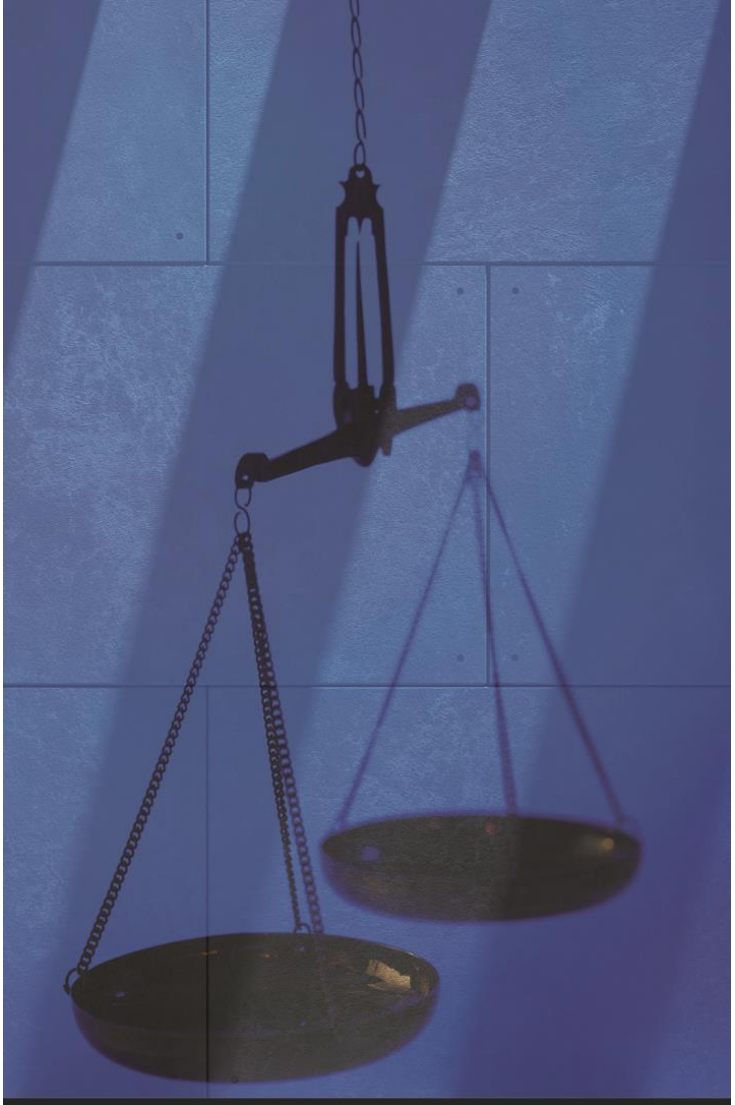

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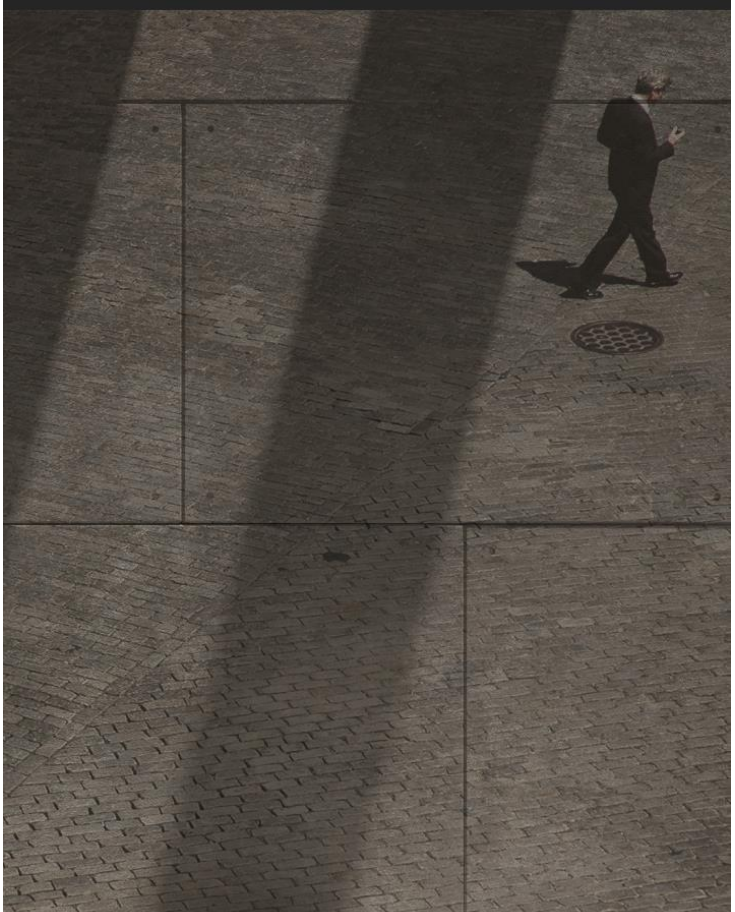

IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION

PHASE 4 REPORT

United States

Implementing the OECD Anti-Bribery Convention

United States
Phase 4 Report

This Phase 4 Report on the United States by the OECD Working Group on Bribery evaluates and makes recommendations on the United States' implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

It was adopted by the 44 members of the OECD Working Group on Bribery on 16 October 2020. The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international cooperation, as well as covering unresolved issues from prior reports.

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EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery (WGB) evaluates and makes recommendations on the United States' implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. It also details the United States' particular achievements and challenges in this regard, including with respect to enforcement of its foreign bribery laws, as well as the progress the United States has made since its Phase 3 evaluation in 2010.

Since Phase 3, the United States has further increased its strong enforcement of the U.S. Foreign Corrupt Practices Act (FCPA), maintaining its prominent role in the fight against transnational corruption. Up to July 2019, the United States has brought 156 cases under the FCPA or related offences, resulting in the conviction or sanctioning of 115 natural persons and 174 legal persons for foreign bribery and related offences. This outstanding achievement results from a combination of enhanced expertise and resources to investigate and prosecute foreign bribery, the enforcement of a broad range of offences in foreign bribery cases, the effective use of non-trial resolution mechanisms, and the development of published policies to incentivise companies' cooperation with law enforcement agencies.

The update of the 2012 FCPA Resource Guide, following the on-site visit, resulted from the concerted effort by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) to continue to provide clear and comprehensive public guidance on the fast-evolving FCPA landscape. With this sustained and holistic enforcement policy, the United States has become a driving force in concluding multijurisdictional resolutions, which enable the countries concerned to conclude foreign bribery matters comprehensively with effective, proportionate, and dissuasive sanctions, while also providing legal certainty to the companies involved. The Dodd-Frank Act's multi-faceted protections, most notably the SEC's ability to enforce the anti-retaliation provisions, constitute a good practice given that they provide powerful incentives for qualified whistleblowers to report foreign bribery allegations against issuers. However, additional consideration should be given to protections for other whistleblowers. As practice has developed considerably since Phase 3, new issues calling for the Working Group's attention have emerged. In particular, a series of recent FCPA-related court proceedings have recently shed new light on the law enforcement authorities' practices with respect to certain elements of the FCPA as well as its jurisdictional reach. The United States should continue its commendable efforts to enhance transparency of FCPA enforcement by addressing recidivism through appropriate sanctions and raising awareness of its impact on the choice of resolution in FCPA matters as well as by making more easily accessible the grounds for extending the term of DPAs with companies in FCPA matters.

The report and its recommendations reflect the findings of experts from Argentina and the United Kingdom and were adopted by the Working Group on 16 October 2020. The report is based on legislation, data and other materials provided by the United States and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its on-site visit to the United States in January 2020, during which the team met representatives of the United States' public and private sectors, media, and civil society. The United States will submit a written report to the Working Group in two years on the implementation of all recommendations and its enforcement efforts.

INTRODUCTION

1. In October 2020, the Working Group on Bribery (Working Group) completed its fourth evaluation of the United States' implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention or the OECD Anti-Bribery Convention), the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Recommendation), and related instruments.

Previous Evaluations of the United States by the Working Group on Bribery

2. Monitoring of Working Group members' implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review system. The monitoring process is subject to specific, agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (as of Phase 2), including meetings with non-government actors. The evaluated country has no right to veto the final report or recommendations. All of the OECD Working Group on Bribery evaluation reports and recommendations are systematically published on the OECD website.

3. The last full evaluation of the United States – in Phase 3 – dates back to October 2010. The Working Group first evaluated the U.S. implementation of its Phase 3 recommendations in October 2012.[1] At that time, the Working Group concluded that 7 of the U.S. 10 Phase 3 recommendations were implemented, 2 were partially implemented and 1 was not implemented (see Figure 1 and Annex 2). In March 2013, on the occasion of an additional Follow-up, the Working Group deemed that the two partially implemented recommendations had been fully implemented.

Box 1. Previous Working Group on Bribery Evaluations of the United States

March 2013: Additional Phase 3 follow-up Report

October 2012: Phase 3 Follow-up Report

2010: Phase 3 Report

2002: Phase 2 Report

1999: Phase 1 Report

Figure 1. The U.S. implementation of its Phase 3 recommendations

(As of the 2013 Additional Written Follow-up Report)

Phase 4 Process and On-Site Visit

4. Phase 4 evaluations focus on three key cross-cutting issues: enforcement, detection, and corporate liability. They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework.[2] Phase 4 takes a tailor-made approach, considering each country's unique situation and challenges, and reflecting positive achievements and good practices. For this reason, issues which were not deemed problematic in previous phases

[1]United States Phase 3 Follow-up Report: Continuation of the Written Follow-up for the U.S. Review of the Phase 3 recommendations relevant to the FCPA Resource Guide.
[2]See Phase 4 Evaluation Procedures.

or which have not arisen in the course of this evaluation may not have been fully re-assessed at the on-site visit or reflected in this report.

5. The evaluation team for the United States' Phase 4 evaluation was composed of lead examiners from Argentina and the United Kingdom, as well as members of the OECD Anti-Corruption Division.[3] Pursuant to the Working Group's Phase 4 evaluation procedures, after receiving the United States' responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit to Washington D.C. on 27-31 January 2020 in anticipation that the Working Group would discuss this evaluation report in June 2020. The team met with representatives of the United States' public sector, including government agencies and law enforcement authorities; the private sector, including business organisations, companies and lawyers; and civil society, including non-governmental organisations, academia and the media.[4] The evaluation team expresses its appreciation to these participants for their contributions to these discussions. The evaluation team is also grateful to the United States government, particularly the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) for their level of engagement and their cooperation throughout the evaluation, the organisation of a well-attended on-site visit, and the provision of additional information following the on-site visit. The U.S. government also demonstrated its commitment to the Phase 4 process through the participation of Mr. Brian Benczkowski, then Head of the Department of Justice's Criminal Division, during the opening session of the on-site visit. Following the on-site visit, the Working Group decided to postpone discussion of this evaluation report until October 2020 as a result of the COVID-19 pandemic.

The United States' Foreign Bribery Risk in light of its Economic Situation and Trade Profile

The world's largest economy and first exporter among the Working Group members trades with high-risk jurisdictions in sectors known to be at risk of bribery

6. The United States is the world's largest economy and a leading global trader. In 2019, the U.S. gross domestic product amounted to USD 21.5 trillion, the highest in the world.[5]The United States is ranked first among Working Group members in term of exports (and second globally) accounting for more than 8.5% of the globe's total exports in 2018.[6] In 2019, exports of goods and services represented 11.7% of the U.S. gross domestic product.[7] Also in 2019, the United States ranked first globally in terms of outward FDI stocks, with USD 7.72 trillion at current prices invested around the world,[8] and the country provided the highest aid volume (USD 34.6 billion) of any DAC member (see section D.4 on ODA measures).[9] The United States has established solid competitive positions in numerous economic sectors ranging from agriculture and petroleum to finance and high technology. The United States' economy started slowing down in 2019, and this trend was exacerbated by the COVID-19 outbreak according to the 2019 and 2020 OECD Economic Outlooks.[10]

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[3]Argentina was represented by Mr. Ricardo Lachterman, First Secretary, Embassy of Argentina in the United States, Ministry of Foreign Affairs, International Trade and Worship; Ms. Sedení Irigoyen, Investigator Anti-Corruption Office, Ministry of Justice and Human Rights. The United Kingdom was represented by Ms. Cath Rylance, Global Head of Anti-Corruption, Prosperity Fund, Economic Diplomacy Directorate, Foreign & Commonwealth Office; Ms. Laura Conway, Senior Lawyer, Serious Fraud Office; and Ms. Simali Shah, Senior Policy Advisor, Financial Crime Advisory, Financial Conduct Authority. The OECD was represented by Ms. Sandrine Hannedouche-Leric, Coordinator of the Phase 4 Evaluation of the United States and Senior Legal Analyst; Mr. Brooks Hickman and Ms. Elisabeth Danon, both Legal Analysts; and Mr. Vitor Geromel, Anti-Corruption Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

[4]See Annex 4 for a list of participants.

[5]UNCTAD, Data Centre, Economic Trends, National accounts [Gross domestic product: Total and per capita, current and constant (2015) prices, annual] .

[6]WTO, Trade Profile, United States.

[7]World Bank data, 2018, (using World Bank National Accounts Data and OECD national accounts datafiles). World Bank Data, 2018, U.S.

[8]UNCTAD, Data Centre, Foreign Direct Investment, [Outward FDI, stocks, USD at current prices in millions].

[9]See OECD DAC U.S. Development Cooperation Profile.

[10]OECD Economic Outlook, Volume 2019, Issue 2, p.222; and OECD Economic Outlook, Volume 2020, Issue 1, p.329.

7. Bilateral free trade agreements have recently been preferred by the United States over multilateral trade initiatives, with free trade agreements currently in force with 20 countries. The United States also participates in regional multilateral trade agreements, like the NAFTA and the USMCA agreements.[11] In 2019, the main destinations of U.S. goods were Canada, Mexico, China, Japan, and the United Kingdom.[12] About a third of U.S. exports is directed towards Mexico and Canada, and another third to Asia (mainly China, Japan, and South Korea).[13] Transportation equipment, computer and electronic products, and chemicals were the top three U.S. merchandise exports in 2019.[14] The main destinations of American overseas direct investment are the Netherlands, the United Kingdom, Luxembourg, Canada and Ireland.[15] Latin American and Asian countries accounted for a third of the total of the United States' FDI in 2019.[16]

A business-friendly regulatory environment

8. International rankings show that the U.S. regulatory environment is broadly business-friendly. In the 2020 World Bank Group Doing Business ranking, the United States places 6 out of 190 economies, indicating that regulatory policy is conducive to opening and running companies.[17]

9. The U.S. business sector is diverse including both extremely large multinational enterprises and a significant population of small and medium sized business. American business entities can take the form of issuers or private companies. An issuer is a company whose securities are listed on a national securities exchange in the United States (either stock or American Depository Receipts) or its stock trades in the over-the-counter market in the United States and the company is required to file SEC reports. They are required to comply with U.S. federal securities laws administered by the SEC. For example, they are required to publish periodic financial reports and comply with the SEC filing requirements. Private companies, which are held under private ownership, may issue stocks and have shareholders, but their shares are not traded on a national securities exchange. They are generally not required to follow SEC rules, though certain regulations may apply in specific contexts, such as when raising capital. The United States is also home to a large number of multinational enterprises (MNEs). The United States has 35 of the Forbes 100 listing of public companies worldwide.[18] Those companies operate in a wide range of sectors, including highly sensitive sectors (i.e. oil and gas, defence, pharmaceuticals, and financial services). When investing abroad, U.S. companies often create foreign subsidiaries controlled by holding companies owned by U.S. parents.[19]

10. Following the on-site visit, the Coronavirus (COVID-19) crisis brought about unprecedented challenges, uncertainty and major economic disruption on a global scale, which have the potential to create environments that are ripe for bribery and corruption. The impact of the crisis on the U.S. economy and the magnitude of the foreign bribery risks the U.S. will face as a result of the actions taken to mitigate the health and economic crisis could not yet be assessed at the time of finalising this report.

The United States' exposure to foreign bribery risks

11. The U.S. private sector is highly exposed to the risk of bribery of a foreign public official, as U.S. companies trade with high-risk jurisdictions world-wide and operate in sectors known to be at risk of bribery. The foreign bribery allegations and concluded cases that have surfaced to date illustrate this high-risk exposure

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[11]The NAFTA agreement was concluded in 1994 between the United States, Mexico and Canada. The USMCA was concluded in 2018 also between the United States, Mexico and Canada but is not yet in force.
[12] IMF, Direction of Trade and Statistics, 2019.
[13]IMF, Direction of Trade and Statistics, 2019.
[14]U.S. International Trade Administration, 2019 Exports to World of NAICS Total All Merchandise.
[15]OECD Foreign Direct Investment statistics database, FDI positions by partner country BMD4.
[16]U.S. Department of Commerce Bureau of Economic Analysis, Direct Investment by Country and Industry, 2019.
[17]The World Bank Group, 2020 Ease of Doing Business ranking.
[18]Andrea Murphy, Jonathan Ponciano, Sarah Hansen and Halah Touryalai (15 May 2019), The World's Largest Public Companies, Forbes.
[19]U.S. Department of Commerce, Bureau of Economic Analysis, Direct Investment by Country and Industry.

in a variety of sectors and industries on the global market, in which the United States often acts as a major player. In particular, the United States is the world's largest arms and defence equipment exporter,[20] and a significant global actor in several other sensitive sectors, such as medicinal and pharmaceutical products, [21] oil and gas,[22] technology,[23] and aerospace.[24] Furthermore, U.S. financial institutions are among the largest financial and insurance services providers.[25]

Overview of U.S. Enforcement of Foreign Bribery and Related Offences since Phase 3

12. The level of U.S. enforcement levels has increased remarkably with each successive WGB report. In Phase 3, the WGB found that the United States had achieved a "substantial level of enforcement" of FCPA and related offences as its average prosecutions had jumped from 4.6 per year in 2001-2005 to 18.75 per year in 2006-2009.[26] The United States has maintained this significant upward trend, initiating 37.7 enforcement actions on average each year since Phase 3 (including both DOJ and SEC actions, some of which were brought in parallel against the same natural or legal persons).

13. According to the case data used for this Phase 4 evaluation,[27] the United States has brought 156 different cases under the FCPA or related offences between September 2010 and July 2019. This resulted in 394 separate foreign bribery and related enforcement actions against 163 natural persons as well as 175 legal persons since Phase 3. Furthermore, the US authorities report that the DOJ typically has around 250 open investigations per year, while the SEC typically has around 140 open investigations. This confirms that, among the Parties to the Convention, the United States is among the leading enforcers of the foreign bribery offence.

14. For natural persons, the DOJ has obtained convictions of 93 natural persons for FCPA or related offences, 89 through plea agreements and 4 after trial. Another 38 criminal enforcement actions remained pending, while 6 natural persons received no sanctions after their charges were dismissed or after they were acquitted at trial. Meanwhile, the SEC has sanctioned 31 natural persons for FCPA offences, and it was still pursuing charges against 2 natural persons. Finally, 4 individuals received no sanctions after their SEC enforcement actions were dismissed. For legal persons, the DOJ has obtained convictions or otherwise imposed sanctions through non-trial resolutions against 117 entities, while charges against 1 entity were dismissed after trial. The SEC in turn obtained sanctions against 102 entities for FCPA offences. One notable trend is the rise in the number of concluded supply-side enforcement actions against natural persons, driven largely by the DOJ.

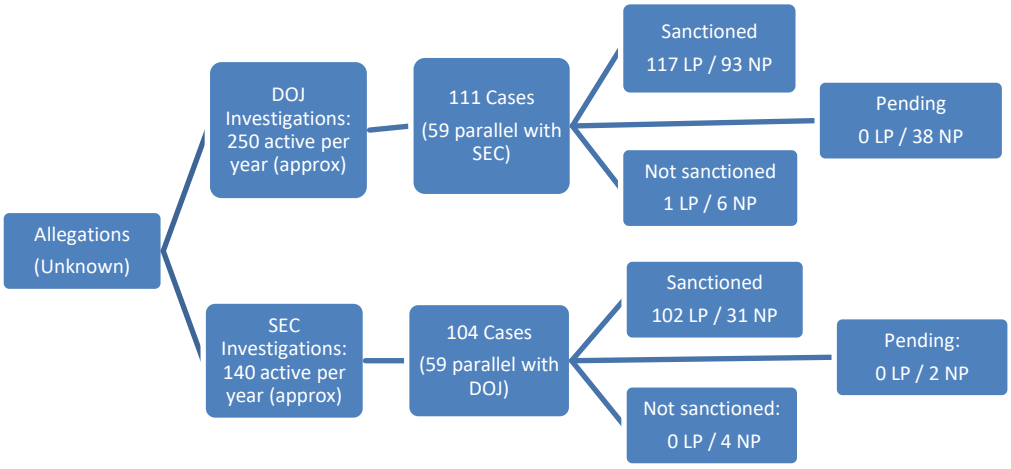
15. While these enforcement actions can take years to resolve, this trend could indicate that the DOJ's increased focus on holding natural persons accountable may also be influencing FCPA enforcement priorities.

[20]Stockholm International Peace Research Institute (SIPRI). Trends in International Arms Transfers, 2019.
[21]UNCTAD. Merchandise trade matrix – product groups, exports in thousands of United States dollars, annual. Medicinal and Pharmaceutical Products, 2018.
[22]OPEC (2019), 2019 Annual Statistical Bulletin.
[23]The World Bank. High-technology exports (current USD), 2018.
[24]UNCTAD. Merchandise trade matrix – detailed products, exports in thousands of United States dollars, annual. Aircraft and associated equipment, 2018.
[25]OECD Stats. EBOPS 2010 - Trade in services by partner economy, 2018.
[26]United States Phase 3 Report, para. 23 & commentary at page 15. The 30.5 per year average includes actions brought by the DOJ and the SEC against corporate and individual respondents.
[27]The DOJ and SEC provided data on their numerous respective FCPA-related cases that were charged or resolved between 29 September 2010 and 29 July 2019. In a few instances, the evaluation team added additional cases or enforcement actions that were charged or resolved during this time period, including the declinations under the DOJ's FCPA Corporate Enforcement Policy. The U.S. authorities were both able to provide a large range of data concerning the number of natural and legal persons that faced FCPA-related enforcement actions, the types of natural and legal persons (e.g. issuer, domestic concern), as well as the outcomes of the enforcement actions and sanctions imposed, if any. Given their different methods for tracking cases, however, the U.S. authorities were not always able to provide the same categories of data, in particular concerning the amounts of the bribes and illicit proceeds obtained The evaluation team thus supplemented the data provided by relying on DOJ and SEC resolutions and press releases. In addition, the evaluation team has endeavoured to update the status of the various cases charged or concluded during the relevant time period, in order to ensure that the status of those cases was accurate as of 30 June 2020. When relevant, the report may at times refer to specific cases brought after July 2019. In addition, graphs showing trends over time since Phase 3 begin with 2011 as this is the first full year for which case data are available.

Still, it is notable that the overall enforcement pattern against legal persons has remained fairly constant, other than a dramatic spike in enforcement in 2016.

16. Overall, the level of FCPA enforcement against both natural and legal persons reflects the United States' continued strong commitment to fighting foreign bribery (as shown in Figure 2 below) as well as its prominent role in promoting the implementation of the Convention.

Figure 2. U.S. enforcement of FCPA and related supply-side offences since Phase 3



Source: Phase 4 case data provided by the United States, combined with evaluation team research.

17. As a final note, looking beyond the supply-side focus of the Convention, the evaluation team observed a welcome trend since Phase 3 in the increasing number of U.S. enforcement actions against foreign public officials. While foreign officials are not directly subject to liability under the FCPA, under certain circumstances they can be charged with related offences under other U.S. criminal law statutes, most notably money laundering and conspiracy to engage in money laundering predicated on FCPA violations. In fact, during the reporting period, the DOJ has brought enforcement actions against 33 foreign public officials during this period and has obtained convictions of 20 individuals.[28] Of the 20 concluded actions against foreign officials, 13 received prison sentences ranging between just over 12 month and 120 months. On average, foreign public officials received jail terms of just over 38 months. In addition, 1 foreign official received a 24-month probation in lieu of imprisonment, while another 6 foreign officials were awaiting sentencing. The cases against 13 foreign public officials were still pending when this report was adopted.

Commentary

The lead examiners commend the United States for its sustained and demonstrable commitment to enforcing its foreign bribery offence as well as other related offences against both natural and legal persons. In particular, they welcome the U.S. authorities' clear efforts to hold natural persons responsible for foreign bribery. They also commend the United States for also holding foreign public officials responsible when jurisdiction exists. The overall enforcement pattern confirms the prominent role that the United States plays globally in combating foreign bribery.

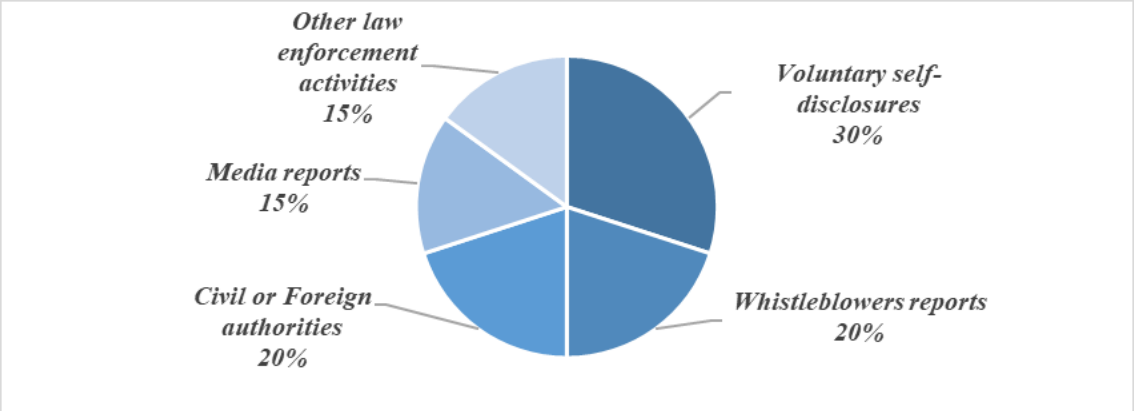
[28]At least one FCPA supply-side defendant was also a foreign public official and was sanctioned for both FCPA offences as well as demand-side offences.

A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

18. The United States could not provide its detection sources for each of its enforcement action in part because the DOJ and SEC expressed concern that the release of such data might hinder future investigations and in part because of legal considerations, such as whistleblower protection laws. In their questionnaire responses, the U.S. authorities indicate that they receive information on foreign bribery and related offences from a wide variety of sources. These include (but are not limited to) SEC filings, media reports, tax authorities, financial intelligence units, international financial institutions, embassies, and foreign authorities. After the on-site visit, the DOJ reported that it previously did not closely track the origin of its cases, but it was able to provide approximate percentages for its concluded enforcement actions. While the SEC does track this information, it does not disclose it to the public.

19. After the on-site visit, the U.S. authorities provided the evaluation team with approximate percentages of the origin of cases resolved by the DOJ. As shown in the graph below, these numbers show that approximately 30% of the DOJ's concluded foreign bribery cases were detected through voluntary self-disclosure of companies, while another 20% came from whistleblower reports. Referrals from foreign and civil authorities accounted for another 20% of the DOJ's foreign bribery cases. Finally, the DOJ estimated that other law enforcement activities (information provided by cooperating defendants and other sources, such as the review of suspicious activity reporting by financial institutions), and news stories in the media each contributed to the detection of 15% of its foreign bribery cases.

Figure 1. Estimated Sources of the U.S. Foreign Bribery Cases resolved by the DOJ



A.1. The Ability of U.S. Foreign Missions to Detect and Report Foreign Bribery

20. U.S. foreign missions have important roles to play in preventing, detecting, and reporting foreign bribery involving U.S. natural and legal persons conducting business abroad. The Phase 3 report notes that the DOJ cited at the time examples of full-blown investigations that were launched due to information provided by an embassy and referrals from State Department and Commercial Services branches.[29] In its questionnaire responses, the United States indicates that the reporting of FCPA allegations from U.S. embassies has continuously increased over time. It is unknown whether one or more of the concluded cases were detected through foreign missions.

21. The Department of Commerce (DOC) and the Department of State (State Department, or DOS) promote commercial advocacy for U.S. companies doing business abroad, including in high-risk countries. The U.S. representatives abroad receive regular training on FCPA risks and prohibitions. In their questionnaire responses as well as during the on-site visit, the U.S. authorities indicated that the DOC and the DOS representatives

[29]United States Phase 3 Report, para. 51.

abroad receive regular training on FCPA matters. The U.S. authorities explained that information and guidance on the FCPA is transmitted to embassies with detailed information on foreign bribery risks. They use internal FCPA guidance for training including hypotheticals and power points. They also provide online training and links to the DOJ and SEC websites and the FCPA Resource Guide. The U.S. authorities emphasised that this good practice has been in place for decades.

22. The Federal Bureau of Investigation (FBI) counts 60 legal attachés throughout the world. During the on-site visit, the U.S. authorities indicated that the legal attachés are aware of foreign bribery risks and are well placed to report potential foreign bribery allegations to law enforcement agencies as they are in constant contact with the local business community, law enforcement officials, and media. [30] Furthermore, the Internal Revenue Service (IRS) indicated that it has agents and analysts in 13 posts abroad who are also aware of foreign bribery risks and are well placed to receive and report potential foreign bribery allegations.

23. In their responses to the questionnaire and during the on-site visit, the U.S. authorities indicated that when learning of a potential foreign bribery case, U.S. government employees abroad report it to the legal attaché and the relevant law enforcement agencies.

Commentary:

The lead examiners welcome the continued and consistent long-term efforts of the United States to regularly train its representatives posted abroad on FCPA matters and in turn the U.S. overseas representatives' efforts to detect and report potential foreign bribery and related offences including in high-risk countries. The lead examiners recommend that these training efforts to raise awareness on foreign bribery and enhance reporting of allegations by U.S. officials posted abroad be identified by the Working Group as a good practice. The U.S. authorities emphasise that this practice has been having a meaningful impact on enforcement efforts as well as in providing information and assistance to U.S. companies abroad.

A.2. Capacity to Detect Foreign Bribery through the U.S. Anti-Money Laundering (AML) Framework

24. Under the U.S. AML regime, an effective AML program designed to guard against money laundering and the requirement to detect and report suspicious activity may uncover a wide range of illicit financial activity, including corruption. It may provide information for investigations into financial crimes and underlying predicate offences such as foreign bribery. The U.S. AML/CFT measures are set out in the Bank Secrecy Act (BSA) and the Treasury Department's implementing regulations. As the lead U.S. AML regulator and supervisor, the Financial Crimes Enforcement Network (FinCEN) is responsible for promulgating those regulations, supervising all financial institutions for compliance with the AML requirements, and enforcing against violations of the BSA. FinCEN is also the U.S. financial intelligence unit (FIU), which plays an essential role in analysing suspicious activity reports submitted by reporting entities and disseminating those analyses to law enforcement and other relevant agencies. FinCEN conducts research and analysis on data provided by the reporting institutions as well as from other sources of information to support financial crimes investigations.[31]

25. Due to the large amount of data it receives, FinCEN continues to develop and expand the use of automated business rules to rapidly surface high value reports of illicit financial activity. The business rules are developed and implemented to support the priorities set by FinCEN.[32] Rule findings are reviewed internally by FinCEN and distributed to external stakeholders, such as domestic law enforcement and foreign FIU partners. The U.S. authorities stress that FinCEN's business rules play a vital role in the identification and dissemination of timely financial intelligence to combat threats such as terrorist financing, money laundering, cyber threats, and other illicit financial activity, including foreign bribery. Furthermore, federal, state, and local law enforcement agencies may access reports filed under the BSA through a secure web connection after entering into a

[30]OECD (2017), *The Detection of Foreign Bribery*, p. 102.
[31]FinCEN, FinCEN's Mandate from Congress.
[32]The term "business rule" refers to automated queries or algorithms designed to screen incoming BSA filings against established criteria to identify high priority filings likely to require further review or analysis.

Memorandum of Understanding (MOU) with FinCEN. FinCEN provides training and monitors use to ensure that the BSA information is properly used, disseminated, and kept secure.

26. Under the BSA and implementing regulations, covered financial institutions are required to establish an AML program, maintain appropriate records, and file certain transactional reports. In addition, financial institutions that establish, maintain, administer, or manage a private banking account or a foreign correspondent account must establish specific due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.[33] The broad statutory definition of financial institution covers many sectors and financial activities, including banks, securities, brokers and dealers, money services business, and casinos.[34] FinCEN has promulgated regulations further defining many of the sectors and clarifying their AML requirements under the BSA. The BSA also imposes reporting obligations on non-financial trades or businesses, including professional service providers, for currency transactions in excess of USD 10 000. Because the U.S. AML regime imposes obligations on financial institutions, which are primarily defined based on the financial activities in which they engage, any individual acting as a covered financial institution under the relevant definitions has to comply with the AML requirements for that sector.

27. Lawyers, accountants, and others non-financial businesses and professions are not required to have AML programs.[35] The U.S. authorities however emphasised that both financial and non-financial business are required to report the receipt of cash exceeding USD 10 000 by a trade or business, and to disclose the person on whose behalf the transaction was conducted. Business may also voluntarily report suspicious activity in connection with such a cash transaction. For example, in April 2020, the American Bar Association (ABA) issued a formal opinion on how lawyers should comply with their ethical obligation not to counsel or assist their clients to commit crime or allow their representation of a client, in a non-litigation and transactional setting, to be used in furtherance of money laundering.[36] This is in addition to the ABA's voluntary guidance to lawyers on combatting money laundering and terrorist financing, which builds on the FATF's call to apply a risk-based approach.[37]

28. In February 2020, the U.S. Department of the Treasury issued the 2020 National Strategy for Combating Terrorist and Other Illicit Financing. This document, which was the product of an interagency process involving all U.S. government stakeholders, points to vulnerabilities in the U.S. AML/CFT regime and lists priority actions to address these issues. One of the vulnerabilities the document cites is the lack of comprehensive AML requirements on some financial institutions (e.g., state-chartered banks that lack a federal functional regulator), key gatekeeper professions like lawyers and accountants engaging in financial activity, and anonymous purchases of real estate. The extension of AML requirements to these institutions and activities is one of the priority actions listed in the 2020 strategy. [38]

29. Covered financial institutions are required to file reports on certain transactions, and to detect and report suspicious activity, which can help authorities to detect money laundering and other illicit financial activity. The seminal reports that financial institutions file are the currency transactions report (CTR) and the suspicious activity report (SAR). CTRs must be filed by U.S. financial institutions to report all currency transactions over USD 10 000 (daily aggregate amount). CTRs must be filed within 15 days of the date of a reportable transaction.[39] SARs must be filed by covered entities to report known or suspected suspicious activity identified

[33]31 U.S.C. § 5318(i)
[34]FinCEN, Financial Institution Definition.
[35]FATF (December 2016), *Anti-money laundering and counter-terrorist financing measures - United States, Fourth Round Mutual Evaluation Report*, FATF, Paris, paras. 20-22. FATF Recommendations n. 22 and n. 23. See also OECD (2017), *The Detection of Foreign Bribery*, p. 92.
[36]American Bar Association, Formal Opinion 491, 29 April 2020.
[37]American Bar Association, Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (2010).
[38]U.S. Department of the Treasury, 2020 National Strategy for Combating Terrorist and Other Illicit Financing.
[39]FinCEN, Frequently Asked Questions Regarding the FinCEN Currency Transaction Report (CTR).

in transactions conducted of attempted by, at, or through the financial institution. Once a transaction is determined to be suspicious, financial institutions have 30 days to file a SAR through the FinCEN electronic filing system (BSA E-Filing System). If the subject of the SAR is not known, a financial institution is provided an additional 30 days to make that identification; the total amount of time allocated for this purpose cannot exceed 60 days. During the on-site visit, the U.S. authorities indicated that FinCEN chairs the U.S. Department of the Treasury's Bank Secrecy Act Advisory Group (BSAAG) consisting of representatives from federal regulatory and law enforcement agencies, financial institutions, and trade groups with members subject to the requirements of the Bank Secrecy Act.[40] The BSAAG is one of the means by which the Treasury receives advice and information on the operations of the Bank Secrecy Act.

30. After the on-site visit, the U.S. authorities indicated that in 2013, FinCEN revised the SAR form to improve reporting and tracking of certain illicit activity, including foreign corruption. For that reason, statistical information on SARs filed under that tracking mechanism is only available from 2014 onwards. From January 2014 through February 2020, covered financial institutions have filed 11 635 SARs reporting suspected foreign corruption and 4 205 SARs reporting suspected domestic corruption. FinCEN also indicates that it incorporates information from foreign corruption SARs into its intelligence products shared with law enforcement agencies. Additionally, FinCEN has received and processed 5 750 requests from foreign FIUs relating to financial crimes in general. While FinCEN does not specifically track information requests by illicit activity type, a review of Egmont information requests completed for foreign FIU partners between 1 October 2013 through 30 September 2019 found 642 responses listed Public Corruption as a violation, as determined by FinCEN, and 237 listed Bribery as a violation. A portion of these requests included both as violations. FinCEN regularly receives many information requests that cover multiple violation types, rather just a single violation. Investigations may be opened for a variety of reasons and financial intelligence is but one tool that may prompt an investigation. FinCEN does produce strategic intelligence productions on foreign corruption which may initiate new investigations or further existing ones.

Commentary

The lead examiners welcome FinCEN's efforts to disseminate financial intelligence products addressing potential foreign bribery schemes. They also commend the U.S. authorities for their continued efforts to identify vulnerabilities in the U.S. AML/CFT regime and corresponding priority actions to address these issues.

The lead examiners thus encourage the United States to continue enhancing its AML reporting framework by applying appropriate AML/CFT obligations to lawyers, accountants, and trust and company service providers related to foreign bribery.

A.3. Reporting Foreign Bribery by the U.S. Tax Authorities

(a) Foreign bribery can be detected through tax return assessment and tax crime investigations

31. In the United States, the Internal Revenue Service (IRS) is in charge of auditing tax returns of organisations and individuals to ensure information is reported correctly according to the tax laws and to verify the reported amount of tax. Both domestic and international tax examiners are trained to detect illegal payments in the course of an audit.

32. The Internal Revenue Manual includes specific provisions on how suspected illegal payments should be treated by examiners. In conducting a tax return assessment, in addition to deductions for operating expenses, examiners review areas susceptible to concealment, such as returns and allowances. Special attention would be given to the use of foreign bank accounts, other indicators of "slush funds" or the use of cash payments. Expense categories requiring careful scrutiny might include outside services (e.g. consulting) or items relating to foreign property of questionable use to the taxpayer or its affiliates. Additionally, examiners are encouraged to research sources such as other Federal agencies, as well as internal and external audit reports, for indications of illegal

[40]Bank Secrecy Act, 31 CFR 1000-1099 *et seq.* or Section 6050I of the Internal Revenue Code of 1986.

payment activity. Suspicions of illegal payments following the assessment of tax returns are flagged to the IRS compliance personnel, and further referred to the Criminal Investigation team of the IRS (IRS-CI).

33. IRS-CI investigates potential criminal violations of the Internal Revenue Code (IRC) and related financial crimes, such as fraud and money laundering. It is the only federal agency that has statutory authority to investigate criminal violations of the IRC, and to refer these cases for prosecution. IRS-CI has specialisation in tracing financial flows from crime. IRS-CI receives suspicions of foreign bribery following tax audits, and has also detected suspicions of foreign bribery in the context of criminal investigations.

(b) Reporting of foreign bribery suspicions to enforcement authorities

34. During the on-site visit, representatives of the IRS explained that suspicions of FCPA violations would be referred directly to the DOJ Fraud Section, but stressed that referrals predominantly occur the other way around, coming from the Fraud Section to IRS-CI. Following the on-site visit, the United States reported that IRS-CI referred 10 to 12 foreign bribery-related violations from 2010 through 2019 to the DOJ. It is unknown how many of these referrals were subject to an FCPA-related enforcement action.

Commentary

Reporting by tax authorities is an important source of detection of foreign bribery allegations in the United States. The lead examiners consider that mechanisms in place to support the detection and reporting by tax authorities are efficient, and they welcome the fact that tax authorities have referred between 10 and 12 foreign bribery-related violations to FCPA enforcement authorities since Phase 3.

A.4. Whistleblower Reports concerning Foreign Bribery and the Adequacy of the U.S. Whistleblower Protections

35. In Phase 3, the United States identified whistleblowing as one of several sources for detecting foreign bribery cases. The DOJ and SEC both had created dedicated public hotlines to receive tips promptly and anonymously.[41] At that time, the U.S. authorities also believed that the 2010 enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) would increase whistleblowing concerning foreign bribery by offering greater confidentiality and employment protections as well as the possibility that whistleblowers who report to the SEC could receive financial awards in successful cases.[42]

36. As the Working Group did not make any recommendations concerning whistleblower protection, the Phase 4 evaluation team has limited its review to assessing the existing U.S. whistleblower frameworks against the Working Group's standards based on developments since Phase 3. In particular, the Phase 4 evaluation provides the first opportunity to consider whether the Dodd-Frank provisions have in fact encouraged whistleblowing for foreign bribery in practice.

(a) Whistleblowing plays a critical role in detecting foreign bribery allegations

37. In Phase 4, the DOJ and the SEC report that they continue to receive foreign bribery allegations from whistleblowers as well as competitors or other members of the public. The DOJ still maintains a hotline and email contact points to receive FCPA tips. For its part, the SEC has developed an online Tips, Complaints and Referrals Portal to enable whistleblowers to submit allegations and supporting materials online for all securities laws violations, including foreign bribery.[43] These submissions can be anonymous, if desired. The SEC also continues to maintain its public whistleblower hotline and has returned nearly 24 000 calls from members of the public about its whistleblower programme.

[41]United States Phase 3 Report, paras. 20 and 47.
[42]United States Phase 3 Report, para. 49.
[43]The SEC also accepts whistleblower submissions by mail and facsimile, which would enable whistleblowers who may not have access to a computer to make reports.

38. The United States further encourages whistleblowing for FCPA matters under the SEC's jurisdiction by providing confidentiality provisions, financial incentives, as well as anti-retaliation employment protections. Under Dodd-Frank, the SEC generally has an obligation to maintain the confidentiality of information that could "reasonably be expected to reveal" a whistleblower's identity.[44] Nonetheless, Dodd-Frank permits the SEC to share information with domestic and foreign law enforcement agencies or securities regulators using appropriate procedures to help safeguard the confidentiality of whistleblower-identifying information. Furthermore, Dodd-Frank permits the DOJ to present information to a grand jury as well as potential witnesses and defendants in a criminal investigation.[45] According to the U.S. authorities, they can thus maintain an "adequate and appropriate flow of information" to conduct their investigations within this confidentiality framework.

39. In terms of financial incentives, the 2010 Dodd-Frank Act authorises awards to qualified whistleblowers whose voluntary disclosures of "original information" leads to SEC enforcement actions resulting in a recovery exceeding USD 1 million. By law, these awards must be between 10% and 30% of the total amount collected by the SEC as well as in any related enforcement actions brought by certain other authorities based on the information provided to the SEC.[46] In September 2020, the SEC amended the whistleblower program's rules to clarify how it will exercise its discretion when determining the appropriate award amount depending on the facts and circumstances of the case.[47] Crucially, Dodd-Frank whistleblowers can make their reports anonymously and still remain eligible for an award, so long as they are represented by counsel.[48] The SEC maintains that any person who reports to the SEC under the programme's rules is eligible to receive heightened confidentiality protections as well as anti-retaliation protections, even if the person is not eligible for an award. The Phase 4 evaluation provides the first opportunity to capture how these incentives have worked in practice.

40. Under Dodd-Frank, the SEC has the discretion to determine how large the award should be within the statutory range of 10% to 30% of the amount collected. The SEC makes this determination based on a number of factors, including the quality of the information provided, the degree of assistance provided in the covered action, the SEC's "programmatic interest" in deterring violations, and other relevant factors.[49] As of July 2020, the SEC has awarded over USD 505 million to 89 individuals for whistleblowing related to all securities law violations. As of the adoption of this report, the largest award was a joint award to two claimants for USD 50 million, while the highest individual award was USD 39 million. The top ten awards made through FY2019 equalled or exceeded USD 14 million.[50] The evaluation team did not have access to statistics on awards issued solely for foreign bribery, given the SEC's procedures for protecting the confidentiality of whistleblowers.

41. The SEC's Dodd-Frank whistleblower programme has coincided with obtaining substantial recoveries for the U.S. government. Since the programme's inception, the SEC has ordered wrongdoers to pay over USD 2.5 billion in monetary sanctions (including more than USD 1.4 billion in disgorgement of ill-gotten gains and interest) in enforcement actions brought with information provided by meritorious whistleblowers. Between 2012 and 2019, it has seen a 74% increase in the number of reports received concerning all securities law violations, and it has received tips from whistleblowers in 123 countries. In Fiscal Year 2019, the SEC received 200 tips from whistleblowers who believed the misconduct concerned FCPA violations, which constituted approximately 4% of all tips received that year. This volume is comparable to the annual rates of potential FCPA reporting since Dodd-Frank went into effect. It is not clear how many FCPA-related whistleblower tips actually resulted in FCPA enforcement actions, as the SEC does not as a policy matter disclose such statistics to maintain whistleblower confidentiality. The SEC has reported that whistleblowers "have assisted the Commission in

[44]15 U.S.C. § 78u-6(h)(2).
[45]15 U.S.C. § 78u-6(h)(2)(A), (C).
[46]United States Phase 3 Report, para. 48; *see also* 15 U.S.C. §§ 78u-6(b)(1) & 78u-6(a)(1), (5).
[47] *See* SEC Release 2020-219 (23 Sept. 2020). As this change occurred after the on-site visit, the evaluation team could not discuss the potential impact of these changes with representatives from the government or civil society.
[48]15 U.S.C. § 78u-6(d)(2)(A).
[49]15 U.S.C. § 78u-6(c).
[50]SEC (15 November 2019), 2019 Annual Report to Congress "Whistleblower Program" pp. 1 and 9.

bringing enforcement cases involving an array of securities violations, including [FCPA] violations".[51] SEC enforcement officials confirmed this information during the on-site visit, as did civil society participants. For its part, the DOJ reported that approximately 20% of its FCPA matters since Phase 3 have come from whistleblowers.

42. In Phase 3, the U.S. authorities believed that the Dodd-Frank whistleblower provisions would likely increase the detection of FCPA violations.[52] Based on the anecdotal evidence received during the on-site visit, it is clear that Dodd-Frank provides strong incentives to qualified whistleblowers, as further explained below. Nonetheless, the evaluation team could not in fact confirm that the number of FCPA matters uncovered through whistleblowing increased between Phase 3 and Phase 4.

(b) Two potentially relevant U.S. federal whistleblower protections do not appear to cover all aspects of the 2009 Recommendation

43. The Parties to the Convention should ensure that "appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report [suspected acts of foreign bribery] in good faith and on reasonable grounds to the competent authorities".[53] As reported in Phase 3, the United States does not have a single whistleblower protection law that would cover all whistleblowers who may report potential foreign bribery violations to any competent authority. Protections for employees in both the public and private sectors who lawfully report potential violations are available through an array of federal and state laws.[54] In Phase 3, the main federal whistleblower protections then in place derived from the 2002 Sarbanes-Oxley Act (15 U.S.C. § 7201 *et seq*.) and the 2010 Dodd-Frank Act (15 U.S.C. § 78u-6). In addition, certain federal criminal law provisions (e.g. retaliation against witnesses) as well as the laws of 18 states could also provide whistleblower protections.[55] Finally, auditors of publicly traded companies also enjoyed whistleblower protections (15 U.S.C. § 78j-1). In Phase 4, the Sarbanes-Oxley and Dodd-Frank still provide the two main sources of anti-retaliation protections for private sector whistleblowers who report foreign bribery allegations.[56] As these laws have different scopes and remedies, it is worthwhile to briefly recall their provisions.

(i) Sarbanes-Oxley Protections

44. In terms of employers covered, the Sarbanes-Oxley provisions mainly apply to issuers as well as their officers, employees, contractors, and agents. They also apply to non-issuer companies and their officers or employees, if the non-issuer company's financials are consolidated into an issuer's financial statements. Thus, these protections have a broader reach than the Working Group understood in Phase 3. In addition, Sarbanes-Oxley covers disclosures made to a broad range of institutions both to competent enforcement authorities, including Congress, as well as internally within the company.[57]

45. At the same time, in light of recent jurisprudence, the Sarbanes-Oxley provisions may be substantively narrower than what the Working Group understood in Phase 3. They protect whistleblowers who lawfully "provide information … regarding any conduct which the employee reasonably believes" would violate certain federal criminal fraud statutes, SEC "rules and regulations", or "any provision of Federal law relating to fraud

[51]SEC (15 November 2019), 2019 Annual Report to Congress "Whistleblower Program" pp. 18 and 22.
[52]United States Phase 3 Report, para. 48.
[53]2009 Recommendation, art. IX(iii).
[54]The Department of Labor lists 22 separate laws that it administers containing whistleblower remedies, covering issues ranging from environmental crimes, to health care, consumer protection and transportation safety. Other agencies administer their own laws with whistleblower protections.
[55]United States Phase 3 Report, para. 213.
[56]The United States also has other laws providing whistleblower protections to different categories of federal workers, but this report does not cover them as they are less relevant for reporting allegations of foreign bribery by U.S. entities or other companies subject to FCPA jurisdiction.
[57]18 U.S.C. § 1514A(a)(1)-(2).

against shareholders".[58] It is not clear that this would include FCPA anti-bribery provisions, which unlike other FCPA provisions, have not been codified in SEC rules and regulations. In 2019, the Ninth Circuit, for example, set aside a jury verdict that a company had violated Sarbanes-Oxley for terminating the employment of a whistleblower who had internally reported allegations of potential FCPA anti-bribery and books-and-record violations. While the Ninth Circuit held that FCPA violations were not covered by Sarbanes-Oxley in their own right, it recognised that reporting FCPA books-and-records allegations could be protected as it would also constitute reporting potential violations of SEC rules and regulations implementing the FCPA's books-and-records provisions.[59] At least one district court in the Second Circuit has likewise ruled that Sarbanes-Oxley whistleblower provisions did not cover disclosures concerning FCPA anti-bribery violations.[60]

46. If qualified whistleblowers believe that they have suffered retaliatory or discriminatory action, they can seek redress by first filing a complaint with the Secretary of Labor and then seeking review in a federal district court. The whistleblower must bring the action within 180 days of when the retaliatory act occurred or when it is discovered.[61] If the Secretary of Labor has not issued a final decision within 180 days due to no fault of the alleged whistleblower, the claimant can bring an action in federal court to have the claim heard.[62] If whistleblowers prevail, they "shall be entitled to all relief necessary to make [them] whole". This includes reinstatement, back pay with interest, and compensation for special damages, including litigation costs and reasonable attorney fees.[63]

(ii) Dodd-Frank whistleblower protections

47. The 2010 Dodd-Frank Act enacted further protections for whistleblowers in the private sector who report their allegations to the SEC. Unlike Sarbanes-Oxley, the Dodd-Frank anti-retaliation provisions technically apply to all employers.[64] Substantively, however, the Dodd-Frank anti-retaliation provisions only protect whistleblowers who possess a reasonable belief that they are reporting information "relating to a violation of the securities laws".[65] Thus, a whistleblower who reports to the SEC potential violations of the FCPA's anti-bribery, books-and-records, and internal controls provisions about an issuer would be fully protected. It is not clear, however, that a whistleblower reporting FCPA anti-bribery violations concerning a non-issuer would be protected, given that the FCPA anti-bribery, books-and-records, or internal controls provisions in the Securities Exchange Act of 1934 would not apply. Furthermore, Dodd-Frank only protects whistleblowers who have reported their allegations to the SEC.[66] Thus, unlike Sarbanes-Oxley, Dodd-Frank would not cover whistleblower reports made within the company or to any other authority, including the DOJ, unless the whistleblower additionally makes a timely report to the SEC.

48. Some courts have held that Dodd-Frank whistleblower protections will not apply extraterritorially when a whistleblower based abroad seeks redress for alleged adverse treatment by a foreign company after reporting a potential securities law violation. In 2014, the Second Circuit held that a Taiwanese compliance officer for a Chinese subsidiary of Siemens AG, a Germany company classified as a U.S. issuer, could not bring an action for retaliation under Dodd-Frank because the alleged wrongdoing and retaliatory conduct all took place abroad. The court specifically rejected the argument that the United States had jurisdiction because Siemens AG was a

[58] 18 U.S.C. § 1514A. The Sarbanes-Oxley provisions specifically refers to the following fraud offences: 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), and 1348 (securities and commodities fraud).
[59] Wadler v Bio-Rad Laboratories, Inc., Opinion, No. 17-16193 (9th Cir. Feb. 26, 2019).
[60] See Liu Meng-Lin v. Siemens AG, 763 F. 3d 175, 183 (2d Cir. 2014) (noting but not addressing district court's ruling that Sarbanes-Oxley "does not 'require or protect' disclosures of FCPA violations").
[61] See 18 U.S.C. §§ 1514A(b)(1), (2)(D).
[62] 18 U.S.C. § 1514A(b)(2)(B); 49 U.S.C. § 42121(b)(1).
[63] 18 U.S.C. § 1514A(c).
[64] 15 U.S.C. § 78u-6(h)(1)(A).
[65] 15 U.S.C. § 78u-6(a)(6).
[66] Following Digital Realty Trust, Inc. v Somers (U.S. 2017), a whistleblower for purposes of Dodd-Frank must make the disclosure to the SEC.

U.S. issuer.[67] During the on-site visit, civil society representatives observed that many foreign whistleblowers whom they had advised did not have recourse in their home countries. They thus expressed concern that limiting U.S. protections for such whistleblowers would inhibit reporting of FCPA violations. Despite this ruling, the SEC considers that foreign whistleblowers would still be entitled to Dodd-Frank confidentiality protections and eligible to receive a monetary award. After the on-site, the SEC also maintained that it could bring an action to protect foreign whistleblowers because it has the authority to bring enforcement actions to remedy violations of federal securities laws that take place abroad under Dodd-Frank Section 929P.[68] As Section 929P only grants jurisdiction expressly over enforcement actions alleging certain antifraud violations, it is not clear that the SEC could rely on this provision in the whistleblowing context.

49. If qualified whistleblowers suffer retaliation or other discrimination "in the terms and conditions of employment" because of the whistleblowing, the whistleblower can obtain certain remedies, including reinstatement, double back pay with interest, and compensation for reasonable attorney's fees and other litigation expenses.[69] The whistleblower must bring a civil action within 6 years from the violation or 3 years after learning of the material facts but before 10 years have elapsed.[70] Significantly, the SEC can bring an independent enforcement action against a covered company for retaliating against a whistleblower.[71] In September 2016, the SEC brought its first action solely to enforce whistleblower protections. In that case, which did not involve FCPA matters, the company ultimately agreed to pay USD 500 000 to settle the charges that it had retaliated unlawfully against the whistleblower.[72] In the *Anheuser-Busch InBev* case (2016), the company was sanctioned for FCPA violations as well as for restricting a whistleblower's communications with the SEC by concluding a non-disclosure agreement with the employee on separation.[73]

(iii) Criminal law provisions

50. Under the U.S. Code, it is a criminal offence for anyone "knowingly, with the intent to retaliate to take any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offence". Violators who retaliate against such individuals, including witnesses, can be punished with up to 10 years' imprisonment, a fine, or both.[74] As this offence focuses on punishing those who retaliate, it does not provide an economic remedy (e.g. reinstatement, back pay, or damages) to any whistleblower who suffers discriminatory or disciplinary action for reporting to a competent authority.

51. Despite the number of sources of federal whistleblower protection, the United States does not have a clear federal framework protecting all whistleblowers who may report on reasonable grounds FCPA-related allegations to any competent authority. While some whistleblowers may be protected if they report to the SEC, whistleblowers who report FCPA allegations about non-issuers or who only report to the DOJ may not themselves be protected – even if those who retaliate against them might be criminally punished. Table 1 shows the main breakdown of the features of the three main federal sources of whistleblower protections for the private sector.

[67] See *Liu Meng-Lin v. Siemens AG*, 763 F. 3d 175, 183 (2d Cir. 2014).
[68] Section 929P of Dodd-Frank, P.L. 111-203, 124 Stat. 1376 (July 21, 2010), codified as 15 U.S.C § 78aa(b).
[69] United States Phase 3 Report, para. 49.
[70] 15 U.S.C. § 78u-6(h)(1)(B).
[71] SEC website "Office of the Whistleblower".
[72] OECD (2017), *The Detection of Foreign Bribery*, p. 43; see also SEC Administrative Order, In re International Game Technology, 29 September 2016.
[73] SEC Press Release, 28 September 2016.
[74] 18 U.S.C. § 1513(e); see OECD (2017), *The Detection of Foreign Bribery*, pp. 43-44.

Table 1. Comparison of U.S. federal whistleblower protections for private-sector employees reporting suspected foreign bribery allegations

Do the applicable whistleblower protections:	Sarbanes-Oxley protections 18 U.S.C. § 1514A	Dodd-Frank protections 15 U.S.C. § 78u-6	Criminal offence for retaliation against witnesses 18 U.S.C. § 1513(e)
Protect foreign bribery allegations	Unknown	Yes, if report concerns foreign bribery by an issuer	Yes
Apply to reports of foreign bribery allegations about non-issuers	No, unless consolidated into issuer's financials	No	Yes
Protect reports to law enforcement agencies	Yes	No, unless also reported to SEC	Yes
Protect reports within company	Yes	No, unless also reported to SEC	No
Authorise reinstatement	Yes	Yes	No
Authorise compensation and back pay	Yes	Yes, double back pay	No
Permit whistleblower to bring claim	Yes, first to Secretary of Labour; then court	Yes, to court	No

Source: Federal statutes.

Commentary

The lead examiners recognise that whistleblowing has played an important role in detecting U.S. foreign bribery matters since Phase 3. Though the lead examiners could not confirm that Dodd-Frank Act actually resulted in more whistleblowing for foreign bribery since Phase 3, they welcome the strong incentives that the Act has given certain FCPA whistleblowers in practice, by providing confidentiality guarantees, financial incentives, as well as remedies, including double back pay, to compensate whistleblowers who suffer retaliation. The lead examiners also highly commend the fact that the SEC can enforce the Dodd-Frank anti-retaliation provisions in its own right, thus offering protections to whistleblowers who may lack sufficient resources to commence their own actions. In their view, the multiple layers of protection for qualifying whistleblowers, most notably the SEC's ability to enforce the anti-retaliation provisions independently, provides a powerful framework to encourage whistleblowing concerning potential foreign bribery violations. They invite the Working Group to recognise this multi-faceted approach to whistleblower protection as a good practice. At the same time, the lead examiners observe that the various existing U.S. federal protections may not protect all potential private-sector whistleblowers who may raise FCPA-related claims.

For this reason, they recommend that the United States consider how it can enhance protections for whistleblowers who report suspected acts of foreign bribery by non-issuers and enhance guidance about the protections available to whistleblowers who report suspected acts of foreign bribery depending on the competent enforcement agency to which they report.

A.5. Prevention and Detection of Foreign Bribery through Official Development Assistance (ODA) and Export Credits

(a) The United States' agencies involved in the distribution of U.S. Official Development Assistance

(i) Institutional set-up

52. The U.S. Agency for International Development (USAID) is an independent agency of the U.S. government that works closely with the State Department and receives overall foreign policy guidance from the Secretary of State. In October 2018, Congress passed the BUILD Act, which consolidates the Overseas Private Investment Corporation and USAID's Development Credit Authority into a new International Development

Finance Corporation that will be established in the first half of 2020.[75] The legislation doubles the size of the United States' current regime and authorises a wider set of development finance tools.[76]

53. In 2017, USAID managed 56.3% of the United States' gross ODA, while the U.S. State Department managed 18.9%, primarily covering the major President's Emergency Plan for AIDS Relief and other related communicable diseases programme.[77] A smaller percentage of ODA is managed by the Millennium Challenge Corporation, a U.S. foreign assistance agency whose mission is to reduce poverty through economic growth. There are an additional 19 government agencies in the U.S. government that manage foreign assistance.[78]

(ii) Reporting and whistleblowing mechanisms within bodies administering ODA

- Reporting by USAID funded organisations

54. With respect to reporting by USAID-funded organisations, the United States explains that, consistent with Federal regulations and USAID standard award provisions, organisations receiving USAID funding must disclose in writing to the Office of Inspector General for the U.S. Agency for International Development (USAID OIG), and to USAID officials, in a timely manner, all violations of Federal criminal law involving fraud, bribery, or illegal gratuities potentially affecting the Federal award. Sub-recipients of USAID grants must also make such disclosures to the OIG and to the prime recipient (pass through entity), in a timely manner.[79] Failure to make required disclosures can result in a variety of administrative remedies up to and including suspension and debarment.

- Reporting by implementing partners

55. The U.S. authorities emphasise that timely reporting of fraud allegations allows the USAID OIG to intake and assess the allegations, the connection to USAID (or Millennium Challenge Corporation (MCC) awards),[80] and the viability of pursuing a criminal, civil, or administrative enforcement remedy. USAID OIG, in assessing the disclosure from the implementer will either exercise its independent authority to investigate the matter itself, refer the matter immediately to USAID program officials for consideration, or allow the implementer to first conduct an internal investigation and report the findings to OIG. After the on-site visit, the U.S. authorities indicated that while it is not possible to assess the number of cases that have been "disclosed", they know that 33 investigations into foreign bribery allegations have been conducted by OIG within the past five years, which can approximately be tied back to the number of disclosures received.

56. Assistance recipients are required to report to the Assistance Officer (AO) any use of funds for purposes other than those authorised by the awards. For contracts, the Contractor Business Ethics Compliance Program and Disclosure Requirements amplified the requirements for a contractor code of business ethics and conduct, an internal control system, and disclosure to the Government of credible evidence of violations of criminal law (including bribery), violations of the civil False Claims Act, or significant overpayments.[81] Specifically, the requirements are applicable to a contract with a value of more than USD 5 million that takes longer than 120 days to perform, and require contractors to (among other requirements): establish a written code of business ethics and conduct; make the code available to employees involved in the performance of the contract; exercise "due diligence" to prevent and detect improper conduct; promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law; display a hotline poster; and timely disclose, in writing, to the agency OIG, whenever, in connection with any Government contract, the Contractor has credible

[75] See OECD DAC U.S. Development Cooperation Profile.
[76] See Donor Tracker United States.
[77] See President's Emergency Plan for AIDS Relief.
[78] See OECD DAC U.S. Development Cooperation Profile.
[79] Standard Provisions for U.S. Nongovernmental Organizations - A Mandatory Reference for ADS Chapter 303. An identical provision for non-U.S.-based award recipients can be found at Standard Provisions for non-U.S. Non-governmental Organisations, A Mandatory Reference for ADS 303, section M26.
[80] The Millennium Challenge Corporation (MCC) is an independent U.S. foreign aid agency created in 2004.
[81] 73 Fed. Reg. 67064, FAR Case 2007-006.

evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving a number of offences, including bribery.[82]

(iii) Whistleblowers

57. Investigations can also result from whistleblowers' complaints, submitted confidentially to USAID OIG's Hotline, which are distinct from mandatory disclosures by grantees and contractors at the corporate level. Regarding the specific policies supporting the treatment of whistleblowers in United States ODA agencies, the U.S. authorities indicate that U.S. law protects individuals, no matter their nationality, from reprisal for reporting potential misconduct or alleged criminal activities related to a federal award. As part of its external outreach efforts (see subsection below), OIG emphasises the need for aid organisations to create a culture of transparency, in which whistleblowers' disclosures are encouraged and free from retaliation, in accordance with U.S. law. Allegations of whistleblower reprisal against employees of aid organisations are subject to mandatory investigation by OIG, which then transmits a report of its investigative findings to the USAID Administrator for consideration of corrective action.[83] However, the United States also reports that whistleblowers in ODA agencies have not been a significant source of referrals of potential foreign bribery cases.

(iv) Investigation of ODA financed contracts by the Office of Inspector General

58. With respect to the investigation of ODA financed contracts, the U.S responses indicate that the USAID OIG's mission is to safeguard and strengthen U.S. foreign assistance through timely, relevant, and impactful oversight. Its priority is to prevent fraud, waste and abuse within the programs and operations of these agencies and to foster and encourage the integrity of their employees, as well as that of agency contractors, grantees, and host country counterparts. The OIG's work in this area includes identifying and investigating cases of embezzlement, bribery, kickbacks, false claims, conflicts of interest, bid rigging and other misconduct. During the on-site visit, OIG representatives emphasised that the law affords them a high degree of independence as to what and whom they investigate in relation to corruption in ODA programming. As is the case with most Federal Inspectors General, USAID's Inspector General does not report to the head of USAID, thus providing OIG the independence to investigate all operations and programming by USAID.

59. Importantly, USAID OIG is tasked with conducting worldwide investigations into allegations of criminal, civil, and administrative violations, audits and performance reviews to improve the effectiveness, economy and efficiency, internal control, and compliance of all Agency foreign assistance programs. It also conducts investigations relating to other U.S. government ODA programs, including those funded by the Millennium Challenge Corporation, United States African Development Foundation, Inter-American Foundation and the Overseas Private Investment Corporation. The USAID OIG also maintains relationships – many of which are formalised into MOUs – with anti-fraud counterparts in the donor/PIO community in order to share best practices and establish mechanisms for the share/transfer of information.

60. To fulfil its investigative role, USAID OIG expects transparency and cooperation from USAID implementers (aid and development organisations), who, as discussed above, are all required by law to disclose, in a timely manner, information or allegations of fraud, waste, or abuse, including bribery. During the on-site visit, USAID OIG representatives indicated that their office interprets "in a timely manner" to mean as soon as the implementer determines that allegations of fraud are "believable." Such a determination should be made shortly after the receipt by the organisation of a fraud allegation and promptly disclosed to USAID OIG, before the implementer initiates a comprehensive internal investigation. These expectations are communicated to organisations receiving U.S. foreign assistance by USAID OIG criminal investigators and attorneys in fraud awareness presentations throughout the world. Since 1 October 2019, USAID OIG criminal investigators have presented 65 briefings on fraud indicators and prevention strategies to more than 3 000 participants worldwide.[84] USAID OIG attorneys also frequently present to NGO legal forums emphasising the need for timely and

[82]31 U.S.C. §§ 3729-3733.
[83]See 41 U.S.C. § 4712.
[84]Office of Inspector General, Semi-annual Report to Congress October 1, 2019-March 31, 2020, p. 7.

transparent self-reporting of bribery and other misconduct allegations, while also articulating the potential consequences for misconduct involving USAID funding. All USAID OIG investigations are conducted according to OIG processes and in line with U.S. law. From 2015 to the present, USAID OIG has investigated 33 allegations involving potential foreign bribery, which represents an average of over 6 such cases investigated per year. Of these allegations, three cases were referred to the DOJ for prosecutorial consideration and five were referred to USAID, resulting in five government-wide suspension or debarment actions. The U.S authorities indicate that USAID OIG continues to investigate numerous active cases involving bribery allegations. It is however unclear how many of these cases have later progressed to prosecution and resolution or non-trial resolution for foreign bribery or related offences.

Commentary

The lead examiners commend the United States for its robust detection, reporting and investigation mechanisms including through the powerful tools used by USAID's Office of the Inspector General. They also welcome the USAID OIG's ability to keep track of the type of offences potentially involved in the allegations that they are investigating and the number of investigations into foreign bribery allegations that the USAID OIG has conducted.

(b) The United States' export credit agencies

61. Export credits agencies (ECAs) are in a privileged position to deter foreign bribery cases in international business transactions benefiting from official export credit support. By dealing with companies in international business transactions, those agencies can conduct due diligence on transaction parties, check for red flags, and obtain anti-bribery declarations before conceding credit or guarantee to a company or an individual. For this reason, international standards require ECAs to respond appropriately to deter bribery in international business. In 2019, the OECD Working Party on Credits and Credits Guarantees adopted the 2019 OECD Recommendation on bribery and Official Supported Credits (the 2019 Recommendation). This Phase 4 evaluation is the first time the United States' export credit system is reviewed in light of the 2019 Recommendation.

62. In the United States, the official export credit agency is the Export-Import Bank of the United States (EXIM). EXIM is part of the U.S. delegation at the OECD Working Party on Export Credits and Credit Guarantees.

(i) Promoting internal controls and prevention

63. EXIM promotes staff awareness of the risks of foreign bribery. The Bank indicates that it requires its staff, including underwriters and loan officers, to take various trainings on fraud and corruption, including FCPA prohibitions. EXIM recently enacted a Code of Business Conduct, which includes proscriptions against bribery. The Bank also requires that all those involved in treating applications be aware of the risk profiles of the programs in which they participate. The Bank emphasises that the relevant factors to consider in the risk analysis include the amount of the transaction, the sector or industry, and geographical considerations.[85] EXIM participates in the U.S. Government's Interagency Country Risk Assessment System (ICRAS). This is a committee of agencies that extend credit abroad and that provide country risk ratings. Part of the rating process is an assessment of the corruption risk in the country. EXIM also has, in-house, a group of economists that review countries and provide an analysis of the country risk for each board approved transaction. EXIM's website has a page entirely dedicated to foreign corrupt practices with links to legal materials and other relevant information.[86]

64. Staff involved in EXIM Bank transactions are required to check other authorities' debarment lists as a step in conducting due diligence with regard to the various participants (borrowers, guarantors, lenders and agents) in a transaction. Additionally, the EXIM Bank Exporter's Certificate, application forms for all

[85]EXIM Fraud and Corruption Prevention, Detection and Prosecution.
[86]EXIM Foreign Corrupt Practices and Other Anti-Bribery Measures.

transactions, and contractual provisions for long-term transactions all involve certifications (or representations and warranties in the case of contractual provisions) that the signatory companies (and their principals) or individuals are not debarred or suspended to contract with the U.S. government (i.e. on the Excluded Party List) or any of the multilateral bank debarment lists.[87] These certifications also state that neither the certifying company or individual, nor anyone acting on their behalf, such as agents, have been engaged or will engage in bribery in the course of the transaction guaranteed by the Bank. In addition to obtaining these certifications, EXIM then runs its own screening to verify that these parties are not excluded in the U.S. or the multilateral banks. Borrowers on all export credit transactions are also screened in this same way.

65. Staff involved in treating applications should use reasonable commercial judgment in collecting information and conduct appropriate due diligence for each transaction.[88] In its questionnaire responses, the United States indicates that EXIM has an Enhanced Due Diligence (EDD) process whereby its Office of General Counsel reviews parties that have been accused, or convicted, of any financial crime, including foreign bribery. During the on-site visit, EXIM authorities affirmed that the Bank has an internal watch list with potential borrowers for which EDD may, depending upon the reason the party is on the watch list, be required in order to conclude a transaction. Transactions involving parties on the watch list are scrutinised as appropriate for the reason a party may be on the watch list. As part of its EDD, the Bank analyses the existence of internal controls and compliance remediation requirements as imposed by the DOJ or other relevant regulators, or, if no such requirements have been imposed, as may be relevant to assure EXIM that the party is a responsible party. The Bank emphasises that the core of the EDD process is to establish whether the party in question, despite its past violations, or allegations of violations, has demonstrated a present commitment and effective ability to comply with the applicable laws and regulations, including the FCPA and other applicable anti-bribery laws. The process might include interviews with the concerned parties' principals and employees.

66. Finally, the U.S. legislation makes it possible for EXIM to debar parties involved in foreign bribery. In its questionnaire responses, the U.S. authorities affirm that the government-wide Non-Procurement Debarment and Suspension Regulations, which apply to export credits, require federal agencies to debar parties that are not "presently responsible"(2 CFR 180.125(a)). This term is not defined by the regulations and it might include any indication of FCPA violations, including non-trial resolutions. During the on-site visit, the U.S. authorities indicated that EXIM gives substantial deference to what was decided by law enforcement and regulatory agencies when conducting enhanced due diligence that can then lead to debarment.

(ii) Detecting and reporting foreign bribery

67. EXIM's Office of the Inspector General (EXIM OIG) offers several reporting channels (telephone, mail, and e-mail) for those wishing to report any suspicious of fraud and corruption. Furthermore, EXIM OIG has designated a Whistleblower Protection Ombudsman to educate the Bank's staff about prohibitions as well as rights and remedies against retaliation for protected disclosures. EXIM OIG also contains a group of law enforcement officers that are dedicated to EXIM matters. In addition, during the on-site visit, the U.S. authorities indicated that the EXIM OIG makes investigations on suspicious activities involving the Bank and reports the findings to the Bank administration and to law enforcement agencies.

68. Regarding the reporting obligations, in the questionnaire responses, the U.S. authorities indicate that every federal executive branch employee or official is bound to "disclose waste, fraud, abuse, and corruption to appropriate authorities." (5 CFR § 2635.101(11)). They also indicate that law enforcement agencies receive information from EXIM that leads to foreign bribery investigations. Any suspicion of fraud or corruption is referred to the EXIM OIG, which has law enforcement agents dedicated to EXIM matters. These agents

[87]EXIM Fraud and Corruption Prevention, Detection and Prosecution.
[88]EXIM Requirements and due diligence.

coordinate with the Department of Justice, as appropriate. The number of foreign bribery cases EXIM detected is unknown.

Commentary

The lead examiners welcome EXIM's efforts to promote awareness and report foreign bribery cases and allegations to law enforcement agencies.

A.6. Self-reporting/Voluntary disclosure by companies

(a) Incentives and transparency of authorities' expectations to encourage voluntary self-disclosure

69. Since Phase 3, the DOJ has progressively formalised its policy to incentivise voluntary self-disclosure of FCPA violations by companies. In their questionnaire responses, the U.S. authorities stress that because much of the conduct often occurs in a foreign country, and because the bribe payments are often routed through numerous foreign jurisdictions (and often disguised using shell companies and other methods of concealment), voluntary self-disclosures and cooperation can have a significant positive impact on the government's ability to resolve with the culpable individuals and entities.

70. In 2016, the FCPA Enforcement Plan and Guidance introduced a "Pilot Program" to encourage voluntary self-disclosure by corporate entities. Under the Pilot Program, if a company voluntarily self-disclosed, further cooperated and fully remediated the offence, the DOJ would consider declining prosecution of the company, and would accord a 50% reduction of fine, should an enforcement action be pursued.[89] During the on-site visit, the U.S. authorities explained that incentives set forth in the Pilot Program predated its implementation but were not formalised. By formalising it, the DOJ aimed to provide companies with more consistency and transparency on what they could expect if they self-disclose, cooperate and remediate. The goal was that this additional transparency would further incentivise companies to self-disclose.

71. In November 2017, the DOJ announced the formalisation of the Pilot Program subsequently releasing its *FCPA Corporate Enforcement Policy (CEP)*.[90] The CEP strengthened the incentives for companies to self-report and relaxed the requirements to qualify for credit. To qualify under the CEP, all companies must cooperate and remediate. The CEP reiterated the importance of, and enhanced the incentives for voluntary self-disclosure, with a declination being presumed if the company voluntarily self-disclosed, fully cooperated, and fully remediated as those terms are defined by the CEP, absent aggravating factors. If a criminal resolution is warranted even though a company meets these three conditions, the DOJ will accord a 50% reduction off the low end of the U.S. Sentencing Guidelines fine range. If a company does not voluntarily self-disclose its misconduct but later fully cooperates and remediates, the reduction will fall to up to 25% off the low end of the Sentencing Guidelines range. The CEP has since been altered slightly to clarify certain points and to address questions about the CEP. These revisions softened the threshold that companies must meet to obtain credit.

72. The SEC's framework for evaluating cooperation by companies is set forth in the Seaboard Report, which details the many factors the Commission considers when determining whether, and to what extent, leniency should be granted to companies for cooperating in an investigation.[91] In their questionnaire responses, the U.S authorities indicate that these factors include 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 organisations. In 2010, the SEC also developed a policy for rewarding cooperation by natural persons.[92]

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[89]U.S. DOJ Criminal Division (April 5 2016), FCPA Enforcement Plan and Guidance.
[90]USAM 9-47.120 - FCPA Corporate Enforcement Policy.
[91]U.S. SEC (23 October 2001), Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Seaboard Report).
[92]SEC (13 January 2010), Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions.

73. In their questionnaire responses, the U.S. authorities explain that the DOJ and SEC have spoken at numerous domestic and international anti-corruption conferences where they highlighted the various mechanisms in place to report suspected acts of foreign bribery to the U.S. authorities and provided guidance on the benefits and incentives available to corporations when self-reporting violations. The DOJ actively communicates on the advantages for companies to voluntary self-disclose and cooperate with enforcement authorities, in particular through speeches and public statements.

(b) Notion of voluntary disclosure

74. In their questionnaire responses, the U.S. authorities provide that the notions of "imminent threat of disclosure or government investigation" and "reasonably prompt time after becoming aware of the offense" in the CEP definition of voluntary disclosure depend on the facts and circumstances of each case. They stress, however, that DOJ officials have stated publicly that, although in some instances 3-6 months may be "reasonably prompt", a year is likely not "reasonably prompt". If a company chooses to wait even 3 months to voluntarily disclose misconduct, there is a substantial risk that the DOJ will learn of the misconduct through other methods (including, for example, whistleblowers), and the company will lose the ability to obtain voluntary self-disclosure credit.

(c) Trends in the rate of voluntary disclosure

75. The DOJ reports that it has experienced an increase in voluntary self-disclosures by companies following the introduction of the policy incentivising voluntary disclosure in 2016. In November 2017, in its announcement of the CEP, then Deputy Attorney General Rod Rosenstein reported that "during the year and a half that the Pilot Program was in effect, the FCPA Unit received 30 voluntary disclosures, compared to 18 during the previous 18-month period".[93] He further added that since 2016, the Fraud Section's FCPA Unit had secured criminal resolutions in 17 FCPA-related corporate cases, two were voluntary disclosures under the Pilot Program. Over the same time period, seven additional matters that came to the DOJ's attention through voluntary self-disclosures were resolved under the Pilot Program through declinations with the payment of disgorgement. Complete data on the number of voluntary disclosures since the implementation of the CEP are not available but after the on-site visit, the U.S. authorities reported that the CEP has led to disclosures in a number of cases where the DOJ was able to prosecute high-level executives at a company, including public cases *Cognizant* (President and General Counsel) and *ICBL* (the Chief Executive Officer, Senior Vice-President, and the Minister of Industry of Barbados). They emphasised that these prosecutions indicate that the CEP is having its desired effect.

76. Civil society representatives met during the on-site visit acknowledged the great strides made by the DOJ to increase incentives to voluntary self-disclose and to communicate on these. Both civil society representatives and academics noted an uptick in voluntary self-disclosure since the implementation of the DOJ policies. However, academics believe that more time is needed to collect meaningful figures on voluntary self-disclosure and draw correlations between government policies and companies' willingness to come forward and cooperate.

77. Civil society representatives also explained that, despite strong incentives to voluntary self-disclose suspicions of FCPA violations to authorities, several factors still impede companies from doing so. Academics and private sector representatives believe the companies lack certainty when deciding whether to voluntary disclose as to the likely outcome that would be imposed by the SEC. According to Academics, this uncertainty weakens the DOJ's effort to increase voluntary disclosure. The need for guidance on incentives, and alignment of DOJ and SEC's policies, are discussed under section B.4.(a) below.

78. According to academics, business representatives and business associations met during the on-site visit, other considerations including the cost of internal investigations and the risk of shareholders action would also tend to tip the balance against voluntary disclosure. Private sector representatives emphasised that, as FCPA

[93] DOJ News, 29 November 2017.

enforcement actions are increasingly multijurisdictional, the U.S. authorities alone cannot address companies' need for certainty. Presumably, this would be playing a growing part in companies' consideration for voluntary self-disclosure. This is a horizontal issue across Parties to the Convention and even beyond.[94] However, the DOJ and SEC emphasise that they are aware of this issue and strive to address it through the way they increasingly resolve multijurisdictional cases in a coordinated manner with other countries.

Commentary

The lead examiners commend the United States for its considerable efforts to encourage voluntary self-disclosure, in particular by creating strong incentives and enhancing transparency of credit-awarding policies. Given the intrinsic transnational and hidden nature of the offence, the lead examiners welcome the possibilities the policies offer to uncover and investigate wrongdoing which can only contribute to increased enforcement of the foreign bribery offence both within and beyond the U.S. borders.

A.7. Detection and Reporting of Foreign Bribery by U.S. Accountants and Auditors

79. As accountants and auditors examine companies' financial records and internal controls, they are well positioned to detect and report foreign bribery even when it is falsely reported or kept off the books altogether. Under the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials, the Parties are encouraged to "require" external auditors to report indications of suspected bribery to corporate management and, if appropriate, corporate monitoring bodies" (Section X(B)(iii).

80. In the United States, issuers and non-issuers have different legal bases concerning accounting and internal control obligations. Issuers are required to maintain books and records and design and maintain effective internal controls, as well as to be submitted to the yearly external audits of their financial statements. Non-issuers have no such requirements although they are submitted to general accounting and fiscal obligations. During the on-site visit, private sector panellists confirmed the inexistence of specific reporting obligations for non-issuers. However, the number of enforcement actions brought against non-issuers since Phase 3 shows that the U.S. law enforcement authorities have been able to detect cases involving these entities.

81. Under U.S. law, issuers have the obligation to undertake external audits and reviews of their financial statements on a yearly and quarterly basis, respectively. External auditors are independent professionals who follow the standards issued by the Public Company Accounting Oversight Board (PCAOB Standards). The PCAOB Standards govern, for instance, the auditor's responsibilities concerning illegal acts by a client and its officers, directors, and employees.[95] The report resulting out of the audit process must be filed with the SEC.

82. The PCAOB Standards provide that an auditor should adequately inform the audit committee, as soon as practicable and prior the issuance of the report, about illegal acts that come to his or her attention. Pursuant to the PCAOB Standards, "the communication should describe the act, the circumstances of its occurrence, and the effect on the financial statements." Section 10A of the Securities Exchange Act provides that if the company fails to take appropriate measures, external auditors must report the facts to the SEC. During the on-site visit, external auditors indicated that, in practice, they rarely have to report illegal acts to the SEC. They affirmed that internal accountants are better positioned to uncover improper payments and report them to the companies' management. The evaluation team did not have access to information on how many FCPA cases have been detected by auditors and accountants.

Commentary

The lead examiners note with satisfaction that the sophisticated accounting and auditing rules applying to issuers should enable accountants and auditors to potentially detect and report foreign bribery.

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[94]OECD (2017), *The Detection of Foreign Bribery*, p.26.

[95]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. Foreign Corrupt Practices Act, pp. 38-46.

A.8. Other Sources of Foreign Bribery Allegations including investigative journalism

(a) Foreign authorities and international organisations

83. The United States indicates in its questionnaire responses that law enforcement authorities review MLA requests for possible violations of U.S. laws and that they also receive information as a result of developed relationships with foreign law enforcement partners. In the event of a case or allegation of foreign bribery and related offences, the DOJ Office of International Affairs shares the information with the appropriate section of the Criminal Division. For example, in the Alstom case, after Switzerland raided an Alstom subsidiary, it sent an MLA request to the United States. As the Swiss MLA request contained facts indicating that U.S. persons, a U.S. subsidiary and U.S. banks had been used in the corruption scandal, there was sufficient grounds for the United States to start its own investigation. In addition, Brazil informed the United States about the Odebrecht scandal. The United States recently concluded prominent multijurisdictional cases such as the Odebrecht, Keppel Offshore & Marine, and Airbus cases.

84. In its questionnaire responses, the United States indicates that the DOJ regularly engages with international organisations and cooperates on parallel investigations. It cites the Hitachi case, which was referred by the African Development Bank leading to a SEC resolution in 2015.96 However, since 2012, none of the referrals received from international organisations have led to a criminal resolution.

(b) Investigative journalism

85. The media play a significant role in bringing allegations of foreign bribery to light, either for law enforcement authorities that investigate allegations contained in the press, or for companies that decide to conduct internal investigations or self-report. Historically, U.S. media vehicles have played a proactive investigative role on the detection of foreign bribery either in the U.S. or overseas. U.S. journalists, working together with peers from all over the world, helped uncover major international scandals with potential foreign bribery allegations such as the Panama Papers, the Paradise Papers, and the Odebrecht's "Bribery Division" leaks.

86. In the U.S., law enforcement agencies can open an investigation based on media reports. During the on-site visit, U.S. authorities and companies affirmed that they review allegations both from national and foreign media concerning foreign bribery and related offences. In Phase 2, the Working Group noted that the first FCPA matter arose after a newspaper published an article about a U.S. businessman paying a New Zealand politician.97 The DOJ states that approximately 15% of the DOJ FCPA cases come from media reports, which is a significant indicator of the detection value of media reports. While the SEC confirmed that it conducts media surveillance on both domestic and foreign vehicles to identify foreign bribery allegations, for legal and policy reasons, it was not able to offer comparable data on how many media reports have triggered SEC investigations on foreign bribery matters.

87. Finally, the role of the media in detecting bribery cases is enhanced through the protection of the U.S. legal frameworks safeguarding freedom, plurality and independence of the press.98 This also includes allowing journalists access to information from public administrations combined with comprehensive safeguards to protect journalist sources, including whistleblowers. These safeguards ensure that foreign bribery cases can, and will continue to be, brought to light.

A.9. Law enforcement techniques for detection

88. In Phase 3, the U.S. authorities did not provide statistics on the sources of detection, but they reported that some FCPA cases stemmed from traditional law enforcement operations, including sting operations, as well

[96] Securities and Exchange Commission v. Hitachi, ltd. (15-cv-01573), 28 September 2015.
[97] United States Phase 2 Report, para. 26.
[98] See The United States Constitution, 1st Amendment and The Freedom of Information Act (5 USC § 552).

as industry sweeps.[99] In Phase 4, the U.S. authorities report that they are using "traditional law enforcement techniques" in FCPA cases to a greater extent than before. For example, the DOJ reported that approximately 15% of its foreign bribery cases since Phase 3 came from "other law enforcement activities", excluding media reviews and referrals from other authorities.[100]

(a) Regulatory filings and public sources

89. Both the DOJ and the SEC, report that they regularly obtain information about possible foreign bribery matters from reviewing public sources, including trade publications and company restatements, which may lead to FCPA investigations. The SEC reports that it learns of books and records violations from restatements, whistleblowers, referrals, and self-reports.[101] The SEC has an Office of Market Intelligence, which analyses developments from a variety of sources and flags potential cases for the Division of Enforcement.

(b) Information developed in other investigations

90. Both authorities may also develop information about foreign bribery while investigating other wrongdoing. During the on-site visit, an FBI agent reported that asset recovery cases could detect FCPA violations (or vice versa). In other cases, investigations into one entity might turn up similar patterns of misconduct involving other parties. For example, according to the DOJ, a number of FCPA matters have arisen from Brazil's Petrobras scandal in recent years, including *Braskem* (2016), *Odebrecht* (2016), *Keppel Offshore & Marine* (2017), *Petrobras* (2018), *Samsung Heavy Industries* (2019) and *TechnipFMC* (2019) cases.

(c) Informants

91. The United States has used informants and cooperating witnesses to detect foreign bribery cases. During the on-site visit, the authorities explained that this was a method being used more frequently, especially as wrongdoers are moving away from traditional emails to other forms of electronic communication less accessible to law enforcement. For instance, a would-be accomplice to an FCPA scheme involving the Venezuelan SOE *Corpoelec* reportedly became a confidential witness for the United States. Ultimately, two conspirators in the scheme were sentenced to 51 months in jail and had to disgorge USD 5 million in profit, while two other conspirators were fugitives from justice.[102] At least one FCPA case was uncovered when the foreign public official unknowingly asked an informant working for the U.S. authorities to launder money from the bribery scheme. In 2015, the United States secured the conviction of a Russian foreign official for FCPA-related money laundering charges after a government informant reported the official's efforts to launder the bribes.[103]

(d) Industry sweeps and enforcement "clusters"

92. Since at least 2007, observers have remarked that FCPA enforcement activity has successively focused on a range of industries.[104] This practice is sometimes referred to as "industry sweeps". The two agencies express slightly different perspectives on this practice.

93. The SEC reports that it sometimes detects foreign bribery cases by using its regulatory authority to investigate potentially problematic practices in particular industries. In 2016, the then Director of the SEC's Division of Enforcement reported that the SEC's FCPA unit had conducted a "sweep" in the financial services and the pharmaceutical industries.[105] During the on-site visit, SEC enforcement officials confirmed that certain

[99]United States Phase 3 Report, para. 20.
[100]Unlike the DOJ, the SEC declined to provide statistics about its detection sources to the evaluation team.
[101]Andrew Ceresney, Director, SEC Enforcement Division (3 March 2015), "FCPA, Disclosure, and Internal Controls Issues Arising in the Pharmaceutical Industry", Remarks at CBI's Pharmaceutical Compliance Congress, Washington D.C.
[102]Gibson Dunn, 2019 Year-End FCPA Update.
[103]OECD (2017), *The Detection of Foreign Bribery*, p. 29.
[104]Gibson Dunn, 2012 Year-End FCPA Update.
[105]Andrew Ceresney, Director, SEC Enforcement Division (3 March 2015), "FCPA, Disclosure, and Internal Controls Issues Arising in the Pharmaceutical Industry", Remarks at CBI's Pharmaceutical Compliance Congress, Washington D.C.

financial services cases, including *BNY Mellon*, *JP Morgan*, and *Och-Ziff* grew out of industry sweeps. That said, as industry sweeps can be labour intensive and time consuming, the SEC indicated during the on-site visit that such sweeps would only be conducted in appropriate circumstances.

94. For its part, the DOJ FCPA unit does not participate in "industry sweeps". It reports that it simply follows the evidence, and that a company that is prosecuted may point out other competitors engaged in similar practices. Observers have remarked that the FCPA unit sometimes pursues prosecutions against various entities following the conviction of one participant in a scheme (e.g. *TSKJ*, *Petrobras*, *Alstom*). The DOJ observes that often these cases are developed in parallel, even if the defendants may resolve their matters at different points in time. They also will pursue cases against various entities in an industry that engage in corrupt practices (e.g. pharmaceutical companies bribing doctors, or financial firms hiring Chinese "princelings" for influence).[106]

(e) Detection of violation by non-issuers

95. Finally, concerning Phase 3 Follow-up Issue 1, the U.S. authorities indicated that they use the same techniques when detecting FCPA violations by non-issuers (voluntary disclosures, whistleblower reports, press reports etc.). They observed that they have concluded a number of FCPA resolutions with both domestic concerns and foreign persons.

Commentary

The lead examiners welcome the U.S. authorities' increasing use of various law enforcement methods to detect potential foreign bribery schemes. Given that detection is one of the main pillars of the Phase 4 evaluation cycle, the lead examiners requested data from the U.S. authorities on the sources of the allegations of foreign bribery violations that they received and the detection sources that resulted in actual foreign bribery enforcement actions to help the Working Group ascertain the most effective detection sources for identifying and sanctioning foreign bribery violations. While the U.S. authorities maintain such data, they were either not able to produce an aggregate summary in an easily accessible manner or they could not share such information for legal and policy reasons. The DOJ was, however, able to provide an approximate percentage of detection sources for the foreign bribery cases that it resolved. In general, the lead examiners observe that the United States has detected a significant number of foreign bribery cases, suggesting that the United States is indeed using a broad range of detection sources.

The lead examiners, however, recommend that the United States continue to maintain sufficient data concerning its detection sources and, to the extent permissible, report in an aggregated summary to the Working Group the breakdown of the sources of detection both for allegations leading to the investigation of a legal person for foreign bribery and for concluded cases resulting in sanctions or other dispositions against those legal persons.

[106]Gibson Dunn, 2019 Year-End FCPA Update, "FCPA Clusters" section.

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

B.1. The Foreign Bribery Offence

(a) Overview of the FCPA offences (15 U.S.C. §§ 78dd-1 et seq.)

(i) The Offence of bribing a Foreign Public Official

96. The offence of bribing a foreign public official is contained in the FCPA. There have been no legislative changes to the FCPA since Phase 3.[107] The FCPA contains both anti-bribery and accounting provisions. As summarised in the FCPA Resource Guide, "In general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business."[108]

97. The FCPA's anti-bribery provisions apply broadly to three categories of persons and entities: (i) U.S. and foreign companies listed on stock exchanges in the United States or which are required to file periodic reports with the SEC, i.e. "issuers" and their officers, directors, employees, agents, and shareholders (at 15 U.S.C. § 78dd-1); (ii) U.S. persons and businesses, i.e. "Domestic concerns", and their officers, directors, employees, agents, and shareholders (15 U.S.C. § 78dd-2); and (iii) Certain foreign persons and businesses i.e., other than issuers and domestic concerns, acting "while in the territory of the United States." (15 U.S.C. § 78dd-3).[109]

(ii) The FCPA Accounting and Internal Controls provisions

98. In addition to the anti-bribery provisions, the FCPA contains accounting and internal controls provisions applicable to public companies. The FCPA Resource Guide emphasises that the "FCPA's accounting provisions operate in tandem with the anti-bribery provisions and prohibit off-the-books accounting". These provisions also implement Article 8 of the Convention. The "books and records" provision establishes the issuers' obligation to make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect an issuer's transactions and dispositions of an issuer's assets.[110] In addition, the "internal controls" provision requires issuers to develop and maintain a system of internal accounting controls sufficient to provide reasonable assurances of the company management's control, authority, and responsibility over its assets.[111] Those provisions are complemented by a third provision which prohibits any person from "knowingly circumvent[ing] or knowingly fail[ing] to implement a system of internal accounting controls or knowingly falsify any book, record, or account".[112] The FCPA's accounting provisions apply to every issuer that has a class of securities registered pursuant to the Exchange Act or that is required to file annual or other periodic reports pursuant to the Exchange Act.

99. In its questionnaire responses, the United States indicates that both legal and natural persons can be liable for violating the accounting provisions, in law and in practice. For example, companies (including subsidiaries of issuers) and individuals may face civil liability for aiding and abetting or causing an issuer's violation of the accounting provisions. 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.

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[107]United States Phase 3 Report, para. 78-90 and United States Phase 2 Report, paras. 97-112.
[108]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA (2012), p.10.
[109]For an overview of issuers, domestic concerns, and other persons, see United States Phase 1 Report, section 1.1.1; United States Phase 2 Report, p. 12 note 3.
[110]15 U.S.C. § 78m(b)(2)(A).
[111]15 U.S.C. § 78m(b)(2)(B).
[112]15 U.S.C. § 78m(b)(5).

(iii) The Use of Other Statutes

100. Either in addition to FCPA charges or if all of the elements of an FCPA violation are not present, payments to foreign government officials and intermediaries may violate other laws allowing the filing of indictments under other statutes. The FCPA Resource Guide lists as part of these possible additional or alternative statutes: the Travel Act (18 U.S.C. § 1952), anti-money laundering statutes (18 U.S.C. § 1956-1957), the mail and wire fraud statutes (18 U.S.C. § 1341), certain licensing, certification, and reporting requirements imposed by the U.S. government, and tax violations. The financing of terrorism (18 U.S.C. § 2339C) was also recently mentioned in an ongoing foreign bribery case.[113] During the on-site visit prosecutors indicated that the possibility to file indictment under other statutes is considered systematically in addition to or instead of FCPA charges.

101. The Phase 2 report briefly mentioned that these statutes import a different *mens rea* from that required under the offences in the FCPA. For instance, the Mail and Wire Fraud statutes require a *fraudulent intent*, whereas the *mens rea* requirement that is common to all laws implementing the Convention, is that of *corrupt intent*. In addition, some of these statutes may not provide for nationality jurisdiction.[114]

(iv) Other Criminal Offences Addressing Foreign Public Officials

102. In line with the Convention's requirements, the FCPA only covers perpetrators on the supply side in a bribery scheme and thus does not cover foreign public officials. In its questionnaire responses, the United States indicates that although foreign officials cannot be charged directly under the FCPA, they can be charged under other criminal statutes, including money laundering (18 U.S.C. §§ 1956, 1957), with the underlying offence being an FCPA or foreign bribery violation, when they use U.S. financial institutions to engage in money laundering. The FCPA Resource Guide illustrates this possibility: In the *Esquenazi case*, two Florida executives of a Miami-based telecommunications company were convicted of FCPA and money laundering offences and three former Haitian officials involved in the same scheme were convicted of money laundering.[115] During the on-site visit, prosecutors indicated that they find that it is critical to also prosecute the officials where possible.

Commentary

The lead examiners commend the United States for making broad use of other statutes and offences, either in addition to or instead of FCPA charges, to charge payments to foreign government officials and intermediaries. They recommend that the Working Group identify this approach as a good practice.

The lead examiners also recognise the efforts made by the United States to charge foreign officials who participate in foreign bribery schemes, when they launder proceeds from the scheme using U.S. financial institutions.

(b) Elements of the offence required in practice – developments since Phase 3

(i) Phase 3 Recommendations 2b on the defence of Bona Fide expenses, and 2c on the interpretation of international business (The business nexus test)

103. In Phase 3, the Working Group recommended that for the purpose of further increasing effectiveness of combating the bribery of foreign public officials in international business transactions, the United States consolidate and summarise publicly available information on the application of the FCPA in relevant sources, including on the affirmative defence for reasonable and *bona fide* expenses in recent Opinion Procedure Releases and enforcement actions (recommendation 2b). The Working Group also recommended that the United States revise the Criminal Resource Manual to reflect the decision in *United States v. Kay*, which supports the position of the United States that the business nexus test in the FCPA can be broadly interpreted, such that bribes

[113]BBC News (30 December 2019), Telecom giant MTN accused of paying bribes to Taliban, al-Qaeda.
[114]United States Phase 2 Report, para. 12.
[115]United States v. Joel Esquenazi, et al: Docket No. 09-CR-21010-JEM, 26 October 2011.

to foreign public officials to obtain or retain business or other improper advantage in the conduct of international business violate the FCPA (recommendation 2c).

104. These two recommendations were deemed only partially implemented at the time of the United States Phase 3 Written Follow-up by the Working Group, in December 2012. The Resource Guide to the U.S. Foreign Corrupt Practices Act, which would consolidate and summarise information available in various forms about FCPA enforcement was still to be finalised and the United States was invited to report back in March 2013 on its publication. The Group then deemed that the Guide effectively implemented Phase 3 recommendations 2b on the affirmative defence for reasonable and *bona fide* expenses, and 2c on the business purpose test. This revised rating was noted in the summary record of the Working Group meeting but not published on the Working Group website.[116] Phase 4 is thus the first opportunity to fully assess and publicly report on the content of the Guide and the way in which the affirmative defence for reasonable and *bona fide* expenses and business purpose test are implemented in practice.

- Interpretation of Reasonable and *Bona Fide* Expenses

105. In Phase 3, the Working Group on Bribery re-assessed the need for the affirmative defence for reasonable and *bona fide* expenses. It noted that extensive guidance, which is easily accessible on the DOJ website, had been provided since Phase 2 to clarify the scope of this defence. Five Opinion Procedure Releases had been issued on this topic, and five enforcement actions had included a determination of whether travel or entertainment expenses were bribes under the FCPA or came under the defence for reasonable and *bona fide* expenses. However, during the Phase 3 on-site visit, some companies from the extractive and aerospace and defence industries called for further guidance to reduce the high level of resources they reported as needed for determining whether certain payments fall within the defence. Hence the Working Group Recommendation 2.b.

106. In Phase 4, when asked how frequently the defence is used, the U.S. authorities indicated that the *bona fide* expense defence is sometimes raised by companies in the context of investigations that involve providing travel and entertainment to foreign officials. Since Phase 3, the Resource Guide has referenced this affirmative defence for which the defendant bears the burden of proof. It further includes detailed guidance on the type of payments falling into the scope of the defence (e.g. where expenses are directly related to the promotion, demonstration, or explanation of a company's products or services) and payments that may violate the FCPA's anti-bribery provisions and, if mischaracterised in the books and records, may also violate the FCPA's accounting provisions (e.g. trips that are primarily for personal entertainment purposes). The Guide then provides a list of types of expenditures on behalf of foreign officials that the DOJ opined did not warrant FCPA enforcement action. It further provides a non-exhaustive list of safeguards that may be helpful to businesses in evaluating whether a particular expenditure is appropriate or may risk violating the FCPA.

107. Since the issuance of the FCPA Resource Guide, one case has further illustrated these theories. In *United States v. Ng Lap Seng*, the defendant raised the *bona fide* expenses affirmative defence and argued that certain payments to foreign officials qualified *as bona fide* expenditures related to the promotion, demonstration, or explanation of products or services.[117] On 25 July 2017, the court rejected the defendant's argument, finding that the payments at issue did not meet the requirements of this defence.

- Interpretation of International Business (The *business nexus* or business purpose test)

108. One important aspect of the foreign bribery offence in the FCPA is different from the description of the offence in Article 1 of the Convention: the bribery of a foreign public official must be committed in order to assist the briber "in obtaining or retaining business for or with, or directing business to, any person" (known as the business nexus test). Thus, unlike Article 1, the FCPA language does not expressly convey that the case is covered where the purpose of the bribe is to obtain or retain other improper advantage in the conduct of

[116]The summary and conclusions to the United States Phase 3 Written Follow-up Report includes a footnote informing of the entry into force of the Guide but it does not include a revised rating of the implementation of recommendations 2b and 2c, which are noted as "partially implemented" in this publicly available WGB assessment.
[117]15-CR-706 (VSB), S.D.N.Y.

international business, such as obtaining an operating license or permit to operate a business, or a reduction in tax or import duty.

109. However, it has been the position of the United States Government throughout that the FCPA formulation is very broadly interpreted and covers in practice the kinds of advantages required to be covered by the Convention. The evaluation team noted in Phase 3 that this position had been largely confirmed by jurisprudence, in the 2007 decision of the United States Court of Appeals *United States v. Kay*.[118] In this decision, the Court of Appeals held that a payment to customs officials to reduce import duties on rice meets the requirements of the business purpose test because when Congress enacted the FCPA it was concerned about: (1) bribery that leads to discrete business contract arrangements; and (2) payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country.

110. The United States has also successfully enforced the FCPA in cases involving similar advantages, such as payments to customs officials to import goods and materials (*Helmerich & Payne;* and *Nature's Sunshine*), and payments to tax officials to reduce tax obligations, and to judicial officials for favourable treatment in pending litigation (*Willbros Group*). On the other hand, the Phase 3 report noted that clarification by the Court of Appeals left open the possibility that there might be cases where a bribe to a foreign public official to facilitate international business does not violate the FCPA, although it does meet the test of "other improper advantage in the conduct of international business" in Article 1 of the Convention. Moreover, the Criminal Resource Manual (Title 9, 1018 Prohibited Foreign Corrupt Practices) stated that in order to violate the FCPA, "the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person". Hence the Working Group Recommendation 2c.

111. Since Phase 3, the Resource Guide has emphasised that the business purpose test should be broadly interpreted. It emphasises that beyond obtaining government contracts, the FCPA also prohibits bribes in the conduct of business or to gain a business advantage. It indicates that for example, bribe payments made to secure favourable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test. As recommended in Phase 3, it clearly refers to the broad interpretation of the business nexus test in *United States v. Kay*. The guide also lists examples of payments made to secure a wide variety of unfair business advantages that are covered by the FCPA.

112. Since the issuance of the FCPA Resource Guide, the scope of the business nexus test as described in the FCPA Resource Guide has been confirmed in court in *United States v. Ng Lap Seng*.[119] The Court gave the following jury instruction with respect to the business nexus test: "It is not necessary that the government prove that anyone actually obtained or retained any business whatsoever as a result of an unlawful offer, payment, promise, or gift, only that the defendant intended to assist in obtaining or retaining business for or with any person. Moreover, this element is not limited to obtaining or renewal of contracts or other business but also includes the execution or performance of contracts or the carrying out of existing business."[120]

Commentary

The lead examiners consider that past concerns should be considered fully alleviated. The lead examiners observe that in 2013 the Working Group made an internal assessment that Phase 3 recommendations 2b on the affirmative defence for reasonable and bone fide expenses and 2c on the business purpose test were fully implemented. The lead examiners consider that practice has since confirmed the Working Group assessment.

(ii) Definition of "Agent"

113. One element of the FCPA that has recently been tested at trial is the definition of "agent". This term is important for two reasons. First, the FCPA covers both the ultimate beneficiary of the bribe scheme (e.g. the issuer or domestic concern seeking the improper advantage) their officers, directors, employees, agents, and

[118] *United States v. Kay*, 359 F.3d 738, 755-56 (5th Cir. 2004).
[119] 15-CR-706 (VSB), S.D.N.Y.
[120] *Ng Lap Seng* jury instructions, "Count Three: Seventh Element - Obtaining or Retaining Business."

stockholders. Thus, whether an individual is an "agent" may determine whether authorities can prosecute that individual as a conspirator or accessory. At least one circuit (Second Circuit) has held that individuals cannot be held liable for conspiring to violate the FCPA or for aiding and abetting such a violation unless they could be held directly liable under the statute (e.g. if they were an "agent" of an issuer or domestic concern), though a district court in another circuit rejected that holding. Second, as discussed in section C.1. below, once an agency relationship exists, the agent's knowledge acquired and acts performed in the course of the undertaking will be imputed to the principal, thereby permitting the principal to be held liable under the *respondeat superior* doctrine for wrongful acts committed, at least in part, for the benefit of the principal.[121]

114. The FCPA notably prohibits the agents of issuers, domestic concerns and other persons from engaging in foreign bribery provided that the agent's acts are sufficiently connected to either U.S. instrumentalities of interstate commerce or U.S. territory.[122] The interpretation of "agent" is therefore an important element for ensuring Congress's intent to criminalise the supply-side of foreign bribery. As the FCPA does not define "agent", the term carries its ordinary legal meaning. Under general U.S. legal principles, an agency relationship is formed when "one person (a 'principal') manifests to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act". According to the FCPA Resource Guide, the "fundamental characteristic of agency is control".[123] In this fact-specific analysis, substance prevails over the formal designation of the parties' relationship.

115. In the *Hoskins* case (still pending), the United States charged a UK national based in Paris for conspiring with a U.S.-based subsidiary of Alstom to obtain a power plant construction contract in Indonesia. Hoskins challenged his indictment, arguing that he could not be charged as foreign person under § 78dd-3 of the FCPA because he had never travelled to the United States and thus was not alleged to have taken any act in furtherance of the bribery scheme while in U.S. territory. On appeal, the Second Circuit found that Hoskins could not be charged with conspiracy unless he was found to be an "agent" covered by the FCPA.[124] Hoskins was found guilty of the FCPA charges at trial, thus implying that the government had convinced the jury that Hoskins was an agent of the U.S. subsidiary. Subsequently, however, the trial court set aside the verdict for the FCPA convictions, finding that there was insufficient evidence to conclude that Hoskins was in fact an agent subject to the control of the U.S. subsidiary given that the U.S. entity could not fire or reassign Hoskins. At the time of this report, the DOJ had filed a notice of appeal of the ruling.

(iii) Other elements defined by case law

116. U.S. law also provides several ways to sanction natural and legal persons who participate in a foreign bribery scheme even when they have not committed all the elements of the offence. One form of liability, known as aiding and abetting, allows anyone who "aids, abets, counsels, commands, induces, or procures" any federal offence to be punished as a perpetrator. This form of liability is merely a mode of liability and is not a separate offence from the underlying crime. Thus, the defendant cannot be convicted of both the substantive offence as well as aiding and abetting its commission. Another important theory of liability is conspiracy. Under U.S. law, an individual can be punished for conspiring to commit any federal offence, if that person agrees with one or more other persons to carry out an offence and at least one person commits an act in furtherance of the conspiracy. When conspiring to commit a felony (including FCPA violations), each conspirator can be fined up to USD 250 000 or, alternatively, twice the gross gain or loss caused by the offence. Natural persons can be sentenced to a term of imprisonment up to five years.

117. Conspiracy is a useful doctrine for prosecuting foreign bribery perpetrators. Significantly, individuals can generally be charged with conspiracy even if they could not commit the offence in their own right. Moreover,

[121]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p.27.[Cross-reference corporate liability discussion of *respondeat superior* doctrine].
[122]See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), & 78dd-3(a).
[123]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p.27.
[124] As discussed below, a district court in another circuit rejected the Second Circuit's approach in another FCPA case. *See U.S. v. Firtash*, 392 F. Supp. 3d 872 (N.D. Ill. 2019).

conspirators can be held liable for crimes committed during the course of the conspiracy even if they were not expressly contemplated, so long as they were reasonably foreseeable. In addition, once a conspiracy is formed, each member of the conspiracy remains liable for all acts that any conspirator commits in furtherance of the conspiracy until that member affirmatively withdraws from the conspiracy. As a result, the statute of limitations will not begin to run until the conspiracy ceases or a given member affirmatively withdraws, either by notifying the other conspirators of the withdrawal or by informing the authorities about the conspiracy. This can enable the DOJ to reach criminal conduct even years after a particular conspirator performed an act in furtherance of the conspiracy. Conspiracy is punished as a separate offence in addition to the underlying offence that was the object of the conspiracy. Finally, a conspiracy charge may enable the United States to assert jurisdiction over all members of the conspiracy so long at least one member committed an act in furtherance of the conspiracy while on U.S. territory or by using the instrumentalities of U.S. commerce.

118. In practice, the DOJ has frequently brought conspiracy charges in addition to, or in lieu of, substantive FCPA anti-bribery provisions. Based on the case data that the U.S. authorities provided for Phase 4 from January 2011 to July 2019, the DOJ brought conspiracy charges, typically based on conspiracy to engage in foreign bribery, in 90% of the FCPA-related supply-side cases charged. There has been a nearly 20% increase in the use of conspiracy charges in cases concluded during the period. Whereas just under 80% of the cases charged in 2012 involved conspiracy, 95% or more of the cases filed since 2015 include at least one conspiracy charge.

119. Even though conspiracy charges can generally be applied to any offence, certain U.S. courts have narrowed the use of conspiracy in the FCPA context. In 1991, the Fifth Circuit held that the DOJ could not charge foreign public officials with conspiring to violate the FCPA, reasoning that Congress had categorically excluded the demand-side officials from the reach of the FCPA.[125] In 2018, the Second Circuit in *Hoskins* extended this logic to all individuals – even those on the supply-side of a foreign bribery scheme – not falling within one of the enumerated categories of individuals subject to FCPA anti-bribery liability.[126] It remains to be seen, however, whether other courts will accept this reasoning as a district court in another circuit has upheld an FCPA-related conspiracy charge against another non-national who does not fall within one of the enumerated categories of individuals subject to FCPA liability in a separate case.[127] If individuals seeking to bribe foreign public officials with, or on behalf of, U.S. companies and other persons subject to the FCPA are avoiding liability simply because they themselves do not fall into one of the enumerated categories of persons subject to the FCPA, it may be in tension with Supreme Court jurisprudence applying conspiracy law principles broadly in domestic bribery cases.[128] In particular, if a foreign national conspirator to bribe a U.S. domestic official could be held liable despite having participated in the scheme while outside the United States, this differential treatment would be contrary to Article 1.2 of the Convention.[129]

Commentary

The lead examiners welcome the DOJ's reliance on several theories of liability to enforce U.S. law against foreign bribery. They recognise that U.S. courts have not yet unanimously determined when defendants not explicitly mentioned in the FCPA anti-bribery provisions can be held liable for conspiracy to engage in, or to aid and abet, foreign bribery. To the extent that recent U.S. case law developments create a divergence

[125]See *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991). The Court found evidence in the FCPA's legislative history that Congress wanted to avoid the "jurisdictional, enforcement, and diplomatic difficulties" that would arise if the FCPA were applied to non-citizens. The DOJ, however, has been able to prosecute foreign public officials for laundering the bribes that they have received through FCPA violations.

[126]*United States v. Hoskins*, Docket No. 16-1010-cr (2d. Cir. Aug. 24, 2018).

[127]*United States v. Firtash*, Memorandum Order and Opinion, 1:13-cr-00515 (N.D. Ill. 21 Jun. 2019) at 22.

[128] *See, e.g., Ocasio v. U.S.*, 136 S.Ct. 1423 (2016).

[129]Article 1.2 of the Convention provides in relevant part that "[a]ttempt and conspiracy to bribe a foreign public official shall be criminal offences *to the same extent* as attempt and conspiracy to bribe a public official of that Party." (emphasis added). The jurisdictional aspects for foreign bribery, including for aiding and abetting are discussed under section B.4.(c) below.

between how U.S. courts apply conspiracy law to those who conspire to bribe domestic and foreign officials, the lead examiners consider that this would violate the Convention.

In view of the above, they thus recommend that the Working Group follow up on whether conspiracy to bribe a foreign public official is an offence to the same extent as conspiracy to bribe a domestic public official, even when the conspirator seeking to bribe the foreign official could not be held directly liable for foreign bribery. The lead examiners recommend that the Working Group also follow up on whether U.S. courts develop a common approach to how complicity in foreign bribery, including aiding and abetting liability, is applied to defendants not directly subject to the FCPA anti-bribery provisions.

(c) Small facilitation payments

120. This topic has given rise to long discussions in past evaluations of the United States by the Working Group on Bribery.[130] In their Phase 4 questionnaire responses, the United States reminds that facilitation payments are legal under U.S. law and that the facilitation payments exception to the FPCA is a narrow exception to the broad application of the statute. This treatment of facilitation payments under U.S. law is indeed consistent with paragraph 9 of the commentary to Article 1 of the Convention. As explained in the FCPA Resource Guide, the facilitating payments exception applies only when a payment is made to further routine governmental action that involves non-discretionary acts.[131]

(i) Small payments that constitute bribes and small facilitation payments under the FCPA

121. In its questionnaire responses, the United States refers to the 2012 FCPA Resource Guide, which provides examples of the types of acts that may qualify as routine government action. The United States emphasises that the determination in any particular instance will be driven by the facts of the case. Several court decisions relating to facilitation payments have made clear that this exception is extremely narrow. In the *Duperval* case,[132] the Court emphasised that "[A] brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the exception. These actions are largely non-discretionary, ministerial activities performed by mid-or low-level foreign functionaries, and the payments allowed under this exception are grease payments to expedite the receipt of routine services." During the on-site visit DOJ representatives also pointed to the *Jackson*,[133] *Ralph Lauren*,[134] and *Archer Daniels* cases,[135] which all have contributed to further delineate this narrow exception, including clarifying that improper customs payments may not fall within the exception. The press release on the related *Panalpina* enforcement action quotes Robert Khuzami, then Director of the SEC's Division of Enforcement, who emphasised that "these companies resorted to lucrative arrangements behind the scenes to obtain phony paperwork and special favors, and they landed themselves squarely in investigators' crosshairs."[136]

122. Regarding whether repeated facilitation payments would be treated differently than an isolated case, for example, if the payments involved were substantial once aggregated, the FCPA Resource Guide indicates that the facilitating payments exception focuses on the purpose of the payment rather than its value.[137] Among the cases examples, provided in the Guide, of small payments that were however considered as bribes, one is specifically targeting relatively small repeated payments.[138] In its questionnaire responses, the United States

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[130]See United States Phase 3 Report, paras 72 - 77.
[131] DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p.25.
[132]*United States v. Duperval*, 777 F.3d 1324, 1334 (11th Cir. 2015). Also see S.E.C. v. Jackson, 908 F.Supp.2d 834, 857-58 (S.D. Tex. 2012).
[133]*SEC v. Mark A. Jackson and James J. Ruehlen*, Civil Action No. 4:12-cv-00563 (S.D. Tex. Filed Feb. 24, 2012).
[134]In Re Ralph Lauren Corporation, 22 April 2013.
[135]In Re Archer Daniels Midland Company, 20 December 2013.
[136]SEC Pres Release, 4 November 2010.
[137]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p.25.
[138]In this case, "three subsidiaries of a global supplier of oil drilling products and services were criminally charged with authorizing an agent to make at least 378 corrupt payments (totalling approximately USD2.1 million) to Nigerian Customs

indicates that the DOJ does not believe it has ever been confronted with any case in which it thought prosecution was appropriate but was unable to do so as a result of the facilitation payment exception. Nor does the DOJ believe any other jurisdiction has prosecuted a case that the DOJ would not be able to pursue as a result of the facilitation payment exception.

(ii) Measures taken to conduct periodic reviews on small facilitation payments

123. Paragraph VI of the 2009 Recommendation requires that a country with small facilitation payments exception take measures including the conduct of periodic reviews of its policy and approach on such payments in order to effectively combat the phenomenon, and to encourage companies to discourage their use. In its questionnaire responses, the U.S. authorities refer to the new United States-Mexico-Canada Trade Agreement by which, on November 30, 2018, the United States joined Mexico and Canada, and which has a chapter dedicated to anticorruption including language that states that "the Parties recognize the harmful effects of facilitation payments". The agreement further commits each party to, "in accordance with its laws and regulations: (a) encourage enterprises to prohibit or discourage the use of facilitation payments; and (b) take steps to raise awareness among its public officials of its bribery laws, with a view to stopping the solicitation and the acceptance of facilitation payments".[139] The U.S. authorities also indicated that DOJ personnel have spoken at public conferences at which they consistently emphasise that, although facilitation payments are excepted under the FCPA anti-bribery provisions, such payments may form the basis for another violation of law, including wire fraud or, if they are not properly recorded, the books and records provisions of the FCPA. The DOC conveys the same message to companies during FCPA trainings.

124. After the on-site visit, the U.S. authorities indicated that discussion of small facilitation payments comes up in the normal course of panel discussions or presentations delivered by government personnel at FCPA conferences. For example, the DOJ and SEC typically participate in the annual American Conference Institute's FCPA Conference in National Harbor, Maryland, which is attended by approximately 800 people, including white-collar attorneys, in-house attorneys and compliance personnel, corporate executives, government attorneys, and representatives of non-governmental organisations.[140] They however emphasise that given the relative infrequency of issues relating to facilitation payments, it is rare (if ever) for an entire panel or an agenda to reflect that topic. Rather, they usually take the form of one-off questions by the moderator or audience.

125. During the on-site visit, the evaluation team heard consistent views from the private sector emphasising that the vast majority of the companies now prohibit small facilitation payments. Business representatives emphasised that this is an increasing trend as, over the years, the growing risks and difficulties associated with trying to explain to employees what may or may not be acceptable facilitation payments in order to make use of this exception and the fact that they are forbidden in other jurisdictions have dissuaded most companies from relying on it. One participant contended that there is no more added value in having this exception in the law.

Commentary

The lead examiners note that the converging trends of clarifying the small facilitation payments exception in both the FCPA Resource Guide and case law, and of the prohibition of small facilitation payments by most companies, represent a positive development since Phase 3. They welcome the efforts the U.S. Government has made to both clarify the scope of the exception and dissuade its use through the FCPA Resource Guide, references to relevant case law and participation in conferences that have contributed to further raise awareness of the risks associated to these payments. As a result, the risks identified in former evaluation phases that these payments be used to hide bribes has been mitigated in the present circumstances.

The U.S. government efforts in this respect should be identified by the Working Group as good practices in implementing Paragraph VI of the 2009 Recommendation which requires that a country with small facilitation payments exception take measures including the conduct of periodic reviews of its policy and

Service officials for preferential treatment during the customs process, including the reduction or elimination of customs duties." FCPA Resource Guide, p. 25.

[139] Agreement between the United States of America, the United Mexican States, and Canada 12/13/19 Text, Article 27.3.8.

[140] The agenda for this conference can be found on the conference webpage.

approach on such payments in order to effectively combat the phenomenon, and to encourage companies to discourage their use.

B.2. Sanctions against Natural Persons for Foreign Bribery

126. In Phase 3, the Working Group found that the level of sanctions available by law had not changed since Phase 2. However, the U.S. Sentencing Guidelines (U.S.S.G.), which had been mandatory in Phase 2, were held by the Supreme Court to be non-binding.[141] A key feature of U.S. sentencing practice is that the sanctions imposed for each count can be aggregated and run either concurrently or consecutively.[142]

127. There have been no legislative changes to the sanctions imposed for FCPA violations since Phase 3 for natural or legal persons. Although the DOJ has adopted a new Corporate Enforcement Policy (CEP) for legal persons, as discussed in section B.4.a.below, the DOJ has not adopted new internal DOJ policies concerning how sanctions should be imposed on natural persons. For its part, the SEC has not adopted any new enforcement policies since Phase 3 that would affect sanctions.

(a) Criminal sanctions for natural persons available under U.S. law

128. The FCPA provides a range of criminal sanctions for foreign bribery as well as the books-and-records and internal controls violations. Table 2 below summarises the available sanctions. In addition, the U.S. Criminal Code contains an alternative fine provision that permits a fine up to twice the amount of the illicit gain or loss caused by the offence. This provision helps ensure that the United States can apply a fine commensurate with the seriousness of the wrongdoing. In addition to the fine, a natural person can also face up to 5 years of imprisonment for each anti-bribery violation as well as up to 20 years for each books and records or internal controls violation. In addition, the DOJ can seek criminal or non-criminal forfeiture to recover assets acquired from the wrongdoing.

Table 2. Sanctions for FCPA violations for natural persons

FCPA offence	FCPA Criminal Fine	Alternate criminal fine	Prison term (years)	FCPA Civil penalty	Alternate Civil Penalty	Other
Anti-bribery (issuer) 78dd-1(a), 78dd-1(g)	USD 100 000	USD 250 000, or 2x gross gain/loss	5	USD 16 000, after adjusting for inflation	USD 9 639 - 192 768, depending on severity & after adjusting for inflation, or 2x gross gain/loss (in district court actions)	Probation (≤ 5 years); Restitution; Special assessment USD 100 per charge
Anti-bribery (non-issuer) 78dd-2(a), 78dd-2(i), 78dd-3(a)	USD 100 000	USD 250 000, or 2x gross gain/loss	5	USD 10 000, for "other persons" and officers, employees, or other agents of domestic concerns	N/A	Probation (≤ 5 years); Restitution; Special assessment USD 100 per charge
Wilful false accounting or internal controls violations (issuer) 78m(b)(5) read with 78m(b)(2)(A)&(B)	USD 5 000 000	2x gross gain/loss	20	N/A	USD 9 639 - 192 768, depending on severity & after adjusting for inflation, or 2x gross gain/loss (in district court actions)	Probation (≤ 5 years); Restitution; Special assessment USD 100 per charge
Wilfully & knowingly making material false statement in filing (issuer) 78ff(a)	USD 5 000 000	2x gross gain/loss	20	N/A	USD 9 639 - 192 768, depending on severity & after adjusting for inflation, or 2x gross gain/loss (in district court actions)	Probation (≤ 5 years); Restitution; Special assessment USD 100 per charge

Source: 15 U.S.C. § 78dd 1 et seq.; 18 U.S.C. § 3571; 17 CFR 201.1001; see also FCPA Resource Guide (2020).

[141]United States Phase 2 Report, para. 132 and n.69.
[142]United States Phase 2 Report, para. 130.

129. When the court is sentencing a convicted defendant, it will refer to the non-binding U.S. Sentencing Guidelines (U.S.S.G.).[143] The U.S.S.G. seek to standardise sentences for given offences while still allowing the court to individualise the sentence to reflect the unique mitigating and aggravating factors of the case. The U.S.S.G. also guide how the DOJ calculates sanctions in non-trial resolutions. The DOJ typically includes an explanation of how the U.S.S.G. factors are applied to determine the appropriate fine range.

(b) Civil sanctions

130. The FCPA authorises non-criminal enforcement of its anti-bribery provisions by both the DOJ and the SEC.[144] The SEC's authority is limited to civil or administrative actions against issuers and their officers, directors, employees or other agents, while the DOJ can bring civil enforcement actions against domestic concerns and other persons.

131. As shown in Table 2 above, the civil sanctions for FCPA anti-bribery violations are more modest than their criminal counterparts. The FCPA authorises a USD 10 000 civil fine to be imposed on both natural and legal persons for each violation of the anti-bribery provisions. While the FCPA has not been amended in this regard since Phase 3, an SEC regulation allows civil penalties to be adjusted for inflation for violations committed on or after 6 March 2013. As a result, issuers and their officers, employees or other agents can now be fined up to USD 16 000 per violation of the anti-bribery provisions instead of the USD 10 000 reported in Phase 3.[145] Additionally, for violations of the FCPA's accounting provisions, natural persons can be fined up to USD 192 768 and entities up to USD 963 837 per violation. It is unclear whether this regulation would also apply to civil penalties imposed on domestic concerns or other persons who are not issuers through DOJ civil enforcement actions. Issuers are, however, also subject to an alternative provision that would authorize a civil penalty up to USD 160 000.[146] Furthermore, the fines for multiple FCPA anti-bribery counts can be cumulated.

(c) Additional remedies for foreign bribery available under U.S. law

(i) Injunctions and cease-and-desist orders

132. In addition to or in lieu of monetary sanctions, the U.S. enforcement agencies can seek injunctions to restrain violators from engaging in further wrongdoing. For the SEC, the remedy depends on whether it enforces the FCPA before an administrative tribunal or in a federal court. If the SEC prevails in an administrative enforcement proceeding before an administrative law judge (i.e. an internal agency adjudication), and prevails, then the administrative law judge can issue a Commission order requiring the respondent to cease and desist from engaging in wrongdoing. If the administrative law judge's decision is appealed, the Commission can issue its own decision or order without being bound by the decision of the administrative law judge. The Commission's order may in turn be challenged in federal court in the relevant Court of Appeals. The SEC obtains a civil injunction in a U.S. federal district court, the defendant is enjoined from engaging in FCPA violations and could be held in contempt if the defendant continues to violate the FCPA.[147] The DOJ can also seek a civil injunction in a U.S. federal district court.

(ii) Accounting and disgorgement

133. In its administrative proceedings, the SEC can issue an order for an accounting and disgorgement of illicit profit, including prejudgment interest.[148] The SEC has also traditionally obtained disgorgement in civil proceedings as well, under the theory that courts retain their powers in equity including the power to issue

[143]U.S. Sentencing Commission (1 November 2018), 2018 Guidelines Manual.
[144]While the DOJ has exercised its civil enforcement powers in prior FCPA matters, it has not done so between Phase 3 and Phase 4
[145]See 17 CFR § 201.1004.
[146]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA.
[147]15 U.S.C §§ 78u-2 & 78u-3.
[148]15 U.S.C. § 78u-3(e).

disgorgement orders. The OECD has found that confiscation – including disgorgement – plays a crucial role, along with dissuasive fines, in ensuring that companies do not consider foreign bribery to be economically beneficial.[149] The SEC has relied extensively on disgorgement in the foreign bribery enforcement actions that it has brought since Phase 3. In fact, between December 2010 and July 2019, over 91% of the nearly USD 5 billion ordered in SEC FCPA proceedings came from disgorgement and prejudgment interest. After the *Kokesh v. SEC* decision,[150] respondents started to challenge disgorgement orders by questioning whether the SEC had a statutory basis to obtain disgorgement in civil proceedings. In June 2020, however, the Supreme Court affirmed that the SEC can seek disgorgement as an equitable remedy in federal court, holding that "a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is [permissible] equitable relief".[151] While it remains unclear how this will be applied in foreign bribery cases given the difficulty in identifying victims, this decision preserved an important remedy in the SEC's arsenal.

(iii) Prohibition on serving as officer or director

134. As part of a cease-and-desist proceeding, the SEC can make an order prohibiting the respondent from serving as an officer or director of any issuer. Such an order can be conditional or unconditional and it can be permanent or for a fixed duration.[152] The SEC can seek a similar injunction in a civil action brought before a federal court.[153]

(d) Sanctions imposed on natural persons in practice

135. The United States has enforced its laws prohibiting foreign bribery and other related offences against a wide range of natural persons involved in foreign bribery matters. In total, the U.S. authorities have brought 140 enforcement actions against 115 unique individuals (certain individuals faced enforcement actions by both the DOJ and the SEC). The United States imposed non-criminal sanctions on 25 individuals for foreign bribery during this period and imposed criminal fines, forfeiture, or other monetary obligations on 37 natural persons. The lowest civil fine was USD 10 000 and the highest was USD 250 000. The highest monetary sum imposed, including disgorgement, was USD 3.7 million. The lowest criminal fine was USD 10 000 and the highest was USD 1 million. The highest monetary sum imposed through a criminal proceeding, including forfeiture, was USD 43.7 million.

136. U.S. courts have imposed imprisonment on 50 of the 90 natural persons sanctioned for FCPA or other related supply-side violations. The average term of imprisonment was 25.4 months. At the low end, 6 defendants were sentenced to time already served before conviction, while at the high end one defendant received a 120-month sentence. Another 27 supply-side defendants were awaiting sentencing. For foreign bribery and conspiracy to commit foreign bribery, U.S. courts have imposed imprisonment on 39 of 71 convicted natural persons. The average term was 24.9 months, with the low end again being time served and a maximum of 60 months. Another 13 individuals received probation, which lasted on average just over 32 months. Finally, 19 natural persons were awaiting sentencing after convictions for foreign bribery or related conspiracy charges. In addition, 37 of the 63 natural persons who were convicted and sentenced for FCPA or other supply-side offences paid on average USD 2.48 million in criminal fines, forfeiture or restitution. For foreign bribery in particular, 33 of the 52 natural persons who were convicted and sentenced paid on average USD 3.3 million. The range of monetary sanctions was considerable with a low of US 10 000 and a high of USD 43.7 million.

137. For comparison, 31 of the 56 supply-side defendants convicted for non-FCPA violations (e.g. the Travel Act, money laundering offences) or conspiring to engage in such non-FCPA offences during the reporting period received terms of imprisonment. At the low end, two persons were sentenced to time already served before

[149] OECD Business and Finance Outlook (2016), Chap. 7, "Is foreign bribery an attractive investment in some countries?".
[150] *Kokesh v SEC*, 581 U.S. __, No._16-529, slip. op. (2017). The *Kokesh* decision and its impact on the SEC's ability to obtain disgorgement is further discussed under C.3.(c).
[151] *Liu v SEC*, __ U.S. __, No. 18-1501, slip op. at 1 (22 June 2020).
[152] 15 U.S.C. § 78u-3(f).
[153] 15 U.S.C. § 78u(d)(2).

conviction, while at the high end, a 10-year sentence imposed on a German banker who facilitated money laundering by officials from the Venezuelan state-owned oil and gas company PDVSA.

Commentary

On balance, the lead examiners consider that the mix of monetary sanctions, the disgorgement of ill-gotten gains, and imprisonment for foreign bribery or related conspiracy charges are effective, proportionate, and dissuasive for purposes of the Convention.

(e) Confiscation of the bribe and the proceeds of foreign bribery

138. Under U.S. law, the authorities have an incentive to quantify the illicit proceeds derived from foreign bribery. In the criminal context, the DOJ can seek an alternative fine equal to twice the value obtained from foreign bribery as well as forfeiture of bribe proceeds and property involved in laundering the bribes, depending on the charges brought. The DOJ can also seek civil forfeiture independently of a criminal prosecution, while the SEC can seek disgorgement in its civil or administrative enforcement actions.

139. For the SEC, disgorgement covers "ill-gotten gains" derived from securities laws violations (including the FCPA). This could include both contracts obtained by a company as well as bonuses to employees based entirely on those contracts. The authorities report that they have not had difficulties quantifying the proceeds of bribery. The U.S. authorities are not aware of any case in which the monetary sanction imposed was less than the illicit gain obtained unless the defendant lacked the resources to pay the sanction. (Disgorgement is further discussed under C.3.(c).)

Commentary

The lead examiners note that the panoply of criminal and non-criminal sanctions for FCPA violations enable the U.S. authorities to impose effective, proportionate, and dissuasive sanctions on natural persons for foreign bribery as well as related false accounting and internal controls offences. This is particularly true given the fact that U.S. courts can impose cumulative sanctions for multiple offences.

In addition, the range of other remedies, most notably disgorgement of illicit profits, but also orders to refrain from future violations as well as prohibitions on assuming functions for an issuer, can provide additional means for ensuring that natural persons do not benefit from committing FCPA violations and for preventing future abuses.

(f) Asset Recovery and the Kleptocracy Initiative

140. In July 2010, during the Phase 3 evaluation, the DOJ created a new Kleptocracy Asset Recovery Initiative (KARI) to recover and return public funds stolen from other countries through large-scale official corruption.[154] The Working Group did not make any conclusions or recommendations on this matter, but welcomed the DOJ's announcement that it would place greater emphasis on forfeiture in criminal matters.[155]

141. The Initiative focuses on identifying and recovering assets that were obtained through foreign public corruption whether those assets are found in the United States or abroad as long as there is a sufficient link to the U.S. financial system.[156] It mainly relies on civil forfeiture actions but prosecutors will also criminally prosecute those who launder, into or through the United States, the proceeds of foreign corruption offenses, such as foreign bribery, theft, embezzlement, misappropriation, extortion, and other schemes that defraud the victim country or its people. The KARI consists of a team of dedicated DOJ prosecutors and law enforcement agents specialised in investigating corruption and financial crime and it has taken on cases stemming from dozens of countries. After the on-site visit, DOJ representatives from the Initiative confirmed that they have obtained or enforced final forfeiture orders in Kleptocracy cases in the amount of USD 1.6 billion in foreign corruption proceeds, and that an additional USD 25 billion is currently restrained in litigation, pending forfeiture. Since the

[154]United States Phase 3 report, para. 154.

[155]United States Phase 3 report, page 45 (Commentary).

[156]DOJ, Money Laundering and Asset Recovery Section (MLARS).

inception of the KARI in 2010, the U.S. has returned assets totalling approximately USD 1.1 billion, involving seven countries. An additional USD 21 million is in the process of being returned to two countries. Representatives of the KARI, housed within the DOJ's Money Laundering and Asset Recovery Section, confirmed that the ultimate goal of the Initiative is to repatriate these assets to the affected foreign countries or use them for the benefit of the people of such countries if returning the funds presents a danger they might once again be stolen. After the on-site visit, U.S. authorities indicated that FinCEN included kleptocracy typologies in its algorithm to help track assets improperly obtained in the U.S. U.S. authorities cited the *1MDB* case as the Initiative's most important case to date. In July 2016, the Kleptocracy Initiative announced the commencement of a civil forfeiture action to recover money embezzled from Malaysia's sovereign wealth fund.[157] In May 2019, the U.S. authorities returned USD 57 million to Malaysia and indicated that they were arranging to transfer another USD 139 million thereafter. In October 2019, the DOJ announced that it had recovered USD 1 billion connected with the *1MDB* case, after reaching a settlement with a Malaysian businessman for USD 700 million.[158]

142. In addition to the Kleptocracy Initiative, the U.S. authorities have also structured their foreign bribery resolutions in certain multi-jurisdictional cases with the result that the bulk of monetary penalties imposed went to the country most affected by the corruption. In the *Odebrecht/Braskem* resolutions, for example, the U.S. agreed that Brazil would receive 80% of the principal of the total criminal fine.[159] During the on-site visit, the U.S. authorities indicated that this practice is fact-specific and it aims to reward countries that detect, investigate, and cooperate to solve foreign bribery cases. After the on-site visit, the U.S. authorities similarly agreed, as part of the *Airbus* resolution, to credit 77% of the total criminal fine to France.[160]

Commentary

The lead examiners commend the DOJ's Kleptocracy Initiative for seeking to identify and to repatriate assets stolen by corrupt foreign officials when they come within U.S. jurisdiction. They also commend the U.S. enforcement authorities for designating, when circumstances warrant, substantial portions of sanctions imposed in FCPA matters to the countries where the corrupt acts occurred.

B.3. Investigative and Prosecutorial Framework

(a) Overview of investigative and prosecutorial authorities in charge of foreign bribery enforcement

(i) The DOJ Fraud Section

143. As in Phase 3, the trial attorneys from the DOJ's FCPA Unit within the Criminal Division's Fraud Section handle investigations into FCPA allegations and lead prosecutions. Under the DOJ policy, no FCPA case can be initiated "without the express authorization of the Fraud Section".[161] Furthermore, no other attorney can work on matters arising under the FCPA without the agreement of the Assistant Attorney General of the Criminal Division. The policy explains that this centralisation is needed because FCPA matters are legally complex and because they require close cooperation with the SEC or other agencies as well as foreign counterparts.

144. In 2016, the FCPA Enforcement Plan and Guidance released by the DOJ's Fraud Section marked an important step in resourcing the fight against foreign bribery.[162] The FCPA Enforcement Plan and Guidance laid out three steps to enhance its FCPA enforcement strategy, starting with a "substantial increase of FCPA law enforcement resources". In their questionnaire responses, the U.S. authorities indicate that the Fraud Section's FCPA Unit currently has approximately 30 attorneys plus additional law clerks, investigators,

[157]DOJ, Press release (20 July 2016).
[158]DOJ, Press release (30 October 2019).
[159]DOJ, Press release (21 December 2016).
[160]DOJ, Airbus DPA, (31 January 2020), para 9.
[161]Justice Manual 9-47.110 - Policy Concerning Criminal Investigations and Prosecutions of the Foreign Corrupt Practices Act.
[162]U.S. DOJ Criminal Division (April 5 2016), FCPA Enforcement Plan and Guidance.

paralegals, and support staff. This is about twice as many as in Phase 3, where the Unit had the equivalent of 12-16 attorneys working full-time on FCPA matters.[163]

145. In the spring of 2020, the Fraud Section created the "Special Matters Unit", specifically dedicated to handling evidence collection and conducting reviews that implicate claims of attorney-client or other privileges across the Fraud Section. The creation of a dedicated Unit will assist in insulating the prosecution team from staff managing privilege issues, and thus alleviate concerns in this area.

- Staff continuity in the Fraud Section

146. In parallel to staff increase, the FCPA Unit enjoys some level of staff continuity, which has contributed to building the Unit's expertise over the years. Several groups of panellists, including academics and lawyers, acknowledged the importance of this continuity.

147. Similar to centralisation of FCPA matters under the Fraud Section, continuity is also beneficial to cooperation with foreign counterparts. At the on-site visit, the DOJ stressed that the Fraud Section has developed fruitful working relationships with foreign enforcement agencies as multijurisdictional resolutions have flourished in the last years. The DOJ's ability to maintain these relationships is acknowledged to be a key factor to the success of future FCPA enforcement actions. The DOJ also stressed that centralisation is necessary considering the sensitive diplomatic issues that FCPA enforcement can raise.

- Compliance expertise of the Fraud Section

148. Compliance expertise in the Fraud Section has significantly developed since Phase 3. The DOJ has prioritised building in-house knowledge and expertise on compliance issues, due to the recognition of corporate compliance programs as a critical factor in the choice of corporate enforcement resolutions. In its questionnaire responses, the United States explains that the DOJ has built this expertise through diverse hiring and the development of training programs to ensure that prosecutors evaluating the effectiveness of compliance programs have the tools to undertake an informed analysis, and ensure consistent prosecutorial practices.

149. In 2015, as part of this effort, the DOJ hired a compliance expert to help prosecutors develop appropriate benchmarks for evaluating corporate compliance. Guidance entitled "Evaluation of Corporate Compliance Programs" (the Guidance) was released in February 2017, and revised in April 2019.[164] In its introduction, the revised version of the Guidance provides that it is "meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution".

150. The 2017 Guidance was based on eleven program review topics, each containing questions to assess compliance programs. The 2019 revision expanded its content and reorganised it under three "fundamental questions": (1) Is the corporation's compliance program well designed?; (2) Is the program being applied earnestly and in good faith?; and (3) Does the corporation's compliance program work in practice?

151. In June 2020, as part of its efforts to continuously improve and enhance enforcement policies where appropriate, the DOJ made modifications to the Guidance, including specifying that the individualised assessment of compliance programmes "considers various factors including but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations that might impact its compliance program". The revised Guidance has an additional focus on lessons learned from risk assessments, the compliance commitment of middle management, and on whether the compliance programme is "adequately resourced and empowered." The revised Guidance also adds new

[163]United States Phase 3 Report, para. 27.
[164]U.S. DOJ Criminal Division (April 2019), Evaluation of Corporate Compliance Programs.

questions that should be considered in assessing the efficiency of a compliance programme, and clarifies existing ones, including on regular testing and adjustments of compliance programmes.

(ii) The SEC

152. The SEC is an independent regulatory and law enforcement agency. It is responsible for civil enforcement of the FCPA over issuers and their officers, directors, employees, agents, or stockholders acting on the issuer's behalf. It consists of five presidentially-appointed commissioners, with staggered five-year terms, and no more than three commissioner from a given party can serve at any one time, thus ensuring non-partisanship of the agency. One of the commissioners is designated by the President as chairperson of the commission (the agency's chief executive). Enforcement investigations are conducted and supervised by career civil servants, who are not subject to removal on political grounds.

153. The SEC has had a permanent FCPA Unit since 2010 in Washington D.C. and in regional offices around the country, to focus specifically on FCPA enforcement. The Unit is comprised of attorney investigators, and forensic accountants. According to the FCPA Resource Guide: "The Unit investigates potential FCPA violations; facilitates coordination with DOJ's FCPA program and with other federal and international law enforcement partners; uses its expert knowledge of the law to promote consistent enforcement of the FCPA; analyses tips, complaints, and referrals regarding allegations of foreign bribery; and conducts public outreach to raise awareness of anti-corruption efforts and good corporate governance programs".[165] Since 2010, the SEC has maintained a Whistleblower Program. It was confirmed that the SEC receives information from individuals all over the world under the Program.

154. The FCPA Unit currently has 35 members in various offices around the country. These resources have remained stable since Phase 3. In their questionnaire responses, the U.S. authorities indicate that the Unit is better equipped to address potential foreign bribery allegations as a result of expertise investigating these specialised matters and well-established relationships with domestic and foreign partners. During the on-site visit, the SEC representatives also held that this unique expertise has thus far largely compensated for a lack of increase in resources. The U.S. questionnaire responses also specify that the Unit includes staff with experience in evaluating, implementing and improving compliance programs prior to joining the FCPA Unit. Additionally, FCPA Unit members receive periodic training on the assessment of compliance programs. All assessments are done in conjunction with experienced staff.

155. SEC representatives also emphasised that the agency is able to engage contract attorneys with knowledge of foreign languages to help handle specific cases. As appropriate, the Unit coordinates with both domestic law enforcement and foreign authorities in investigating potential foreign bribery violations.

(iii) The FBI

156. As in Phase 3, the International Corruption Unit of the FBI handles the investigation of FCPA matters, as well as other international matters, such as antitrust and Kleptocracy program cases. The FBI squads are composed of career agents who are not subject to termination of their employment based on political grounds. In 2008, the FBI created an International Corruption Unit.

157. At the time of the U.S. Phase 3 evaluation, the Unit only had one squad based in Washington, DC comprised of 13 agents and 1 analyst.[166] In 2015, the FBI established two additional international corruption squads respectively based in Los Angeles and New York.[167] A fourth squad is now based in Miami.[168] In its questionnaire responses, the United States indicates that currently, the FBI Unit is staffed with approximately 43 Special Agents and 17 Investigative Analysts and Forensic Accountants in the above mentioned various offices around the country. In addition, the FBI maintains over 60 legal attaché offices throughout the world,

[165]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p.5.
[166]United States Phase 3 Report, para. 28.
[167]FBI News, "FBI Establishes International Corruption Squads" (30 March 2015) , 30 March 2015.
[168]FBI website, Public Corruption.

which can assist on foreign bribery cases when necessary. During the on-site visit, the FBI indicated that the International Corruption Units hire senior agents with expertise in international cases. It also affirmed that human resource development is a primary policy.

(iv) Other federal agencies

- Commodity Futures Trading Commission

158. The Commodity Futures Trading Commission (CFTC) is an independent agency created in 1974 to regulate the derivatives markets through which commodities are traded. Like the SEC, it is headed by a five-member commission. The CFTC enforces the Commodity Exchange Act (CEA) by regulating the exchange and investigating violations in the industry.

159. The CFTC does not enforce violations of the FCPA. It investigates and brings administrative enforcement actions of alleged violations of the CEA by individuals as well as firms registered with the CFTC and those who violate the laws in connection with commodities trading. It refers criminal violations to the DOJ for prosecution. In March 2019, the CFTC announced that its Division of Enforcement would encourage self-reporting and cooperation for violations of the CEA involving foreign corrupt practices. Under the CFTC's enforcement advisory, it will reward cooperation and voluntary disclosure by natural and legal persons. In certain circumstances, it will recommend resolutions with disgorgement but no civil penalties in recognition of voluntary disclosure, cooperation, and remediation. If a company does not self-report or if aggravating factors exist, the CFTC will seek all appropriate remedies.[169] During the on-site visit, CFTC representatives indicated that the agency is planning to establish a task-force on CEA enforcement involving foreign corrupt practices in order to develop expertise and coordinate with other agencies both domestic and foreign. They also reported that they work with foreign counterparts through MOUs.

160. In the DOJ and SEC press releases concerning FCPA matters between January 2013 and July 2019, however, the authorities have only mentioned the CFTC in connection with the LIBOR portion of the resolution with Société Générale.[170]

161. During the on-site visit, some panellists expressed their apprehension on the inclusion of CFTC as a law enforcement agency investigating cases involving foreign corrupt practices. They reported that it could cause uncertainty to companies and individuals during the resolution process. Despite the recent involvement of CFTC in FCPA cases, the U.S. authorities affirmed that the DOJ and the SEC work closely with the CFTC and there will be no future coordination problems. The CFTC representatives also did not express concerns on coordination problems with other law enforcement agencies. After the on-site visit, the CFTC issued a new guidance outlining factors to be considered in recommending civil monetary penalties. Among these factors, CFTC's Enforcement Division will take in consideration "sanctions to be imposed in parallel actions by other civil or criminal authorities or self-regulatory agencies" to avoid the piling on of sanctions.[171]

- Internal Revenue Service

162. The Internal Revenue Service, through its Criminal Investigation unit (IRS-CI) has participated in several FCPA investigations since Phase 3. (This topic is further discussed under section B.3.(b)(iii) on the DOJ's and the SEC's coordination with other authorities, and D.3. on tax measures for combatting bribery.)

[169] Commodity Futures Trading Commission, Enforcement Advisory: Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices.
[170] DOJ News, 4 June 2018.
[171] Commodity Futures Trading Commission, CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance.

- U.S. Immigration and Customs Enforcement

163. U.S. Immigration and Customs Enforcement (ICE) is the principal investigative arm of the U.S. Department of Homeland Security. Under ICE, Homeland Security investigations (HSI) is responsible for investigating a wide range of domestic and international activities, including financial crimes. As the United States principal border enforcement investigative agency, ICE-HSI is uniquely positioned to investigate all incidents of transnational and cross-border financial crimes. ICE-HSI is the only law enforcement investigative agency that has border search authority, full access to Bank Secrecy Act reports and exclusive access to trade data. ICE-HSI Special Agents are granted broad authorities to investigate violations of federal law at and away from the border. During the on-site visit, ICE representatives indicated that the agency started participating in FCPA investigations in 2012, including by using its authority to seize cell phones and other devices at the border. Between January 2013 and July 2019, the DOJ has acknowledged cooperation provided by ICE-HSI in at least 23 FCPA resolutions.

- U.S. Postal Inspection Service

164. The U.S. Postal Inspection Service (USPIS) is the investigative unit of the U.S. Postal Service. USPIS enforces over 200 federal statutes related to crimes that involve the postal system, its employees, and its customers. Because of its broad mandate and the fact that the US postal system is often used in foreign bribery cases, the USPIS has served as an investigating agency on several FCPA matters. Between January 2013 and July 2019, the DOJ has acknowledged assistance provided by USPIS in at least four FCPA resolutions.

(b) Coordination between relevant agencies and attribution of cases

(i) Information sharing among the DOJ, the FBI, and the SEC

165. The United States reports that the DOJ, the FBI and the SEC "have a long established relationship in all securities matters, including FCPA enforcement". Given their different mandates as criminal law enforcers and market regulators, the DOJ and SEC conduct parallel investigations in FCPA matters. Their different mandates, however, impose some limits on cooperation. For example, the SEC cannot share certain information that may identify a whistleblower unless certain conditions are met.

(ii) The DOJ's and the SEC's Role at the Investigation Stage

166. The DOJ FCPA Unit has an investigative role, and it works in tandem with the investigative agencies in investigating foreign bribery cases. At the very least, prosecutors would present evidence and the law to any grand jury empanelled to investigate whether there is probable cause to indict a suspect for alleged foreign bribery or related offences. If the grand jury determines that there is probable cause to believe that an offence occurred, it can issue an indictment to bring the suspect(s) to trial.

167. The SEC has its own investigative authority. As the federal agency tasked with upholding U.S. securities laws, the SEC also cooperates with federal and state law enforcement bodies pursuing related criminal charges. SEC staff are "encouraged to work cooperatively criminal authorities, share information, and to coordinate their investigations with parallel criminal investigations where appropriate".[172] SEC staff can share information with criminal investigations, but they cannot perform investigative acts solely intended to benefit the criminal matter. For this reason, the staff should make their own independent decisions about the need for additional evidence and the investigative measures to obtain it.

168. Conversely, the SEC may also receive information from criminal authorities, subject to the restrictions imposed by grand jury secrecy. Under Federal Rule Criminal Procedure 6(e), in general all "matter(s) occurring before the grand jury" are secret, with certain exceptions. Subject to these exceptions, criminal authorities do

[172]SEC Division of Enforcement (28 November 2017), Enforcement Manual, Section 5.2.1.

not share information that comes directly or indirectly from grand jury proceedings. On occasion, criminal authorities can ask the SEC to refrain from taking any actions that might jeopardise the criminal investigation.[173]

(iii) The DOJ's and the SEC's coordination with other authorities

169. The U.S. authorities work in a coordinated manner when investigating FCPA violations. During the on-site visit, the DOJ stressed that this "whole of government" approach, which allows to pull together resources and expertise for more efficiency, does not alter the Fraud Section's leading role in criminal FCPA enforcement. In fact, as a matter of policy, criminal investigative agencies cannot pursue a FCPA criminal case without a previous DOJ referral. This policy does not apply to civil investigations conducted by the SEC.

170. During the on-site visit, the U.S. authorities explained that they use digital resources to gather information collected by each agency acting on the same case. Only the officials and prosecutors or attorneys involved in that particular case have access to a shared folder, and certain agencies may only have access to a portion of that folder. They also indicate that the both DOJ and the Department of Treasury maintain professionally managed forfeiture funds, and the money in those funds can be used, as permitted by law, to support the law enforcement agencies that investigate FCPA violations among other criminal offences.

171. The IRS and FinCEN provide a supporting role in FCPA investigations. FinCEN, as an intelligence agency, has no investigative role but it proactively disseminates SARs along with other information and facilitates international cooperation (e.g. through the Egmont Group).[174] FinCEN also can support law enforcement agencies' ongoing financial investigations, for example by using certain legal authorities only available to FinCEN as well as through law enforcement liaisons stationed at FinCEN. Additionally, FinCEN provides direct access to its database to law enforcement agencies, enabling federal investigators to obtain the full array of financial intelligence products without request or delay. During the on-site, the FBI indicated that it has SARs review teams, which can serve to identify and initiate investigations. The IRS, and particularly its Criminal Investigation (IRS-CI), as a law enforcement agency, offers its investigative expertise in accounting, tax related matters and money laundering. (The IRS' role in FCPA investigations is further discussed under D.3)

Commentary

The lead examiners commend the United States for significantly enhancing the expertise and resourcing of agencies in charge of investigating and prosecuting foreign bribery. The lead examiners also commend the United States for ensuring staff continuity in enforcement authorities. These remarkable efforts have been a driving force of FCPA enforcement since Phase 3.

The lead examiners commend the United States for the high level of coordination among law enforcement agencies in investigating foreign bribery cases. They welcome the "whole of government" approach to the fight against bribery. Since Phase 3, several additional federal agencies have been involved in FCPA investigations, thus allowing the pulling together of resources and expertise to enhance the fight against foreign bribery. The successful coordination has allowed multi-agency resolutions against alleged offenders in FCPA-related matters. The lead examiners note that despite the apprehension of some panellists on the growing number of law enforcement agencies investigating FCPA cases, they have witnessed increasing coordination efforts between the historical enforcing agencies and some of the newest ones. They in particular commend the United States for the SEC and CFTC's recent efforts to avoid pilling on of sanctions. The lead examiners recommend that the Working Group follow up on how the U.S. FCPA enforcement is affected as new agencies join the fight against foreign bribery.

Finally, the lead examiners commend the United States for building an in-house compliance expertise, given the weight attributed to compliance programs in determining how to dispose of charges and what sanctions and compliance obligations to impose on a company. In other Phase 4 evaluations, the Working Group has identified the pitfalls of enforcement agencies' outsourcing compliance assessment due to a lack of in-house

[173]SEC Division of Enforcement (28 November 2017), Enforcement Manual, Section 5.2.1.
[174]FATF (2016), Anti-money laundering and counter-terrorist financing measures - United States, Fourth Round Mutual Evaluation Report, FATF, Paris, Executive Summary, para.11.

expertise. Therefore, the Working Group could consider the United States' substantial efforts to build a compliance expertise as a good practice.

(c) Federal Courts and other Tribunals Handling Foreign Bribery Cases

(i) Overview of U.S. court system

172. The United States does not have specialised courts for handling foreign bribery matters. As a result, criminal and civil proceedings related to foreign bribery allegations are handled through the regular court system depending on rules governing jurisdiction and venue. Federal judges are generalists who preside over both criminal and civil cases. The 94 district courts handle the trials at first instance. The 13 circuit courts primarily have jurisdiction over appeals that arise from the district courts within their geographical remit or from administrative agencies. As appellate courts, however, they do not conduct a second trial.[175]

173. The Supreme Court is the final court of appeal on both the law and constitutional questions. It is composed of nine justices appointed by the President and confirmed by the Senate. Its rulings are binding on all federal courts (as well as on all state courts on applicable constitutional issues). The Supreme Court is not required to take an appeal. It tends to pick cases that will cure egregious injustices or harmonise divergences that arise between the different circuits, which are known as "circuit splits".

174. In addition to federal courts, the SEC can bring enforcement actions against issuers and their officers or employees in administrative tribunals where cases are heard by administrative law judges. As explained in Section B.2.(c) above, the Commission is not necessarily bound by the rulings of administrative law judges.

(ii) Use of courts in practice in FCPA matters

175. Few federal criminal matters end with a trial, as nearly 90% of defendants in federal court agree to plea to some or all of the charges brought against them. Another 8% have their cases dismissed before trial. Less than 1% of defendants charged prevailed at trial. This trend of plea bargaining is long-standing: in 1998, for example, only 7% of defendants went to trial. Under the U.S. Constitution, any defendant in federal court who is charged with sufficiently serious offences is entitled to a jury trial. In criminal matters, this right can be waived with the consent of the government. In such cases, the judge serves as the fact-finder in lieu of the jury.

176. This overall trend is mirrored in FCPA enforcement. Between 29 September 2010 and 29 July 2019, 150 of the 369 concluded FCPA enforcement actions concerned natural persons and 219 concerned legal persons. In total, the United States imposed criminal or non-criminal sanctions on 140 natural persons and 218 legal persons. Charges were dismissed for 9 natural persons and 1 legal person, while 1 natural person was acquitted during the reporting period. Globally, only 5 enforcement actions resulting in sanctions were resolved through adversarial trial proceedings – all involving natural persons (3 convictions at trial and 2 default judgments in civil enforcement proceedings). The remaining 99% of the cases were resolved through a range of non-trial resolutions. The DOJ resolved 116 actions through plea agreements (54% of all criminal enforcement actions during the reporting period), 48 DPAs (22%), 27 NPAs (13%), and 13 actions (6%) through declinations with disgorgement under the FCPA Corporate Enforcement Policy. The use of these resolutions varied considerably between natural and legal persons. For instance 97% of natural persons resolved their matters through plea agreements, versus only 25% for legal persons. On the other hand, the DOJ concluded 41% and 23% of its corporate resolutions with DPAs and NPAs, respectively, but did not report any of these resolutions with natural persons. For its part, the SEC resolved 84 enforcement actions (62% of its matters) through administrative cease-and-desist orders with the respondent's consent. It resolved another 40 actions (29%) through civil judgments entered by consent in federal court. The SEC also resolved 6 matters (4%) using NPAs or DPAs with either natural or legal persons.

177. It should be noted that natural persons are far more likely to resolve their matters through plea agreements. The DOJ resolved 97% of its concluded enforcement actions against natural persons through plea

[175]See generally, U.S. DOJ Offices of the U.S. Attorneys, "Introduction to the Federal Court System" (undated).

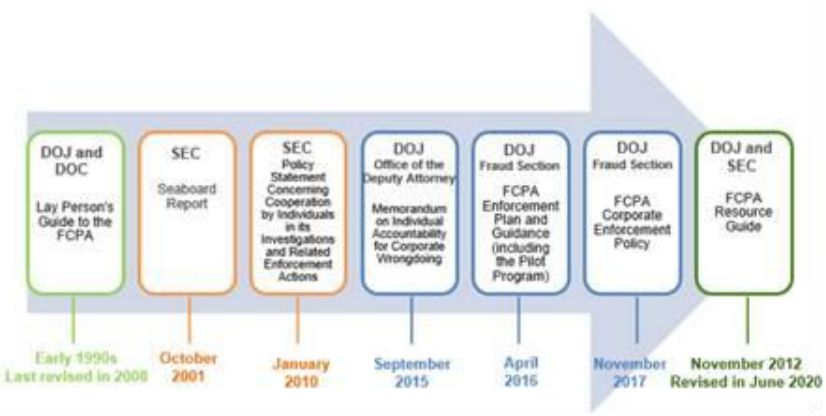
agreements, as compared with 25% of its concluded enforcement actions against legal persons. Since Phase 3, the DOJ has brought to trial a number of criminal enforcement actions relating to foreign bribery. Of the ten supply-side defendants charged since Phase 3 that proceeded to trial, nine were convicted. In one case, the court overturned three defendants' convictions after trial, resulting in the dismissal of their charges. In another case, the DOJ is currently appealing the court's decision to order a new trial for, and overturn the convictions of, two additional defendants after the court found that one of the defendants received ineffective assistance of counsel at trial. In addition, the DOJ convicted three foreign public officials for other offences related to foreign bribery. (Resolution avenues against corporate entities are discussed under C.2.(b) and (c) on the implementation of the CEP and choice of enforcement avenue in corporate resolutions.)

B.4. Conducting a Foreign Bribery Investigation and Prosecution against natural and legal persons

(a) Enforcement Policies and Guidance

178. Since Phase 3, the U.S. enforcement agencies have developed a series of policies and guidance materials relevant to FCPA enforcement.

Figure 1. Timeline of DOJ and SEC key guidance and policy instruments



(i) DOJ policies and guidance: main reference documents

179. The DOJ's policies and procedures are contained in the publicly available Justice Manual.[176] Within the DOJ, the FCPA Unit is organised under the Fraud Section, which is part of the Criminal Division. FCPA enforcement policy and guidance published since Phase 3 emanate from different levels of the DOJ's hierarchy and apply DOJ wide or solely to FCPA prosecutions. They were included as such or otherwise reflected in all or in part in the Justice Manual following their adoption.

- The Memorandum on Individual Accountability for Corporate Wrongdoing

180. The Memorandum on Individual Accountability for Corporate Wrongdoing (Yates Memo),[177] adopted on 9 September 2015, provides DOJ-wide principles pertaining to prosecutors' capacity to consider a corporation's conduct once it learns of potential crimes by rewarding it in the resolution and/or sentencing process.

181. The DOJ has a long practice of awarding credit in resolving corporate cases and sanctioning companies. This practice, already implemented at the time of Phase 3, is grounded in the Principles of Federal Prosecution of Business Organizations (the Principles) [178] and the U.S. Sentencing Guidelines.[179] The Principles provide

[176] Justice Manual (previously known as the United States Attorneys' Manual (USAM)).
[177] U.S. DOJ Office of the Deputy Attorney General (9 September 2015), Memorandum on Individual Accountability for Corporate Wrongdoing.
[178] Justice Manual 9-28.000 Principles of Federal Prosecution of Business Organizations.
[179] U.S. Sentencing Commission (1 November 2018), 2018 Guidelines Manual.

guidance on whether a criminal disposition against a company is appropriate and if so, what form it should take. In this determination, ten factors should be considered including voluntary self-disclosure, cooperation with the DOJ's investigation, existence of a pre-existing compliance program, and measures taken to remediate the misconduct. Similarly, under the U.S. Sentencing Guidelines, these factors weigh on the calculation of a corporate fine.

182. Among measures to enhance individual accountability for corporate offences, the Yates Memo provides that cooperation credit can only be obtained by a corporation if it provides all information on individuals involved in the wrongdoing. In so doing, the Memo does not supersede but builds on the Principles. Following circulation of the Memo, the Principles were revised to include the tenth factor for prosecutors to consider in resolving matters against companies: the impact of the prosecution of responsible individuals.[180] Other sections of the Justice Manual were revised pursuant to the Yates Memo. The Memo was subsequently revised to soften the threshold that companies must meet to obtain cooperation credit. In November 2018, the policy laid out in the Yates Memo was amended to condition the credit granted for cooperation to the requirement that companies identify the individuals who were 'substantially involved in or responsible for the criminal conduct', rather than identifying "all employees involved" in the wrongdoing.[181]

- The FCPA Corporate Enforcement Policy (CEP)

183. The FCPA Enforcement Plan and Guidance, adopted on 5 April 2016 by the Fraud Section, included provisions for fine reductions and other incentives for organisations to self-disclose FCPA violations, cooperate with a criminal investigation, and remediate the offence.[182] These provisions, initially implemented through a one-year Pilot Program, were revised in November 2017 to strengthen incentives and permanently formalised in the Justice Manual under the title FCPA Corporate Enforcement Policy.[183]

184. Similar to the Yates Memo, the CEP supplements the Principles by providing additional benefits to companies based on their behaviour once they learn of actual or possible violations. The CEP also complements the U.S. Sentencing Guidelines in the same way. Contrary to the Yates Memo, which applies to the prosecution of all corporate misconducts, the CEP applies to FCPA prosecutions, and is considered non-binding guidance for other Criminal Division corporate cases.

185. The CEP both revised the criteria to qualify for credit and modified how credit is accounted for in the resolution and sanctioning process. Under the CEP, a declination is no longer considered for companies that fully qualify for credit, but it is presumed, "absent aggravating circumstances involving the seriousness of the offence or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism". Should criminal prosecution be warranted, a company that obtains credit would be eligible for a 50% reduction off the bottom end of the Sentencing Guidelines fine range, and it generally would not be required to engage a monitor. If a company chose not to voluntarily disclose its FCPA misconduct, it could receive 25% credit if it later fully cooperates and timely and appropriately remediates. Finally, to be eligible for such credit, even a company that met all criteria would be required to disgorge all profits resulting from the FCPA violation.

[180] Justice Manual 9-28.300 - Factors to be considered.
[181] Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, 29 November 2018, https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0
[182] U.S. DOJ Criminal Division (5 April 2016), FCPA Enforcement Plan and Guidance.
[183] Justice Manual 9-47.120 - FCPA Corporate Enforcement Policy, 29 November 2017.

- Subject-matter policies

186. After Phase 3, several subject-matter policies which are not specific to FCPA prosecutions, but nonetheless play an important role in its enforcement, were also released. They are briefly described below and further discussed in other sections of this report.

187. In May 2018, the DOJ released a Policy on Coordination of Corporate Resolution (anti-piling on policy) in cases involving penalties imposed by more than one regulator or law enforcement authority. The aim of the anti-piling on policy "is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties." Specifically, the policy requires DOJ attorneys to "coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties and/or forfeiture against [a] company". [184] The anti-piling on policy was included in the Justice Manual. (It is further discussed under sections B.2. and C.3.)

188. In October 2018, then Assistant Attorney General Brian A. Benczkowski issued a Memorandum on the Selection of Monitors in Criminal Division Matters aiming to clarify the criteria to be considered when determining whether a corporate compliance monitor is warranted.[185] (The content of this memorandum is further discussed under section C.1.(f) on monitorships.)

189. In April 2019, the DOJ issued the Evaluation of Corporate Compliance Programs, which emphasises the importance of implementing corporate compliance programs that are not merely well-designed but also effective and adaptable.[186] (This guidance is further discussed under section C.1. (e).)

190. Finally, on 8 October 2019, the DOJ issued a guidance memorandum on *Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty*. The memorandum aims to provide clarity, transparency, and uniformity on how the DOJ's Criminal Division evaluates claims by companies that they are unable to pay a proposed criminal fine or monetary penalty.[187] (The memorandum is further discussed under sections B.2. and C.3.on sanctions.)

(ii) Main Rationale and objectives of DOJ policies and guidance

191. Key policies and guidance released by the DOJ since Phase 3 serve various purposes in the short and the long term. In the short term, the CEP aims to provide additional transparency to the business community, encourage voluntary disclosure and cooperation to better detect foreign bribery and ensure that the company assists the investigation, including through the preservation and sharing of relevant evidence as well as data from overseas, and incentivise remediation so that the company will not have a recurrence of misconduct. The CEP also aims to ensure greater consistency in enforcement practices. In the long term, the CEP aims to deter bribery. In this perspective, the DOJ took the position to further increase its enforcement efforts on natural persons, including through enhanced cooperation with corporate entities.

192. The DOJ's emphasis on enforcement efforts aimed at natural persons is driven by the notion that sanctioning individuals is a powerful and effective deterrent against foreign bribery. Since the adoption of its current policies, the DOJ has clearly and consistently reasserted this position, including while announcing the revision of the Yates Memo in November 2018 and in public statements by DOJ officials of various hierarchical levels.[188] Since Phase 3, enforcement has thus been characterised by a growing shift on individual enforcement

[184]U.S. DOJ Office of the Deputy Attorney General (9 May 2018), Memorandum on Policy on Coordination of Corporate Resolution Penalties.
[185]U.S. DOJ Criminal Division (11 October 2018), Selection of Monitors in Criminal Division Matters.
[186]U.S. DOJ Criminal Division (April 2019), Evaluation of Corporate Compliance Programs.
[187]U.S. DOJ Criminal Division (8 October 2019), Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty.
[188]Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, Oxon Hill, Maryland, 29 November 2018. See also for instance Deputy Assistant Attorney General Matthew S. Miner Delivers Remarks at the 6th Annual Government Enforcement Institute, Houston, Texas, 12 September 2019.

to increase deterrence, while still pursuing prosecution of corporations. (Deterrence is further discussed under section C.3. on sanctions.) Many of the DOJ's policies and guidance released since Phase 3 reflect its desire to provide consistent and transparent messaging to the business community. (Cooperation with the business community is further discussed under section C.4.)

(iii) Main Achievements of DOJ policies and guidance

193. The DOJ has not developed formal benchmarks to measure the success of its policies. In the short term, the level and quality of voluntary self-disclosure, cooperation, and corresponding enforcement increase seem to be the prevailing indicators. Transparency and predictability, at one end of the process, and remediation and enhancement of compliance programs, at the other end, should be indicative of a longer-term success of these policies. Evidently, deterring foreign bribery is another goal, but it cannot easily be measured.

194. The number of voluntary self-disclosures has increased following the implementation of the Pilot Program. Presumably, it has further increased under the CEP although this is not documented. In their questionnaire responses, the U.S. authorities contend that based on an internal assessment, the FCPA Pilot Program achieved its desired results: additional voluntary self-disclosures, higher quality of cooperation and remediation, and additional transparency and guidance for prosecutors and corporations. The U.S. authorities also explain that the CEP led to more sophisticated compliance programs, which they consider a major success of the policy.

195. Civil society representatives met during the on-site visit almost unanimously consider that the DOJ's efforts to increase transparency and reinforce incentives has brought clarity and enhanced certainty for companies, a view also supported by Coalition for Integrity.[189] They consider this as critical to tip the balance in favour of self-disclosure and cooperation. The level of information included in the DOJ's press releases about FCPA resolutions also provides valuable guidance for companies to understand the DOJ's expectations and the way compliance systems should accordingly be designed. Private sector representatives also welcomed the dialogue that the DOJ has instituted with practitioners. This has contributed to level up business cooperation with the Government. However, according to representatives of the private sector met during the on-site visit, the lack of certainty about the medium to long term repercussions of voluntary self-disclosure to the DOJ at both domestic (other national agencies possible jurisdiction) and international level (jurisdictional claims by other countries), would in practice dilute the effects of DOJ's incentives. (This is discussed under section A.6. on self-reporting and voluntary disclosure by companies.) Academics and other stakeholders believe that more time is needed to collect meaningful figures on voluntary disclosure and draw correlations between government policies and companies' willingness to come forward and cooperate.

Commentary

The lead examiners welcome the DOJ's clarification of various aspects of its enforcement policy in FCPA matters, in particular with the Corporate Enforcement Policy. The lead examiners also commend the United States for its unparalleled efforts to encourage voluntary disclosure of FCPA violations and cooperation with authorities. They recognise the United States' continuous dedication to refine enforcement policies in order to achieve the right mix of incentives to voluntary self-disclose and ensure appropriate sanctions are applied.

The lead examiners recommend that, as part of its periodic review of its approach to enforcement provided under the 2009 Recommendation, the United States continue to evaluate the effectiveness of the CEP and in particular its effectiveness in encouraging self-disclosure and deterring foreign bribery through focussing on individuals.

[189] Coalition for Integrity: Evaluation Of United States' Foreign Bribery Enforcement, paper submitted in connection with the phase 4 evaluation of the United States' implementation of the Convention, March 2019.

(iv) SEC policies and guidance

- Overview of SEC policies and guidance

196. In its Phase 3 report, the Working Group welcomed a report, commonly known as the *Seaboard Report*, issued by the SEC in 2001, which sets forth the factors that the SEC will consider when assessing whether to charge a legal person or other entity.[190] This report identified four considerations to assess when determining whether companies should get credit for leniency: (i) self-policing before wrongdoing discovered (compliance procedures and "tone at the top"); (ii) self-reporting of discovered wrongdoing; (iii) remediation (disciplining or terminating those responsible, improving internal controls, and compensating victims); and (iv) cooperation with the SEC and other law enforcement agencies. In Phase 3, the Working Group welcomed the guidance, but it recommended that the SEC (as well as the DOJ) make public, where appropriate, the reasons for the choice of a particular resolution (recommendation 3(b)).[191]

197. In addition, enforcement practice and related communication have contributed to make public the SEC policy to reward cooperation. The SEC has indeed regularly rewarded offenders' cooperation by reducing the penalties imposed. For example, in 2015, the SEC reported that its resolution with *Bio-Rad Laboratories*,[192] which took the form of an administrative order, reflected a "substantial reduction in penalties" as a result of the company's cooperation.[193] In the 2015 *DPA with PBSJ*, the penalty imposed was only 10% of the disgorgement amount in recognition of the company's cooperation with the investigation.[194] In certain matters, such as its 2015 resolution with *the Goodyear Tire & Rubber Company*,[195] the SEC only imposed disgorgement without any penalty because of the company's self-reporting, prompt remediation, and "significant" cooperation with the investigation.[196]

198. In 2010, the SEC also developed a policy for rewarding cooperation by natural persons. Under this policy, the SEC will consider: (i) assistance provided in the investigation; (ii) the severity of the underlying misconduct; (iii) the interest in holding the individual accountable given the co-operator's culpability compared with other participants; and (iv) the individual's profile, including acceptance of responsibility. Under this policy, an individual could obtain a "Cooperation Agreement", giving credit for "substantial assistance" to an investigation, a Deferred Prosecution Agreement (DPA), or a Non-Prosecution Agreement (NPA).[197] In 2016, for example, the SEC resolved FCPA charges against a natural person involved in *PTC Inc.*'s bribery of Chinese officials through a DPA, recognising the "significant cooperation … provided during the SEC's investigation".

199. Guidance of SEC enforcement is also available on its "Spotlight on the FCPA" webpage. The webpage provides a list of all FCPA enforcement actions, along with a summary of each case, with links to the civil complaint or administrative order and other case materials. [198]

- Rationale and results

200. Since Phase 3, no additional or consolidated guidelines have been issued by the SEC. During the on-site visit, the SEC representatives explained that evaluating the success of enforcement policies is complex and the

[190]U.S. SEC (23 October 2001), Seaboard Report.
[191]United States Phase 3 Report, para. 119.
[192]In the Matter of Bio-Rad Laboratories, Inc., 3 November 2014.
[193]Andrew Ceresney, Director, SEC Enforcement Division (3 March 2015), "FCPA, Disclosure, and Internal Controls Issues Arising in the Pharmaceutical Industry", Remarks at CBI's Pharmaceutical Compliance Congress in Washington D.C.
[194]SEC Deferred Prosecution Agreement – PBSJ, 22 January 2015.
[195]In the Matter of The Goodyear Tire & Rubber Company, 24 February 2015,
[196]Andrew Ceresney, Director, SEC Enforcement Division (3 March 2015), "FCPA, Disclosure, and Internal Controls Issues Arising in the Pharmaceutical Industry", Remarks at CBI's Pharmaceutical Compliance Congress in Washington D.C.
[197]SEC (13 January 2010), Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions.
[198]SEC Enforcement Actions: FCPA Cases.

Commission's *Seaboard* guidance is applicable for all securities violations. With respect to FCPA enforcement, they have relied on several indicators, including the increased level of sophistication of compliance programs achieved by issuers, to determine that their policies have so far been successful. The SEC also stressed that it regularly receives positive feedback from companies, expressing satisfaction with the level and quality of engagement with the SEC and with the access to charging documents.

201. During the on-site visit, legal practitioners and other stakeholders praised the SEC's trail-blazing initiative to spell out the factors that it will consider for giving cooperation credit to natural and legal persons. Nonetheless, they observed that the SEC does not have an FCPA-specific cooperation policy and that the SEC's policy does not provide a similar level of certainty as to the likely resolution as the DOJ's new CEP for legal persons. Furthermore, some legal practitioners and company representatives expressed reluctance to self-report violations to the DOJ even under the CEP without knowing how the SEC would apply its factors to the same misconduct. Representatives of the SEC met during the on-site visit held the opinion that the full Seaboard Report provides extensive guidance, noting that it includes many of the factors reflected in the DOJ's guidance, and also emphasised that it is supported by regular outreach activities to raise awareness on how the SEC approaches FCPA enforcement. Additionally, SEC representatives noted that drawing the line on the right amount of guidance is a complex exercise and that too much guidance pose the risk of being too prescriptive on enforcement practices.

Commentary:

The lead examiners commend the United States for the extensive guidance the SEC started to provide regarding SEC's enforcement policies, beginning 19 years ago, with the Seaboard Report and the SEC's continued awareness raising efforts on how it approaches FCPA enforcement. This appears to have paved the way for other guides and policies further developed over time, including the public guidance developed jointly with the DOJ materialised in the FCPA Resource Guide (discussed below). With a view to further incentivise voluntary self-reporting and cooperation in line with the DOJ policy, and in order to further harmonise the approach to fighting foreign bribery of the leading U.S. law enforcement agencies, the lead examiners recommend that the SEC consider consolidating and publicising its policy and guidance on how it enforces the FCPA.

(v) Public guidance: the FCPA Resource Guide

202. In Phase 3, the Working Group was concerned that FCPA guidance was scattered across different sources, including speeches from enforcement authorities, DOJ and SEC complaints, and non-trial resolutions. The Working Group recommended that the United States consolidate and summarise publicly available information on the application of the FCPA in relevant sources […]" (recommendation 2. b.)). In November 2012, one month after the discussion by the Working Group of the U.S. Written Follow-up report, the DOJ and SEC jointly released "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (FCPA Resource Guide),"[199] a "detailed compilation of information about the FCPA, its provisions, and enforcement".[200] In October, the Working Group acknowledged the upcoming publication of the Guide as a "major initiative".

203. The stated purpose of the Guide is "to provide helpful information to enterprises of all shapes and sizes – from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world. The FCPA Resource Guide addresses a wide variety of topics, including who and what is covered by the FCPA's anti-bribery and accounting provisions; the definition of a 'foreign official'; what constitute proper and improper gifts, travel and entertainment expenses; the nature of facilitating payments; how successor liability applies in the mergers and acquisitions context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context". The Guide also provides insight on enforcement practices through hypotheticals, examples of enforcement actions and anonymized declinations, and summaries of applicable case law and DOJ opinion releases. At the

[199]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA.
[200]FCPA Resource Guide webpage.

time of its release, the FCPA Resource Guide was welcomed by the business community and other non-governmental stakeholders, which had unanimously been demanding compiled guidance.

204. Considering the numerous developments that have unfolded in the FCPA landscape since its publication in 2012, the Phase 4 evaluation assesses whether the Resource Guide remains relevant, and, in particular, whether it has continued to consolidate guidance emanating from various sources, including case law developments. During the on-site visit, the U.S. authorities explained that despite an increasingly sophisticated and well-informed business sector, updating the Guide is particularly important for SMEs, which may not have the same ease of access to specialised legal advice and compliance support. On-site discussions with private sector representatives confirmed this view. While large companies are aware of the latest developments and closely monitor revisions of the CEP and important resolutions, fast-growing privately-held companies might be exposed to foreign bribery risks but lack the necessary resources to stay abreast of the latest FCPA developments. Both companies' representatives and academics insisted that keeping the Guide up to date is instrumental to ensure that companies' compliance programs remain adequate.

205. At the time of the on-site visit, the Guide had not been updated since November 2015 and thus did not reflect key policy, and several landmark cases interpreting the FCPA, including for instance *Hoskins* (2017), which, *inter alia*, had an impact on the notion of "agent". In July 2020, the DOJ and SEC released a second edition of the FCPA Resource Guide. The revised Guide refers to several key policies adopted by the DOJ since it was first released in 2012, including the CEP, the "anti-piling on" policy, as well as the guidance on monitorship and on assessing compliance programmes. Important case law is also covered, including developments in the *Hoskins*, *Kokesh* and *Liu* cases. Finally, the Guides lists new partner agencies.[201]

206. In addition to reflecting past developments and existing material, the Guide provides new elements of guidance which likely aim to curtail possible enforcement limitations to FCPA enforcement. In particular, it sets forth that DOJ would apply a six-year rather than a five-year statute of limitations for criminal violations of the accounting provisions. The Guide also provides that the Hoskins ruling regarding the use of conspiracy charges in FCPA cases does not apply to the accounting provisions because unlike the anti-bribery provisions, they apply to "any person".[202] With regard to the CEP, the Guide clarifies that the DOJ has wide discretion when it comes to the aggravating circumstances that warrant criminal prosecution and thus overcome the presumption for a declination. The Guide provides that "Even where aggravating circumstances exist, DOJ may still decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme".[203]

(vi) Enforcement policies and the Coronavirus crisis

207. Since the on-site visit, the Coronavirus (COVID-19) crisis has sparked unprecedented challenges and generated risks associated to the actions taken to mitigate the health and economic crisis. These risks include heightened foreign bribery risks. Commentators also report that the physical distancing implemented in response to the pandemic has significantly disrupted corporate enforcement, in particular by impeding witness interviews and evidence collection.[204] The U.S. authorities have taken a number of measures to address the situation and avoid enforcement disruption but as the pandemic arose after the on-site visit, the evaluation team did not have an opportunity to discuss this topic with panellists.

208. U.S. enforcement authorities report that they are continuing to work largely from home but are holding regular virtual meetings with case teams and law enforcement agents to ensure that cases are moving forward, and are traveling where necessary, including for indictments, court hearings, and in-person interviews. Although U.S. enforcement authorities are not currently conducting many in-person witness interviews in foreign bribery investigations and have had to postpone some interviews, they are conducting a fair number of interviews via secure videoconference systems that permit the sharing of documents. Although they may experience

[201] DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, Second edition.
[202] DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, Second edition p. 46.
[203] DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, Second edition p. 52.

understandable delays in obtaining evidence from producing parties or foreign partners, enforcement authorities are still able to upload document productions onto their document review systems, review documents from home, and take other investigative steps, including those that require court approval. The FinCen Egmont requests system is fully functioning, as is DOJ's ability to obtain search warrants and, where grand juries are operating, to subpoena records. Although some court systems remain closed except for emergency matters, DOJ prosecutors are able to conduct remote court hearings where feasible and some grand juries are now meeting in person with health precautions in place. Where grand juries remain closed, prosecutors have been able to charge individuals via criminal complaint, another mechanism for charging that relies on a finding from a judge rather than a grand jury. Law enforcement authorities are largely continuing to initiate and investigate matters, and resolve cases in a normal fashion. According to the authorities, there has been no noticeable decline in productivity because they are using all available tools. In addition, enforcement authorities are continuing to liaise with their foreign counterparts via telephone and videoconference.

Commentary

The lead examiners commend the United States for drafting and updating the FCPA Resource Guide, which was substantially assessed for the first time in Phase 4 and which is acknowledged as a valuable public resource.

A second edition of the Guide, released in June 2020, addresses the lead examiners' initial concerns that the Guide did not adequately reflect the numerous developments that have unfolded in the FCPA landscape since the Guide was published and last updated in 2015. The lead examiners commend the United States for this initiative, which should help companies, and in particular SMEs, to remain abreast of relevant FCPA developments. They suggest that the Working Group follow up on the United States' practice to update the Guide, to ensure that it continues to consolidate guidance emanating from various sources, including new policies, case law developments and, as relevant, anonymised lessons learned from monitorships or other compliance enhancement efforts flowing from FCPA resolutions.

The lead examiners note that the U.S. authorities have reported that they have taken measures to avoid enforcement disruption during the Covid-19 pandemic.

(b) Initiating investigation against natural and legal persons

(i) DOJ and FBI investigations

209. When the DOJ has information concerning a possible FCPA violation, it can ask the FBI to examine it. If information is limited, the FBI can conduct a brief preliminary investigation to determine whether there is a basis to open a formal inquiry. Only certain types of techniques can be used before a formal investigation is opened. If there is reason to believe that an offence has been committed, the FBI can open a formal investigation directly.

210. In addition, as explained under B.3. (b) on coordination between relevant agencies and attribution of cases, the DOJ can seek to present evidence to a grand jury in the district where the crime occurred to obtain an indictment. A defendant can also choose to waive the right to an indictment and agree to start criminal proceedings on the basis of an "Information" containing the charges alleged.[205] Foreign bribery cases have proceeded both on the basis of indictments and informations.

(ii) SEC investigations

211. For its part, the SEC may commence an investigation when it possesses sufficient information to believe that a possible federal securities law violation is occurring or has occurred. Once an investigation is opened, the Commission may issue a Formal Order of Investigation designating SEC officers to engage in certain investigative activities, including subpoenaing witnesses and taking testimony under oath. In practice, the authority to issue such Orders has been delegated to the Director of the Enforcement Division. If the SEC staff

[205]See Justice Manual 9-11.000 - Grand Jury et seq.

considers that there is sufficient evidence to begin an enforcement action, they must obtain the authorisation of the Commission. The Commission must also authorise resolutions of any enforcement action.[206]

(c) Establishing jurisdiction over both natural and legal persons

212. The FCPA's anti-bribery provisions can apply to conduct both inside and outside the United States. Jurisdiction under the FCPA depends on the type of business organisation and/or person responsible for the bribe payments. The FCPA provides for both territorial jurisdiction and nationality jurisdiction for U.S. issuers and for domestic concerns, for territorial jurisdiction for foreign issuers, and for a slightly different territorial jurisdiction for persons other than an issuer or domestic concern – a category which encompasses most foreign companies and nationals.[207] Jurisdiction has not been assessed since Phase 2, and despite the lack of pending recommendation, the evaluation team deemed it critical to this evaluation given the focus of Phase 4 reviews on enforcement efforts and results in which jurisdiction is playing a key role. The paragraphs below thus provide an overview of U.S. jurisdiction in foreign bribery cases and how it has developed and been applied in practice in recent years.

(i) Territorial jurisdiction in foreign bribery cases

- Territorial Jurisdiction over Issuers and Domestic Concerns: The "interstate nexus"

213. U.S. and foreign issuers as well as domestic concerns are potentially subject to the FCPA's anti-bribery provisions even when acting outside the country because of the breadth of the interpretation of the territorial jurisdiction. Those entities as well as their officers, directors, employees, agents, or stockholders, who engage in a bribery scheme primarily outside U.S. territory, may indeed be prosecuted under the FCPA if they used the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official (15 U.S.C. §§ 78dd-1 (issuers), 78dd-2 (domestic concerns)). This includes trade, commerce, transportation, or communication among the states, or between any foreign country and a state (or between any state and any place or ship outside of the state). The FCPA does not require this "interstate nexus" element for non-U.S. nationals and businesses bribing in the United States or for U.S. nationals and businesses bribing abroad.[208]

214. The FCPA Resource Guide explains that the term also includes the intrastate use of any interstate means of communication, or any other interstate instrumentality. Placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce – as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.[209] The Guide provides that, as noted in former evaluations, there is no serious difficulty in meeting the "interstate nexus" requirement. This is confirmed by the level of enforcement of the FCPA against issuers and domestic concerns since 2012.

- Territorial Jurisdiction over Persons other than Issuers or Domestic Concerns, i.e. certain foreign nationals or entities

215. Persons other than issuers or domestic concerns are also subject to the FCPA's anti-bribery provisions because of the broad U.S. territorial jurisdiction. The FCPA indeed applies to the extent that, while within the territory of the United States, such entity "makes use of the mails or any means or instrumentality of interstate commerce" or engages in any "act in furtherance of" a corrupt payment (Title 15, U.S.C., Section 78dd-3(a) and (f)(1)). The FCPA Resource Guide indicates that, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may co-conspirators, even if they did not themselves attend the meeting. The United States indicates in its questionnaire responses that since 2012, there have been no changes or developments regarding the enforcement of the FCPA against those

[206]SEC Division of Enforcement (28 November 2017), Enforcement Manual.
[207]United States Phase 2 Report, para. 110 and United States Phase 3 Report, relevant section on the offence.
[208]United States Phase 2 Report, paras. 103-105.
[209]Gibson Dunn, 2019 Year-End FCPA Update, p. 11.

entities, nor is there any criteria for determining when to pursue such cases other than the Principles of Federal Prosecution of Business Organizations.[210]

216. The DOJ enforcement charts include 11 cases concluded against at least one legal person that was not an issuer or a domestic concern during the reporting period. Seven cases took place in parallel to SEC enforcement actions against an issuer who was either part of the same corporate group or had participated with the foreign non-issuer as part of the bribery scheme. Notably, these 7 cases are among the largest resolved by the DOJ, e.g. *Odebrecht, SBM, Keppel Offshore & Marine Ltd,* and *Société Générale*.

217. This broad basis for jurisdiction has given rise to many comments and discussions over the years. In the *United States v. JGC Corp.* case, the court approved a DPA with a Japanese national who had bribed Nigerian officials to obtain contracts.[211] Jurisdiction was established in particular based on the fact that wire transfers in furtherance of the scheme that were made from one bank to another were routed at some point through New York. In a settled enforcement action against *Magyar Telekom, Plc.* the transmission and storage of two e-mails on U.S. servers was deemed sufficient.[212] In a more recent case, *Airbus* entered into a DPA with the DOJ in connection to a criminal information charging the company with conspiracy to violate the anti-bribery provisions of the FCPA and other statutes. While Airbus is a global provider of civilian and military aircraft based in France, the DOJ's press release mentions as a basis for its jurisdiction that "In furtherance of the corrupt bribery scheme, Airbus employees and agents, among other things, sent emails while located in the United States and participated in and provided luxury travel to foreign officials within the United States."[213]

218. Because the vast majority of entities, in particular, resolve with the DOJ and SEC rather than face indictment, there is limited case law with respect to the court's interpretation of FCPA territorial jurisdiction. Nonetheless, several individual defendants charged with territorial jurisdiction have unsuccessfully contested the issue of jurisdiction in pre-trial motions.

(ii) Extra-Territorial Jurisdiction over Non-Issuers and Non-Domestic Concerns

219. In their questionnaire responses, the U.S. authorities emphasise that as an initial matter, the FCPA's anti-bribery provisions apply to any officer, director, employee, or agent of an issuer, domestic concern/person, or any stockholder thereof acting on behalf of such issuer or domestic concern/person. Thus, for example, a foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States. The U.S. authorities further explain that the Department of Justice has consistently used conspiracy and aiding and abetting (Title 18, U.S.C., Sections 2 and 371) to prosecute legal entities and natural persons that are not issuers or domestic concerns for bribing foreign officials, even where corrupt acts were not taken while in the territory of the United States.

220. One FCPA enforcement action, the *Hoskins case*, has sparked great interest because it has required the government to test its theories in court concerning the scope of U.S. jurisdiction in FCPA matters. In the *Hoskins case*, initially, the district court dismissed a charge against a foreign defendant based on a potentially broad theory of conspiracy liability in FCPA matters. That conspiracy charge would have enabled the defendant – a foreign national who was not alleged to have engaged in any misconduct while in the territory of the United States – to be held liable for conspiring with a U.S. domestic concern to violate the FCPA anti-bribery provision without proving that he could be held liable in his own right for violating the FCPA anti-bribery provisions. The district court reasoned that Mr. Hoskins could only be charged with conspiring with a U.S. domestic concern to violate the relevant FCPA anti-bribery provision if he fell under one of the FCPA's enumerated categories of persons (e.g. an employee, officer, director, or shareholder of the domestic concern).

[210] Justice Manual 9-28.000 Principles of Federal Prosecution of Business Organizations.
[211] *United States v. JGC Corp.*, No. 11 CR 260, (S.D. Tex. 6 April 2011).
[212] *United States v. Magyar Telekom, Plc*. (1:11CR00597), Information 2, 24, 26(c), 47 (E.D. Va. Dec. 29, 2011).
[213] DOJ News, 31 January 2020.

221. The Second Circuit affirmed the district court decision but also held that a foreign defendant who falls under one of the enumerated categories of persons in the FCPA anti-bribery provisions can be held liable for conspiracy to commit (or aiding and abetting a violation of) any violation of the anti-bribery provisions. Thus, it permitted the government to seek to prove that Mr. Hoskins was an "agent" of a U.S. domestic concern in order to hold him liable for conspiring with that domestic concern to violate the FCPA.[214] In November 2019, a jury found Mr. Hoskins guilty of FCPA violations because he acted as an agent of the U.S. subsidiary, i.e. a domestic concern. However, the judge granted his post-trial motion for acquittal on the seven FCPA conspiracy and substantive charges for which he had been convicted as, in particular, the Court found that the elements of control characterising an agency relationship (e.g. the right to hire or fire and the right to reassign) were not present between the U.S. subsidiary and Hoskins. This ruling, based on the specific facts of the case, may, if confirmed, limit the U.S. enforcement agencies' ability to commence proceedings against foreign nationals who do not engage in acts in furtherance of the foreign bribery scheme while in the territory of the United States. At the time of finalising this report, the DOJ had appealed this decision.

222. In contrast, a district court in the Seventh Circuit rejected the holding in *Hoskins*. That district court, in the *Firtash case*, [215] held that a defendant who does not fall under the enumerated categories of the FCPA anti-bribery provisions can still be guilty of conspiracy to violate (or aiding and abetting a violation of) the FCPA. This decision thus allowed the DOJ to continue to prosecute a foreign national who was not an employee, officer, or agent of any U.S. entity and who was not alleged to have committed any act in furtherance of the scheme while in the territory of the United States.[216]

223. During the on-site visit, academics noted the current trend to continue testing a number of government theories in court, citing in particular the *Hoskins case* as an example, and observing that boundaries to the currently broad interpretations, in particular with regard to the FCPA jurisdictional reach, may be set by courts. Notwithstanding future decisions, the use of alternative offences with broader jurisdictional reach, in particular the federal money laundering statutes, leaves the government with alternative possibilities to successfully prosecute non-issuers, non-domestic concerns and individuals who are not employed by such entities, even when they act entirely outside the United States.

(iii) Nationality jurisdiction in foreign bribery cases for U.S. issuers and domestic concerns

224. The FCPA establishes nationality jurisdiction over "issuers" and "any United States person" (U.S. companies or individuals) who may be subject to the anti-bribery provisions even if they act outside the United States, under a provision entitled "alternative jurisdiction", enacted in 1998 (Title 15, U.S.C., Section 78dd-1(g) and 78dd-2(i). Contrary to territorial jurisdiction, nationality jurisdiction does not require use of interstate commerce (e.g., wire, email, telephone call) for acts in furtherance of a corrupt payment to a foreign official. As a result, with respect to U.S. issuers and domestic concerns, the FCPA's anti-bribery provisions have extraterritorial jurisdiction, and as such, apply also to foreign bribery schemes devised and executed entirely outside of the U.S. territory.

225. At the time of the U.S. Phase 2 evaluation, the Working Group indicated that the U.S. authorities believed that the FCPA also covers acts by a U.S. agent on behalf of a domestic concern, i.e. a non-issuer, and acts by a U.S. person acting abroad on behalf of a foreign company.[217] It remained however unclear at that stage whether in practice the nationality jurisdiction established by the 1998 amendments to the FCPA would be interpreted as covering the two situations, as the United States had not yet brought prosecutions in such circumstances. The lead examiners noted this potential uncertainty and recommended that it should be kept under review as case law develops. The Working Group thus decided to follow-up "whether the current basis for nationality jurisdiction, as established by the 1998 amendments to the FCPA, is effective in the fight against bribery of foreign public officials". The issue was however not followed up in Phase 3.

[214] *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).
[215] *U.S. v. Firtash and Knapp*, 2019 WL 2568569 (N.D. Ill. June 21, 2019).
[216] *United States v. Firtash*, Memorandum Order and Opinion, 1:13-cr-00515 (N.D. Ill. 2019) (June 21) at page 22.
[217] United States Phase 2 Report, para. 110.

226. At the time of the U.S. Phase 2 Written Follow-up, the United States indicated that the DOJ had thus far brought only one case based on nationality jurisdiction. In *United States v. Giffen*, the indictment charged three counts of FCPA violations involving wholly extraterritorial conduct, i.e., transfers between foreign bank accounts in furtherance of unlawful payments to foreign officials. The defence in that case did not challenge the validity and application of the FCPA's nationality jurisdiction. After the on-site visit, the U.S. authorities indicated that they have brought charges under this theory (including cases that may have been brought under seal). They emphasised that the current basis for nationality jurisdiction is effective and that the reason why such charges are not brought more frequently is that most U.S. nationals use a U.S. wire in furtherance of the corrupt payment and do not act wholly outside the United States.

(iv) When several Parties to the Convention have jurisdiction for prosecution of the same case

227. Article 4.3 of the Convention provides that "When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution". The implementation of this article was not assessed in former evaluations of the United States and rarely assessed in other countries' evaluations. However, given the high level of enforcement of the U.S. FCPA, whether the United States consulted at the request of another Party concerning appropriate jurisdiction for prosecution has over time become a relevant topic for the Working Group.

228. In their questionnaire responses, the U.S. authorities indicate that in cases involving overlapping investigations, they would often discuss with the foreign authorities the various equities and prosecutorial resources available to determine which jurisdiction is the most appropriate for prosecution. The handling of competing jurisdiction over the same case has given rise to regular comments and analysis. In a recent article, U.S. lawyers and academics indicated that "Much has been written about the fact that a number of recent FCPA settlements involved European companies and many question whether foreign companies are specifically targeted by the DOJ."[218] They cited the fact that "As of January 2018, eight of the top ten FCPA enforcement actions of all time (based on assessed penalties) involved foreign corporations". As of February 2020, this had increased to nine of the top ten FCPA enforcement actions of all time. The above mentioned lawyers and academics further stated that "the reason has less to do with any policy or bias of the DOJ and more to do with the difference in timing of when companies became the subject to anti-bribery laws in their home country and the corresponding enhancements made to companies' compliance programs to prevent and detect potential corruption". This is in line with what the evaluation team consistently heard from law enforcement representatives as well as from lawyers and academics during the on-site visit.

229. The Phase 4 evaluation case data supports this interpretation. Among the 219 concluded supply-side enforcement actions against legal persons, 91 were against foreign issuers or other persons (42%), while 124 were against domestic issuers or concerns (57%).[219] On the other hand, the foreign entities paid nearly 72% of all fines imposed in the concluded actions. According to the United States, this seeming disparity, however, is explained by the fact that the foreign entities' bribery schemes were larger than the domestic entities' schemes. Despite their smaller number, the foreign entities were responsible for approximately 64% of the known bribe amounts and 69% of the known profits earned, as compared with 30% and 27%, respectively, for the more numerous domestic entities. As a result, the foreign entities' aggregate fines were 17% larger than the domestic entities' aggregate fines after taking into account the size of the bribes, but 1% lower after taking into account the illicit profits. While the evaluation team does not have visibility on the cases that the U.S. authorities investigated but did not bring to prosecution, the concluded resolutions do not demonstrate a bias against foreign entities either in the number of enforcement actions or in their results.

[218]University Paris 2 Panthéon-Assas, Assas International Law Review, RDIA n° 1 2018, Robert Luskin, partner at Paul Hastings LLP and Associate Professor at the Georgetown Law Center Lucy B. Jennings, associate at Paul Hastings LLP Foreign Corrupt Practices in U.S. Law.

[219]The nationality of the targets of 8 enforcement actions (5%) could not be determined.

230. Moreover, as emphasised by enforcement agencies' representatives during the on-site visit, whenever possible, in particular with cooperative jurisdictions where a non-trial resolution mechanism is available, they work with other Parties to the Convention to coordinate the resolution of foreign bribery cases. This is illustrated by the growing resolution of prominent foreign bribery cases such as the *Odebrecht, Rolls, Royce*, and *Société Générale* cases. Even in the absence of explicit policy on the implementation of Article 4.3 of the Convention and of international recognition of the *ne bis in idem* principle, practice shows that it is implemented on a case by case basis in a pragmatic manner. During the on-site visit, enforcement agencies representatives indicated that in the case foreign and U.S. authorities have jurisdiction, they would proceed with their investigation first and then decide the best way forward based on the foreign authority's handling of the case and whether there is a national interest for the United States.

231. The May 2018 Policy on Coordination of Corporate Resolution Penalties ("anti-piling on" policy), which directed DOJ attorneys to "consider the totality of fines, penalties, and/or forfeiture imposed by all [DOJ] components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result", is an important component in the increasingly coordinated resolution of foreign bribery cases and recognised as another factor to incentivise voluntary self-disclosure by corporate entities.[220]

Commentary

The lead examiners note that the Working Group's concerns in its prior evaluations regarding the ease with which territorial and nationality jurisdiction could be established over U.S. issuers and domestic concerns have been alleviated by the large number of U.S. enforcement actions against these entities. There is thus no difficulty in establishing territorial jurisdiction over issuers and domestic concerns based on the "interstate nexus".

Jurisdiction over persons other than issuers or domestic concerns, i.e. certain foreign nationals or entities, has also been regularly established, including through the broad U.S. territorial jurisdiction (15 U.S.C. § 78dd-3(a)). However, the lead examiners recommend that the Working Group follow up as case law develops on how complicity in FCPA violations, including aiding and abetting, is applied when foreign nationals or companies engage in wrongful conduct while outside the United States. In this context, the lead examiners recall that Article 4.4 specifies that every Party to the Convention "shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps".

Finally, the lead examiners commend the United States for the leading role of their enforcement agencies and their growing efforts to consult upon request with other Parties to the Convention, when more than one Party has jurisdiction over an alleged foreign bribery offence (Article 4.3 of the Convention). They also welcome the fact that, beyond the requirement under Article 4.3 of the Convention, the U.S. enforcement agencies are coordinating with other Parties to the Convention before being asked to consult.

(d) Statute of limitations for both natural and legal persons

232. The U.S. statute of limitations remains unchanged since Phase 3. Criminal and civil proceedings under the FCPA must be commenced within five years after the offence has been committed. Federal law allows the suspension of the statute of limitations by the DOJ for up to three years based on requests for evidence from abroad. The limitations period may thus be extended in some cases to 8 years.[221]

233. In Phase 3, the Working Group noted that "the five-year statute of limitations has led to some FCPA criminal charges being dropped or transferred to other countries (and that) this period for FCPA enforcement actions may no longer be adequate". The Working Group therefore recommended that "the United States ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to allow adequate investigation and prosecution" (recommendation 1). At the time of the U.S. Written Follow-up, this

[220]U.S. DOJ, Office of the Deputy Attorney General, Memorandum on Policy on Coordination of Corporate Resolution Penalties, 9 May 2018.
[221]United States Phase 3 Report, para. 36, referring to 18 U.S.C. §§ 3282, 3290 and 3292.

recommendation was considered fully implemented by the Working Group "because of the large volume of cases completed by U.S. prosecutors during the relevant period." The summary and conclusions to the Follow-up nevertheless noted that "because the United States had declined to bring criminal charges in some cases, in part due to the lack of admissible evidence obtained prior to the termination of the statute of limitations, the Working Group encourages the U.S. to consider increasing the length of the statute."[222] At that time, the United States had reported that the DOJ was "considering measures to extend the statute of limitations through possible legislative action to further ensure adequate time within which to investigate these complex international schemes." However, these measures have since not been pursued. The Working Group should thus re-assess whether the unchanged statute of limitations has proven adequate over time based on the longer experience of U.S. law enforcement agencies.

(i) Adequacy of the statute of limitations and practice of tolling agreements

234. In its questionnaire responses, the United States indicates that neither the DOJ nor the SEC maintain statistics on enforcement actions terminated due to the expiration of the statute of limitations. During the on-site visit, the SEC explained that an FCPA investigation typically lasts three to five years. Data shared by the United States with the evaluation team shows that the average time between the day the act ended and the case was resolved by the SEC is around 5 years.[223] In their questionnaire responses, the U.S. authorities acknowledge that the statute of limitations has at times limited their ability to investigate and prosecute historical conduct, and that it can pose challenges when the bribery schemes are complex, well-concealed, and involve multiple foreign jurisdictions. Enforcement practice suggests that several enforcement actions were terminated on this basis since Phase 3. For instance, in 2018, the SEC's civil suit against two former executives of Och-Ziff Capital Management Group was deemed statute-barred because it challenged transactions that took place between May 2007 and April 2011.[224]

235. Nonetheless, the U.S. authorities stress that the statute of limitations rarely impedes them from pursuing FCPA enforcement actions, because in the face of their considerable caseload, they prioritise the investigation of the most recent schemes that are usually easier to prove as evidence tends to become more unreliable and difficult to obtain over time. They also stress that the Corporate Enforcement Policy, by incentivising companies to report misconduct to the DOJ's attention when the company learns of the misconduct, allows the DOJ to begin its investigation earlier than if it learned of the misconduct through other means, which can be years later.

236. Additionally, the DOJ and SEC have been using various mechanisms to extend the 5-year limitation period. First, the DOJ regularly pursues foreign bribery actions under conspiracy charges. The statute of limitations for conspiracy does not start running until the last overt act by any conspirator. As a result, if the defendant does not withdraw from the conspiracy, the limitations period will not expire even if the defendant stopped playing a role in the scheme years before. This theory was already commonly used at the time of Phase 3 but the proportion of foreign bribery cases pursued under conspiracy charges has grown substantially with the enforcement increase since Phase 3. Second, the DOJ and SEC commonly conclude tolling agreements, under which alleged offenders agree to a suspension of the statute of limitations, leaving the authorities more time to conduct their investigations. Under these agreements, the two parties agree on the scope and length of the tolling agreement. During the on-site visit, the U.S. authorities explain that these agreements typically last one year, but parties can conclude several agreements in the course of the same proceeding. They also specified that tolling agreements are commonly used in proceedings against legal persons, but not individuals, who rarely agree to them.

[222]United States Phase 3 Follow-up Report, para. 3.

[223]As the Phase 4 case data only provided the years when the bribery scheme started and ended, the statute of limitations calculations are based on the assumption that the offence started on 30 June and ended on 31 December of the respective years. These assumed dates, which were chosen to be conservative in the amount of time that elapsed between the scheme and the enforcement action, were then compared against the date when charges were filed or, if none, when the resolution was reached.

[224] *SEC v. Cohen*, Memorandum & Order, 17-cv-00430, (E.D.N.Y. July 12, 2018).

237. In June 2020, the DOJ and SEC released a second edition of the FCPA Resource Guide, which provides that the DOJ would apply a six-year statute of limitations for criminal violations of the accounting provisions on the ground that those claims "are defined as 'securities fraud offense[s]' under 18 U.S.C. § 3301."[225] The Guide thereby sets forth that while criminal violations of the anti-bribery provisions must be charged within five years, under the accounting provisions, federal prosecutors have six years after the offense has ended to bring a case. By granting more time to prosecutors to carry out charges based on the FCPA accounting provisions, this clarification could help prosecutors address the challenges raised by the currently observed five-year limitation.

(ii) The five-year limitation period now also applies to disgorgement

238. In June 2017, the U.S. Supreme Court ruled in *Kokesh v. SEC* (*Kokesh*) that the SEC's disgorgement remedy is subject to the five-year statute of limitations.[226] Until then, the five-year limitation period applied to SEC actions seeking civil penalties, but did not prevent the SEC from seeking equitable remedies, such as an injunction or the disgorgement of ill-gotten gains, even for conducts pre-dating the five-year period.[227] As a result of *Kokesh*, the SEC's ability to seek disgorgement of ill-gotten profits is subject to the five-year limitation period, which means that proceeds of misconduct obtained by a wrongdoer outside the limitation period can no longer be sought in such actions.

239. The SEC explains that while no investigations were fully or partly terminated due to *Kokesh*, the ruling has become a factor in deciding whether to open or forego an enforcement action, and several cases were not opened as a consequence of the ruling. Public statements delivered by SEC officials on the impact of *Kokesh* also suggest that the impact has been and continues to be substantial. In November 2017, a few months after the ruling, Steven R. Peikin, Co-Director of the SEC Enforcement Division, made a public statement about enforcement of the FCPA by the SEC. He referred to the statute of limitations as "one of the principal challenges [the SEC] face[s]" and explained that "in many instances, by the time a foreign corruption matter hits our radar, the relevant conduct may already be aged. And because of their complexity and the need to collect evidence from abroad, FCPA investigations are often the cases that take the longest to develop". He also emphasised that "these limitations issues have only grown in the wake of the U.S. Supreme Court's recent decision in *Kokesh v. SEC*," as "*Kokesh* is a very significant decision that has already had an impact across many parts of our enforcement program. [I] expect it will have particular significance for our FCPA matters, where disgorgement is among the remedies typically sought."[228]

240. In their questionnaire responses, the U.S. authorities explain that the SEC has the possibility to impose other remedies that are not subject to the 5-year limitation, but it is unclear whether the SEC has used these possibilities in FCPA cases since the *Kokesh* ruling. In the 2017 above-mentioned statement, Steven R. Peikin said that "while the ultimate impact of *Kokesh* on SEC enforcement as a whole – and FCPA enforcement specifically – remains to be seen, we have no choice but to respond by redoubling our efforts to bring cases as quickly as possible." In addition to resolving cases more quickly, the SEC can strive to extend the terms of tolling agreements during the course of investigations. However, the SEC explained during the on-site visit that this would not allow them to recover all the profits that could have potentially been recovered before the *Kokesh* ruling. (The SEC and DOJ's capacity to recover ill-gotten gains through disgorgement is further discussed under section C.3.(c).)

[225] DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, Second edition, p.36.
[226] *Kokesh v. Securities and Exchange Commission* 137 S. Ct. 1635 (2017).
[227] DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p. 35.
[228] Steven R. Peikin (9 November 2017), "Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act", speech at New York University School of Law, New York, NY.

Commentary

The lead examiners note that while the five-year statute of limitations provides limited time to the DOJ and the SEC to conduct complex foreign bribery investigations, the U.S. authorities can rely on a number efficient mechanisms to extend the limitation period.

The lead examiners also note that the second edition of the FCPA Resource Guide, published in July 2020, provides that the accounting provisions of the FCPA carry a six-year limitation period as those claims "are defined as 'securities fraud offense[s]' under 18 U.S.C. § 3301".

In view of recent case law development (also further discussed under section C.3.(c)), they recommend that the Working Group follow up on whether the statute of limitations remains adequate to allow the recovery of ill-gotten gains in complex foreign bribery cases, in compliance with Article 3 of the Convention.

(e) Investigative techniques

(i) Overview

241. The main enforcing agencies of the FCPA have different enforcement tools. This reflects their different natures. As the agency responsible for enforcing U.S. federal criminal law, the DOJ has the authority to conduct a wide range of coercive measures, including covert investigative techniques. At the same time, it also has greater limitations on how it operates (e.g. grand jury secrecy applies). The SEC, as a regulatory body, is primary entrusted to ensure the stability of the capital market and to protect investors from fraud and other unlawful practices in the securities markets. It does not have the authority to use covert investigative techniques (e.g. wire taps). As a regulator, however, it may have more leeway to conduct its investigation.

(ii) SEC's investigative powers

242. According to the SEC, it seeks to develop facts of potential wrongdoing through various means, including making informal inquiries, interviewing witnesses, and examining financial or trade records. Once the Director of the Division of Enforcement has authorised a formal investigation, the SEC staff working on a matter are empowered to act as officers for the investigation. They can administer oaths, subpoena witnesses, take evidence, and require the production of documents. For example, the SEC can compel "any person" to file a "sworn written statement concerning all facts and circumstances of the matter under investigation". The SEC can compel witnesses and the production of records "from any place in the United States or any State". If the recipient does not comply, the SEC can seek a judicial order to enforce the requests. SEC can seek information about financial records of a customer of a financial institution without prior notice, through an *ex parte* proceeding in court. This can be done for example to preserve evidence from destruction or to prevent a flight risk.[229]

(iii) DOJ's investigative powers

243. For civil enforcement actions, the FCPA authorises the DOJ to subpoena witnesses, take evidence under oath, and compel the production of documents relevant to the investigation.[230] In addition, the DOJ and FBI have other powers derived from federal statute or other provisions for use in criminal matters. The use of these powers is also governed by internal DOJ regulations. Some of these investigative techniques are described below.

[229]SEC Division of Enforcement (28 November 2017), Enforcement Manual.
[230]15 U.S.C §§ 78dd-2(d)(2) & 78dd-3(d)(2). The DOJ's authorisation to compel witnesses and documents under the FCPA is formulated slightly differently than the provision for the SEC, but it is not clear whether this makes a material difference.

- Cooperating Witnesses

244. The United States credits the increased use of cooperating witnesses and informants as a major factor in bringing natural persons to trial.[231] In this regard, the DOJ has had success obtaining voluntary cooperation from intermediaries or foreign public officials to develop evidence against FCPA supply-side offenders. The United States may approach those involved in the scheme to see if they would be willing to cooperate with the investigation in exchange for leniency or even immunity. This occurred, for example, in the *Alstom* (2014) and *Haiti Telecom* (2011) cases, although it seems these leads occurred after the matters were already open.[232]

- Subpoenas for documents

245. Under Federal Rules of Criminal Procedure, either party may request a subpoena to a witness to produce documents or to attend a hearing or trial.[233] Under the Stored Communications Act, prosecutors can also seek a warrant to obtain records from U.S.-based telecommunications companies wherever the records may be stored. Under the Right to Financial Privacy Act (1978), law enforcement agencies must follow particular procedures to obtain "financial records" of any "customer" of a financial institution. If properly followed, the authorities can obtain the records without alerting the target of the investigation. Finally, certain DOJ personnel can seek tax returns in investigating and bringing non-tax criminal cases and civil forfeiture actions, but only with permission from a court. Under MLA treaties, U.S. authorities must attempt to obtain records located abroad through MLA requests before issuing subpoenas to persons or entities in the United States to produce such records. Those entities or persons may of course voluntarily provide the records.

- Search warrants

246. Under Rule 41 of the Federal Rules of Criminal Procedure, a federal law enforcement officer or a government attorney may seek a warrant from a magistrate judge. The officer or attorney must provide an affidavit or give testimony describing the facts supporting the application. The magistrate judge must issue the warrant if there is probable cause to search for and seize a person to be arrested or property that is evidence of crime, the fruit of a crime, or intended to be used or has been used for committing a crime. In general, the U.S. authorities are not supposed to use search warrants to obtain records from third parties who are not suspects unless using a subpoena or other means would jeopardise the availability or use of the material.

- Wiretapping or capturing oral communications

247. The Omnibus Crime Control and Safe Streets Act (1968) provides the authority for law enforcement officials to obtain warrants to wiretap or intercept communications as well as regulate the disclosure and use of such communications. Under the Act, the FBI or any other federal agency responsible for investigating an offence may seek a judicial order approving the interception of wire or oral communications. While the FCPA does not appear to be listed, several related offences are cited, including the Travel Act 18 U.S.C § 1952, wire fraud § 1343, and money laundering §§ 1956, 1957. In contrast, any government attorney can authorise the application for a judicial order to seize electronic communications concerning any federal felony. Under DOJ regulations, however, attorneys are still required to get prior approval from superiors for most such seizures.

248. Upon application, the judge may issue an order authorising the intercept of wire, oral, or electronic communications within the court's jurisdiction (including the United States for mobile devices), if the judge finds (1) probable cause that a listed offence has been committed or is about to occur, (2) probable cause that the interception will capture communications about that offence, and that (3) "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous". The authorisation is limited in time, and the authorities must periodically keep the judge informed about the

[231]OECD (2017), *The Detection of Foreign Bribery*, p. 50.
[232]See OECD (2017), *The Detection of Foreign Bribery*, p. 48.
[233]Fed. R. Crim. Pro. 17.

implementation of the wiretap authorisation. If evidence of other crimes arises, the evidence is admissible but the authorities must seek another order to have the scope of the wiretap expanded as soon as practicable.[234]

249. Finally, the government can intercept communications if a law enforcement agent is a participant or if one of the participants gives permission. In the *Baptiste* case, the defendant was recorded by the FBI proposing to funnel payments to a Haitian official through his charity. The complaint also cites intercepted telephone calls between Baptiste and a Haitian official.[235]

- Undercover operations

250. Law enforcement agents may, after obtaining all necessary approvals, pose undercover as criminal actors to reveal illegal behaviour by criminal suspects. For instance, Joseph Baptiste and Roger Richard Boncy were charged with colluding with two undercover FBI agents to bribe Haitian officials to obtain a port development project. Baptiste and Boncy allegedly embezzled the money. Though it is subject to appeal, they were convicted at trial in June 2019 of FCPA violations and other counts. Similarly, the U.S. authorities may ask cooperating witnesses to serve as an undercover operative under the authorities' direction. They can either make in-person audio or video recordings or participate in monitored phone conversations.[236]

- Access to Beneficial Ownership Information

251. With respect to beneficial ownership information in foreign bribery cases, the main development since Phase 3 is the entry into effect, in May 2018, of FinCEN's Rule on Beneficial Ownership Requirements for Legal Entity Customers, also known as Customer Due Diligence rule (CDD rule). It requires that covered financial institutions create and preserve written procedures to identify and verify the beneficial ownership of legal entity customers at the time a new account is opened and upon other defined occurrences.[237] Beneficial owners are defined as anyone with 25% of more of the shares of a legal entity or who has control over it.

252. In their questionnaire responses, the U.S. authorities report that they do not have problems accessing beneficial ownership information about legal entities or other legal arrangements (e.g. trusts) in the United States for the purpose of foreign bribery investigations. However, during the on-site visit, law enforcement representatives indicated that on occasion, they have difficulty accessing such information in a timely manner, in particular due to the requirement for investigators to physically visit individual registry offices in person to obtain information. This coincides with the FBI's testimony before Congress that the current state-by-state system for maintaining records about companies created difficulties for investigations by limiting the collection sufficient beneficial ownership in a centralised place.[238] The U.S. authorities did report more difficulty obtaining such information outside the United States, especially when they do not have strong MLA relationships with the countries concerned.

253. A draft law adopted by the House of Representatives and referred to the Senate in October 2019 would increase transparency of beneficial ownership. If passed into law, the Corporate Transparency Act of 2019 (H.R. 2513) would, require any applicant to create a corporation or a limited liability company to also submit and regularly update information about the entity's beneficial owners. Under the proposed legislation, the information would only be available to financial institutions (with the customer's consent) and to law enforcement officials. Furthermore, the 2020 National Strategy for Combating Terrorist and Other Illicit

[234]See DOJ Criminal Resource Manual, 27-31.
[235]DOJ News, 29 August 2017.
[236]OECD (2017), *The Detection of Foreign Bribery*, p. 50.
[237]FinCEN, *Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions*. See also: FATF (March 2020), *United States: 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating*, FATF, Paris, p.2.
[238]Steven M. D'Antuono, Acting Deputy Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation, Statement before the Senate Banking, Housing, and Urban Affairs Committee (21 May 2019), https://www.fbi.gov/news/testimony/combating-illicit-financing-by-anonymous-shell-companies.

Financing, issued in February 2020 by the Department of Treasury, cites the collection of beneficial ownership information at the time of the company's formation and after ownership changes as a priority measure. It also indicates that the government is working with Congress to adopt the Corporate Transparency Act and other proposals to enhance law enforcement capacities to obtain beneficial ownership information.[239]

Commentary

The lead examiners note with satisfaction that the U.S. enforcement authorities have access to a broad range of investigative means, which is critical to successfully pursue enforcement actions. The lead examiners recommend that the Working Group follow-up on how the United States facilitates access by law enforcement of beneficial ownership information in a timely manner for foreign bribery investigations.

B.5. Concluding a Foreign Bribery Case with both natural and legal persons

(a) Grounds for commencing and terminating an enforcement action

254. Whether and how the DOJ commences, declines, or otherwise resolves a FCPA matter is guided by the Principles of Federal Prosecution in the case of individuals,[240] and the Principles of Federal Prosecution of Business Organizations in the case of companies.[241]

255. The Principles of Federal Prosecution provide that prosecutors should recommend or commence federal prosecution if the putative defendant's conduct constitutes a federal offense and the admissible evidence will probably be sufficient to obtain and sustain a conviction unless (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) an adequate non-criminal alternative to prosecution exists. In assessing the existence of a substantial federal interest, the prosecutor is advised to "weigh all relevant considerations," including the nature and seriousness of the offense; the deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the person is convicted.

256. The Principles of Federal Prosecution of Business Organizations provide guidance on whether and how the DOJ commences, declines, or otherwise resolves a FCPA enforcement matter with respect to legal entities. Prosecutors should consider 10 factors when determining whether and how to resolve a corporate criminal matter, including which enforcement vehicle to use, specifically:

- The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- The corporation's willingness to cooperate, including as to potential wrongdoing by its agents;
- The adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision;
- The corporation's timely and voluntary disclosure of wrongdoing;
- The corporation's remedial actions, including, but not limited to, 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;

[239] U.S. Dept of the Treasury 2020 National Strategy for Combating Terrorist and Other Illicit Financing, p. 40.
[240] Justice Manual 9-27.000 Principles of Federal Prosecution.
[241] Justice Manual 9-28.000 Principles of Federal Prosecution of Business Organizations.

- 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;
- The adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and
- The adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

257. The FCPA Resource Guide also emphasises that "Pursuant to these guidelines, DOJ has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence. To protect the privacy rights and other interests of the uncharged and other potentially interested parties, DOJ has a long-standing policy not to provide, without the party's consent, non-public information on matters it has declined to prosecute. […] there are rare occasions in which, in conjunction with the public filing of charges against an individual, it is appropriate to disclose that a company is not also being prosecuted".[242] Prosecutors met during the on-site visit explained that in a foreign bribery case, they are guided by the DOJ's Principles of Prosecution of Business Organizations and would decline to take action in various situations, including: insufficient evidence; legal impediment; referral to another jurisdiction; and a *de minimis* offence. Following the on-site visit, the U.S. authorities indicated that the DOJ and SEC close or decline up to 30 FCPA-related cases each year.

258. As explained under section B.4.(c), the initiation of an enforcement action by a foreign counterpart can constitute ground to forego an FCPA action. In some instances, the United States has deferred to foreign authorities as to certain individuals and/or corporate entities. The United States gives the example of the *case of Guralp Systems* (a U.K. company), in which the DOJ prosecuted the foreign officials who laundered the bribe money through the United States, but deferred to the Serious Fraud Office to prosecute the company and its employees. In this particular instance, the case against the company was resolved under the CEP,[243] but the United States contended that authorities have done this in a number of other cases that are not public.

259. The SEC may decline to take enforcement action against both individuals and companies based on the facts and circumstances present. This applies, for example, when the conduct was not egregious, the company fully cooperated, and the company identified and remediated the misconduct quickly. SEC Enforcement Division policy is to notify individuals and entities at the earliest opportunity when the staff has determined not to recommend an enforcement action against them to the Commission. This notification takes the form of a termination letter. Information on matters that are declined is not published.

(b) Trial and Non Trial Resolutions

260. Between the entry into force of the Convention and June 2018, 96% of foreign bribery cases in the United States were resolved with a non-trial resolution instrument.[244] The country's high volume of concluded cases is largely attributed to this practice. Some of the advantages non-trial resolutions have over trial resolution are that they incentivise voluntary self-disclosure of foreign bribery and facilitate the resolution of complex cases requiring long investigations before the limitations period expires. These non-trial resolutions have also been instrumental in the resolution of prominent multi-jurisdictional cases, as "one recognised advantage that resolutions have over trials is that multi-jurisdictional cases can be resolved between several authorities at the same time, giving both prosecution authorities and companies some certainty in the outcome and in particular the amount of the combined financial penalty".[245] The United States has so far played the leading role globally in the resolution of multi-jurisdictional foreign bribery cases.

[242]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p. 75.
[243]In re: Guralp Systems Limited, 20 August 2018.
[244]OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, p.13.
[245]OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, p. 14.

(i) Range of DOJ resolutions available in foreign bribery cases

- Trial resolutions

261. The number of trial resolutions against natural persons have increased in the past years. Between September 2010 and July 2019, the DOJ has laid charges against 173 natural persons in supply side FCPA matters, out of which 116 were resolved with a plea agreement or some other non-trial resolution (e.g. a civil consent judgment), and 57 were either pending or concluded through trial. In 7 of the 15 cases resolved in trial, the charges were laid in or after January 2016. Several cases against natural persons were resolved at trial recently, including in prominent cases. These include trials against Mark Lambert (2019) in the *Transport Logistics Inc. case*, [246] and Ng Lap Seng (2017) in connection with the bribery of UN officials. Proceedings are ongoing respectively against Lawrence Hoskins, as part of the *Alstom* case[247] as well as Roger Richard Boncy and Joseph Baptiste, in a case known as the *Haitian bribery case*,[248]

262. Some commentators view the increase of trial resolution as the corollary to the DOJ's policy to focus its enforcement efforts on individuals.[249] In part because of the increased number of FCPA prosecutions recently, there has been an increase in court rulings relating to the statute. Contrary to other financial crimes statutes, the DOJ's implementation of the FCPA was very rarely tested in court until fairly recently. Several commentators have stressed that resolution through non-trial instruments, including plea deals, deprive courts from the possibility to clarify key elements of the FCPA, in particular jurisdiction. The increase of jury trial resolutions could thus be an opportunity for Courts to examine the DOJ's interpretation and related implementation of the FCPA.

- Plea agreements

263. Both natural and legal persons can conclude a plea agreement with enforcement authorities. While this form of resolution is rare for legal persons, resolutions with individuals generally take the form of a plea agreement. According to the case data provided for the Phase 4 evaluation, 91% of the criminal resolutions against natural persons were resolved with a plea agreement. When a resolution cannot be reached, the case may proceed to trial.[250] The Principles of Federal Prosecution set out the considerations to be weighed when deciding whether to enter into a plea agreement with an individual defendant.[251]

264. Under a plea agreement, the defendant can reach an agreement on the charges brought as well as the sanctions that will be sought. The Sentencing Guidelines[252] allow the United States to file a pleading with the sentencing court, which recommends that the court depart below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another.[253]

- DOJ Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)

265. The Principles for Federal Prosecution of Business Organisations provide that: "in certain instances, it may be appropriate to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation."[254]

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[246] *United States of America v. Mark Lambert* (18-CR-00012-TDC), 22 November 2019.
[247] *United States of America v. Hoskins*, (16-1010), 24 August 2018.
[248] DOJ News, 20 June 2019. In March 2020, after Boncy and Baptiste had been convicted by a jury at trial, a federal judge ordered new trials for the two defendants, after finding that one of their lawyers failed to provide effective counsel.
[249] See for instance analysis law firms LinkLaters and Gibson Dunn.
[250] DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p.74.
[251] Justice Manual 9-27.420 – Plea Agreements – Considerations To Be Weighed.
[252] U.S. Sentencing Commission (1 November 2018), 2018 Guidelines Manual.
[253] Justice Manual 9-27.400 - Plea Agreements Generally.
[254] Justice Manual 9-28.000 Principles of Federal Prosecution of Business Organizations.

266. Under a DPA, the DOJ files a charging document with the court, but it simultaneously requests that the prosecution be deferred, that is, postponed, for the purpose of allowing the company to demonstrate its good conduct. DPAs generally require a defendant to agree to pay a monetary penalty, waive the statute of limitations, cooperate with the government, admit the relevant facts, and enter into certain compliance and remediation commitments, potentially including a corporate compliance monitor. DPAs describe the company's conduct, cooperation, and remediation, if any, and provide a calculation of the penalty pursuant to the U.S. Sentencing Guidelines. If the company successfully completes the term of the agreement (typically three years), the DOJ will then move to dismiss the filed charges.[255]

267. Under an NPA, the DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA. Unlike a DPA, an NPA is not filed in court. In circumstances where an NPA is concluded with a company for FCPA-related offenses, it is made available to the public on the DOJ's website. The requirements to enter an NPA are similar to those of a DPA. If the company complies with the agreement throughout its term, DOJ does not file criminal charges. The Principles of Federal Prosecution provide the possibility for the DOJ to dispose of a matter against a natural person with an NPA. The U.S. authorities explained that the DOJ does not enter into resolutions of any kind (NPAs, DPAs, or guilty pleas) where there is insufficient evidence to prove the case beyond a reasonable doubt at trial.

- DOJ Declinations with disgorgement

268. With the CEP**,** the DOJ introduced a new *de facto* non-trial resolution. A declination with disgorgement is accorded to a company that voluntary self-discloses, cooperates with the investigation and fully and timely remediates the offence, as per the definition of such behaviours provided in the policy. The CEP marks a clear distinction between declinations with disgorgement and "regular" declinations by establishing that "a declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution".[256] In practice, CEP declinations are fundamentally different from regular declinations, as they derive from the DOJ's discretion to decline prosecution based on the company's voluntary disclosure, cooperation and remediation, even though a case would have otherwise been brought. As with NPAs, companies are not charged. There is in fact little difference between the two instruments, besides the fact that under an NPA, companies have to pay a fine. Similar to NPAs, charging documents are not filed with the court, but unlike NPAs, there is not a three-year term for a CEP declination and a number of obligations (such as cooperation, reporting, and compliance obligations) are not included. In fact, the only obligation imposed for CEP declinations is the disgorgement of ill-gotten gains. During the on-site visit, private sector panellists and lawyers unanimously agreed that in order to limit reputational damage and collateral impacts, companies would much rather agree to a declination with disgorgement than risk being sanctioned through an NPA or DPA.

(ii) Range of SEC resolutions available in foreign bribery cases

269. The SEC Enforcement Division has four options to resolve FCPA matters: civil actions, administrative actions, DPA and NPA.[257] Under a civil action, the SEC files a civil complaint with a U.S. District Court and asks the court for a sanction or remedy. Both parties may also reach an agreement, in which case the agreement is subject to judicial approval. Administrative actions are brought by the SEC's Enforcement Division and litigated before an SEC administrative law judge (ALJ). The ALJ's decision is subject to appeal directly to the SEC itself, and the Commission's decision is in turn subject to review by a U.S. Court of Appeals. If both parties reach an agreement, the Commission approves the agreement and administrative order. Whether the

[255]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p. 74.
[256] USAM 9-47.120 - FCPA Corporate Enforcement Policy.

[257]Information in this section was provided by the United States in support of the Working Group study on non-trial resolutions: OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions*.

Commission decides to bring a case in federal court or within the SEC before an ALJ may depend upon various factors.

270. Under an SEC DPA, the SEC agrees to forego an enforcement action against an individual or company that agrees to a certain number of conditions, including cooperating with the investigation. DPAs must be approved by the Commission, and they are published on the SEC's website. The term of a DPA cannot exceed five years. If the agreement is violated during the period of deferred prosecution, SEC staff may recommend an enforcement action to the Commission against the individual or company for the original misconduct as well as any additional misconduct. Under an NPA, the SEC will not pursue an enforcement action against the individual or company if they agree, among other things, to: (1) cooperate truthfully and fully in SEC's investigation and related enforcement actions; and (2) comply, under certain circumstances, with express undertakings. If the agreement is violated, SEC staff retains its ability to recommend an enforcement action to the Commission against the individual or company. NPAs must be approved by the Commission, and they are made available on the Commission's website unless the Commission directs otherwise.[258]

(iii) Transparency, guidance and oversight of non-trial resolutions

- Guidance and transparency in the choice of non-trial resolution

271. As detailed above, the CEP provides guidance on the circumstances when the DOJ will use declinations with disgorgement. The DOJ prosecutors met during the on-site visit emphasised that they need to keep a margin of discretion to select enforcement instruments on a case-by-case basis. Further, they believe that concluded NTRs also inform practitioners about the rationale and practice for using NTRs. Non-government stakeholders met during the visit confirmed that the publication of detailed statement of facts and factors taken into account to determine the resolution instrument is a very helpful source of guidance to design compliance programs and understand what is expected from them in terms of voluntary disclosure, cooperation and remediation of the offence.

272. Indeed, DPAs, NPAs and declinations with disgorgement are published on the FCPA website. Statements of facts of DPAs and NPAs as well as the agreements themselves are provided, along with mitigating and aggravating factors in each resolution. Implementing a Phase 3 recommendation, the DOJ has thus continued its already most welcomed efforts to make public in each case in which a DPA or NPA is used, more detailed reasons on the choice of a particular type of agreement; the choice of the agreement's terms and duration; and the basis for imposing monitors.[259] Plea agreements are also published on the DOJ website, unless such agreements were filed confidentially (under seal) to protect the safety of cooperating witnesses or the integrity of the investigation. Other Parties to the Convention have regularly been invited by the Working Group to follow this good practice in the course of their own evaluations.

- Oversight of non-trial resolutions

273. Under the DOJ's Manual for prosecutors, the Deputy Attorney General must be notified before certain non-trial resolutions may be concluded, including those involving a monetary component of over USD 200 million. Judicial oversight varies according to NTRs. In plea agreements, judges have the authority to reject the agreement and have to check the factual basis of the indictment. In DPAs, final agreements are filed in court. NPAs and Declinations with disgorgement are a contract between the government and the putative offender. As such, they are not filed in court, and are thus not subject to judicial review.

274. Some commentators consider that DPAs, which were historically the most frequently used instrument against legal persons, are subject to insufficient judicial review. They argue that in practice, court "rubber

[258]See SEC Enforcement Manual, https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[259]Phase 3 recommendation 3b that was deemed fully implemented.

stamps" DPAs, and stress that "as a result, the boundaries of the laws concerned are not tested and there is scope for abuse of power".[260]

275. Since Phase 3, case law developments have heightened these concerns. In April 2016, in the *Fokker case*, a circuit court held in a trade sanction regulation case that, to preserve "the Executive's long-settled primacy over charging," a court is not authorised to reject a DPA based on a finding that the "charging decisions" and "conditions agreed to in the DPA" are inadequate.[261] Since then, lower courts, both within and without the D.C. circuit stood by this finding. One commentator considers that "by ostensibly precluding judicial review of a DPA's negotiated terms, the D.C. Circuit overcorrected and reinforced the executive branch's unchecked discretion over DPAs by reassuring prosecutors that future courts will rubber stamp such agreements".[262] During the on-site visit, the absence of oversight did not give rise to specific criticism from panellists.

Commentary

The lead examiners acknowledge that non-trial resolutions are an important contributory factor to the U.S. high volume of concluded cases through the better detection of foreign bribery and because it allows the U.S. authorities to address enforcement challenges, in particular complex investigation and statute of limitations. They commend the United States for the pragmatic development – including with the recent declinations with disgorgement – and use of these instruments, which have been instrumental in the resolution of prominent multi-jurisdictional cases in which the United States have played a leading role.

They also welcome the recent trend to see more cases also resolved at trial, thus allowing courts to clarify key elements of the FCPA and to pronounce on some of the DOJ's interpretation and related implementation of the FCPA, which had so far not been tested in court.

The lead examiners commend the United States for publishing non-trial resolutions and for the increased level of details that they now provide, including on fact patterns and the grounds for choosing the resolution avenue. Published resolutions are a valuable source of guidance for companies and their advisers, in particular to design adequate compliance programmes. They recommend that the Working Group identify this as a good practice, and continue to encourage other Parties to the Convention to follow a similar approach.

(c) Article 5 safeguards in FCPA prosecutions

276. Under Article 5 of the Convention, the "[i]nvestigation and prosecution of the bribery of a foreign official shall […] not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved". In Phase 3, the Working Group primarily analysed Article 5 from the perspective of whether the DOJ's criteria for charging companies could lead prosecutors to consider U.S. national economic interests when making FCPA enforcement decisions. It concluded that the criteria did not encourage enforcement based on U.S. economic interests, especially as the criteria would be applied equally to FCPA actions taken against U.S. and foreign entities.[263] Furthermore, the Working Group observed that while national security interests could halt prosecutions, the United States had "safeguards" in place to prevent abuses, such as requiring high-level officials to authorise a declination on national security grounds and reporting the decision to Congress.[264]

277. During the Phase 4 evaluation on-site visit, a number of participants in various panels expressed Article 5 concerns about the DOJ's "China Initiative"[265] because it focuses on China and references the FCPA. After examining the issue, however, the Lead Examiners concluded that the China Initiative does not implicate Article

[260]See for instance: Corruption Watch (March 2016), *Out Of Court, Out Of Mind: do deferred prosecution agreements and corporate settlements fail to deter overseas corruption?*.
[261]United States v. Fokker Servs. B.V. - 422 U.S. App. D.C. 65, 818 F.3d 733 (2016).
[262]Case note, "*United States v. Fokker Services B.V.*", 130 Harv. L. Rev. 1048 (2017).
[263]United States Phase 3 Report, p. 22.
[264]United States Phase 3 Report, paras. 61-62.
[265]DOJ, "Department of Justice China Initiative Fact Sheet" (last updated 21 Sept. 2020).

5 because the China Initiative requires the DOJ to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses" so that it can report such cases, but does not require the DOJ to initiate, investigate, or prosecute such cases. In addition, even the participants that raised the concerns stressed that they did not believe the DOJ or SEC would initiate, investigate, or prosecute cases for improper purposes. For its part, the DOJ representatives confirmed that the China Initiative does not in any way influence decisions to investigate or prosecute foreign bribery. Based on this information and the United States' strong track record in enforcing the FCPA, the Working Group does not consider that the China Initiative implicates Article 5 concerns.

278. In addition, the evaluation team considered the role that political appointees can play in supervising career prosecutors in specific matters. Under the DOJ's policy, the Deputy Attorney General, a political appointee, must be notified before the DOJ reaches a resolution that involves a monetary component of at least USD 200 million, sensitive or novel legal or policy issues, or sensitive or novel remedies.[266] In two recent cases that do not involve the FCPA, career prosecutors resigned from the prosecutions of two politically connected individuals, with at least one prosecutor alleging that he believed that the proposed sentencing recommendations in one case were revised by politically appointed prosecutors because of the defendant's political connections.[267] Not having access to the actual files, the evaluation team cannot make a determination about how these non-FCPA matters have been handled. However, based on the information gathered during the Phase 4 evaluation, there is no substantiated basis for concern in this regard with respect to FCPA matters. The Working Group recognises that the United States has a long and consistent track record of FCPA enforcement and that the various stakeholders with whom they met during the on-site visit maintained that FCPA-related enforcement decisions have not been made for improper reasons prohibited by Article 5.

279. During the on-site visit, the DOJ officials stressed that they have internal review procedures to prevent individual prosecutors from allowing improper considerations from influencing decisions to commence or terminate an enforcement action. The decision to commence or terminate an enforcement action lies with career prosecutors. However, political appointees, such as the head of the Criminal Division, who is confirmed by the Senate have the authority to overrule the career prosecutors. It is not clear whether the political appointees' reasons for overruling the career prosecutors in a particular case are documented. As in Phase 3, the U.S. authorities stressed that if a supervisor, including a political appointee, believed that the collateral consequences of a conviction would be too light or too severe, the matter would be discussed further with all relevant decision-makers, including the line prosecutors, and on rare occasions might result in a different type of enforcement action.[268] Finally, as in Phase 3, they also reported that politically appointed officials have never sought to improperly influence an FCPA enforcement decision. If that were to occur, they believed that the prosecutors or enforcement staff involved would likely report any impropriety or resign.

280. For their part, the SEC enforcers reported that they did not need approval to commence investigations. The SEC Commissioners, who are not removable at will, however, ultimately have to decide whether the SEC will bring an enforcement action. Furthermore, the Commission's decisions are recorded even though the decision is non-public. According to the United States, the Commission's files reflect no instance in which the Commissioners have ever declined to authorise an FCPA investigation.

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[266] Justice Manual 1-14.000 - Notice to Deputy Attorney General Required for Certain Criminal and Affirmative Civil Resolutions, under (A).

[267] Following the on-site visit, certain developments in non-FCPA cases highlighted the fact that senior DOJ leadership can overrule line prosecutors' decisions either to recommend a lower sentence or to seek to dismiss charges against a defendant who pleaded guilty. *See* David Shortell, "All 4 federal prosecutors quit Stone case after DOJ overrules prosecutors on sentencing request," CNN (12 Feb. 2020); Spencer Hsu et al., "Justice Dept. moves to drop case against Michael Flynn," Washington Post (8 May 2020); Jeremy Herb, "Ex-Stone prosecutor says Stone treated differently 'because of his relationship to the President,'" CNN (24 June 2020).

[268] *See* United States Phase 3 report para. 115 ("If a company does not agree with the settlement decision, it may informally appeal the decision to the Assistant Attorney General.").

281. Academics, private sector lawyers, and civil society concurred that the attorneys currently in the FCPA units in the DOJ and SEC were committed professionals with high integrity. They did not believe that political considerations had ever influenced FCPA enforcement, and they agreed that there would have been resignations or reports if any political pressure had been exerted. Still, they maintained that the DOJ's China Initiative was in tension with Article 5 considerations. Certain non-governmental participants believed that there were no real institutional safeguards to prevent Article 5 considerations from influencing decisions beyond the integrity of the personnel involved. Indeed, following the on-site visit, career prosecutors withdrew from matters or even resigned from the DOJ after senior leadership reportedly reversed decisions in two non-FCPA cases.[269] The fact that no such withdrawals or resignations have been reported in any FCPA matter lends credence to the views of both government and non-government on-site participants that FCPA enforcement has not been subject to political interference or otherwise affected by improper considerations by politically appointed prosecutors.

Commentary

Based on the information gathered during the Phase 4 evaluation, the lead examiners emphasise that they have found no basis to consider that any FCPA decisions have been made for improper reasons. They recognise that the United States has a long and consistent track record of FCPA enforcement across successive phases of WGB evaluations and that the various stakeholders with whom they met during the on-site visit maintained that FCPA-related enforcement decisions have not been made for improper reasons prohibited by Article 5.

B.6. International Cooperation, Mutual Legal Assistance and Extradition in Foreign Bribery Cases

(a) Overview of mutual legal assistance framework

282. In Phase 3, the United States reported that it was party to 80 bilateral MLA treaties in criminal matters and 133 extradition treaties. Additionally, it was party to several multilateral instruments that could form a basis for requesting assistance in connection with foreign bribery matters, including the UNCAC and the OECD Anti-Bribery Convention. The United States also made clear that it can provide assistance even when there is no treaty.[270] The Working Group did not have any recommendations to the United States concerning MLA, but observed that all countries can face challenges in obtaining assistance in foreign bribery cases.

283. In Phase 4, the United States reports that it has MLA treaties or instruments with approximately 80 states. It also has approximately 130 extradition treaties and arrangements. Given the broad coverage of multilateral instruments like the UNCAC, the U.S. legal framework for MLA is roughly comparable to what it was at the time of Phase 3.

284. The SEC has made a concerted effort to develop relationships with other securities regulators around the world to ensure that it can protect investors from transnational fraud or other risks in a global economy. For this reason, the SEC has developed an international cooperation framework, including memoranda of understanding with partner regulators. Under the Securities Exchange Act of 1934, the SEC can provide assistance to foreign counterparts even without proof of dual criminality.[271] In addition, the SEC has at least 20 bilateral arrangements with foreign regulators for enforcement matters and it is also a signatory to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of

[269]Following the on-site visit, certain developments in non-FCPA cases highlighted the fact that senior DOJ leadership can overrule line prosecutors' decisions either to recommend a lower sentence or to seek to dismiss charges against a defendant who pleaded guilty. *See* David Shortell, "All 4 federal prosecutors quit Stone case after DOJ overrules prosecutors on sentencing request," CNN (12 Feb. 2020); Spencer Hsu et al., "Justice Dept. moves to drop case against Michael Flynn," Washington Post (8 May 2020)..

[270]United States Phase 3 Report, para. 195.

[271]See 15 U.S.C. § 78u(a)(2).

Information (MMOU), which facilitates assistance among over 100 securities regulators.[272] The SEC is also a signatory to the Enhanced MMOU.[273]

(b) U.S. mutual legal assistance in practice

(i) Incoming requests

285. In Phase 3, the United States reported granting 24 of 31 MLA requests between July 2002 and March 2010. The others were either withdrawn or refused because the requesting state did not provide sufficient supporting information or the evidence was not available in the United States.[274] In Phase 4, the United States reported that it has received 16 incoming requests since 2013 that were identified as being related to the FCPA. Of these requests, the United States granted 9 in full, 2 partly, and closed the others either because the foreign authority withdrew the request or did not provide sufficient information to execute the request, and/or the evidence sought did not have a clear connection with the crimes under investigation. The United States reported that it received a total of 441 requests during the same period tied to "bribery" or "official" corruption, of which 306 requests were fully or partly granted. In 2017, the DOJ announced that it had seen a 147% increase in incoming MLA from foreign counterparts seeking to support foreign bribery and corruption investigations.[275] This statistic corroborates the increase in enforcement activity in fighting foreign bribery among the other Parties to the Convention.

286. For Phase 4 evaluations, the Secretariat has conducted surveys of MLA practice among the other Parties to the Convention. Seven parties responded to the survey concerning U.S. MLA practice, with six reporting that they had had relevant MLA experience in the past five years. Overall, the Parties reported that they have good interactions with their U.S. counterparts, with most requests being fulfilled at least in part. One respondent praised the U.S. central authority for creating teams based on geographic areas as well as certain specialised subject matters, such as electronic or banking records, in order to better process requests.[276] The survey respondent believed that this change had helped reduce the time needed to execute requests as the components of a given MLA request could be processed in parallel. Nonetheless, some countries reported long delays to obtain assistance, with one country reporting that it took over two years. Certain countries also reported difficulties obtaining electronic communications from service providers.

287. During the on-site visit, however, the United States authorities explained that requests sometimes cannot be executed immediately because the requesting country does not provide sufficient information to justify execution under U.S. law. In addition, the U.S. authorities sometimes cannot share information because it may prejudice an on-going U.S. investigation or enforcement action. They maintain, however, that they provide assistance when the requesting country has provided a factual basis to establish that the evidence sought is relevant to the offence(s) under investigation, so long as a U.S. prosecutor can legally execute the request. In particular, the United States reports that neither damage to the U.S. economy nor data privacy claims would affect the execution of MLA requests. Finally, although the United States can refuse to provide assistance on national security grounds, the authorities were not aware of any instances where this ground was asserted in an FCPA-related matter.

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[272]SEC webpage, International Enforcement Assistance.

[273]2016 Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, https://www.iosco.org/about/pdf/Text-of-the-EMMoU.pdf.

[274]United States Phase 3 Report, para. 196.

[275]Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, Department of Justice (24 May 2017), "Acting Principal Deputy Assistant Attorney General Trevor N. McFadden Speaks at American Conference Institute's 7th Brazil Summit on Anti-Corruption".

[276]The DOJ's Office of International Affairs includes a large number of former federal and state prosecutors as well as lawyers with experience from working in private practice or other government agencies. Its personnel are divided into teams by geographic region. It also has specialised teams that handle "issues and case work requiring subject-matter expertise", including a team dedicated to incoming requests for cyber evidence and one for non-cyber incoming requests. See DOJ OIA webpage (undated); see also DOJ OIA webpage, "Frequently Asked Questions Regarding Evidence Located Abroad" (last update 11 June 2015).

(ii) Outgoing requests

288. In Phase 3, the United States had made 65 formal outgoing MLA requests in FCPA cases between July 2002 and March 2010, with various degrees of success.[277] In Phase 4, the United States reported that it had made 309 requests to 81 countries in foreign bribery matters between January 2013 and July 2019. It reported that the "vast majority" of those requests were granted, though some remain pending. As in Phase 3, the United States reports that the level of cooperation varies considerably from prompt and fulsome assistance to outright non-compliance. The U.S. authorities, however, report that they have been able to obtain information abroad thanks to "excellent working relationships with foreign investigators and prosecutors". As a result, the U.S. authorities have even been able to track down ultimate beneficial ownership information in "many cases". One survey respondent praised the well-drafted requests and translations that the U.S. central authority prepared, which may increase receiving countries' ability to provide effective MLA. At the same time, the U.S. authorities report that MLA requests "have been denied on the ground that they could result in economic damage to the requested state, including from Parties to the Convention". Finally, the U.S. authorities report that foreign countries' economic blocking statutes and data protection laws have prevented companies from cooperating voluntarily with U.S. investigations, which in the U.S. view may help "protect criminals in many cases".

(c) Engagement with foreign partners

289. In their questionnaire responses, the U.S. authorities emphasise that they regularly participate in capacity-building seminars, international conferences, and bilateral conferences with foreign authorities, including trainings and speaking engagements with foreign law enforcement agencies and prosecutors. For example, in March 2018, a member of the DOJ's FCPA Unit provided a training to investigative and law enforcement officials in Mexico, including those from the Attorney General's office, the Tax Administration Service, Financial Intelligence Unit and the office of the Secretary of Foreign Affairs. The training, which lasted a full day, addressed topics such as the unique complexities of bribery investigations, cooperation and information sharing between agencies and governments, utilization and protection of whistleblowers, jurisdiction, and sophisticated investigative tools. The SEC, DOJ, and FBI also previously partnered with other countries for bilateral and regional trainings on combatting and prosecuting foreign bribery and corruption cases, such as Brazil, Colombia, Mexico, and India, among others. In November 2018, the SEC hosted the Foreign Bribery and Corruption Conference in conjunction with the DOJ and FBI. More than 220 officials from 65 law enforcement authorities representing 34 countries participated in the conference to discuss tools and techniques to successfully detect, investigate, and prosecute foreign bribery and corruption violations. This conference, which was also held in 2013, 2014, and 2016, provides a forum to share enforcement practices and collaborate on ways to improve international cooperation. In addition, U.S. officials have also spoken at numerous international anti-corruption conferences, highlighting developments in FCPA enforcement and related guidance concerning various topics such as the FCPA Corporate Enforcement Policy and guidance on the selection of monitors in corporate enforcement matters. For example, in March 2019, a senior lawyer from the DOJ's FCPA Unit participated in a panel discussion at the OECD's Global Anti-Corruption & Integrity Forum concerning non trial resolutions.

(d) Investigating and concluding multi-jurisdictional cases

290. As more countries enact and enforce laws prohibiting foreign bribery and other forms of transnational corruption, there is an increasing need to coordinate investigations and enforcement. The United States has long resolved major cases in coordination with foreign partners, beginning with the 2008 *Siemens* resolutions, concluded simultaneously by the DOJ, the SEC and the Munich Public Prosecutors Office. This was the first coordinated foreign bribery resolution involving at least two Parties to the Convention. Since then, the number of U.S. multi-jurisdictional resolutions has increased dramatically, albeit not immediately. Since 2016, the United States has concluded at least 9 major multi-jurisdictional resolutions based on at least one FCPA anti-bribery violation working with counterparts from Brazil, France, the Netherlands, Switzerland, and the United Kingdom.[278] Other major multi-jurisdictional

[277]United States Phase 3 Report, para. 196.

[278]*Odebrecht* (2016), *Braskem* (2016), *VimpelCom* (2016), *Keppel Offshore & Marine Ltd.* (2017), *Telia Company* (2017), *Rolls-Royce* (2017), *Société Générale* (2018), *TechnipFMC plc* (2019), and *Airbus* (2020).

resolutions have been concluded in connection with FCPA fact patterns, such as the resolutions with *Petrobras* (2018) coordinated with Brazil. In addition, the United States has also sanctioned companies, such as *SBM Offshore* and *Teva Pharmaceuticals*, in parallel with other Parties to the Convention.

291. While the United States reports that multi-jurisdictional cases present some challenges, such as differences in substantive law, investigative powers, and rules of admissibility, it maintains that close cooperation with foreign partners helps develop stronger cases. In 2018, the then-chief of the DOJ FCPA unit reported that increased cooperation from other countries had made DOJ prosecutions more successful as countries could obtain evidence concerning participants across the entire corruption scheme.[279] Perhaps not coincidentally, multi-jurisdictional resolutions have often resulted in record-setting sanctions. In February 2020, six of the ten largest FCPA cases based on penalties and disgorgement were multi-jurisdictional cases. This demonstrates the importance that the United States has placed on finding ways to cooperate with willing partners among the Parties to the Convention and beyond.[280]

292. Such coordination also helps ensure prosecution in an appropriate forum. The U.S. authorities report that they "often discuss" both the "various equities and prosecutorial resources available to determine which jurisdiction is the appropriate jurisdiction for prosecution". They also report that "in numerous instances", they have deferred to foreign authorities to prosecute matters. In response to the Phase 4 evaluation MLA survey, the Parties to the Convention that had conducted parallel investigations with U.S. authorities reported positive experiences. One country in particular praised the U.S. liaison officers for their assistance. The United States worked closely with France and the United Kingdom to resolve the *Airbus* matter.

293. When resolving matters in which multiple countries are concerned, the United States has sought to coordinate its resolutions and even to credit fines paid to foreign authorities in order to avoid unfair sanctions. This is not a new phenomenon. In its 2006 resolution with Statoil, for instance, the United States credited fines the company paid to Norway. The trend, however, is quite clear, following resolutions in recent years including *Odebrecht* (2016), *Embraer* (2016), *Keppel Offshore & Marine Ltd* (2017), *Telia* (2017), *Credit Suisse* (2018), and *Petrobras* (2018).[281] The DOJ has formalised this approach under its 2018 policy against "piling on".[282] The mechanics of how the U.S. enforcement agencies give credit in light of parallel enforcement actions in other countries is highly fact specific. On occasion, the authorities have credited actual payments made to foreign authorities as well as estimated payments that the company expects to pay to foreign authorities.[283] After the on-site, the U.S. authorities emphasised that typically their resolutions would require the company to pay to the US the outstanding amount where a resolution with the foreign authority is not reached.

Commentary

The lead examiners commend the United States for the quality of its outgoing MLA requests in terms of clarity and translation, which reflects the efficacy of having the U.S. central authority review all outgoing requests. The lead examiners also welcome the DOJ's decision to expedite the execution of incoming MLA requests by developing teams specialised by region and subject matter.

They further congratulate the United States' concerted efforts to build working relationships with engaged foreign partners among the Parties to the Convention and in other jurisdictions as well as to help build capacity through joint conferences and peer-to-peer training. This has enabled the law enforcement authorities to better investigate and sanction prominent foreign bribery cases.

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[279]Michael Griffiths (14 June 2018), "Cooperate with everyone simultaneously to avoid piling on, says FCPA chief", GIR.
[280]See, e.g., OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions*, p. 119.
[281]See OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions*.
[282]U.S. DOJ Office of the Deputy Attorney General (9 May 2018), Memorandum on Policy on Coordination of Corporate Resolution Penalties.
[283]United States v. SBM Offshore N.V. (Cr. 17-686), 29 November 2017, pp.12-13 (crediting USD 240 million in fines and disgorgement already paid to the Netherlands as well as "the amount provisioned for by the Company in connection with its ongoing efforts to reach resolution in Brazil").

C. RESPONSIBILITY OF LEGAL PERSONS

294. The Working Group has long recognised that the background corporate liability framework in the United States is an "important factor" for understanding FCPA enforcement.[284] Under U.S. law, companies can be held liable for foreign bribery and other offences both through criminal and non-criminal proceedings. In both types of proceedings, companies and other corporate entities can be found liable for foreign bribery and related offences under a form of vicarious liability, also known as *respondeat superior*, which does not require any particular wrongdoing by the company itself or its management.

295. While there have been no changes to the corporate liability framework in the United States since Phase 3, the Working Group has not formally assessed the framework under the standards it adopted in the 2009 Anti-Bribery Recommendation. Thus, the Phase 4 evaluation report provides a brief overview and assessment.

C.1. Scope of Corporate Liability for Foreign Bribery and Related Offences

(a) Prerequisites for corporate liability

(i) Any officer or employee can engage the liability of a legal person

296. Under the 2009 Anti-Bribery Recommendation, the Working Group set forth additional guidance on how Parties should implement Article 2 of the Convention, which requires establishing the liability of legal persons for foreign bribery. In the spirit of functional equivalence, Annex I(B) to the 2009 Recommendation contains two standards designed to ensure that legal persons can be held liable for foreign bribery even when their senior officers are not directly involved in the offence.

297. The principles underlying corporate liability for criminal and regulatory offences in the United States are quite broad. Under the *respondeat superior* doctrine, a company or other entity will be liable for the "acts of its directors, officers, or employees whenever they act within the scope of their duties and at least in part for [its] benefit".[285] If those conditions are met, the entity can be held liable. Notably, this liability will attach even if the entity or its management attempted to supervise the persons involved or otherwise prevent the offence from occurring.

298. Given that the U.S. approach for attributing corporate liability does not depend on whether those with the highest level managerial authority participated in, or failed to prevent, the offence, it is consistent with the "flexible" approach set forth in Annex B of the 2009 Anti-Bribery Recommendation.

299. Nonetheless, the U.S. enforcement agencies will consider corporate compliance efforts when determining whether it is appropriate to charge a company if, for example, the offence was committed by a rogue employee.[286] The degree to which corporate compliance efforts are taken into account when exercising prosecutorial discretion and sanctioning wrongdoing are discussed in sections C.1. and C.3. below, respectively.

(ii) Offences and entities covered

300. The *respondeat superior* doctrine applies as a background rule for all criminal offences as well as civil liability in tort. Thus, corporate entities could in theory face liability for offences committed for their benefit by individuals acting with the scope of their duties. The same principles thus would apply to foreign bribery as well

[284]United States Phase 2 Report, para. 15; see also DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p. 27.
[285]United States Phase 2 Report, para. 15.
[286]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, n.305 (citing former USAM 9-28.500).

as false accounting and money laundering predicated on foreign bribery, in addition to other offences that may be charged.

301. Moreover, the FCPA specifies that its provisions can apply to a range of legal persons and other entities, including all issuers as well as "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship".[287] In practice, the United States reports that it has sanctioned a wide-range of entities, including issuers, other foreign and domestic entities. From the data provided for Phase 4 evaluation, at least 155 of the 219 entities sanctioned in supply-side FCPA-related actions were issuers (71%), 31 were foreign non-issuers (14%), and 26 were domestic concerns (12%). Across all categories of FCPA violations, 91 concluded enforcement actions (42%) were with foreign entities while 124 (57%) were domestic entities. The United States has also sanctioned enterprises that are owned, in whole or in part, by a foreign state. These include *Alstom* (2014), *Petrobras* (2018), and *Statoil* (2006).

(b) Imposition of a corporate fine in the absence of a prosecution or conviction against a natural person

302. Under the Annex I(B) of the 2009 Recommendation, the Parties to the Convention cannot condition the liability of legal persons on the prosecution or conviction of a natural person. Even though the Working Group did not make a formal assessment of this standard in Phase 3, it had previously observed that the United States had sanctioned some companies for FCPA violations without any action being taken against a natural person.[288]

303. In the United States, a legal person can be sanctioned without first prosecuting, convicting, or otherwise sanctioning a natural person so long as the conditions for imposing vicarious liability on the entity under the *respondeat superior* doctrine are satisfied. While a prior conviction of a relevant natural person for committing an offence for the benefit of the company would be strong evidence that the legal person could be held liable, there is no legal obligation to first prosecute or convict the natural person.

304. Indeed, both the DOJ and the SEC have prosecuted or otherwise sanctioned companies for foreign bribery before commencing proceedings against any natural person(s) involved. Just to take two examples, the SEC first sanctioned *American Bank Note Holographics* (July 2001) and *Schnitzer Steel Industries* (October 2006), before it obtained resolutions against the natural persons involved (2003 and 2007, respectively). For its part, the DOJ has sanctioned companies such as *Statoil* (October 2006) without also prosecuting or sanctioning any natural person. In the *Latin Node* case (2009), the company pleaded guilty before four individual executives were convicted.[289] In other instances, the authorities have resolved cases with natural persons before or at the same time as they resolved the matter with the relevant legal person. These enforcement patterns demonstrate corporate liability in the United States is not dependent on enforcement actions taken against the natural persons involved. Thus, the U.S. corporate liability framework also complies with this portion of Annex I(B) of the 2009 Recommendation.

Commentary

The lead examiners consider that the U.S. corporate liability framework, which is applicable to foreign bribery and other related offences, satisfies the "flexible" approach set forth in 2009 Recommendation Annex I(B), which provides that the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons. They also consider that the U.S. corporate liability framework does not require authorities to first prosecute or convict natural persons before sanctioning a legal person for foreign bribery.

(c) Liability of the legal person for acts committed by intermediaries, including related persons

305. Under Annex I(C) of the 2009 Anti-Bribery Recommendation, the Parties to the Convention should ensure that legal persons "cannot avoid responsibility by using intermediaries, including related legal persons"

[287]See 78dd-1, 78dd-2(h)(1)(B), & 78dd-3(f)(1).
[288]See e.g., United States Phase 2 Report, Annex at page 45 (United States v. Goodyear International Corporation).
[289]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p. 30 & nn. 192-3.

to engage in foreign bribery on their behalf. There are several ways in which U.S. companies can be held liable for foreign bribery committed by intermediaries working on their behalf.

306. First, the same *respondeat superior* doctrine applicable for holding companies liable for the acts of their officers and employees also applies to acts committed by third party agents.[290] As a result, a company can be held liable for foreign bribery committed for its benefit by any person or entity entrusted with carrying out responsibilities or a mandate for the company. In this context, it is important to recall that the FCPA's anti-bribery provisions also expressly apply to the agents of issuers, domestic concerns, and other persons subject to U.S. jurisdiction. Thus, if the conditions for vicarious liability are met, both the agent and the company can be held liable for FCPA violations.

307. As the FCPA does not define the term "agent", the courts will apply traditional common law agency principles to determine whether a particular individual or entity is in fact an agent of a company to support the application of the *respondeat superior* doctrine. An agency relationship arises when one person (the agent) agrees to undertake services on behalf of, and under the control of, another person (the principal).[291] When such an agency relationship is formed, the principal can be held liable for offences that the agent committed when carrying out the undertaking for the principal. The same agency analysis will apply whether the intermediary is a natural or a legal person and irrespective of whether the agent is designated as a "sales agent", a "consultant", or another formal label. In their questionnaire responses, the U.S. authorities explain that in order to determine whether a related entity, such as a subsidiary, is in fact an agent of a company, they will evaluate the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction, emphasising substance over form to examine the practical realities of how the parent and subsidiary actually interact. In the *Alcoa* case (2014), for example, the SEC sanctioned the parent company issuer based on the acts of its agents, even though no individual within the parent company issuer knowingly engaged in the scheme. [292] Such broad liability for the acts of third parties is consistent with Annex I(C) of the 2009 Anti-Bribery Recommendation.

308. Second, the FCPA criminalises making, offering, or promising payments to third parties knowing that all or part of the thing of value will be in turn offered, given, or promised to a foreign public official for a prohibited purpose.[293] In addition, the FCPA defines "knowing" to include both actual knowledge that the circumstance exists as well as a firm belief that the circumstance exists. Moreover, "such knowledge will be established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes it does not exist." Thus, a company cannot avoid liability for the FCPA anti-bribery provision by structuring payments through intermediaries and ignoring clear evidence.

309. In the *Parker Drilling* case (2013), executives of the company engaged a local agent through a U.S. law firm to reduce its liability imposed for violating Nigerian permitting requirements for offshore rigs temporarily imported into Nigerian waters. The company engaged the agent without conducting due diligence and continued to pay him, knowing that the agent was spending money without documentation, including to entertain public officials. Ultimately, the agent reduced the fines from USD 3.8 million to USD 750 000. As part of its DPA, Parker Drilling agreed to pay a USD 11 760 000 penalty.

310. Third, the DOJ can also prosecute a company if its employees participate in the scheme with the intermediaries. For example, the DOJ can bring conspiracy charges against a company that knowingly uses intermediaries to bribe foreign public officials. In the *Alstom Power* case (2014) the company was held liable for bribery committed by unrelated intermediaries, as it engaged a number of consultants who in turn provided bribes to government officials in several countries in an effort to obtain contracts to work on power projects. The company was held liable for conspiring to engage in FCPA violations.

Commentary

[290] United States Phase 3 Report, para. 16; see also Section C.1.a. above.
[291] *See e.g., Cleveland v. Caplaw Enterprises*, 448 F.3d 518, 522 (2d Cir. 2006).
[292] *In re Alcoa Inc.*, File No. 3-15673,(9 Jan. 2014), para. F.
[293] *See* 15 U.S.C. 78dd-1(a)(3), 15 U.S.C. 78dd-2(a)(3), and 78dd-3(a)(3).

The lead examiners consider that the U.S. corporate liability framework includes several ways in which U.S. companies can be held liable for foreign bribery committed by intermediaries and thus satisfies the requirement set forth in 2009 Recommendation Annex I(C) to ensure that legal persons "cannot avoid responsibility by using intermediaries, including related legal persons".

(d) Liability of successor companies

311. Although successor liability has not been discussed in prior U.S. evaluations, the Working Group is examining the topic as a horizontal issue in Phase 4. Successor liability refers to the rules governing when, if ever, a successor entity will be liable for foreign bribery committed by its predecessor. Under U.S. law, a company that acquires another entity through a merger will generally acquire that entity's assets and liabilities. Depending on the applicable law, this can include criminal liability. The same is true for a company that is created after being spun out of another entity. Crucially, successor liability does not create FCPA liability where it did not previously exist. Thus, if a U.S. company were to buy a foreign non-issuer company that had engaged in domestic bribery, the acquisition alone would not create FCPA liability for the U.S. company. The U.S. authorities maintain that if the newly acquired foreign company were to continue the scheme or to benefit from it, however, FCPA liability could arise for post-acquisition conduct.[294]

312. U.S. enforcement agencies have sanctioned entities for wrongdoing committed by units before they were acquired. For example, the SEC's 2005 resolution with *GE InVision* concerned conduct that had occurred before the company was acquired by GE and was operating as InVision Technologies. In a separate case involving a U.S. tobacco company, Alliance One, and its foreign subsidiaries the SEC and DOJ prosecuted the successor entity because both predecessor entities had been issuers that had engaged in foreign bribery. In their public guidance, the U.S. enforcement agencies explain that they typically only take actions against successor entities that "directly participated in the violations or failed to stop the misconduct from continuing after the acquisition".[295]

313. These robust successor liability principles encourage companies to engage in careful due diligence to identify problems. This promotes detection of foreign bribery, as the acquiring company has an incentive to notify the DOJ to mitigate its own legal liability post-acquisition. Notably, the U.S. enforcement agencies report declining to take action against successor entities that voluntarily report and remediate wrongdoing discovered through pre-merger due diligence. Moreover, acquiring companies can seek an "Opinion" of the Attorney General concerning potential liability that might accrue following a potential acquisition. Companies have also used this procedure before concluding a merger or acquisition to ensure that proposed remedial steps post-acquisition will be sufficient to avoid liability.[296] That being said, the use of the opinion release procedure has declined substantially over time.

Commentary

The lead examiners consider that the U.S. rules on successor liability provide clear incentives to companies to conduct appropriate due diligence on potential acquisitions. Such due diligence in turn can help uncover past problems both for enforcement purposes and to help companies make necessary reforms to prevent

[294]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p. 28.
[295]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, p. 28.
[296]FCPA, 15 U.S.C. § 78dd-1(e) ("Opinions of the Attorney General"). The DOJ has issued opinions concerning potential liability post-acquisition in Opinions 08-02 and 14-02.

future violations. As such, the lead examiners consider the successor liability framework to be a good practice for fighting foreign bribery.

(e) Impact of a company's compliance system on liability

(i) Compliance programs under the DOJ Corporate Enforcement Policy

314. The Principles of Federal prosecution of Business Organization provide that "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" is a factor to be considered by prosecutors in determining whether to bring charges against a company, and how to dispose of charges.[297] Under the CEP, implementation of an effective compliance program is a requirement for a company to obtain credit for timely and appropriate remediation. The CEP further specifies the criteria of a compliance program, which "will be periodically updated and which may vary based on the size and resources of the organization, but may include":

- The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
- The resources the company has dedicated to compliance;
- The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
- The authority and independence of the compliance function and the availability of compliance expertise to the board;
- The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
- The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
- The auditing of the compliance program to assure its effectiveness; and
- The reporting structure of any compliance personnel employed or contracted by the company.

315. In order for a company to receive full credit for remediation and avail itself of CEP, it must have effectively remediated at the time of the resolution. In resolving FCPA matters against companies, prosecutors in the Fraud Section thus refer to these criteria to determine if a company qualifies for remediation credit under the CEP. As examined under section B.3.(a)**,** compliance expertise in the Fraud Section has significantly developed since Phase 3.

(ii) Consideration of compliance programs in SEC resolutions

316. The SEC also considers compliance programs in determining whether and how to pursue an FCPA matter. As part of assessing self-policing under its Seaboard factors, the SEC considers factors such as what compliance procedures were in place to prevent the misconduct and why those procedures failed to stop or inhibit the wrongful conduct.[298] In April 2020, the SEC charged a former financial services executive of Goldman Sachs for violating the anti-bribery provisions of the FCPA and federal securities laws but declined to charge Goldman Sachs. According to the SEC, "the firm's compliance personnel took appropriate steps to prevent the firm from participating in the transaction and it is not being charged".[299]

(f) Monitorships

317. In Phase 3, the Working Group found that U.S. FCPA resolutions "often require[d]" companies to engage a corporate monitor to assess the companies' efforts to implement corporate compliance enhancements required by their FCPA resolutions. As such, monitorships are not a sanction intended to punish past wrongdoing,

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[297] Justice Manual 9-28.300 - Factors to be considered.
[298] SEC Release No. 4469, 23 October 2001.
[299] SEC press release, 13 April 2020.

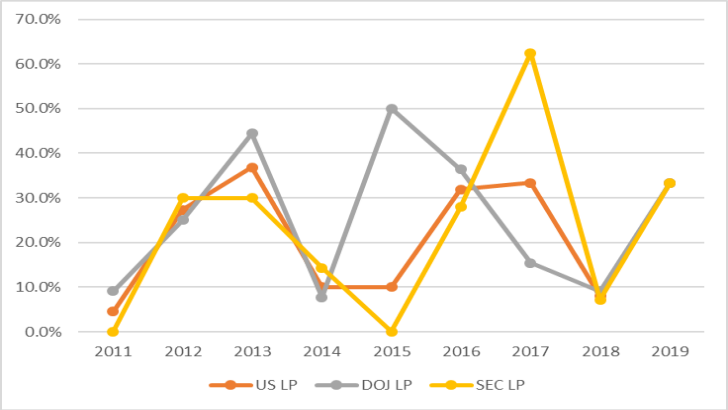
but rather a remedial measure designed to "reduce the risk of recurrence of the … misconduct". The DOJ and SEC believed that corporate monitorships "reduce the likelihood of continuing violations of the law" and reduce the enforcement agencies' burden in monitoring whether the companies have fully implemented implementation of the FCPA resolutions' conditions.[300] The Working Group considered that corporate monitorships were an "innovative method" but called for more transparency about when they are imposed in individual resolutions.[301] The Working Group also focused its attention on the appointment process, given that many monitors were former DOJ or SEC officials.[302]

(i) The frequency of monitorships

318. In Phase 3, the United States reported that it had imposed monitors in just over half of the cases resulting in criminal enforcement action between 1998 and 16 September 2010. It was not clear how many had been imposed through non-criminal matters. In Phase 4, the United States had concluded criminal or non-criminal resolutions against 219 legal persons in 127 cases. U.S. enforcement agencies imposed monitorships on legal persons in 29 of those cases (23%), while 48 of the 218 legal persons sanctioned had monitorships imposed (27%) either individually or as part of a corporate group. It thus seems that in general the U.S. enforcement agencies are not requiring monitorships as frequently as in Phase 3. Furthermore, the percentage of monitorships imposed since September 2010 has fluctuated considerably on an annual basis, ranging from 5% and 37% of enforcement actions involving legal persons during the reporting period. This suggests that the enforcement agencies are not routinely imposing monitorships. Indeed, during the on-site visit, the U.S. enforcement agencies indicated that they are unlikely to impose a monitor in cases where the company has conducted its own analysis of its compliance shortcomings, made compliance enhancements, and "tested" the new policies to ensure that they are working effectively.

Figure 2. Percent of FCPA-related cases with LPs resulting in monitorships

January 2011 to July 2019



Note: As DOJ and SEC sometimes both imposed monitorships in same case, the percentages for each agency are not necessarily correlated with the percentage for all U.S. cases.
Source: Case data provided by United States for Phase 4 evaluation.

[300]United States Phase 3 Report, paras. 120 - 121.
[301]United States Phase 3 Report, Commentary p. 38. The Working Group ultimately considered that 3 Recommendation 3(b) concerning public transparency about the decision to impose a monitor had fully implemented.
[302]United States Phase 3 Report, paras. 122-124.

(ii) Criteria for imposing a monitorship

319. In Phase 3, the private sector had expressed concerns about the costs of monitorships, in particular that their scope was often too broad.[303] In 2018, the DOJ issued updated guidance, known as the Benczkowski memo, on the selection of monitors in all criminal division matters.[304] While maintaining that monitorships can reduce the risk of corporate recidivism, it stresses that monitorships "will not be necessary in many corporate criminal resolutions". Ultimately, the memo recommends imposing a monitorship "only where there is a demonstrated need for, and clear benefit to be derived from" a monitorship after considering "the projected costs and burdens". In addition, the memo emphasizes that "the scope of the monitorship should be appropriately tailored to address the specific issues … that created the need for the monitor." To this end, the memo provides further clarification to help prosecutors weigh the costs and benefits of a monitorship in a specific case, including whether the company's remedial compliance efforts sufficiently address the causes of the wrongdoing. This is one reason why the DOJ representatives during the on-site stressed that they are training prosecutors to better assess corporate compliance efforts. Monitorships are now imposed when a company cannot demonstrate at the time of the foreign bribery resolution that it has sufficiently implemented remedial changes to its compliance programme in order to deter future misconduct.

320. The Benczkowski memo also outlines the procedure for selecting a monitor. Under the policy, the company must nominate three candidates whose qualifications are acceptable to the DOJ and who have filed appropriate disclosures to prevent conflicts of interest. The candidates will be evaluated initially by the prosecutors handling the matter as well as a Standing Committee for evaluating monitorship candidates and the Assistant Attorney General. Ultimately, the candidate selected after the review process must be approved by the Office of the Deputy Attorney General.

321. For its part, the SEC has not elaborated a public policy on the use and selection of monitors, but SEC representatives explained that the basic framework is that the company will propose suggest a slate of three candidates and it can generally select any monitor who the SEC does not consider to be unacceptable. In this process, the SEC staff ensures that the proposed candidate's background and qualifications are acceptable, including by conducting interviews of the proposed monitor teams. In appropriate circumstances, the SEC may require companies to report on their post-resolution compliance efforts instead of requiring a formal monitorship. This is commonly called a "self-reporting period", which may also be combined with a period of a traditional formal monitorship.

322. During the on-site visit, some non-government participants reported instances where eligible monitors were not proposed or selected because the company concerned believed that they would be too independent. While the evaluation team could not confirm such reports or if they concerned FCPA matters, on-site panellists who had served as corporate monitors stressed that an effective monitor must be knowledgeable both about the law and how to develop systems to promote compliance in business environments. Some panellists observed that the DOJ has helpfully created a network of active corporate monitors for them to share discuss best practices and learn from each other. For their part, the US authorities maintained that the rigorous selection process ensures that only qualified monitors are appointed.

(iii) Effectiveness and oversight

323. The U.S. enforcement agencies will review the monitor's periodic reports to assess the company's progress without any judicial oversight. If a company does not comply with the terms of the monitorship, the U.S. enforcement authority could initiate prosecution of the original wrongdoing after finding the company in breach of its obligations under the resolution. The U.S. authorities will usually require a company to extend the term of its resolution in order to give it time to fully comply with the terms of the monitorship. In recent years, *Odebrecht* received a nine-month extension (2020), *Bilfinger's* monitorship was extended for two years (2016), and *Biomet* had its monitorship extended (2015). For this reason, civil society participants questioned whether there was a credible threat of prosecution when companies do not comply with their monitorship obligations.

[303]United States Phase 3 Report, para. 125.
[304]U.S. DOJ Criminal Division (11 October 2018), Selection of Monitors in Criminal Division Matters.

324. According to civil society, there was very little transparency about the effectiveness of monitorships on corporate compliance in particular cases. Some on-site participants observed that if the monitor had been appointed under a DPA, they could get a better sense of the situation because the company and the government would need to make a court filing to request an extension. When asked about the effectiveness of monitorships, the U.S. authorities pointed out that no companies that had completed a monitorship had engaged in recidivist conduct. In the *Biomet* case, the company was already under a monitorship when new foreign bribery allegations were uncovered. The DOJ ultimately extended the monitorship twice. At the time of finalising this report, on 14 April 2020, the DOJ, in line with its efforts to increase transparency, published for the first time a list identifying all monitors currently engaged as a part of criminal resolutions with the Fraud Section.[305] While the decision to publish the information is a welcome development increasing transparency into corporate criminal enforcement, the DOJ should consider expanding the publication to other details about monitorships imposed in FCPA matters. This would be helpful in evaluating the effectiveness of the corporate monitor programme and identifying areas of improvement. For its part, the DOJ reports that it has in fact considered whether it could make more aspects public and maintains that as a policy matter further disclosure could interfere with monitors' ability to carry out their mandate.

325. During the on-site visit, the evaluation team spoke with corporate monitors. They considered that monitorships can indeed be effective, but much depends on the willingness of the company and its leadership to engage with the process. The monitor in many cases can provide support to compliance personnel attempting to change the corporate culture. The private sector representatives also reported that a monitor can keep pressure on management to sustain reforms after an FCPA resolution is concluded. Private sector representatives also indicated that the U.S. enforcement agencies could still exercise more control over the scope of monitorships to ensure that monitors do not unilaterally expand their remits.

Commentary

The lead examiners welcome the fact that the DOJ has long-established and published procedures to screen proposed monitor candidates for expertise and conflicts of interest. The lead examiners recognise that monitorships can, when effective, provide a powerful impetus to improving compliance within an organisation.

In terms of oversight, the lead examiners recognise that each monitorship is unique and that confidentiality is required to ensure that the monitors can have frank discussions with the company. They also welcome the transparency efforts made by the DOJ after the on-site visit to publish a list of corporate monitors engaged as a part of criminal resolutions. While the lead examiners are sensitive to the requests of civil society participants who would appreciate more transparency into the work performed by monitors, they recognise that the DOJ and SEC regularly consider how much information they can publish about the fulfilment of monitors' recommendations without disclosing confidential business information or interfering with the effectiveness of monitorships.

C.2. Enforcement of Corporate Liability for Foreign Bribery

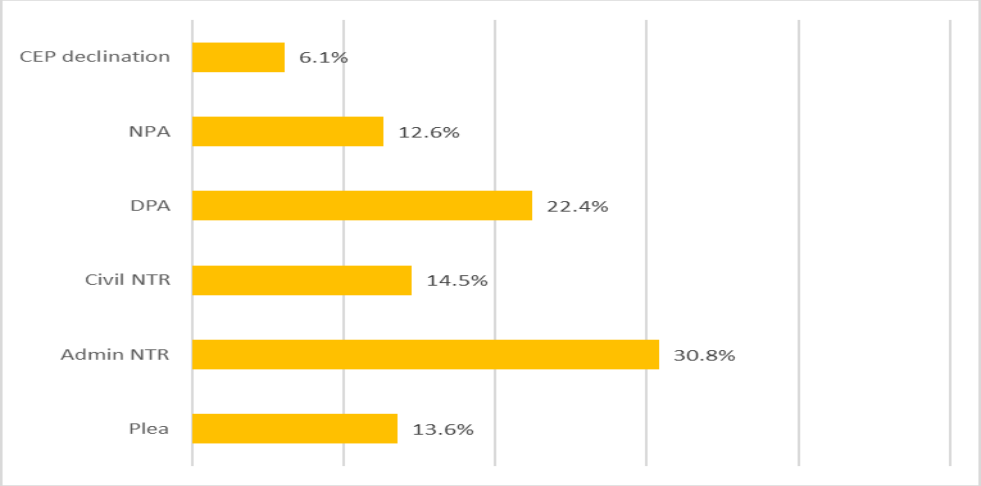
(a) Overview of enforcement to date

326. The DOJ has obtained convictions or sanctions against 117 entities for FCPA offences. The SEC in turn obtained sanctions against 101 entities for FCPA offences. All of the enforcement actions imposing sanction on legal persons during the reporting period were resolved through non-trial resolutions. The charges against one legal person, however, were dismissed after trial. Overall, U.S. corporate enforcement has remained fairly constant over time, other than a dramatic spike in 2016.

[305] *See* US DOJ, "List of Independent Compliance Monitors for Active Fraud Section Monitorships" (last updated 2 June 2020).

327. A key feature of U.S. enforcement against legal persons is that it has been driven almost exclusively by non-trial resolutions. Figure 6 below shows how different non-trial resolutions have been used in FCPA supply-side enforcement actions against legal persons.

Figure 3. Use of non-trial resolutions in FCPA enforcement actions against legal persons



Note: September 2011 to July 2019.
Source: Phase 4 evaluation case data.

(b) Implementation of the Corporate Enforcement Policy

(i) Declinations with disgorgement are only granted to companies that self-disclosed

328. In order to obtain a declination with disgorgement under the CEP, a company must meet the criteria for voluntary disclosure, cooperation and remediation as defined in the policy. The CEP defines what constitutes voluntary disclosure in term of timing and content. In order to qualify for cooperation credit, the policy sets forth five requirements in addition to those provided in the Principles of Federal Prosecution of Business Organisations. Similarly, it adds requirements to qualify for timely and appropriate remediation credit. The DOJ mostly relies on the facts and circumstances of each case to determine whether a company meets the CEP criteria. As explained during the on-site visit, as part of the determination of remediation credit, the DOJ examines whether the company had implemented a "reasonable and effective" compliance programme at the time of the offence and, further, at the time of the resolution. As discussed under section B.3.(a) on compliance expertise, prosecutors refer to the guide on Evaluation of Corporate Compliance to conduct this assessment.

329. Up to the cut-off date for case data for this report, thirteen declinations with disgorgement had been concluded since the adoption of the CEP.[306] All of them are published on the DOJ's website and include the reasons why the company was able to avail itself of the policy. Resolutions concluded with an NPA or DPA since the adoption of the CEP clearly establish why companies did not qualify to obtain full credit under the CEP. In particular, in five out of six NPAs, the company failed to voluntary self-disclose.[307]

330. During the on-site visit, the DOJ explained that declinations with disgorgement are "only for companies that self-report". In the *Fresenius case*, the only NPA since the CEP came into effect where the company did voluntary disclose, the press release explains that the company could not benefit from the CEP because

[306] As explained in footnote 28, the case data in this report reflects cases initiated or concluded between Phase 3 and 29 July 2019. On 5 August 2020, the DOJ concluded a fourteenth declination with disgorgement under the CEP.
[307] In re *Microsoft Magyarorszag Szamitastechnikai Szolgaltato es Kereskedelmi Kft*, (22 July 2019); In re *Walmart Inc.* (20 June 2019); In re *Petroleo Brasileiro S.A.*, 27 September 2018; In re *Legg Mason, Inc.* (4 June 2018); and In re *Credit Suisse (Hong Kong) Limited* (24 May 2018).

"although Fresenius voluntarily self-disclosed the misconduct in April 2012, the company did not timely respond to certain requests by the Department and, at times, did not provide fulsome responses to requests for information. In addition, misconduct occurred in 13 countries, yielded profits of more than USD140 million and continued in certain countries until 2016".[308] DOJ press releases for the nine DPAs that were concluded since the implementation of the CEP also explain why companies failed to obtain full credit for voluntary disclosure, cooperation and/or remediation.

(ii) The DOJ retains a high level of discretion in its consideration of aggravating circumstances

331. Aggravating circumstances may warrant a criminal resolution even for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated. Under the policy, there is a presumption that the company will receive a declination only absent aggravating circumstances "involving the seriousness of the offense or the nature of the offender". These include "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism".

332. During the on-site visit, an academic stated that in practice, the presumption that the company will receive a declination only absent aggravating circumstances is hard to overcome when a company has voluntarily self-disclosed, fully cooperated, and remediated. The DOJ did not know of a case in which a company satisfying the above three requirements could not avail itself of the policy because of aggravating circumstances. Cases resolved with a declination under the CEP suggest that aggravating circumstances do not automatically warrant a criminal resolution and that the prosecutors retain a level of discretion in the implementation of the policy. In at least three of the thirteen declinations with disgorgement accorded under the CEP, executives were involved in the scheme. In *ICBL*, the company's former President and Chief Financial Officer were involved in the scheme. In *HTMC*, two regional managers based in the United States approved the commissions of an agent to a Venezuelan public official. The U.S. authorities confirmed this position in the second edition of the FCPA Resource Guide, released in June 2020, which provides that "Even where aggravating circumstances exist, DOJ may still decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme".[309]

333. During the on-site visit, an academic expressed concerns that the CEP could be perceived as being applied in a somewhat "arbitrary" manner, thus sending conflicting signals to companies and the public at large. DOJ prosecutors indicated that they are aware of this risk, but explained that they aim to apply the CEP in the way that best serves its objective. Prosecutors further explained that they do not want to discourage companies from voluntarily disclosing a case simply because high-level employees were involved in the scheme, and thus wanted to send a clear message that a declination with disgorgement would still be possible in those situations. According to a lawyer met during the on-site visit, this "seismic" practice sends a clear message on the DOJ's determination to seek individual accountability, up to highest levels of corporate hierarchy.

(c) Choice of enforcement avenue for corporate resolutions

334. According to the case data for Phase 4, the U.S. brought FCPA-related enforcement actions against 219 legal persons during the reporting period. The charges against one entity were dismissed after trial. The remaining 218 actions were resolved through a variety of non-trial resolutions. In the criminal context, 13 were resolved through declinations with disgorgement under the CEP (6%),[310] 27 through NPAs (12%), 48 through DPAs (22%), and 29 through plea agreements (13%). The SEC imposed sanctions on 3 entities using NPAs (1%), 2 using DPAs (1%), 29 judgements entered in federal court by consent (13%), and 67 using cease-and-desist orders obtain by consent (31%).

[308] In Re Fresenius Medical Care AG & Co. KGaA, 29 March 2019.
[309] DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, Second edition, p. 51, 52
[310] Two resolutions were concluded under the *Linde case*, and are therefore accounted for in calculations.

(i) The DOJ has ample discretion in choosing resolution instruments in FCPA enforcement actions

335. Besides the CEP, the DOJ has not released consolidated guidance on how prosecutors choose among resolutions instruments, and in particular between a DPA and an NPA, to enforce the FCPA. Prosecutors met during the on-site visit explained that the decision is made on a case-by-case basis and they emphasised that they have some discretion to select the appropriate resolution instrument. Although fact specific, in some instances prosecutors can also choose whether to pursue an enforcement action against the parent company or a relevant subsidiary.

336. In addition to the facts and circumstances of a case, prosecutors also consider the collateral consequences of the resolution, in order to find a balance between sanctioning past conduct, deter future such conduct and avoid penalising third parties. In particular, prosecutors explained that guilty pleas typically occur in cases where bribery was pervasive and/or management was involved but they can trigger heavy consequences. Using the hypothetical example of a company operating in the pharmaceutical industry, prosecutors explained that not only would a conviction negatively impact the company's employees and shareholders, but it could also limit public access to medicines developed by this company.

337. The CEP provides that criminal recidivism is an aggravating factor that can negate the presumption for declination. They also emphasise that recidivism is also a factor that is considered under the U.S. Sentencing Guidelines in fashioning an appropriate sanction, as well as under DOJ guidelines for determining the appropriate resolution with a company.[311] The use of DPAs despite recidivism, e.g. in the *Biomet case*,[312] was discussed with several panellists during the on-site visit. DOJ prosecutors acknowledged that in several instances, matters against repeat offenders were resolved with a new non-trial resolution (other than a guilty plea), but could not think of a case where the offender was not subject to "additional punishment" in the second non-trial resolution. Lawyers defended this practice, claiming that it might be justified by the facts and circumstances of each case. They argued that if a company took all the necessary measures to prevent repetition of the misconduct following a first non-trial resolution, a guilty plea might not be warranted. However, during the on-site visit civil society representatives and academics expressed concerns that this practice might negatively impact deterrence of future conduct. The use of non-trial resolutions (other than a guilty plea) with corporate recidivists also raises concern among non-government organisations. Corruption Watch, for instance, considers that "repeated use of settlements for companies that have already been subject to enforcement actions of any type encourages recidivism and removes the deterrent value of a settlement completely".[313] Coalition for Integrity suggests that U.S. authorities monitor and publish the number of investigations and declinations for recidivists.[314]

338. Civil society representatives also expressed concern regarding access to information on DPAs' extension. Prosecutors explained that a DPA would typically be extended in order to allow a company to complete its monitorship. When extending a DPA, the DOJ files a public motion with the Court detailing the reasons for the extension. The document is by definition public although not accessible on the DOJ website along with other pieces of information regarding DPAs.

(ii) Potential remedies play a role in the SEC's choice of enforcement avenue

339. In 2013, the SEC concluded its first-ever NPA in an FCPA matter in recognition of the *Ralph Lauren* Company's prompt disclosure and cooperation in the SEC's investigation.[315] The SEC explained that the NPA met the criteria provided under its enforcement cooperation programme because the company self-reported the

[311] See Justice Manual 9-28.600 Principles of Federal Prosecution of Business Organizations

[312] United States v. Biomet, Inc. (12-CR-00080) and SEC v. Biomet, Inc. (12-cv-00454), 26 March 2012; United States v. Zimmer Biomet Holdings, Inc. (12-CR-00080) and In the Matter of Biomet, Inc., 12 January 2017.

[313] Corruption Watch (March 2016), *Out Of Court, Out Of Mind: do deferred prosecution agreements and corporate settlements fail to deter overseas corruption?*

[314] Coalition for Integrity (2020), Coalition for Integrity: Evaluation of United States' Foreign Bribery Enforcement.

[315] In Re Ralph Lauren Corporation, 22 Avril 2013.

wrongdoing after instituting a compliance program and also provided "exceptional assistance" to the investigation. [316] In this case, the company reported its preliminary findings two weeks after learning of the wrongdoing, provided documents and English translations, provided summaries of witness interviews conducted during the internal investigation, and made overseas witnesses available to the SEC for interviews. The SEC also took into account the additional compliance measures that the company instituted following the incident. Another application of the enforcement cooperation programme, the SEC also entered into a DPA with *PBSJ Corporation* in 2015, after the company self-reported.[317]

340. During the on-site visit, the SEC explained that after the SEC Division of Enforcement conducts an investigation, its staff will consider whether to bring an action. In this context, the potential remedies and chances of success influence the decision of whether to recommend an enforcement action, as well as the choice of enforcement avenue.

Commentary

The lead examiners recommend that the United States continue to address recidivism through appropriate sanctions and raise awareness of the impact of recidivism on the choice of resolution in FCPA matters.

In order to achieve more transparency, the lead examiners recommend that going forward: (i) the law enforcement agencies make publicly available whether a Non-Prosecution Agreement or a Deferred Prosecution Agreement with a legal person in an FCPA matter has been extended or completed; and (ii) when extending a Deferred Prosecution Agreement with a legal person in an FCPA matter, that they make public in an easily accessible manner the grounds for extension, including when such extension is decided to allow a company to complete its monitorship.

C.3. Sanctions Available for Legal Persons for Foreign Bribery

(a) Sanctions for legal persons

341. There have been no legislative changes to the sanctions imposed for FCPA violations since Phase 3 for natural or legal persons Since Phase 3, the DOJ has adopted a policy authorising prosecutors to seek approval to reduce the sanctions that would be imposed, if an entity demonstrates it is not able to pay the otherwise applicable fine or penalty.[318] The enforcement increase since Phase 3 enables the Working Group to consider how sanctions have since been applied in practice since 2010. As a reminder, the existing sanctions that can be imposed on a company for violating the FCPA are shown below.

Table 3. Sanctions for FCPA violations for legal persons

FCPA offence	Criminal Fine (USD)	Alternate criminal fine	FCPA Civil penalty (USD)	Alternate Civil Penalty (USD)	Other Penalties
Anti-bribery (issuer) 78dd-1(a), 78dd-1(g)	2 000 000	2x gross gain/loss	16 000, adjusted for inflation.	96 384 – 963 837 & after adjusting for inflation or gross pecuniary gain (in district court actions)	Probation (≤ 5 years); Restitution; Special assessment USD 400
Anti-bribery (non-issuer)	2 000 000	2x gross gain/loss	USD 10 000	N/A	Probation (≤ 5 years); Restitution; Special assessment USD 400

[316] SEC Press Release, 22 April 2013. The Cooperation program for individuals and corporations was announced on January 13, 2010. See: SEC Press Release, 13 January 2010.

[317] SEC Deferred Prosecution Agreement – PBSJ, 22 January 2015.

[318] *See* U.S. DOJ Memo from Brian A. Benczkowski to All Criminal Division Personnel, "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty" (31 Oct. 2019). The DOJ guidance concerning inability to pay has been followed in subsequent FCPA-related matters. *See, e.g.*, Plea Agreement with Sargeant Marine Inc. (21 Sept. 2020).

78dd-2(a), 78dd-2(i), 78dd-3(a)					
Wilful false accounting or evading internal controls 78m(b)(5) with 78m(b)(2)(A)&(B)	25 000 000	2x gross gain/loss	N/A	96 384 – 963 837 & after adjusting for inflation or gross pecuniary gain (in district court actions)	Probation (≤ 5 years); Restitution; Special assessment USD 400
Wilful & knowing false material statement in filing 78ff(a)	25 000 000	2x gross gain/loss	N/A	96 384 – 963 837 & after adjusting for inflation or gross pecuniary gain (in district court actions)	Probation (≤ 5 years); Restitution; Special assessment USD 400
Issuer fails to file required reports 78ff(b)	100 per day of violation	N/A	N/A	N/A	N/A

Source: 15 U.S.C. § 78dd-1 *et seq*.; 18 U.S.C. § 3571; 17 CFR 201.1001; see also DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, Second Edition.

(b) Sanctions imposed in practice

342. The monetary fines imposed on companies in U.S. foreign bribery cases has increased substantially since the early 2000s. This trend has continued in Phase 4, especially with the rise of multijurisdictional coordinated resolutions. It seems that with each passing year, the U.S. authorities break a new record in imposing sanctions for foreign bribery. In January 2020, the United States joined France and the United Kingdom in resolving foreign bribery and related violations with Airbus SE in a multijurisdictional resolution amounting to USD 4 billion.

343. According to the Phase 4 evaluation case data, the United States imposed fines, forfeiture, disgorgement or other monetary penalties totalling over USD 10.4 billion between December 2012 and mid July 2019. The largest corporate monetary sanctions imposed during the relevant period was over USD 1 billion in the 2018 *Petrobras* case. At the low end, in 2018, Insurance Corporation of Barbados Limited (ICBL) paid USD 93 940 to resolve its alleged FCPA matter through a CEP declination with disgorgement.

344. Of the 127 FCPA-related schemes involving a corporate entity in the Phase 4 evaluation case data, the U.S. provided information about the bribes involved for 86 schemes (68%) and about the illegal profits obtained for 93 schemes (73%). From this sample of cases, the aggregate monetary sanctions imposed exceeded the sums involved in the illicit scheme on a nominal basis. Notably, the sanctions imposed were over 20 times the sum of the bribes reported and nearly twice the amount of the illicit profits reported. The range, however, was quite broad, as the median fine to bribe ratio was only 4.6 times the amount of the bribes and 1.3 times the amount of the illicit profits. While, as a purely economic matter, it is difficult to know how dissuasive the fines are in practice without knowing the rate in which foreign bribery is detected, the U.S. authorities have on average imposed fines or sanctions exceeding the nominal value of the bribes and profits during the reporting period.

Commentary

The lead examiners observe that the U.S. sanctions framework, given that it is proportionate to the amount of illicit profits obtained or the harm caused by the offence, generates large financial penalties on corporate entities that engage in foreign bribery and related offences. Given the major bribery schemes that the United States has prosecuted, in times in coordination with foreign partners, the sanctions imposed in practice are quite significant and appear to satisfy the Convention's effective proportionate and dissuasive standard.

(c) Confiscation of the bribe and disgorgement of proceeds of the bribe

(i) SEC disgorgement

- Increasing amounts of disgorgement since Phase 3

345. Strictly speaking, disgorgement of illicit gains should be limited to the amount needed to return a wrongdoer to the *status quo ante* before the offence. This includes accounting for pre-judgment interest accrued on the illicit gains. Disgorgement is thus a remedy that is fact-dependent. In recent years, the SEC has obtained FCPA resolutions imposing significant amounts of disgorgement. The SEC first used disgorgement in an FCPA case in 2004, when it required *ABB Ltd* to disgorge USD 5.9 million for books and records and internal controls offences. The amounts disgorged have since sometimes been far higher. In 2018, the SEC required *Petrobras* to disgorge USD 933 million after it concluded that the company had made false and misleading filings in a stock offering by not disclosing its bribery and bid-rigging scheme.[319] In December 2019, the SEC imposed USD 540 million in disgorgement through a consent judgment in a civil action against *Telefonaktiebolaget LM Ericsson*.[320] Overall, according to the statistics provided for this evaluation, the SEC has concluded 90 enforcement actions with sanctions. Disgorgement was imposed in 72% of its actions. In dollar amounts, disgorgement has accounted for 81% of the nearly USD 4.7 billion that the SEC has imposed in monetary obligations through FCPA enforcement actions.

- Impact of the *Kokesh* decision on the amount of disgorgement

346. As discussed under section B.4. (d), the Supreme Court held in the *Kokesh* case that disgorgement is a penalty and is therefore subject to the 5-year limitation rule (28 U.S. Code § 2462).[321] In their questionnaire responses, the U.S. authorities stress that the effect of the *Kokesh* ruling has been to reduce the amount of disgorgement available in SEC enforcement actions. Determining the actual monetary loss engendered by *Kokesh* when it comes to FCPA enforcement is admittedly impossible. However, there are strong indications that the amount could be substantial. The 2019 Annual Report of the SEC Enforcement Unit indicates that: "The Division estimates that the *Kokesh* ruling has caused the Commission to forgo approximately USD 1.1 billion in disgorgement in filed cases. The actual impacts of *Kokesh* are likely far greater than this number reflects, however, because, since the *Kokesh* decision, the Division has shifted its resources to those investigations which hold the most promise for returning funds to investors".[322] This estimate is not broken down by offences but the statement suggests that *Kokesh* might negatively impact resourcing of FCPA investigations.

- SEC's ability to impose disgorgement in foreign bribery cases put into question

347. In *Kokesh*, the Supreme Court explained in a footnote that the ruling did not address "whether courts possess authority to order disgorgement in SEC enforcement proceedings". Although this footnote initially caused some commentators to question whether the SEC had the authority to impose disgorgement at all, the Supreme Court affirmed the SEC's power to seek disgorgement in civil injunctive actions filed in federal courts. In its June 2020 decision, *Liu v.* SEC, the Supreme Court affirmed the SEC's power to seek disgorgement as an equitable remedy. Significantly, however, the Supreme Court also held that disgorgement could only be imposed when traditional equitable limitations were applied to ensure that it does not in practice constitute a penalty.

348. In *Liu*, petitioners claimed that disgorgement is necessarily a penalty under *Kokesh* and thus not a remedy available in equity. The Supreme Court instead held: "A disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under §78u(d)(5)".[323] On the first point, the Supreme Court clarified that, ordinarily, the profits disgorged would be the gains from the wrongful conduct minus lawful business expenses, which would limit the amount sought to net profits. Perhaps

[319]SEC Press Release, 27 September 2018.
SEC News, 6 December 2019.
[321]Kokesh v. Securities and Exchange Commission, 137 S. Ct. 1635 (2017)
[322]U.S. Securities and Exchange Commission, Division of Enforcement, 2019 Annual Report.
[323]Liu v. SEC, No. 18–1501 (2020).

more crucially for foreign bribery matters, the Supreme Court suggested that the notion of "victim" refers chiefly to investors, as § 78u(d)(5) requires that the remedy be "appropriate or necessary for the benefit of investors". Thus, the Supreme Court observed that "the equitable nature of the profits remedy generally requires the SEC to return a defendant's gains to wronged investors". This could significantly limit the SEC's ability to impose disgorgement in FCPA enforcement actions, since funds collected in such actions are normally not returned to victims or investors but rather deposited with the Treasury. The Supreme Court's decision left unresolved whether the SEC could, consistently with § 78u(d)(5), deposit the amount disgorged with the Treasury where "it is infeasible to distribute the collected funds to investors".[324]

(ii) DOJ disgorgement

349. Since the resolution of FCPA matters with declinations under the Pilot program and, further, the CEP, the DOJ has imposed disgorgement on corporate entities. In the first three declinations with disgorgement, all concluded in June 2016, the DOJ did not itself impose disgorgement *per se* but included in the agreement that the company would be "disgorging to the SEC the full amount of disgorgement as determined by the SEC".[325] In September 2016, the DOJ imposed disgorgement for the first time as part of a declination agreement concluded with company HTM LLC.[326] The amount of disgorgement corresponds to an estimation of profits illegally-obtained by the company. Its amount is determined by the DOJ and the company during the discussions leading up to a declination under the CEP. During the on-site visit, the DOJ and SEC explained that they independently assess the amount of disgorgement.

350. DOJ decisions on disgorgement are independent of the SEC's action or inaction and the DOJ started imposing disgorgement prior to the *Kokesh* ruling. It is however interesting to note that, following *Kokesh*, the DOJ has imposed disgorgement of ill-gotten gains outside the limitation period. This is noticeable in the December 2018 *Polycom, Inc. case* (*Polycom*).[327] *Polycom* is the first declination with disgorgement that was granted to a listed company after the *Kokesh* ruling. Through a declination with disgorgement, the DOJ observed the Supreme Court 5-year limitation applying to SEC disgorgements following *Kokesh* by crediting the portion of the disgorgement of profits generated during the limitation period to the SEC. It allocated the rest of the disgorged amounts to other federal agencies – presumably to ensure that the company did not benefit from the misconduct while respecting the *Kokesh* ruling.

351. Two declinations were accorded under the CEP following *Polycom*, both to listed companies. In the first one, *Cognizant Technology Solutions Corporation*, it seems that the DOJ proceeded as in *Polycom*.[328] It provides that the disgorgement amount should be credited by amounts paid to the SEC and "any remaining amount" shall be paid to the Treasury. In *Quad/Graphics Inc*., however, the DOJ noted that the company would disgorge to the SEC the full amount of its ill-gotten gains.[329]

Commentary

The lead examiners are concerned with the significant limitation of the SEC's ability to impose disgorgement following the 2017 Supreme Court Kokesh and Liu decisions. In Kokesh, the Supreme Court held that disgorgement is subject to a five year statute of limitations, which means that proceeds of misconduct obtained by a wrongdoer outside the limitation period are insulated from disgorgement by the SEC. In Liu, the Supreme Court held that the SEC can impose disgorgement if the funds recovered are awarded to victims while expressly stating that it did not pronounce on other possible circumstances. It thus remains to be seen how disgorgement will work in FCPA cases that often do not have identified victims.

While the lead examiners welcome the DOJ's imposition of disgorgement since 2016, as also indicated under section B.4.(e)(ii), they recommend that the Working Group follow up the impact of the Supreme Court ruling

[324] Liu v. SEC, No. 18–1501 (2020).
[325] In re: Akami Technologies, Inc., 6 June 2016. https://www.justice.gov/criminal-fraud/file/865411/download
[326] In re: HMT LLC, 29 September 2016.
[327] In re: Polycom Inc., 20 December 2018.
[328] In re: Cognizant Technology Solutions Corporation, 13 February 2019.
[329] In re: Quad/Graphics Inc., 19 September 2019.

to ensure that the United States' capacity to recover ill-gotten gains from foreign bribery remains possible, in line with Article 3 of the Convention.

(d) Additional sanctions and debarment

352. In Phase 3, the Working Group focused on specific issues related to the United States' exclusion from public contracting, including whether debarment can be imposed as part of a non-trial resolution, coordination among different agencies, and restrictions to arms exports licences for companies and individuals involved in foreign bribery acts. The Working Group recommended "that the United States take appropriate steps to verify that, in accordance with the 2009 Anti-Bribery Recommendation, debarment and arms export license denials are applied equally in practice to domestic and foreign bribery, for instance by making more effective use of the Excluded Parties List System' (EPLS)" (recommendation 4). At the time of the United States Phase 3 Written Follow-up report, the Working Group deemed this recommendation fully implemented. Since Phase 3, the debarment regulations in the United States have not substantially changed except that the Excluded Parties List System was replaced, in 2012, by the System for Award Management (SAM), but the registering requirements remain the same.

353. Since Phase 3, commentators and civil society have regularly discussed the efficiency of debarment as a dissuasive measure in foreign bribery cases.[330] The U.S. authorities, however, emphasised that the actual purpose of debarment in government contracting is to provide a protective measure of business risk, not a dissuasive one and that cannot be used for punishment.[331] The evaluation team thus briefly revisited the topic with some panellists during the on-site visit and further explored how it has been applied in practice.

354. A company or individual who violates the FCPA or other criminal statutes may be debarred from doing business with the United States' federal government to the extent that the violation is referred for consideration to the agency suspending and debarring official. In the U.S., most foreign bribery cases are resolved with non-trial resolutions (NTRs). Although it is not an automatic consequence, the underlying misconduct under the NTR may be used as a ground for debarment under the U.S. procurement debarment system. Under U.S. laws and regulations, debarment and suspension remedies may be imposed only if "in the public interest for the government protection and not for purposes of punishment".[332] The decision to debar a company or individual is discretionary and rests with each governmental agency, who also should consider remedial measures or mitigating factors per regulations.[333] However, the debarment decision issued by one agency has a governmental-wide effect applicable to the entire executive branch of the federal government. Once the decision to debar a company or individual is issued, the relevant information will be uploaded on SAM.gov, where it will be publicly available. Before doing business with companies and individuals, federal governmental agencies must consult SAM.gov to ensure that the contractor is not debarred. [334]

355. Government agencies are required to coordinate with other federal agencies to seek lead agency status before making debarment decisions on companies that have undergone enforcement actions. Each agency may also, at its discretion, enter into an administrative compliance agreement to resolve debarment concerns. Those agreements can include provisions to enhance the companies' ethical culture and corporate governance process. [335] Debarring officials may also take into account a company's compliance program or other remedial measures

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[330]See Corruption Watch (March 2016), *Out Of Court, Out Of Mind: do deferred prosecution agreements and corporate settlements fail to deter overseas corruption?*"; Drury D. Stevenson and Nicholas J. Wagoner, "FCPA Sanctions: Too Big to Debar?", 80 Fordham L. Rev. 775 (2011); Matthew Stevenson (29 January 2015), "Is the "Too Big to Debar" Problem a Problem? And Is Partial Debarment a Solution?", The Global Anticorruption Blog, and OECD (November 2016), Public consultation on liability of legal persons: Compilation of responses, response of Jennifer Arlen, Professor of Law, New York University, pp. 4-12.

[331] 48 C.F.R. § 9.402.

[332]48 CFR § 9.402(b) and 2 CFR §180.215.

[333]48 CFR§ 9.406-1(a).

[334]US General Services Administration, (20 March 2020), System for Award Management Non-Federal User Guide.

[335]Interagency Suspension and Debarment Committee, Annual Report to Congress. Fiscal Year 2017.

in making suspension and debarment decisions. In 2018, approximately 1 688 persons were debarred or suspended by U.S. Federal authorities. Of those, individuals represented the vast majority of cases, 1 233 (73%), while only 258 (15%) concerned companies.[336] There is no publicly available information on how many of these debarment decisions by the United States' authorities have been imposed as a result of FCPA matter.

356. A Multilateral Development Bank (MDB) may also debar a company or individual. The main MDBs have a cross-debarment system to mutually enforce each other's debarment decisions based on corruption, fraud, coercion and collusion.[337] At the time of drafting this report, the Multilateral Development Banks had debarred a number of United States' persons: The World Bank (66),[338] Inter-American Development Bank (43),[339] Asian Development Bank (30),[340] African Development Bank (24)[341] (all cross-debarred from other multilateral banks), and European Bank for Reconstruction and Development (8).[342] Some U.S. agencies such as EXIM inform in their websites that they regularly check MDBs debarment lists, but it is not clear whether this is a general routine throughout the government. ***[343]***

(e) Loss of export privileges

357. As discussed above and as in other countries, the defence sector is exposed to a high-risk of foreign bribery. A high number of companies in the aerospace and defence industry have been involved in FCPA cases.[344] Under section 38(g)(4) of the AECA[345] the Department of State's Directorate of Defense Trade Controls (DDTC) is generally precluded from issuing a license to export a defence article to a person convicted of violating certain statutes or conspiring to violate certain statutes specified in section 38(g)(1) of the AECA, which includes section 104 of the FCPA. This provision, often referred to as "statutory ineligibility," applies automatically following such conviction. Furthermore, under section 126.7 of the ITAR, DDTC can revoke, suspend, amend, or deny an arms export licence if the applicant has been indicted or convicted of FCPA violations. Furthermore, the AECA prohibits U.S. suppliers of defence materials and services, as well as licenced arms exporters "with respect to the sale or export of any such defence article or defence service to a foreign country, (to) make any incentive payments for the purpose of satisfying, in whole or in part, any offset agreement with that country".[346]

358. The ITAR permits the "administrative debarment" of persons who violated 22 U.S.C. § 2778 or the ITAR when such a violation is established in accordance with 22 C.F.R. part 128 and provide a reasonable basis for the Department to believe that the violator cannot be relied upon to comply with 22 U.S.C. § 2778 or the ITAR in the future.[347] The ITAR also provides for the imposition of a "statutory debarment" on persons who are convicted of violating the AECA or a conspiracy to violate the AECA.[348] ImpFaosition of statutory debarment is a policy decision taken in the event of such violations, and, where adopted, such restrictions apply in addition

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[336]David Robbins and Laura Baker, Crowell & Moring LLP, (30 October 2018), "Suspension and debarment: FY 2018 by the Numbers", Law 360. The remaining 12% of cases concerned special entities, defined as those which cannot be classified as individuals or firms. See: US General Services Administration, (20 March 2020), System for Award Management Non-Federal User Guide.

[337]The agreement was signed on 9 April 2010 by African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank Group.

[338]The World Bank, Procurement –World Bank Listing of Ineligible Firms & Individuals.

[339]Inter-American Development Bank, Sanctioned Firms and Individuals.

[340]Asian Development Bank, Anticorruption Sanctions List.

[341]African Development Bank. Debarment and Sanctions Procedures.

[342]European Bank for Reconstruction and Development, Ineligible entities.

[343]EXIM website.

[344]Stanford Law School. FCPA database, Statistics by industry.

[345]22 U.S.C. § 2751, *et seq.*

[346]22 U.S.C. § 2779(a).

[347]See 22 CFR §§ 127.7(a) and 127.7(c)(2).

[348]See 22 C.F.R. §§ 127.7(b) and 127.7(c)(1).

to the 22 U.S.C. § 2778(g)(4) ineligibility described above. Statutory debarments are published in the Federal Register.

Commentary

The lead examiners recognise the specificities of the U.S. debarment system. However, the lack of data on the number of companies referred for debarment after concluding non-trial resolutions do not allow the lead examiners to assess neither the extent to which it has been used in FCPA and related offences' cases or its deterrent effect as an additional measure. They further welcome the efforts made by the U.S. authorities to take into consideration acts of foreign bribery when granting arms' and defence articles export licences.

The lead examiners recommend that the United States collect, to the extent possible within its system, data on debarment in foreign bribery cases to improve the monitoring of the impact of such measures. They also recommend that the United States consider encouraging public contracting authorities and those responsible for granting arms export licences to implement reviews of debarment lists of multilateral financial institutions as an additional source in determining whether an entity is trustworthy.

(f) Tax treatment of sanctions and confiscation

359. Monetary sanctions imposed in FCPA cases are not tax-deductible. Since 1969, the U.S. Internal Revenue Code (IRC) has denied a deduction for "any fine or similar penalty paid to a government for the violation of any law."[349] Following adoption of the Tax Cuts & Jobs Act in December 2017, the provision was revised to state that no deduction is allowed for "any amount paid or incurred (whether by suit, agreement, or otherwise) to, or at the direction of, a government in relation to the violation of any law or to the investigation or inquiry into the potential violation of any law". The new rule provides an exception when the taxpayer can demonstrate that the amount paid constituted restitution or that the amount was paid to come in compliance with a law.

360. According to some practitioners, under the previous rules, the question of whether disgorgement amounts are deductible from tax basis was not clear. The IRS's position was that a disgorgement payment was deductible if imposed for "primarily compensatory" purposes and not deductible if imposed primarily for deterrence and/or punishment purposes, which would be determined on a case-by-case basis.[350] In November 2017, the IRS Chief Counsel published an internal advice that, based on *Kokesh*, in securities laws, all disgorgement payments in relation to securities laws violations are penalties for purposes of Section 162(f) of the U.S. Internal Revenue Code and are therefore not deductible.[351]

361. The non-precedential internal guidance issued in late 2017 seemed to lift any ambiguity regarding non-deductibility of SEC disgorgement payments. Indeed, as the restitution exception applies to amounts measured by the loss of the victims and paid to such victims, SEC disgorgement amounts, to the extent they are measured by the wrongdoer's unjust enrichment, are not be eligible for the exception. In June 2020, the IRS published a Proposed Rule to implement the disallowance of deductions under Section 162(f), introduced by the 2017 IRC revisions.[352] In line with the 2017 internal guidance, the IRS provides in the public consultation material for the Proposed Rule that "restitution, remediation, and amounts paid to come into compliance with a law do not include any amount paid or incurred which the taxpayer elects to pay in lieu of a fine or penalty or as forfeiture or disgorgement".[353]

362. Similarly, companies disgorging following a DOJ declination with disgorgement concluded under the CEP are not able to seek a tax deduction in connection to the disgorgement amount. Since September 2016, the

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[349]U.S. Internal Revenue Code, Section 162 (f).

[350]Diana L. Wollman, Rebecca Reeb and Katie Sheridan (21 February 2018), "Settlement Payments Under the New Tax Reform Law", Cleary Gottlieb Enforcement Watch.

[351]Office of Chief Counsel Internal Revenue Service (17 November 2017), memorandum on Section 162(f) and Disgorgement for Violating a Federal Securities Law.

[352]Denial of Deduction for Certain Fines, Penalties, and Other Amounts; Information With Respect to Certain Fines, Penalties, and Other Amounts, A Proposed Rule by the Internal Revenue Service on 05/13/2020.

[353]Denial of Deduction for Certain Fines, Penalties, and Other Amounts; Information With Respect to Certain Fines, Penalties, and Other Amounts, A Proposed Rule by the Internal Revenue Service on 05/13/2020, p.32.

DOJ has systematically included a term to that effect in its declinations with disgorgement. During the on-site visit, representatives of the IRS explained that the compliance personnel is "well versed" in detecting claims for deduction of sanctions, as it routinely looks through returns to identify inflated or mischaracterised payments.

Commentary

The lead examiners commend the United States for issuing non-precedential guidance in 2017 highlighting the non-deductibility of disgorgements from taxable incomes. They also welcome the proposed rule published in May 2020 which clarifies that the 2017 revisions of the U.S. Internal Revenue Code disallow the deductibility of disgorgement. They recommend that this be identified by the Working Group as a good practice.

C.4. Engagement with the Private Sector

(a) Continuous dialogue with the private sector to enhance enforcement policies and guidance

363. Following the on-site visit, the U.S. authorities explained that the FCPA Unit and Criminal Division consult "external stakeholders", including legal counsels with respect to revisions to policies, including recent revisions to CEP. In fact the private sector has contributed to shape all key FCPA guidance and policy instruments since Phase 3.

364. During the on-site visit, representatives of the private sector indeed explained that they were consulted in the discussions leading up to the adoption of the FCPA Resource Guide in December 2012, beginning with a roundtable with private sector representatives hosted at the DOC with the DOJ and SEC. Companies were also consulted in the revisions to the Yates Memo, announced in November 2018 by then Deputy Attorney General Rod J. Rosenstein.[354] An outcome of this consultation is for instance reflected under the revised provisions, where credit for cooperation now requires companies to "identify the individuals who were 'substantially involved in or responsible for the criminal conduct'", whereas it previously required companies to identify "all employees involved" in the wrongdoing. Rod Rosenstein explained that these changes "reflect a lot of deliberation and analysis by experienced government and private sector lawyers who understand the practical implications of [the DOJ's] policies and how they sometimes help – but sometimes inhibit – efforts to achieve [the DOJ's] goals." [355]

365. Similarly, during the on-site visit, the DOJ explained that, when the Pilot Program reached an end and morphed into the Corporate Enforcement Policy in 2017, the business community was consulted in the discussions that led up to the strengthening of cooperation incentives. A few months after the policy rollout, the DOJ collected feedback on practical aspects of its application and revised the original language of the CEP which originally prohibited the use of instant messaging as not complying with business records requirements. After hearing from the business community that instant messaging is often indispensable to conduct business efficiently in some jurisdictions, the DOJ withdrew this prohibition. The DOJ further explained that feedback from the private sector can be critical to better adjust enforcement policies to business realities.

366. This continuous dialogue is rooted in the DOJ's strategy to build ties with the business community, encourage cooperation, with the aim of identifying individual wrongdoers. This strategy underlies policy and guidance instruments, but also transpires from the numerous speeches and public statements delivered by DOJ officials from different hierarchical levels of the Department. For instance, in a statement announcing the "anti-piling on" policy, Rod Rosenstein stated that "Corporate America should regard law enforcement as an ally".[356] Commentators anticipate that the DOJ will continue to consult the private sector on a regular basis as the CEP continues to unfold and evolve.[357] During the on-site visit, private sector representatives and lawyers expressed their appreciation of the fact that the U.S. enforcement authorities "are listening to companies", and expressed

[354]U.S. DOJ Office of the Deputy Attorney General (9 September 2015), Memorandum on Individual Accountability for Corporate Wrongdoing.
[355]DOJ News, 29 November 2018.
[356]DOJ News, 9 May 2018.
[357]Morrison & Foerster LLP (8 March 2019), "DOJ Announces Revised FCPA Corporate Enforcement Policy".

their satisfaction with the fruitful ongoing dialogue with the DOJ. Efforts to consult with the business community in policymaking, combined with enhanced transparency of enforcement policies, have contributed to creating trust and encouraging companies' cooperation.

(b) Increased transparency of enforcement policies and continued awareness-raising efforts

367. Several federal agencies contribute to raising awareness of foreign bribery. The DOJ and SEC are the frontrunners of this effort. In their questionnaire responses, the U.S. authorities explain that members of the DOJ and the SEC FCPA units are constantly participating in conferences, continuing education programs, and bar events to raise awareness among compliance officials, in-house lawyers, and outside counsels on FCPA related risks and prohibitions. In fact, during the on-site visit, DOJ prosecutors stressed that, to their knowledge, no federal offence is subject to more guidance and communication than the FCPA.

368. In addition to the DOJ and SEC's initiatives, since Phase 3, the Departments of Commerce and State have also continued to hold and participate in numerous outreach events with the business community and civil society on the importance of the implementation of the Convention and enforcement of foreign bribery laws. Most recently, in 2019, the Department conducted outreach with the State Department and several business, legal groups and non-governmental organisations on the revision of the 2009 Recommendation. The DOC also co-hosted a major and widely-attended event "Celebrating the OECD Anti-Bribery Convention at 20, the FCPA at 40 & Addressing the Challenges Ahead" with multiple private sector groups to raise awareness about and commemorate the twentieth anniversary of the Convention and the fortieth anniversary of the FCPA in November 2017. Similarly, the DOJ and the SEC co-hosted a major conference in New York to mark the occasion entitled "No Turning Back: 40 Years of the FCPA and 20 Years of the OECD Anti-Bribery Convention," which was attended by practitioners and experts from around the world. The Department of Commerce also hosted, co-sponsored, or participated in numerous events and roundtables with non-government organisations, businesses, and other private sector groups over the years on issues including bribe solicitation, corruption in certain key markets, corruption in international trade, the OECD Foreign Bribery Report, and others. The U.S. authorities also stress that since 2010, the Department of Commerce's International Trade Administration (ITA) has played a prominent role in the Business Ethics for APEC SMEs Initiative, a public-private partnership to strengthen ethical business conduct and enable a level playing field. Its work has resulted in broad industry association code of ethics adoption and implementation among business groups in the pharmaceutical and medical device industries.

369. During the on-site visit, business representatives expressed the view that the most relevant development since Phase 3 was the publication of the FCPA Resource Guide. Panellists from different segments of the business community emphasised the importance of the Guide to promote awareness of foreign bribery. Other measures aiming at enhancing transparency and publicity, such as timely press releases on enforcement actions, and more generally policy and guidance documents published by the DOJ since Phase 3 were also cited as effective ways to engage with the private sector. The documents cited were in particular the CEP, and the DOJ guidance on the Evaluation of Compliance Programs.[358]

370. Business organisations play an important role in raising foreign bribery awareness within the private sector. During the on-site visit, panellists indicated that business organisations have organised a series of events and sector specific trainings on foreign bribery risks for U.S. companies doing business abroad, including SMEs. FCPA awareness initiatives and enforcement actions promoted by the U.S. authorities have shown positive results in enhancing companies' compliance programmes.

(c) Effect of enforcement and guidance on compliance

371. In their questionnaire responses, the U.S. authorities explain that while assessing the effect of their policies on the level of foreign bribery is complex, they have observed improvements in the compliance programs of U.S. companies that can reasonably be tied to enforcement efforts and public outreach. During the

[358]U.S. DOJ Criminal Division (April 2019), Evaluation of Corporate Compliance Programs.

on-site visit, the DOJ thus stressed that "corporate compliance culture is growing as a result of our enforcement and policies". Similarly, SEC officials reported that they have seen increased sophistication of compliance programs, which they attribute to enforcement and the publication of resolutions, the latter providing valuable insight and guidance to companies, along with guidance in the FCPA Resource Guide and the U.S. Sentencing Guidelines.

372. During the on-site visit, the evaluation team met with representatives of business organisations, as well as issuers and non-issuers. The discussions confirmed that with the now long established level of enforcement of the foreign bribery offence in the United States, U.S. businesses are well aware of foreign bribery risks and are continuously enhancing their compliance programmes to prevent FCPA violations. Even non-issuers, which are not bound by FCPA books and records and internal controls provisions, reported that they spontaneously design compliance programmes for reasons including client's demands and the attenuation of risks of facing enforcement actions. Research conducted by the OECD in 2020 on the drivers of anti-corruption compliance coincides with this feedback, as it showed that enforcement is the main incentive for companies to adopt compliance programmes.[359] The study describes the "bystander effect", emphasising that some of the companies surveyed have developed or strengthened their compliance programmes after witnessing the impact of FCPA investigations on their competitors.

373. Private sector panellists emphasised that highly regulated industries such as defence, healthcare and finance have even more robust compliance programmes. Additionally, they indicated that companies operating in sectors targeted by the most recent industry investigations (*e.g.* finance and oil and gas) have enhanced compliance programmes to specifically address sectorial compliance risks.

374. Private sector representatives also explained that the DOJ guidance on the Evaluation of Corporate Compliance Programs has been a valuable tool to design adequate and efficient compliance systems. More generally, the Guidance received considerable attention, and was perceived as an "important step in recognizing the value of compliance programs".[360] The U.S. authorities report that they have received very positive feedback from compliance officers, who presumably report that the Guidance is helpful to convey to corporate leadership the importance of investing in compliance, despite the cost it incurs. This coincides with the findings of the 2020 OECD study on compliance, which revealed that clear guidance from the government not only helps compliance personnel as they develop their programmes, but also "provide them with evidence to show their boards and management teams why the steps are important."[361] The U.S. authorities explained that following demands from companies, they are considering the opportunity of issuing industry-specific guidance by types of industries.

375. The U.S. authorities also indicate that in connection with the issuance of the revised guidance, the DOJ Criminal Division held its first annual Compliance Training Symposium on April 30, 2019. The symposium featured prosecutors from the FCPA Unit, who discussed the prosecutor's role in assessing the adequacy and effectiveness of corporate compliance programs, and compliance lessons learned from recent corporate resolutions, as well as compliance experts from major global corporations. The training was attended by over 150 government attorneys, including members of the SEC's FCPA Unit. Going forward, the DOJ Criminal Division plans to provide quarterly training on compliance-related topics. The revisions made to the guidance on the Evaluation of Corporate Compliance Programs in June 2020 stress the importance of data in designing, testing and updating compliance programmes. In particular, they set forth that the periodic review of a company's risk assessment should be "based upon continuous access to operational data and information across functions". To determine if a company's programme is "adequately resourced and empowered to function

[359]OECD (2020), Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change, p.17. The study shows that 80.7% of the 124 respondents whose companies had an anti-corruption compliance programme indicated that avoiding prosecution or other legal action was a "significant" or "very significant" factor in their decision to establish the programme.
[360]Robert Connolly (5 August 2015), "Report: DOJ hires expert to evaluate target company compliance programs", FCPA Blog, and Karen Freifeld (15 July 2015), "US Justice Department hiring compliance expert", Reuters.
[361] OECD (2020), Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change, p.70.

effectively", the revised Guidance also calls for prosecutors evaluating compliance programmes to consider whether compliance staff's access to data is sufficient to "allow for timely and effective monitoring and/or testing of policies, controls, and transactions". Commentators, particularly practitioners, welcomed the DOJ's new position on the role of data in compliance. In the months that followed the revision of the Guide, the terms of several DPAs started to reflect the language of the Guide regarding the use of data, thus increasing further the emphasis on this subject.

376. However, several commentators contend that the CEP - and in particular the presumption of declination - undermines compliance. For instance, one academic suggests: "allowing corporations to escape criminal liability if they assist the government in prosecuting the employees would tend to weaken corporate compliance programs more than it would strengthen deterrence […]."[362] Along these lines, another academic met during the on-site visit, while recognising the efficiency of incentives, opined that a formal policy based on a presumption for declination risks trivialising the offence itself.

377. According to DOJ prosecutors met during the on-site visit, companies can only benefit from the policy if they disclose, fully cooperate and remediate the wrongdoing, which requires them to have designed and implemented efficient compliance programs before the misconduct occurred. They indicate that the policy encourages companies to uproot misconduct in its early stages. Indeed, as they are incentivised to share information, they are incentivised to find it, which requires an efficient compliance system.

(d) Support of U.S. companies engaging in business abroad

378. The DOC's International Trade Administration's United States and Foreign Commercial Service has a network of export and industry trade specialists located in more than 100 U.S. cities and over 70 countries worldwide. These trade professionals provide counselling and a variety of products and services to assist U.S. businesses in exporting their products and services. These trade professionals also provide support and assistance as appropriate to U.S. businesses in their efforts to comply with applicable U.S. and foreign commercial laws, regulations, and other measures in conducting their activities in foreign markets. As highlighted in the U.S. questionnaire responses, to assist U.S. companies, including SMEs, with the tools they need to export without running afoul of the FCPA and related international laws, the DOC provides general information and resources to U.S. companies on the statute and related international initiatives. The Commerce and State Department legal offices also continue to provide basic training on the FCPA and related anticorruption instruments to U.S. DOC Foreign and Domestic Commercial Service and State Department Foreign Service Officers, who in turn provide general information and resources to U.S companies on the FCPA and related anticorruption issues. Department of Commerce officials from the Office of the General Counsel have also served as guest speakers at numerous conferences and university classes on the FCPA and related anticorruption initiatives. During the on-site visit, the DOS further stressed that the Bureau of International Narcotics and Law enforcement has an active program on combating foreign bribery.

Commentary

The lead examiners positively note the joint efforts of the U.S. authorities and business sector to raise awareness and provide guidance about the FCPA, and instil a sophisticated culture of compliance in the private sector, through a continuous dialogue on enforcement policy about the impact an effective compliance program can have both in terms of identifying potential misconduct at an early stage and on the resolution of any enforcement action. Awareness of foreign bribery risks is high, mainly due to the high priority by the U.S. Government to enforcing the FCPA and the highly commendable enforcement results achieved; but also due to the parallel continued efforts by the business organisations and companies themselves to adapt to a constantly evolving landscape.

[362]Matthew Stephenson (29 September 2015), "Should FCPA Enforcers Focus on Bribe-Paying Employees or Their Corporate Employers?", Global Anticorruption Blog.

D. OTHER ISSUES

D.1. Money Laundering

379. In its Phase 3 evaluation report, the Working Group focussed on the U.S. regulatory issues that could affect the effectiveness of the U.S. AML system in preventing and detecting the laundering of the proceeds of foreign bribery. The report recognised the improvements of the U.S. AML system since Phase 2, including the repatriation of significant amounts of proceeds of corruption held by foreign officials. Since Phase 3, the main development in the U.S. AML system was the implementation of the U.S. Treasury's 2016 customer due diligence rule, which is further discussed under Section A2 of this report. This section thus mainly focuses on enforcement, since Phase 3, of the money laundering offence in cases where foreign bribery is the predicate offence. It also discusses the financial information sharing mechanism established by Section 314 (a) of the USA Patriot Act of 2001.

(a) AML Enforcement

380. Since Phase 3 the United States has significantly increased the use of its money laundering and conspiracy to commit money laundering offences[363] in cases where foreign bribery was the predicate activity that generated the illicit proceeds. Based on data provided by the U.S. authorities, from 2012 to 2019, the DOJ brought 57 enforcement actions against natural persons for money laundering connected with FCPA offences. This represents 25% (52 out of 205) of the total enforcement actions against natural persons in the same period. In 83 of the natural person enforcement actions (40%) included charges for conspiracy to launder money during the reporting period. No legal person was charged with money laundering or conspiracy to commit money laundering predicated on foreign bribery during the same time period**.** After the on-site visit, U.S. authorities explained that it is very rare for legitimate businesses to knowingly engage in money laundering. If they do, it is usually related to trade-based money laundering which is most often not a foreign bribery method. When financial institutions enable money laundering, U.S. prosecutors would likely charge criminal violations of the Bank Secrecy Act, including the offence of failing to maintain an effective anti-money laundering program. They further indicate that since U.S. law enforcement can aptly identify the human actors behind shell companies, and because penalties (such as imprisonment) are better suited for use against the natural persons who simply misuse legal persons, they prefer to prosecute individuals as opposed to entities established for the sole purpose of facilitating or concealing criminal activity or entities that have legitimate business but where a few bad actors perpetrated the crime. Finally, they see little incremental value in charging shell companies when they can impose more dissuasive sanctions against persons and when forfeiture can be accomplished against assets connected to the criminal activity regardless of the nominal owner.

381. The U.S. enforcement authorities have also charged foreign public officials or their associates involved in foreign bribery schemes with money laundering offences. In its questionnaire responses, the United States explains that although foreign public officials cannot be charged under the FCPA for solicitation, they can be charged with money laundering whenever they use the U.S. financial system to launder the proceeds of a wide variety of domestic offences, including the FCPA and certain foreign offences. During the on-site visit, the DOJ confirmed that it often charges individuals on the demand side of foreign bribery with money laundering and conspiracy to commit money laundering. Based on data provided by the U.S. authorities, from 2012 to 2019, the DOJ charged foreign public officials with money laundering in 11 enforcement actions, and with conspiracy to commit money laundering in 19 enforcement actions. Besides these FCPA based enforcement actions, the U.S. authorities reach foreign corruption cases through criminal prosecutions and civil forfeiture actions brought under the auspices of its *Kleptocracy Initiative*. Finally, in a written submission following the on-site visit, the

[363] 18 U.S.C. Section 1956 and offence 18 U.S.C. Section 1956(h), respectively.

examination team learned of a series of AML legislative proposals under consideration by Congress aiming to sanction corrupt foreign officials.[364]

(b) Financial information sharing through Section 314 (a) of the U.S.A. Patriot Act

382. In addition to access to the BSA data under information sharing MOUs and the dissemination of financial intelligence products (discussed under Section A2 of this report), U.S. and foreign law enforcement agencies may also seek to use tools available to FinCEN during investigations. FinCEN's regulations under Section 314(a) enable federal, state, local, and foreign (European Union) law enforcement agencies, through FinCEN, to reach out to more than 34 000 points of contact at more than 14 000 financial institutions to locate accounts and transactions of persons that are suspected, based on credible evidence, of terrorism or money laundering (to include laundering linked to any predicate crime, e.g., foreign bribery). [365]

383. The financial institutions must query their records for data matches, including accounts maintained by the named subject during the preceding 12 months and transactions conducted within the last 6 months. Financial institutions have 2 weeks from the posting date of the request to respond with any positive matches. To make a 314(a) request, a law enforcement agent must provide FinCEN with a written certification that the individual or entity under investigation "is engaged in, or is reasonably suspected based on credible evidence of engaging in, terrorist activity or money laundering".[366] The financial institutions will then be required to search their systems and report back to FinCEN swiftly and affirmatively if they have information on the person entity that is the subject of the request. The institution simply indicates whether it holds an account or has engaged in a recent transaction involving the subject. This limited answer would generally prompt investigators to issue a subpoena or other legal process to one or more specific financial institutions for additional information and detailed records. FinCEN informed the evaluation team that, since 2010, it received seventeen 314 (a) requests that mention foreign bribery as one of the predicate offences of the money laundering conduct under investigation.

Commentary

The lead examiners welcome the high level of enforcement by the U.S. law enforcement agencies of their money laundering offence in cases where foreign bribery was the predicate offence. They also welcome the cooperation of FinCEN with law enforcement authorities attending requests to share important financial information in cases of money laundering predicated on foreign bribery.

D.2. Accounting Requirements, External Audit, and Companies Compliance and Ethics Programmes

384. The books and records provision (discussed above under section B.1.(a)(ii) on the offence) aims to prohibit the mischaracterisation of bribes in the issuers' accounting books and records. Hence the necessity to reflect, with reasonable detail, the issuer's transactions. Similarly, the internal controls provision requires "reasonable assurances" on the management's control, authority, and responsibility over the companies' assets. The statute defines "reasonable details" and "reasonable assurances" as "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs" (Section 13(b)(7) of the Exchange Act, 15 U.S.C. § 78m(b)(7)). In practical terms, the concept of reasonableness contemplates the weighing of a number of relevant factors. In the first case, the details should contemplate enough information not to mischaracterise transactions. In the second case, the provision gives companies a flexibility to structure its internal controls in a tailored fashion, matching the risks of each sector or industry.[367]

385. The United States has demonstrated a high-level of enforcement of the FCPA's accounting provisions since Phase 3. Based on the Phase 4 case data, U.S. authorities brought books and records charges in 151 of 392

[364]Coalition for Integrity (2020), Coalition for Integrity: Evaluation of United States' Foreign Bribery Enforcement.
[365]31 CFR Section 1010.520.
[366]31 CFR Section 1010.520.
[367]DOJ Criminal Division, SEC Enforcement Division, A Resource Guide to the U.S. FCPA, Second Edition, pp.38-46.

supply-side enforcement actions (39%). Similarly, they brought charges for internal control violations in 139 enforcement actions (35%). Charges were brought based on the § 78m(b)(5) provision in 61 enforcement actions (16%). The data also show that these charges have a high success rate. For example, 141 of the 146 concluded enforcement actions involving books and records charges resulted in sanctions on that count (97%), while 131 of the 136 enforcement actions involving internal controls charges resulted in sanctions on that count (96%).

(a) Accounting requirement for non-issuers

386. In Phase 3, the Working Group decided to follow-up on the detection and prosecution of violations of the bribery provisions of the FCPA by non-issuers, which are not subject to the books and records provisions in the FCPA (Follow-up Issue 1). The U.S level of enforcement actions against non-issuers in foreign bribery cases has since progressed. Based on data provided by the U.S. authorities, from 2012 to 2019, 210 FCPA enforcement actions were brought against non-issuers (domestic concerns and other persons, as well as agents of domestic concerns). This represents 54% of the total of enforcement actions in the period. Nonetheless, the absence of books and records and internal controls specific obligations to non-issuers might still *prima facie* raise some concerns, especially regarding private companies with considerable volume of business abroad. During the on-site visit, non-issuers' representatives affirmed that despite not being bound by the FCPA's accounting provisions, they are driven by owners demands to implement accounting controls similar to those imposed to issuers. In the accountants' panel, several panellists highlighted that large private companies often spontaneously adopt FCPA accounting standards. In addition, state and federal laws establish accounting provisions that non-issuers must follow. Therefore, the legal and commercial demands towards non-issuers accounting obligations combined with the number of enforcement actions brought against those entities provide sufficient evidence to alleviate past Working Group's concerns.

(b) Exclusion of liability for FCPA accounting provisions with respect to national security matters

387. Under the FCPA, liability for violation of the accounting provisions in the FCPA can be excluded with respect to matters concerning the national security of the United States.[368] This exception applies so long as the head of a federal department or agency requests cooperation from an issuer with a specific written directive pursuant to Presidential authority. The directives must be shared with U.S. Congress intelligence committees. The DOJ and the SEC are not aware that this exception was ever applied.

Commentary

The lead examiners welcome the high level of enforcement by the United States DOJ and SEC of the FCPA accounting provisions. They note that the detection and prosecution of violations of the bribery provisions of the FCPA by non-issuers no longer raises concerns. There is thus no more ground for the Working Group to continue to specifically follow-up developments in this specific area as was decided in Phase 3 (Follow-up Issue 1).

D.3. Tax measures for combating bribery

(a) Enforcement of the non-tax deductibility of bribe payments

388. Reassessment of tax returns following an FCPA-related resolution was discussed with representatives of the IRS and the Fraud Section during the on-site visit. As explained under section A.3, in the United States, the IRS would be notified by the DOJ Fraud Section while the investigation is ongoing rather than when it is terminated, in order for the agencies to reach one global resolution with the alleged offender. This practice ensures a consistent re-examination of tax returns in FCPA-related matters.

389. In Phase 3, the Working Group expressed concern with the uncertainty about how the U.S. tax authorities deal in practice with facilitation payments for which tax deductions are claimed. The Group considered that there might be a potential for some companies to identify a payment as a facilitation payment when it was in fact a payment for discretionary official action that violates the FCPA. It recommended that the

[368] 15 U.S.C. 78m(b)(3)(A).

United States clarify the policy on dealing with claims for tax deductions for facilitation payments, and give guidance to help tax auditors identify payments claimed as facilitation payments that are in fact in violation of the FCPA.[369]

390. During the on-site visit, the IRS-CI explained that under the current system, a bribe payment disguised as a small facilitation would likely not raise a red flag, and evidence of this scheme would emerge in the context of an examination open on different grounds. Additionally, after the on-site visit, the U.S. authorities reported that small facilitation payments are likely to be categorised in a somewhat generic category (like "other expenses"). Given the inherent difficulty to thus identify such payments, the IRS does not have a method to specifically determine the rate at which facilitation payments have been claimed as deductible payments since 2010.

391. However, as discussed under B.1.(d), private sector panellists have consistently stressed, during the on-site visit, that there is a marked trend to now prohibit small facilitation payments in a vast majority of companies given the growing risks associated with the use of this narrow exception. As emphasised by one panellist, these risks would be further heightened by a request for deduction, which no longer appears to be part of a normal course of action for many companies. This change in approach combined with the level of detection and robust enforcement of the foreign bribery offence since Phase 3 thus alleviate the concerns identified in Phase 3 with regard to the claims for deduction of small facilitation payments.

Commentary

The lead examiners consider that the shift in approach by most companies which now largely disallow small facilitation payments implies that these payments can no longer be seen as a material risk that they be used to hide bribes. Accordingly the Phase 3 pending recommendation that the United States clarify the policy for tax deduction for facilitation payments is no longer relevant.

(b) Role of the Criminal Investigation unit of the Internal Revenue Service in FCPA investigations

392. The FCPA Resource Guide provides that IRS-CI regularly investigates potential FCPA violations.[370]The U.S. authorities explain that once CI has opened an investigation, it is authorised to request permission to expand the investigation to other non-tax criminal violations arising out of the same facts and circumstances and request assistance from other law enforcement agencies that have jurisdiction to pursue those crimes.

393. Sometimes the IRS-CI conducts the investigation.[371] At other times, it works with the FBI,[372] ICE-HSI,[373] or both.[374] From the 2019 Annual Report, it appears that the International Tax Group (ITG) may be the unit most directly involved in FCPA matters.[375] At least one set of cases (e.g. *Telia*), were investigated by the IRS Global Illicit Financial Team. In its questionnaire responses, the United States specifically mentions the IRS-CI along with the FBI and FinCEN as having expertise in tracing assets.

394. Between January 2013 and July 2019, the DOJ or the SEC have acknowledged assistance provided by the IRS-CI in at least 14 FCPA-related cases. Several press releases on FCPA resolutions mention the involvement of the IRS-CI in the investigation, and sometime suggest that the FBI and the IRS-CI were equally involved in an investigation. For instance, the press release following an individual's guilty plea for conspiracy to violate the FCPA in 2015 indicated that "the investigation [was] being conducted by the FBI and the IRS-CI".[376] Commenting on this case, a group of lawyers including the former head of the DOJ Fraud Section FCPA

[369]United States Phase 3 Report, paras. 190-193.
[370]DOJ Criminal Division and SEC Enforcement Division, A Resource Guide to the U.S. FCPA, pp.5 and 49.
[371]DOJ News, 19 July 2019.
[372]Alcoa (2014), Algawhary (2014), Hewlett-Packard (2014), SAP International (2015), "Mexican Aviation" case (2016) Och-Ziff (2016), Ng Lap Seng (2017), Walmart (2019).
[373]VimpelCom (2016), Telia (2017), PDVSA (at least in 2018), MTS (2019).
[374]PDVSA (2016), Chi Ping Patrick Ho (2017).
[375]IRS-CI, 2019 Annual Report, pp. 35-36.
[376]FBI News, 12 August 2015.

Unit wrote that "the FBI has long been the Fraud Section's partner in pursuing FCPA cases, but so too has the IRS-CI. Many people do not realize the role played by IRS-CI in FCPA cases, but IRS-CI agents have played major roles in many of the most prominent FCPA cases in the past few years".[377] In several cases, charges have been brought in conjunction with FCPA charges.[378]

Commentary

The lead examiners commend the United States for the valuable involvement of tax authorities in FCPA investigations. They also commend the success of the DOJ and tax authorities' efforts to coordinate to reach a global resolution with alleged offenders in FCPA-related matters.

D.4. Official Development Assistance (ODA)

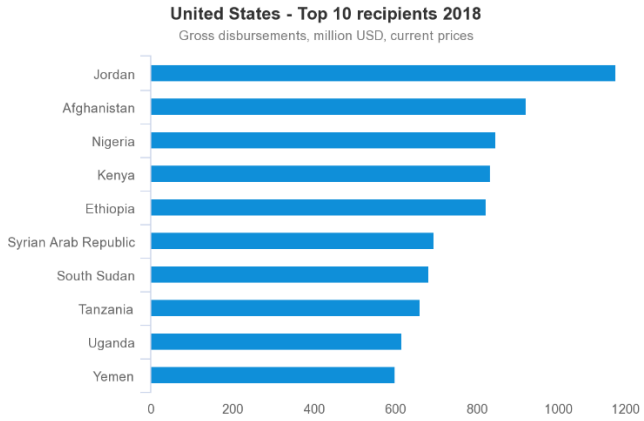
395. This Phase 4 evaluation is the first time the U.S. ODA system is reviewed in light of the 2016 Recommendation for Development Cooperation Actors on Managing Risks of Corruption, and in particular sections 6-8 and 10 which more directly pertain to foreign bribery. [379] (The aspects of this Recommendation specifically related to prevention and detection are discussed under section A.4.)

(a) Volume and Distribution of American ODA

396. In 2019, the United States provided the highest aid volume (USD 34.6 billion) of any DAC member, which represented 0.16% of its gross national income. One-third of bilateral aid went to least developed countries. The United States has a very high share of bilateral aid, 40% of which was channelled through civil society and the private sector in 2017. In 2017, 86.7% of gross ODA was provided bilaterally, of which 20.9% was channelled through multilateral organisations. The United States allocated 13.3% of total ODA as core contributions to multilateral organisations. [380]

397. The United States provides development assistance to 136 countries, and the share of ODA to its top recipients is declining.[381] In 2017, support to fragile contexts reached USD 14.2 billion (46.3% of gross bilateral ODA), and 26.4% of gross bilateral ODA went to the United States' top 10 recipients, with a primary focus on sub-Saharan Africa to which USD 11.3 billion was allocated (seven of the U.S. top 10 recipients are in that region). USD 3.0 billion went to the Middle East, USD 2.9 billion went to South and Central Asia, and USD 2.1 billion went to Latin America and the Caribbean.[382] The top 10 recipients are all ranked as having high to very high risk of corruption in the Transparency International CPI Index.[383]

[377]Charles E. Duross, Stacey Sprenkel and Ian K. Bausback, Morrison & Foerster LLP (26 August 2015), "5 Takeaways From Former SAP Exec's FCPA Case", Law 360.
[378]For instance in the PDVSA Case. See DOJ News, 16 June 2016.
[379]The 2016 OECD Recommendation for Development Co-operation Actors on Managing Risks of Corruption replaces the 1996 DAC Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement.
[380]See OECD DAC U.S. Development Cooperation Profile.
[381]See OECD, Development Co-operation Report 2018: Joining Forces to Leave No One Behind.
[382]See OECD DAC U.S. Development Cooperation Profile. The ten biggest recipients of US ODA are: Afghanistan, Ethiopia, Jordan, South Sudan, Kenya, Nigeria, Uganda, Syrian Arab Republic, Tanzania, and South Africa.
[383]Transparency International Corruption Perceptions Index.



Source: United States Development Cooperation Profile (OECD, DAC 2019)[384]

398. In 2017, 48.2% of bilateral ODA commitments (USD 15.0 billion) was allocated to social infrastructure and services, with a focus on health and population policies (USD 8.3 billion) and support to government and civil society (USD 4.2 billion). Humanitarian aid amounted to USD 8.3 billion.[385] Health is a key sector of the U.S.'s bilateral development assistance. As also confirmed by panellists during the on-site visit, this is a sector often described as subject to high or even, in certain countries, systemic risks of corruption. Infrastructure is also a sector at high risk of corruption and, while it is not among the U.S. development assistance priority focus, it remains a sector in which the U.S. bilateral development assistance is playing a salient role with USD 1 903 million (2012-16 average, 2016 constant prices).[386]

(b) Risk assessment of country level capacity to administer funds and fight corruption as well as partners vetting system

399. Regarding how corruption risks associated with the projects/activities are assessed, the United States indicates in its questionnaire responses that "safeguarding USAID investments from corruption and from falling into the hands of corrupt actors is absolutely essential, and the Agency takes the stewardship of U.S. taxpayer funds extremely seriously". All direct USAID procurements are executed in accordance with Automated Directives System (ADS) 302, the Federal Acquisition Regulations (FAR), and USAID's supplement to the FAR, the USAID Acquisition Regulations (AIDAR).[387] The U.S. authorities also emphasise that the FCPA applies to USAID grantees and contractors and that USAID procurement practices are guided by international agreements such as the UNCAC and other treaties and conventions.

400. USAID has developed concrete tools aimed at assessing the capabilities of partner governments and other recipients to properly administer funds. One such tool is the Public Financial Management Risk Assessment Framework, which has led to several decisions not to utilise host government systems because of insufficient controls. As part of its programmatic and technical approach, USAID routinely conducts country-level anticorruption assessments to determine country level capacity for fighting corruption. In addition, as part of the Agency's new Journey to Self-Reliance policy framework, USAID is monitoring and measuring partner countries' capacity and commitment to fighting corruption as a consideration in providing assistance. For this purpose, USAID has recently rolled out a set of secondary metrics, among which are included metrics on Control of Corruption measured by World Bank Worldwide Governance Indicators), and Corruption Perception Indexes measured by Transparency International.

[384]OECD (2020), "United States", in *Development Co-operation Profiles*, OECD Publishing, Paris, https://doi.org/10.1787/45472e20-en.
[385]See OECD DAC U.S. Development Cooperation Profile.
[386]See OECD (2018), Sector Financing in the SDG Era, The Development Dimension, p. 84.
[387]USAID executes assistance in accordance with ADS 303 and/or 22 CFR 226.

401. USAID also exercises due diligence prior to awarding funds by ensuring that organisations that receive USAID funds have proper systems in place to manage and account for funds and any funds sub-granted or sub-contracted to other organisations or companies. USAID only partners with entities and individuals that are considered presently responsible, i.e. whether a partner has the capability, integrity, and management to implement federal funds. All prospective USAID partners must be vetted through their official System for Award Management prior to receiving any U.S. government funds.

(c) Internal Ethics Rules and Auditing of ODA contracts and operations

402. The U.S. questionnaire responses indicate that USAID and other agencies in the U.S. government involved in providing foreign assistance implement robust internal integrity and anticorruption, fraud, waste and abuse systems. In addition to assessing corruption risk in partner countries, these systems include ethics and standards of business conduct as detailed in ADS Chapter 109. The chapter establishes internal agency procedures for documenting or processing any determination, approval, or other action required for ethics compliance. Although the Chapter does not explicitly mention corruption, all USAID employees are required to abide by the ethics rules in the Standards of Ethical Conduct for Employees of the Executive Branch, and other applicable laws and regulations which govern, among other things, prohibitions of corruption and bribery. USAID's Standards of Conduct set forth USAID's expectations for all employees, and apply to all USAID contractors and fellows.

403. Pursuant to the U.S. questionnaire responses, recipients of federal awards are required to submit for inspection financial audits, internal controls, finance and accounting manuals, financial management surveys, and procedures for documenting cost principles. The Compliance Division of USAID's Office of Management Policy, Budget and Performance tracks compliance with U.S. federal regulations by partner organisations or individuals working directly with USAID; take suspension and/or debarment actions against firms, organisations, and/or individuals whose conduct reveals a lack of present responsibility; evaluate contractor or grantee disclosures of organisational or compliance issues; and manage corrective actions with partner entities. The Compliance Division works closely with the USAID Office of Inspector General (OIG) and other U.S. government oversight bodies on waste, fraud, and abuse matters. The division proactively manages alleged reports of non-compliance or ethical concerns associated with USAID development partners.

(d) Certification or declaration that the applicant has not been engaged into corruption

404. Implementing partners and their subcontractors must attest that they are not debarred, suspended or voluntarily excluded from covered transactions by any Federal department or agency; have not within a three-year period preceding their application been convicted for a criminal offense in connection for instance with obtaining contract under a public transaction; or the commission of a number of offences including bribery; and are not presently indicted for one of these offences. The U.S. authorities indicate that these declarations are verified "when necessary".

(e) Provision in the contract to ensure that the money will be used properly

405. The U.S. authorities indicate that USAID closely monitors all of its programs to ensure that funds are used in accordance with the terms of the award. When they are not, USAID can take a number of steps in accordance with its grants or contract rules, including disallowing costs, suspending or terminating all or part of awards and/or imposing additional conditions on recipients. They further explain that other measures such as fixed obligation grants, can ensure that disbursements are only made against agreed-upon results. The Millennium Challenge Corporation (MCC)[388] requires all recipients of MCC funding, including its implementing partners, their contractors and grantees and their sub-contractors to comply with MCC's AFC Policy, which specifically prohibits them from engaging in corruption.

[388]The Millennium Challenge Corporation (MCC) is an independent U.S. foreign aid agency created in 2004

(f) Sanction of corruption in ODA contracts

406. Regarding the sanctioning regime in place for bodies administering ODA to respond to cases of corruption (such as termination, suspension or reimbursement clauses or other civil and criminal actions), the U.S. questionnaire response note that USAID closely monitors all of its programs to ensure that funds are used in accordance with the terms of the award. When they are not, USAID can take a number of steps in accordance with its grants or contract rules, including disallowing costs, suspending or terminating all or part of awards and/or imposing additional conditions on recipients.

407. Penalties and sanctions may apply to findings of violations of USAID requirements. These penalties can be severe and can result in an entity or individual being criminally or civilly prosecuted or debarred from future awards by the entire U.S. government. During the on-site visit, OIG representatives emphasised that they do not have to prove bribery beyond any reasonable doubt to decide to refer an entity to USAID's Office of Compliance for consideration of suspension or debarment, or to other agency officials for administrative action such as an award termination. The standard for proving misconduct which may lead to a suspension/debarment action is "adequate evidence" for purposes of suspension and "preponderant evidence" for purposes of debarment. They also indicated that the range of measures that USAID can take is broad and can for instance include withholding payments or requiring that staff be fired. In addition, the U.S. authorities emphasise in their questionnaire responses that USAID has several mandatory provisions that relate to different aspects of corruption. They include: Establish a written code of business ethics and conduct; Debarment, Suspension, and Other Responsibility Matters (June 2012); and Pilot Program For Enhancement Of Grantee Employee Whistleblower Protections (September 2014).[389]

Commentary:

The lead examiners commend the United States for its sophisticated due diligence, certification, control, and sanctioning system to combat corruption in development cooperation. This notably includes measures to ensure that countries governance capacity and partners "present responsibility" are reviewed before implementing a development cooperation program. The lead examiners also note that robust controls on the spending of the development aid money are in place and that both contracts provisions and available sanctioning capacities cover a remarkably large range of situations and wrongdoings in direct or indirect connection with foreign bribery. The availability of criminal and civil prosecution as well as debarment complete a system that places great importance on preventing, controlling and sanctioning misuse of development cooperation money, with a strong focus on anticorruption.

[389]The provisions are available in the Agency's policies on USAID's website, usaid.gov, Automated Directives System (ADS) Chapter 302 and 303.

CONCLUSION: POSITIVE ACHIEVEMENTS, RECOMMENDATIONS, AND ISSUES FOR FOLLOW-UP

The Working Group congratulates the United States for its sustained and outstanding commitment to enforcing its foreign bribery offence and accounting and other offences against both natural and legal persons. Enforcement has increased remarkably since Phase 3, confirming that the United States plays a leading role in combating foreign bribery. The United States has also been a driving force in the resolution of several multijurisdictional cases since Phase 3. While non-trial resolutions remain the prevailing FCPA enforcement method in the United States, more defendants have taken their cases to trial, thus leading to increased court rulings regarding the FCPA. The Working Group will continue to monitor the impact that the resulting jurisprudence will have on U.S. enforcement of the FCPA and related offences. The Working Group will also continue to monitor the U.S. law enforcement agencies' development and implementation of their FCPA-related enforcement policies.

Regarding outstanding Phase 3 recommendations at the time of the United States Written Follow-up, in December 2012, (i) the Working Group already deemed in March 2013 that recommendations 2b and 2c on consolidating and summarising publicly available information on the application of the FCPA were fully implemented, and (ii) recommendation 7 on clarifying the policy for tax deduction for facilitation payments is no longer relevant.

Based on the findings in this report, the Working Group concludes by commending the United States' good practices and positive achievements(Part 1 below), makes recommendations (Part 2) and identifies issues for follow-up (Part 3). The United States will submit a written report to the Working Group in two years (i.e. in October 2022) on its implementation of all recommendations as well as detailed information on its foreign bribery enforcement and developments related to follow-up issues.

Positive Achievements and Good Practices

This report has identified several good practices and positive achievements in the United States that have proved effective in combating bribery of foreign public officials and enhancing FCPA enforcement. Since Phase 3, the U.S. enforcement authorities have made broad use of other statutes and offences to prosecute payments to foreign government officials and intermediaries either in addition to or instead of FCPA charges. They have also increasingly addressed the demand side of bribery by charging foreign public officials or their associates with money laundering or other offences when they use U.S. financial institutions or otherwise fall under U.S. jurisdiction. The DOJ's reliance on several different theories of liability to enforce U.S. law against foreign bribery has allowed it to hold both legal and natural persons responsible for foreign bribery. The efforts the U.S. government has made to both clarify the scope of the small facilitation payments exception and dissuade its use have contributed to further awareness of the risks associated with these payments, thus implementing Paragraph VI of the 2009 Recommendation. The good practice of training U.S. embassy personnel on bribery risks and reporting requirements has been in place for decades.

The United States is playing a leading role and making growing efforts to recognise the fact that other Parties to the Convention may have overlapping jurisdiction, when more than one Party has jurisdiction over an alleged foreign bribery offence, with a view to coordinating and cooperating in investigating and resolving multijurisdictional foreign bribery matters. As part of the U.S. positive achievements, the concerted efforts to build working relationships with engaged foreign partners among the Parties to the Convention and in other jurisdictions as well as to help build capacity through joint conferences and peer-to-peer training has enabled the law enforcement authorities to better investigate and sanction prominent foreign bribery cases. The explicit prohibition to deduct disgorgements from taxable income is also a positive achievement. Additionally, while small facilitations payments remain legal under the FCPA, U.S. companies have taken significant steps to stamp out this practice, including raising awareness of the risks associated with it. Staff continuity within the enforcement authorities as well as the DOJ Fraud Section's centralised authority to pursue foreign bribery cases have played a pivotal role in developing prosecutors' expertise and building durable ties with their foreign counterparts. At the same time, several federal agencies including tax authorities and the Department of

Homeland Security have been increasingly involved in FCPA investigations since Phase 3, thereby augmenting the resources and expertise available for fighting foreign bribery. The successful coordination has allowed multi-agency resolutions against alleged offenders in FCPA matters.

Increased guidance and transparency of enforcement policies have fostered voluntary disclosure and cooperation with foreign bribery investigations. The publication of non-trial resolution agreements, including information on fact patterns and the reasons for choosing a certain type of resolution instrument provides insight to companies on the DOJ's expectations and guidance in designing compliance programs. The U.S. enforcement agencies have also made concerted efforts to develop policies that would avoid imposing duplicative sanctions in overlapping enforcement proceedings. The second edition of the FCPA Resource Guide, eight years after its initial publication, reflects the United States' commendable commitment to ensure that key developments in the FCPA landscape are reflected in a comprehensive and easily-accessible guidance. The pragmatic development – including with the recent declinations with disgorgement – and use of a range of non-trial resolutions have been instrumental in the resolution of prominent multi-jurisdictional cases in which the United States has played a leading role. The DOJ's efforts to build in-house compliance expertise is also a good practice, as the effectiveness of compliance programs influences the decision on the form of any resolution, the monetary penalty, and any compliance obligations that may be imposed on a corporate offender. U.S. rules on successor liability provide clear incentives to companies to conduct appropriate due diligence on potential acquisitions, which can help uncover past problems and prevent future violations. Finally, the Dodd-Frank Act's multi-faceted protections, most notably the SEC's ability to enforce the anti-retaliation provisions, constitute a good practice given that they provide powerful incentives for qualified whistleblowers to report foreign bribery allegations against issuers.

Recommendations of the Working Group

Recommendations regarding detection of foreign bribery

1. Regarding **detection of foreign bribery**, the Working Group recommends that the United States:

    a. Continue to maintain sufficient data concerning its detection sources and, to the extent permissible, report in an aggregated summary to the Working Group the breakdown of the sources of detection both for allegations leading to the investigation of a legal person for foreign bribery and for concluded cases resulting in sanctions or other dispositions against those legal persons. [2009 Recommendation, I. and III. iv.]

    b. Continue enhancing its AML reporting framework by applying appropriate AML/CFT obligations to lawyers, accountants and trust and company service providers related to foreign bribery. [Article 7 of the Convention; 2009 Recommendation III. i.]

    c. Consider how it can enhance protections for whistleblowers who report suspected acts of foreign bribery by non-issuers and enhance guidance about the protections available to whistleblowers who report suspected acts of foreign bribery depending on the competent enforcement agency to which they report. [2009 Recommendation IX. iii.]

Recommendations regarding enforcement of the foreign bribery offence

2. Regarding the **investigation and prosecution of foreign bribery**, the Working Group recommends that the United States:

    a. With a view to further harmonise the approach to fighting foreign bribery of the leading U.S. law enforcement agencies, consider having the SEC consolidate and publicise its policy and guidance on how it enforces the FCPA. [2009 Recommendation, V]

    b. As part of its periodic review of its approach to enforcement provided under the 2009 Recommendation, continue to evaluate the effectiveness of the Corporate Enforcement Policy and in particular assess its effectiveness in terms of encouraging self-disclosure and of its deterrent effect on foreign bribery. [2009 Recommendation, V]

c. Continue to address recidivism through appropriate sanctions and raise awareness of the impact of recidivism on the choice of resolution in FCPA matters. [Article 3(1) of the Convention; 2009 Recommendation, V]

d. Ensure that, going forward;(i) the law enforcement agencies make publicly available whether a Non-Prosecution Agreement or a Deferred Prosecution Agreement with a legal person in an FCPA matter has been extended or completed; and (ii) when extending a Deferred Prosecution Agreement with a legal person in an FCPA matter, that they make public in an easily accessible manner the grounds for extension, including when such extension is decided to allow a company to complete its monitorship. [2009 Recommendation, III.i]

Recommendations regarding the liability of, and engagement with, legal persons

3. Regarding **sanctions** and other measures for legal persons, the Working Group recommends that the United States:

a. Collect data, to the extent possible within in its system, on debarment in foreign bribery cases to improve the monitoring of the impact of such measures. [Article 3.4 of the Convention, 2009 Recommendation III. i., iv., and vii.; and XI. i.]

b. Consider encouraging public contracting authorities and those responsible for granting arms export licences to implement reviews of debarment lists of multilateral financial institutions as an additional source in determining whether an entity is trustworthy [2009 Recommendation III. i., iv., and vii.; and XI. i.]

Follow-up by the Working Group

4. The Working Group will follow up on the issues below as case law, practice, and legislation develops:

a. Whether conspiracy to bribe a foreign public official is an offence to the same extent as conspiracy to bribe a domestic public official, even when the conspirator seeking to bribe the foreign official could not be held directly liable for foreign bribery;

b. Whether U.S. courts develop a common approach to how complicity in foreign bribery, including aiding and abetting liability, is applied to defendants not directly subject to the FCPA anti-bribery provisions;

c. How complicity in FCPA violations, including aiding and abetting, is applied when foreign nationals or companies engage in wrongful conduct while outside the United States;

d. How U.S. FCPA enforcement is affected as new agencies join the fight against foreign bribery;

e. The impact of the Supreme Court ruling to ensure that the United States' capacity to recover ill-gotten gains from foreign bribery remains possible, in line with Article 3 of the Convention;

f. How the United States facilitates access by law enforcement of beneficial ownership information in a timely manner for foreign bribery investigations;

g. The United States' practice of updating the FCPA Resource Guide, to ensure that it continues to consolidate guidance emanating from various sources, including new policies, case law developments and, as relevant, anonymised lessons learned from monitorships or other compliance enhancement efforts flowing from FCPA resolutions.

ANNEX 1: U.S. FOREIGN BRIBERY ENFORCEMENT ACTIONS SINCE PHASE 3

Box 2. Dataset methodology

The U.S. DOJ and SEC provided the following tables to capture their respective FCPA-related enforcement actions since Phase 3. The analysis in the body of the evaluation report may reflect different figures based on complementary research conducted by the evaluation team using official U.S. government documents such as FCPA-related indictments and resolutions.

Table 4. FCPA-related enforcement actions brought by the DOJ against Natural Persons since Phase 3

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Lee, Steven K.	21-10-2010	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2	N/A	N/A	N/A	N/A	Dismissed	N/A	N/A	N/A	Mexico	2002-2009	Domestic Concern
Lindsey, Keith E.	21-10-2010	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2	N/A	N/A	N/A	N/A	Dismissed	N/A	N/A	N/A	Mexico	2002-2009	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Granados, Jorge	14-12-2010	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 982(a)(1) 18 U.S.C. § 982(b)(2)	19-05-2011	N/A	07-09-2011	18 U.S.C. § 371 (78dd-2)	Guilty Plea	$100 assessment	46 months	2 years supervised release	Honduras	2006-2007	Domestic Concern
Caceres, Manuel	14-12-2010	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 982(a)(1) 18 U.S.C. § 982(b)(2)	18-05-2011	N/A	19-04-2012	18 U.S.C. § 371 (78dd-2)	Guilty Plea	$100 assessment	23 months	1 year supervised release	Honduras	2006-2007	Domestic Concern
Vasquez, Juan Pablo	17-12-2010	18 U.S.C. § 371 (78dd-2)	21-01-2011	N/A	25-04-2012	18 U.S.C. § 371 (78dd-2)	Guilty Plea	$7,500 fine	N/A	3 years' probation	Honduras	2006-2007	Domestic Concern
Salvoch, Manuel	17-12-2010	18 U.S.C. § 371 (78dd-2)	12-01-2011	N/A	06-06-2012	18 U.S.C. § 371 (78dd-2)	Guilty Plea	$100 assessment	10 months	3 years supervised release	Honduras	2006-2007	Domestic Concern
Truppel, Andres	12-12-2011	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(B), 1343) 18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1343	30-09-2015	N/A	scheduled 3/13/2020	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(b), 1343)	Guilty Plea	TBD	TBD	TBD	Argentina	1996-2009	Issuer

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Reichert, Eberhard	12-12-2011	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(b), 1343) 18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1343	15-03-2018	N/A	scheduled 3/13/2020	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(b), 1343)	Guilty Plea	TBD	TBD	TBD	Argentina	1996-2009	Issuer
Bock, Ulrich	12-12-2011	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(b), 1343) 18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1343	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Argentina	1996-2009	Issuer
Czysch, Miguel	12-12-2011	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), 1343 18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1343 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 982	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Argentina	1996-2007	Issuer
Sergi, Carlos	12-12-2011	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), 1343) 18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1343 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 982	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Argentina	1996-2007	Issuer

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Sharef, Uriel	12-12-2011	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), 1343) 18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1343 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 982	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Argentina	1996-2007	Issuer
Signer, Stephan	12-12-2011	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), 1343) 18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1343 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 982	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Argentina	1996-2007	Issuer
Steffen, Herbet	12-12-2011	18 U.S.C. § 371 (78dd-1, dd-3, 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5), 1343) 18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1343 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 982	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Argentina	1996-2007	Issuer

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
DuBois, Peter	27-12-2011	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 981(a)(1)(c)	05-01-2012	N/A	08-04-2013	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2	Guilty Plea	$200 assessment	N/A	60 months probation, including 8 months of home detention	Mexico, Brazil, Panama	2005-2010	Domestic Concern
Uhl, Neal	28-12-2011	18 U.S.C. § 371 (78dd-2)	05-01-2012	N/A	08-04-2013	18 U.S.C. § 371 (78dd-2)	Guilty Plea	$100 asessment; $10,000 fine	N/A	60 months probation, including 8 months of home detention	Mexico, Brazil, Panama	2004-2010	Domestic Concern
Kowalewski, Bernd	05-01-2012	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1957(a)	24-07-2014	N/A	18-11-2014	18 U.S.C. § 371 (78dd-2) 18 U.S.C. § 2 15 U.S.C. § 78dd-2	Guilty Plea	$200 assessment; $15,000 fine	Time served	N/A	Mexico, Brazil, Panama	2004-2010	Domestic Concern
Jensen, Jald	05-01-2012	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1957(a) 18 U.S.C. § 981(a)(1)(c) 18 U.S.C. § 982 (a)(1)	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Mexico, Brazil, Panama	2004-2010	Domestic Concern
Richers, Amadeus	19-01-2012	18 U.S.C. § 371 (78dd-2(a), 18 U.S.C. § 1343) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i)	19-07-2017	N/A	25-09-2017	18 U.S.C. § 371 (78dd-2(a), 18 U.S.C. § 1343)	Guilty Plea	$100 assessment	Time served	3 years supervised release	Haiti	2001 - 2006	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Vasconez Cruz, Washington	19-01-2012	18 U.S.C. § 371 (78dd-2(a), 18 U.S.C. § 1343) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i)	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Haiti	2001 - 2006	Domestic Concern
Zurita, Cecila	19-01-2012	18 U.S.C. § 371 (78dd-2(a), 18 U.S.C. § 1343) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i)	N/A	N/A	N/A	Fugitive	At Large	N/A	N/A	N/A	Haiti	2001 - 2006	Domestic Concern
Rothschild, David	02-11-2012	18 U.S.C. § 371 (78dd-2)	02-11-2012	N/A	scheduled 4/23/2020	18 U.S.C. § 371 (78dd-2)	Guilty Plea	TBD	TBD	TBD	Indonesia	2005 - 2009	Domestic Concern
Pierucci, Frederic	30-04-2013	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A)	29-07-2013	N/A	25-09-2017	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2	Guilty Plea	$20,000 fine; $200 assessment	30 months	12 months supervised release	Indonesia	2005 - 2009	Domestic Concern
Firtash, Dmitry	20-06-2013	18 U.S.C. § 371 (78-dd2, 78-dd3) 18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956 18 U.S.C. § 1962									India	2006 - 2013	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Gevorgyan, Suren	20-06-2013	18 U.S.C. § 371 (78-dd2, 78-dd3) 18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956 18 U.S.C. § 1962									India	2006 - 2013	
Knopp, Andras	20-06-2013	18 U.S.C. § 371 (78-dd2, 78-dd3) 18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956 18 U.S.C. § 1962									India	2006 - 2013	Domestic Concern
Lal, Gajendra	20-06-2013	18 U.S.C. § 371 (78-dd2, 78-dd3) 18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956 18 U.S.C. § 1962									India	2006 - 2013	Domestic Concern
Sunderalingam, Periyasamy	20-06-2013	18 U.S.C. § 371 (78-dd2, 78-dd3) 18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956 18 U.S.C. § 1962									India	2006 - 2013	
Rao, K.V.P. Ramachandra	20-06-2013	18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956 18 U.S.C. § 1962									India	2006 - 2013	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Pomponi, William	30-07-2013	18 U.S.C. § 371 (78-dd2) 15 U.S.C. § 78dd-2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A)	19-07-2016			Charges Dismissed (deceased)		Dismissed	Dismissed	Dismissed	Indonesia	2005 - 2009	Domestic Concern
Hoskins, Lawrence	30-07-2013	18 U.S.C. § 371 (78-dd2, 78-dd3) 15 U.S.C. § 78dd-2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A)		08-11-2019	06-03-2020	15 U.S.C. § 78dd-2; 18 U.S.C. § 1956(h); 18 U.S.C. § 1956(a)(2)(A)					Indonesia	2005 - 2009	Domestic Concern
Clarke Bethancourt, Tomas Alberto	30-08-2013	18 U.S.C. § 371 (78-dd2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1952(a)(3)(A) 18 U.S.C. § 1956(a)(2)(A)	30-08-2013		08-12-2015	18 U.S.C. § 371 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1952(a)(3)(A) 18 U.S.C. § 1956(a)(2)(A)		$600 assessment; $5,800,000 (forfeiture)	24 months	36 months supervised release	Venezuela	April 2009 - 2012	Domestic Concern
Lujan, Ernesto	30-08-2013	18 U.S.C. § 371 (78-dd2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1952(a)(3)(A) 18 U.S.C. § 1956(a)(2)(A)	30-08-2013		04-12-2015	18 U.S.C. § 371 (78-dd2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1952(a)(3)(A) 18 U.S.C. § 1956(a)(2)(A)		$600 assessment; $18,500,000 (forfeiture)	24 months	36 months supervised release	Venezuela	2009 - 2012	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Hurtado, Jose Alejandro	30-08-2013	18 U.S.C. § 371 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1952(a)(3)(A) 18 U.S.C. § 1956(a)(2)(A)	30-08-2013		15-12-2015	18 U.S.C. § 371 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1952(a)(3)(A) 18 U.S.C. § 1956(a)(2)(A)		$600 assessment; $11,900,000 (forfeiture)	36 months	36 months supervised release	Venezuela	2009 - 2012	Domestic Concern
Riedo, Alain	15-10-2013	18 U.S.C. § 371 15 U.S.C. § 78dd-1 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a) 15 U.S.C. § 78m(b)(2)(B) 18 U.S.C. § 2									China	2002 - 2009	Issuer
Weisman, Gregory	08-11-2013	18 U.S.C. § 371 (15 U.S.C. §78dd-2 and 1343) 18 U.S.C. § 981(a)(1)(C) 28 U.S.C. § 2461(c)	08-11-2013		10-09-2015	18 U.S.C. § 371 (78dd-2 and 1343)		$30,000 fine; $51,000 restitution	None	24 months probation	Colombia	2009 - 2010	Domestic Concern
Gonzalez de Hernandez, Maria de los Angeles	18-11-2013	18 U.S.C. § 371 (78-dd2) 18 U.S.C. § 1952(a)(3)(A) 18 U.S.C. § 1956(a)(2)(A)	18-11-2013		15-01-2016	18 U.S.C. § 371 (78-dd2) 18 U.S.C. § 1952(a)(3)(A) 18 U.S.C. § 1956(a)(2)(A)		$500 assessment; $5,000,000 (forfeiture)	16.5 months		Venezuela	2009 - 2012	
Hammarskjold, Knut	18-02-2014	18 U.S.C. § 371 (15 U.S.C. §78dd-2 and 1343) 18 U.S.C. § 981(a)(1)(c) 28 U.S.C. § 2461(c)	18-02-2014		10-09-2015	18 U.S.C. § 371 (78dd-2 and 1343)		$15,000 fine; $106,000 restitution	None	24 months probation	Colombia	2009 - 2010	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Chinea, Benito	10-04-2014	18 U.S.C. § 371 (15 U.S.C. § 78dd-1 and 18 U.S.C. § 1952) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 371 (18 U.S.C. § 1505)	17-12-2014		27-03-2015	18 U.S.C. § 371 (15 U.S.C. § 78dd-1 and 18 U.S.C. § 1952)		$100 assessment; $3,636,432 forfeiture $40,000.00 fine	48 months	36 months supervised release	Venezuela	2008 - 2012	Domestic Concern
Demeneses, Joseph	10-04-2014	18 U.S.C. § 371 (15 U.S.C. § 78dd-1 and 18 U.S.C. § 1952) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 371 (18 U.S.C. § 1505)	17-12-2014		27-03-2015	18 U.S.C. § 371 (15 U.S.C. § 78dd-1 and 18 U.S.C. § 1952)		$2,670,612 forfeiture $40,000.00 fine	48 months	36 months supervised release	Venezuela	2008 - 2012	Domestic Concern
Sigelman, Joseph	09-05-2014	18 U.S.C. § 371 (15 U.S.C. § 78dd-2 and 1343) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1957	15-06-2015		16-06-2015	18 U.S.C. § 371 (78dd-2)		$100,000 fine; $240,000 restitution	None	36 months probation	Colombia	2009 - 2010	Domestic Concern
Rubizhevsky, Boris	10-06-2015	18 U.S.C. § 1956(h) (1956(a)(1)(B)	15-06-2015		13-11-2017	18 U.S.C. § 1956(h) (1956(a)(1)(B)		$26,500 forfeiture	12 months and one day	36 months supervised release	Russia	2011 - 2013	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Rama, James	16-06-2015	18 U.S.C. § 371 (15 U.S.C. § 78dd-2)	16-06-2015		09-10-2015	18 U.S.C. § 371 (15 U.S.C. § 78dd-2)		None	120 days	24 months supervised release	Kuwait	2005 - 2008	Domestic Concern
Condrey, Daren	16-06-2015	18 U.S.C. § 371 (15 U.S.C. § 78dd-2 and 18 U.S.C. § 1343)	17-06-2015		11-03-2020	18 U.S.C. § 371 (15 U.S.C. § 78dd-2 and 18 U.S.C. § 1343)					Russia	2004 - 2014	Domestic Concern
Garcia, Vicente Eduardo	13-07-2015	18 U.S.C. § 371 (78dd-2(a)) 18 U.S.C. § 981(a)(1)(C) 18 U.S.C. § 2461(c)	12-08-2015		16-12-2015	18 U.S.C. § 371 (78dd-2(a))		None	22 months	36 months supervised release	Panama	2009 - 2013	Domestic Concern
McClung, James	17-07-2015	18 U.S.C. § 371 (78dd-2(a)&(i); 18 U.S.C. § 2)	17-07-2015		07-07-2016	18 U.S.C. § 371 (78dd-2(a)&(i); 18 U.S.C. § 2)		$200 assessment	1 year and 1 day	None	Vietnam India	2000 - 2010	Domestic Concern
Hirsch, Richard	17-07-2015	18 U.S.C. § 371 (78dd-2(a)&(i); 18 U.S.C. § 2)	17-07-2015		08-07-2016	18 U.S.C. § 371 (78dd-2(a)&(i); 18 U.S.C. § 2)		$200 assessment, $10,000 fine	None	24 months probation	Vietnam India	2000 - 2010	Domestic Concern
Hernandez-Montemayor, Ernesto	06-11-2015	18 U.S.C. § 1956(h)	09-12-2015		12-01-2017	18 U.S.C. § 1956(h)		$2,026,308.67 Forfeiture $100 assessment	24 months	12 months supervised release	Mexico	2005 - 2010	
Maldonado, Christian	24-11-2015	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i) with 78dd-2 SUA)	03-12-2015		23-05-2019	18 U.S.C. § 371 (78dd-2; 18 U.S.C. § 1956(a)(1)(B)(i))		$165,000 money judgment and $100 assessment	None	24 months probation	Venezuela	2009 - 2012	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Ramos-Castillo, Jose Luis	24-11-2015	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i) with 78dd-2 SUA) (2 counts)	03-12-2015		29-08-2019	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i) with 78dd-2 SUA) (2 counts)		$7,814,315.15 money judgment; $15,000 fine, and $200 assessment ($100 per count)	18 months		Venezuela	2009 - 2013	
Shiera-Bastidas, Abraham Jose	10-12-2015	18 U.S.C. § 371 (78dd-2; 78dd-3 and 18 U.S.C. § 1343) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i) 18 U.S.C. § 1957	22-03-2016		19-02-2020	18 U.S.C. § 371 (78dd-2; 78dd-3 and 18 U.S.C. § 1343) 15 U.S.C. § 78dd-2					Venezuela	2009 - 2014	Domestic Concern
Rincon, Roberto	10-12-2015	18 U.S.C. § 371 (78dd-2; 78dd-3 and 18 U.S.C. § 1343) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i) 18 U.S.C. § 1957	6/16/2016		19-02-2020	18 U.S.C. § 371 (78dd-2; 78dd-3) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 26 U.S.C. § 7206(1)					Venezuela	2009 - 2014	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Millan-Escobar, Moises Abraham	07-01-2016	18 U.S.C. § 371 (78dd-2(a))	19-01-2016		06-09-2019	18 U.S.C. § 371 (78dd-2(a))		$533,578.13 money judgment, $15,000 fine, and $100 assessment		36 months probation	Venezuela	2009 - 2012	Agent of Domestic Concern
Nevarez, Ramiro Ascencio	04-03-2016	18 U.S.C. § 1956(h)	04-03-2016		27-05-2016	18 U.S.C. § 1956(h)		$138,234.60 $100 assessment	15 months	12 months supervised release	Mexico	2012-2016	
Wang, Julia Vivi	16-03-2016	18 U.S.C. § 2 18 U.S.C. § 371; 15 U.S.C. § 78 dd-2 (a)(3)(A); 26 U.S.C. § 7206 (1)	04-04-2018		26-06-2019	18 U.S.C. § 2 18 U.S.C. § 371; 15 U.S.C. § 78 dd-2 (a)(3)(A); 26 U.S.C. § 7206 (1)		Restitution to the IRS of $629,295	Time-served	36 months supervised release	Antigua	2012 - 2015	Domestic Concern
Mebiame, Samuel	12-08-2016	18 U.S.C. § 371 (78dd-3)	09-12-2016		31-05-2017	18 U.S.C. § 371		$100 assessment	24 months		Niger, Chad, Guinea	2007 - 2012	
Perez, Daniel	15-08-2016	18 U.S.C. § 371 (78dd-2)	02-11-2016		02-02-2017	18 U.S.C. § 371		$100 assessment		36 months probation	Mexico	2011-2016	Domestic Concern
Ramnarine, Kamta	15-08-2016	18 U.S.C. § 371 (78dd-2)	02-11-2016		02-02-2017	18 U.S.C. § 371		$100 assessment		36 months probation	Mexico	2011-2016	Domestic Concern
Ray, Douglas	15-09-2016	18 U.S.C. § 371 (78dd-2) 18 U.S.C. § 371 (1343)	28-10-2016		30-03-2017	18 U.S.C. § 371 18 U.S.C. § 371		$2,089,698 forfeiture $589,698.87 restitution, $200 fine	18 months	36 months supervised release	Mexico	2006 - 2016	Domestic Concern
Karina Del Carmen Nunez Arias	30-09-2016	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i))	17-10-2016		23-05-2019	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i))		$3,238,720.19 money judgment	36 months	12 months supervised release	Venezuela	2010 - 2013	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Padron-Acosta, Darwin	30-09-2016	18 U.S.C. § 371 (78dd-2 and 1956(a)(1)(B)(i))	17-10-2016		19-11-2019	18 U.S.C. § 371 (78dd-2 and 1956(a)(1)(B)(i))		$9,052,397.73 money judgment	18 months		Venezuela	2009-2014	Domestic Concern
Victor Hugo Valdez Pinon	17-10-2016	18 U.S.C. § 371 (78dd-2)	26-10-2016		23-02-2017	18 U.S.C. § 371		$275,000 forfeiture $90,800 restitution $100 assessment	12 months and 1 day	24 months supervised release	Mexico	2006 - 2016	Domestic Concern
Yin, Jeff C.	22-11-2016	18 U.S.C. § 371 (18 U.S.C. § 666(a)(2); 78dd-2; 78dd-3) 18 U.S.C. § 666(a)(2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 15 U.S.C. § 78dd-3 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A) 26 U.S.C. § 7212(a) 18 U.S.C. § 981 18 U.S.C. § 982 21 U.S.C. § 853 28 U.S.C. § 2461	07-04-2017		28-02-2018	18 U.S.C. § 371 (tax fraud)		Restitution to the IRS of $61,674	7 months	24 months supervised release	United Nations; Antigua: Dominican Republic	2011 - 2015	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Seng, Ng Lap	22-11-2016	18 U.S.C. § 371 (18 U.S.C. § 666(a)(2); 78dd-2; 78dd-3) 18 U.S.C. § 666(a)(2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 15 U.S.C. § 78dd-3 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A) 26 U.S.C. § 7212(a) 18 U.S.C. § 981 18 U.S.C. § 982 21 U.S.C. § 853 28 U.S.C. § 2461		27-07-2017	11-05-2018	18 U.S.C. § 371 (18 U.S.C. § 666(a)(2); 78dd-2; 78dd-3) 18 U.S.C. § 666(a)(2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 15 U.S.C. § 78dd-3 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A)		$1 million fine $302,977 restitution (to the United Nations) $1.5 million forfeiture	48 months	36 months supervised release	United Nations; Antigua: Dominican Republic	2011 - 2015	Domestic Concern
Thiam, Mahmoud	12-12-2016	18 U.S.C. § 1957 18 U.S.C. § 1956(a)(1)(B) 18 U.S.C. § 1956(f)(2)		03-05-2017	25-08-2017	18 U.S.C. § 1957 18 U.S.C. § 1956(a)(1)(B)		$8,500,000 forfeiture	84 months	36 months	Guinea	2009 - 2011	
Harris, Malcolm	15-12-2016	18 U.S.C. § 1343 18 U.S.C. § 2 18 U.S.C. § 1957(a) 18 U.S.C. § 1028A(a)(1) 18 U.S.C. § 1028A(c)(5)	21-07-2017		05-10-2017	18 U.S.C. § 1343 18 U.S.C. § 2 18 U.S.C. § 1957(a)&2		$500,000 forfeiture; $760,148.57 restitution	42 months	36 months	Qatar	2013 - 2015	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Bahn, Joo Hyun "Dennis"	15-12-2016	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 1343 18 U.S.C. § 2 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 1956(h) 18 U.S.C. § 1957(a) 18 U.S.C. § 1028A(a)(1) 18 U.S.C. § 1028A(c)(5)	05-01-2018		06-09-2018	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2		$255,000 forfeiture; $500,000 restitution	6 months	36 months	Qatar	2013 - 2015	Domestic Concern
Ki Sang, Ban	15-12-2016	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 1956(h)									Qatar	2013 - 2015	
Barnett, Keith	20-12-2016	18 U.S.C. § 371 (78dd-2)	28-12-2016		24-07-2019	18 U.S.C. § 371 (78dd-2)		$250,000 fine; $100 assessment		36 months probation	Kazakhstan; China	2001 - 2012	Domestic Concern
Beech III, Charles Quintard	04-01-2017	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2)	10-01-2017		19-02-2020	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2)					Venezuela	2011 - 2012	Domestic Concern
Hernandez-Comerma, Juan Jose	04-01-2017	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2	10-01-2017		08-01-2020	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2					Venezuela	2008 - 2012	Domestic Concern
Woo, Sang "John"	10-01-2017	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 1956(h)	10-10-2017		24-01-2019	18 U.S.C. § 371 (78dd-2) 15 USC § 78dd-2		$500,000 restitution	time served	2 Years Supervised Release	Qatar	2013 - 2015	Issuer

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Andrade Cedeno, Alejandro	18-02-2017	18 U.S.C. § 1956(h)	22-02-2017		27-11-2018	18 U.S.C. § 1956(h)		$100 assessment; forfeiture $1 billion	120 months	12 months supervised release	Venezuela	2007 - 2017	
Lorenzo, Francis	27-04-2017	18 U.S.C. § 371 18 U.S.C. § 666 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(A)(2)(A) & 2 26 U.S.C. § 7206(1) 18 U.S.C. § 2 31 U.S.C. § 5314 and 5322(a)-(b) 31 U.S.C. § 1010.350, 1010,306(c)-(d) and 1010.840(b) 18 U.S.C. § 2 15 U.S.C § 78dd-2	27-04-2017			18 U.S.C. § 371 18 U.S.C. § 666 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(A)(2)(A) & 2 26 U.S.C. § 7206(1) 18 U.S.C. § 2 31 U.S.C. § 5314 and 5322(a)-(b) 31 U.S.C. § 1010.350, 1010,306(c)-(d) and 1010.840(b) 18 U.S.C. § 2 15 U.S.C § 78dd-2					United Nations; Antigua: Dominican Republic	2011 - 2015	Domestic Concern
Kohler, Andreas	06-06-2017	18 U.S.C. § 371 (78dd-2)	20-07-2017		22-07-2019	18 U.S.C. § 371 (78dd-2)		$72,000 fine; $100 assessment	4 months	4 months supervised release	Kazakhstan; China	2008 - 2012	
Zuurhout, Aloysius Johannes Jozef	09-06-2017	18 U.S.C. § 371 (78dd-2)	13-06-2017		25-07-2019	18 U.S.C. § 371 (78dd-2)		$50,000 fine; $100 assessment		5 years probation	Kazakhstan; China	2000 - 2013	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Camacho, Jose	05-07-2017	18 U.S.C. § 371 (object 18 U.S.C. § 1956(a)(1)(B)(i) with 78dd-2 and 78dd-3 SUA)	06-07-2017		20-02-2020	18 U.S.C. § 371 (object 18 U.S.C. § 1956(a)(1)(B)(i) (78dd-2 SUA)					Venezuela	2009 - 2013	
Finley, James	21-07-2017	15 U.S.C. § 78dd-2 18 U.S.C. § 371 (78dd-2)	28-07-2017		22-07-2019	15 U.S.C. § 78dd-2 18 U.S.C. § 371 (78dd-2)		$500,000 fine; $200 assessment	4 months	8 months supervised release	Kazakhstan; China	1999 - 2013	Domestic Concern
De Leon, Luis Carlos	23-08-2017	18 U.S.C. § 1956(h) 18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2) 18 U.S.C. § 1956(a)(1)(B)(i) 18 U.S.C. § 2	16-07-2018		13-04-2020	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2, domestic concern FCPA) 18 U.S.C. § 1956(h)					Venezuela	2011 - 2013	Domestic Concern
Rincon, Cesar David	23-08-2017	18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i) (with 78dd-2 SUA) 18 U.S.C. § 2	19-04-2018		13-04-2020	18 U.S.C. § 1956(h)		$7,033,504.71 money judgment			Venezuela	2011 - 2013	
Isturiz-Chiesa, Alejandro	23-08-2017	18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i) (with 78dd-2 SUA) 18 U.S.C. § 2									Venezuela	2011 - 2013	
Reiter-Munoz, Rafael Ernesto	23-08-2017	18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i) (with 78dd-2 SUA) 18 U.S.C. § 2									Venezuela	2011 - 2013	

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Ardila-Rueda, Fernando	24-08-2017	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2	11-10-2017		19-02-2020	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2 domestic concern FCPA); 15 U.S.C. § 78dd-2					Venezuela	2008 - 2014	Domestic Concern
Chow, Jeffrey	29-08-2017	18 U.S.C. § 371 (78dd-2, 78dd-3)	29-08-2017		15-11-2019	18 U.S.C. § 371 (78dd-2, 78dd-3)		$75,000		1 year probation	Brazil	2000 - 2016	Domestic Concern
Baptiste, Joseph	04-10-2017	18 U.S.C. § 371 (78dd-2; 18 USC § 1952(a)(3)) 18 U.S.C. § 1952 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 981(a)(1)(C) & 28 U.S.C. § 2461(c) 18 U.S.C. § 982(a)(1)		20-06-2019		18 U.S.C. § 371 (78dd-2; 18 USC § 1952(a)(3)) 18 U.S.C. § 1952 18 U.S.C. § 1956(h)					Haiti	2014-2015	Domestic Concern
Zubiate, Robert	06-10-2017	18 U.S.C. § 371 (15 USC 78dd-2, dd-3)	06-11-2017		28-09-2018	18 U.S.C. § 371 (15 USC 78dd-2, dd-3)		$100 assessment; $50,000 fine	30 months	36 months supervised release	Brazil	1996 - 2012	Domestic Concern
Luque Flores, Ramiro Andres	06-10-2017	18 U.S.C. § 371 18 U.S.C. § 981(a)(1)(C) 18 U.S.C. § 982(a)(1) 18 U.S.C. § 982(b)(1) 18 U.S.C. § 3551 et seq. 21 U.S.C. § 853(p) 28 U.S.C. § 2461(c)	06-10-2017			18 U.S.C. § 371					Ecuador	2013-2017	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Contoguris, Petros	12-10-2017	15 U.S.C. § 78dd-2 18 U.S.C. § 371 (78dd-2) 18 U.S.C. § 1956(a)(2)(A)&(B) 18 U.S.C. § 1956(h) 18 U.S.C. § 2									Kazakhstan; China	2008 - 2013	
Simon, Andrew	17-10-2017	18 U.S.C. § 371 (78dd-2)	10-05-2018		25-02-2019	18 U.S.C. § 371 (78dd-2)		$500,000 restitution	Time served	36 months	Qatar	2013 - 2015	Domestic Concern
Mace, Anthony	19-10-2017	18 U.S.C. § 371 (15 USC 78dd-2, dd-3)	09-11-2017		28-09-2018	18 U.S.C. § 371 (15 USC 78dd-2, dd-3)		$100 assessment; $150,000 fine	36 months	12 months	Angola, Brazil, Equatorial Guinea	2008 - 2011	Domestic Concern
Reyes Lopez, Marcelo	25-10-2017	18 U.S.C. § 1956(h) 18 U.S.C. § 982	11-04-2018		24-07-2018	18 U.S.C. § 1956(h)		$100 assessment; $30,000 fine	53 months	36 months supervised release	Ecuador	2013-2016	
Ho, Chi Ping Patrick	16-11-2017	18 U.S.C. § 2 18 U.S.C. § 371 (78d-d2, 78dd-3) 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(a) 15 U.S.C. § 78dd-2 15 U.S.C. § 78dd-3		05-12-2018	25-03-2019	18 U.S.C. § 2 18 U.S.C. § 371 (78d-d2, 78dd-3) 18 U.S.C. § 1956 (h) 18 U.S.C. § 1956(a)(2)(a) 15 U.S.C. § 78dd-2 15 U.S.C. § 78dd-3		$700 assessment; $400,000 fine	36 months	No supervised release; to be removed from US upon release from confinement	Chad, Uganda	2014 - 2017	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Gadio, Cheikh	16-11-2017	18 U.S.C. § 2 18 U.S.C. § 371 (78d-d2, 78dd-3) 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(a) 15 U.S.C. § 78dd-2 15 U.S.C. § 78dd-3				Dismissed 9/14/2018					Chad	2014 - 2017	Domestic Concern
Finocchi, Roberto	17-11-2017	18 U.S.C. § 371 (78dd-2, 78dd-3)	17-11-2017			18 U.S.C. § 371 (78dd-2, 78dd-3)					Brazil	2010-2017	Domestic Concern
Parker, Lawrence	20-12-2017	18 U.S.C. § 371 (78dd-2, 1343) 18 U.S.C. § 981(a)(1)(C)	29-12-2017		30-04-2018	18 U.S.C. § 371		$100 assessment; $701,750 restitution	35 months	36 months supervised release	Aruba	2005 - 2015	Domestic Concern
Steven, Colin	21-12-2017	15 U.S.C. § 78dd-1 18 U.S.C. § 2, 18 U.S.C. § 371, 18 U.S.C. § 1343 18 U.S.C. § 1349 18 U.S.C. § 1956(h) & (a)(2)(A) 18 U.S.C. § 1001, 18 U.S.C. § 982(a)(1), 21 U.S.C. § 853(p), 28 U.S.C. § 2461(c)	21-12-2017		09-12-2018	15 U.S.C. § 78dd-1 18 U.S.C. § 2, 18 U.S.C. § 371, 18 U.S.C. § 1343 18 U.S.C. § 1349 18 U.S.C. § 1956(h) & (a)(2)(A) 18 U.S.C. § 1001, 18 U.S.C. § 982(a)(1), 21 U.S.C. § 853(p), 28 U.S.C. § 2461(c)		$173,935 (forfeiture), $25,000 (fine), $700 (special assessment)	Time served		Saudi Arabia	2009 - 2011	Issuer

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Lambert, Mark	10-01-2018	18 U.S.C. § 371 (78dd-2, 18 U.S.C. § 1343) 15 U.S.C. § 78dd-2 18 U.S.C. § 1343 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 2		22-11-2019	09-03-2020	15 U.S.C. § 78dd-2, 18 U.S.C. § 2, 18 U.S.C. § 371 18 U.S.C. § 1343					Russia	2007-2014	Domestic Concern
Escobar Dominguez, Arturo	20-02-2018	18 U.S.C. § 1956(h) 18 U.S.C. § 982	28-03-2018		07-06-2018	18 U.S.C. § 1956(h)		$100 assessment	48 months	24 months supervised release	Ecuador	2012 - 2014	
Jimenez Aray, Gabriel Arturo	12-03-2018	18 U.S.C. § 1956(h)	20-03-2018		29-11-2018	18 U.S.C. § 1956(h)		$100 assessment	36 months	36 months supervised release	Venezuela	2010 - 2014	
Inniss, Donville	15-03-2018	18 U.S.C. § 982(a)(1) & 982(b)(1) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 3551 et seq 21 U.S.C. § 853(p)									Barbados	2015 - 2016	
Koolman, Egbert Yvan	09-04-2018	18 U.S.C. § 1956(h) 18 U.S.C. § 982(a)(1)	13-04-2018		29-06-2018	18 U.S.C. § 1956(h)		$100 assessment; $1,308,500 restitution	36 months	Must surrender to immigration upon release	Aruba	2005 - 2016	
Castillo Rincon, Juan Carlos	11-04-2018	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2, domestic concern FCPA) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 18 U.S.C. § 1956(h)	13-09-2018		20-02-2020	18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2)					Venezuela	2011 - 2013	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Chatburn, Frank	20-04-2018	18 U.S.C. § 371 18 U.S.C. § 1956(h) 15 U.S.C. § 78dd-2, 78dd-3 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 1956(a)(1)(B)(i) 18 U.S.C. § 2 18 U.S.C. § 981(a)(1)(C) 18 U.S.C. § 982(a)(1)	11-10-2019		18-12-2020	18 U.S.C. § 1956(h)					Ecuador	2013 - 2016	Domestic Concern
Larrea, Jose	20-04-2018	18 U.S.C. § 1956(h) 18 U.S.C. § 981(a)(1)(C) 18 U.S.C. § 982(a)(1)	11-09-2018		27-11-2018	18 U.S.C. § 1956(h)		$100 assessment	27 months	24 months supervised release	Ecuador	2013-2016	Domestic Concern
Martirossian, Azat	24-05-2018	18 U.S.C. § 1956(a)(2)(A)&(B) 18 U.S.C. § 1956(h) 18 U.S.C. § 2									Kazakhstan; China	2008 - 2013	
Leshkov, Vitaly	24-05-2018	18 U.S.C. § 1956(a)(2)(A)&(B) 18 U.S.C. § 1956(h) 18 U.S.C. § 2	16-08-2018		30-07-2019	18 U.S.C. § 1956(h)		$500,000 fine; $500,000 forfeiture; $100 assessment	12 months	4 months supervised release	Kazakhstan; China	2008 - 2013	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Leissner, Tim	07-06-2018	18 U.S.C. § 371 (78dd-1, dd-2, dd-3 and 78m(b)(5)) 18 U.S.C. § 982(a)(1)(C) 18 U.S.C. § 982(a)(1) 18 U.S.C. § 982(b) 18 U.S.C. § 1956(h) 18 U.S.C. § 3551 T 21 U.S.C. § 853(p) T. U.S.C. § 2461(c)	28-08-2018			18 U.S.C. § 371 (78dd-1, dd-2, dd-3 and 78m(b)(5)) 18 U.S.C. § 982(a)(1)© 18 U.S.C. § 982(a)(1) 18 U.S.C. § 982(b) 18 U.S.C. § 1956(h) 18 U.S.C. § 3551 T 21 U.S.C. § 853(p) T. U.S.C. § 2461(c)		Not sentenced yet, but already ordered to forfeit $43.7 million			Malaysia United Arab Emirates	2009-2014	Issuer and domestic concern
Baquerizo Escobar, Juan Andres	11-07-2018	18 U.S.C. § 982 18 U.S.C. § 1956(h)	14-09-2018		18-01-2019	18 U.S.C. § 982 18 U.S.C. § 1956(h)		$100 assessment	36 months	3 years supervised release	Ecuador		
Krull, Matthias	23-07-2018	18 U.S.C. § 1956(h)	22-08-2018		29-10-2018	18 U.S.C. § 1956(h)		$50,000 fine; $100 assessment	120 months	3 years supervised release	Venezuela	2014 - 2018	
Ortega, Eduardo Abraham	23-07-2018	18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B) 18 U.S.C. § 1952(a)(3)	31-10-2018		12-03-2020	18 U.S.C. § 1956(h)					Venezuela	2014 - 2018	
Amparan Croquer, Jose Vincente	23-07-2018	18 U.S.C. § 1956(h) 18 U.S.C. § 1952(a)(3)									Venezuela	2014 - 2018	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Aqui, Carmelo Urdaneta	23-07-2018	18 U.S.C. § 1956(h) 18 U.S.C. § 1952(a)(3)									Venezuela	2014-2018	
Convit Guruceaga, Francisco	23-07-2018	18 U.S.C. § 1956(h) 18 U.S.C. § 1952(a)(3)									Venezuela	2014-2018	
Frieri, Gustavo Adolfo Hernandez	23-07-2018	18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 1952(a)(3)	26-11-2019		20-03-2020	18 U.S.C. § 1956(h)					Venezuela	2014-2018	
Gois, Hugo Andre Ramalho	23-07-2018	18 U.S.C. § 1956(h)									Venezuela	2014-2018	
Acosta y Lara, Marcelo Federico Gutierrez	23-07-2018	18 U.S.C. § 1956(h)									Venezuela	2014-2018	
Bonilla Vallera, Mario Enrique	23-07-2018	18 U.S.C. § 1956(h)									Venezuela	2014-2018	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Gonzalez -Testino, Jose Manuel	27-07-2018	18 U.S.C. § 371 (78dd-2) 18 U.S.C. § 2 15 U.S.C. § 78dd-2 31 U.S.C. § 5314 31 U.S.C. § 5322	29-05-2019		19-02-2020	18 U.S.C. § 371 (78dd-2) 18 U.S.C. § 2 15 U.S.C. § 78dd-2 31 U.S.C. § 5314 31 U.S.C. § 5322					Venezuela	2011-2018	Domestic Concern
Gorrin Belisario, Raul	16-08-2018	18 U.S.C. § 371 (78dd-2, 78dd-3) 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(2)(A)									Venezuela	2008 - 2017	
Innes, Ingrid	23-08-2018	18 U.S.C. § 982(a)(1) & 982(b)(1) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 3551 et seq 21 U.S.C. § 853(p)									Barbados	2015 - 2016	
Tasker, Alex	23-08-2018	18 U.S.C. § 982(a)(1) & 982(b)(1) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 2 18 U.S.C. § 1956(18 U.S.C. § 3551 et seq 21 U.S.C. § 853(p)									Barbados	2015 - 2016	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Ng Chong Hwa, aka "Roger Ng"	03-10-2018	18 U.S.C. § 371 (78dd-1, dd-3 and 78m(b)(5)) 18 U.S.C. § 982(a)(1)(c) 18 U.S.C. § 982(a)(1) 18 U.S.C. § 982(b) 18 U.S.C. § 1956(h) 18 U.S.C. § 3551 T 21 U.S.C. § 853(p) T. U.S.C. § 2461(c)									Malaysia United Arab Emirates	2009-2014	Issuer
Low Taek Jho, aka " Jho Low"	03-10-2018	18 U.S.C. § 371 (78dd-3) 18 U.S.C. § 982(a)(1)(C) 18 U.S.C. § 982(a)(1) 18 U.S.C. § 982(b) 18 U.S.C. § 1956(h) 18 U.S.C. § 3551 T 21 U.S.C. § 853(p) T. U.S.C. § 2461(c)									Malaysia United Arab Emirates	2009-2014	Issuer
Ivan Alexis Guedez	12-10-2018	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i) and 1956(a)(2)(A))	31-10-2018		20-02-2020	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i) and 1956(a)(2)(A))		$978,339.50 money judgment			Venezuela	2009 - 2013	
Boncy, Roger Richard	30-10-2018	18 U.S.C. § 371 (78dd-2; 1952(a)(3)) 18 U.S.C. § 1952 18 U.S.C. § 2 18 U.S.C. § 1956(h) 18 U.S.C. § 981(a)(1)(C) & 28 U.S.C. § 2461(c) 18 U.S.C. § 982(a)(1)		20-06-2019		18 U.S.C. § 371 (78dd-2; 18 USC § 1952(a)(3))					Haiti	2014 - 2015	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Pearse, Andrew	19-12-2018	18 U.S.C. § 1349 & 3551 et seq 18 U.S.C. § 371 & 3551 et seq 18 U.S.C. § 371 (1956h) 18 U.S.C. § 371 (78m(b)(2)(B), 78m(b)(4), 78m(b)(5) and 78ff(a))	19-07-2019			18 U.S.C. § 1349					Mozambique	2012-2017	Issuer
Singh, Surjan	19-12-2018	18 U.S.C. § 1349 & 3551 et seq 18 U.S.C. § 371 & 3551 et seq 18 U.S.C. § 371 (1956h) 18 U.S.C. § 371 (78m(b)(2)(B), 78m(b)(4), 78m(b)(5) and 78ff(a))	06-09-2019			18 U.S.C. § 1956(h)					Mozambique	2012-2017	Issuer
Subeva, Detelina	19-12-2018	18 U.S.C. § 1349 & 3551 et seq 18 U.S.C. § 371 & 3551 et seq 18 U.S.C. § 371 (1956h) 18 U.S.C. § 371 (78m(b)(2)(B), 78m(b)(4), 78m(b)(5) and 78ff(a))	20-05-2019			18 U.S.C. § 1956(h)					Mozambique	2012-2017	Issuer
De La Paz Roman, Jose Luis	08-01-2019	18 U.S.C. § 371 (78dd-2) 18 U.S.C. § 981(a)(1)(C) 28 U.S.C. § 2461(c)	24-01-2019		10-04-2019	18 U.S.C. § 371 (78dd-2)		$100 assessment	36 months	2 years supervised release	Ecuador	2012-2016	Domestic Concern
Lyon, Frank James	16-01-2019	18 U.S.C. § 371	22-01-2019		13-05-2019	18 U.S.C. § 371		$100 assessment	30 months	36 months	Micronesia	2006 - 2016	Domestic Concern
Halbert, Master	24-01-2019	18 U.S.C. § 1956(h)	02-04-2019		29-07-2019	18 U.S.C. § 1956(h)		$7,500 fine; $100 assessment	18 months	36 months	Micronesia	2006-2016	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Coburn, Gordon J.	14-02-2019	18 U.S.C. § 371 (15 U.S.C. §§ 78dd-1, 78ff(c)(2)(A), 78m(b)(5), 78ff(a), 78m(b)(2)(B)) 15 U.S.C. § 78dd-1 15 U.S.C. § 78ff(c)(2)(A) 18 U.S.C. § 2 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a)									India	2014-2016	Issuer
Schwartz, Steven	14-02-2019	18 U.S.C. § 371 (15 U.S.C. §§ 78dd-1, 78ff(c)(2)(A), 78m(b)(5), 78ff(a), 78m(b)(2)(B)) 15 U.S.C. § 78dd-1 15 U.S.C. § 78ff(c)(2)(A) 18 U.S.C. § 2 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a)									India	2014-2016	Issuer
Pinto Francesc hi, Rafael Enrique	21-02-2019	18 U.S.C. § 371 (15 U.S.C. § 78dd-2) 18 U.S.C. § 1349 18 U.S.C. § 1343 18 U.S.C. § 2 18 U.S.C. § 1956(h)	31-07-2019		20-02-2020	18 U.S.C. § 371 (15 U.S.C. § 78dd-2) 18 U.S.C. § 371 (18 U.S.C. § 1343)		$985,416.6 money judgment			Venezuela	2009 - 2013	Agent/Employee of Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Muller Huber, Franz Herman	21-02-2019	18 U.S.C. § 371 (15 U.S.C. § 78dd-2) 18 U.S.C. § 1349 18 U.S.C. § 1343 18 U.S.C. § 2 18 U.S.C. § 1956(h)	21-08-2019		20-02-2020	18 U.S.C. § 371 (15 U.S.C. § 78dd-2) 18 U.S.C. § 371 (18 U.S.C. § 1343)		$263,402.83 money judgment			Venezuela	2009 - 2013	Agent/Employee of Domestic Concern
Karimova, Gulnara	07-03-2019	18 U.S.C. § 1956(h)									Uzbekistan	2001 - 2012	
Akhmedov, Bekhzod	07-03-2019	18 U.S.C. § 371 (78dd-1,78dd-2) 18 U.S.C. § 2 15 U.S.C. § 78dd-1 18 U.S.C. § 1956(h)									Uzbekistan	2001 - 2012	Issuer
Trujillo, Gustavo	04-04-2019	18 U.S.C. § 371 18 U.S.C. § 1956(h) 18 U.S.C. § 981(a)(1)(C) 18 U.S.C. § 982(a)(1), 18 U.S.C. § 982(b)(1) 18 U.S.C. § 3551 et seq. 21 U.S.C. § 853(p); 28 U.S.C. § 2461(c)	04-04-2019			18 U.S.C. §§ 371, 1956(h)					Ecuador	2015-2017	Domestic Concern
Alvarado-Ochoa, Javier	24-04-2019	18 U.S.C. § 1956(h) 18 U.S.C. § 2 18 U.S.C. § 1956(a)(1)(B)(i) 18 U.S.C. § 1956(a)(2)(A)									Venezuela	2011-2013	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Rafoi-Bleuler, Daisy Theresa	24-04-2019	18 U.S.C. § 1956(h) 18 U.S.C. § 371 (15 U.S.C. §§ 78dd-2, 78dd-3) 18 U.S.C. § 2 18 U.S.C. § 1956(a)(1)(b)(i)									Switzerland	2011-2013	Agent of Domestic Concern
Murta, Paulo Jorge Casqueira	24-04-2019	18 U.S.C. § 1956(h) 18 U.S.C. § 371 (15 U.S.C. §§ 78dd-2, 78dd-3) 18 U.S.C. § 2 18 U.S.C. § 1956(a)(2)(A)									Switzerland	2012 - 2013	Agent of Domestic Concern
Cevallos Diaz, Armengol Alfonso	09-05-2019	18 U.S.C. §§ 371, 1956(h), 1956(a)(1)(B)(i), 1956(a)(2)(A), 2, 981(a)(1)(C), 982(a)(1)									Ecuador	2012-2015	Domestic Concern
Cisneros Alarcon, Jose Melquiades	09-05-2019	18 U.S.C. §§ 371 18 U.S.C. § 1956(h) 18 U.S.C. § 1956(a)(1)(B)(i) 18 U.S.C. § 1956(a)(2)(A) 18 U.S.C. § 2 18 U.S.C. § 981(a)(1)(C) 18 U.S.C. § 982(a)(1)	19-08-2019		25-02-2020	18 U.S.C. § 1956(h)					Ecuador	2012-2015	Domestic Concern
Veroes, Jesus Ramon	11-06-2019	18 U.S.C. § 371 18 U.S.C. § 981(a)(1)(C) 28 U.S.C. § 2461(c)	24-06-2019		29-10-2019	18 U.S.C. § 371			51 months	2 years supervised release	Venezuela	2016 - 2018	Domestic Concern

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Chacin Haddad, Luis Alberto	11-06-2019	18 U.S.C. § 371 18 U.S.C. § 981(a)(1)(C) 28 U.S.C. § 2461(c)	24-06-2019		25-09-2019	18 U.S.C. § 371			51 months	2 years supervised release	Venezuela	2016 - 2018	Domestic Concern
Zwi Skornicki	25-06-2019	18 U.S.C. § 371 (78dd-2)	25-06-2019			18 U.S.C. § 371 (78dd-2)					Brazil	2001-2014	Domestic Concern
Motta Dominguez, Luis Alberto	27-06-2019	18 U.S.C. § 1956(h), (a)(2)(A), (a)(2)(B)(i), 18 U.S.C. § 2, 18 U.S.C. § 982(a)(1)									Venezuela	2016-2018	
Lugo Gomez, Eustiquio Jose	27-06-2019	18 U.S.C. § 1956(h), (a)(2)(A) (a)(2)(B)(i), 18 U.S.C. § 2 18 U.S.C. § 982(a)(1)									Venezuela	2016-2018	
Saab Moran, Alex Nain	25-07-2019	18 U.S.C. § 1956(h), (a)(2)(A) 18 U.S.C. § 2, 18 U.S.C. § 982(a)(1)									Venezuela	2011-2015	
Pulido Vargas, Alvaro	25-07-2019	18 U.S.C. § 1956(h), (a)(2)(A), 18 U.S.C. § 2 18 U.S.C. § 982(a)(1)									Venezuela	2011-2015	
Gravina Munoz, Alfonzo	11/27/2015 and 11/15/2018	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i) with 78dd-2 SUA) and 26 U.S.C. § 7206(1) 18 U.S.C. § 371 (18 U.S.C. § 1512(c) SUA)	12/10/2015 and 12/10/2018		30-01-2020	18 U.S.C. § 371 (18 U.S.C. § 1956(a)(1)(B)(i) with 78dd-2 SUA) 26 U.S.C. § 7206(1); 18 U.S.C. § 371 (18 U.S.C. § 1512(c) SUA)		$590,446 money judgment			Venezuela	2007 - 2014; 2018	

Name	Charge Date	Statutes Charged	Plea Date	Verdict Date	Sentencing Date	Statutes Convicted	Result	Fine / Money Sanction	Jail	Supervised Release / Probation	Country of Foreign Official	Scheme Dates	Issuer/ Domestic Concern?
Chi, Heon Cheol	12/14/2016; 4/12/2017 (superseding indictment)	18 U.S.C. § 1957 18 U.S.C. § 2 18 U.S.C. § 982 (a)(1) 28 U.S.C. § 2461(c)		17-07-2017	02-10-2017	18 U.S.C. § 1957 18 U.S.C. § 2		$100 special assessment; $15,000 fine	14 months	12 months	South Korea	2003 - 2015	
Harder, Dimitrij	12/15/15 (superseding)	18 U.S.C. § 371 (15 U.S.C. § 78dd-2 and 18 U.S.C. § 1952) 18 U.S.C. § 2 18 U.S.C. § 1952 18 U.S.C. § 1956(h) (18 U.S.C. § 1956(a)(2)(A)) 18 U.S.C. § 1956(a)(2)(A) 15 U.S.C. § 78dd-2	20-04-2016		18-07-2017	15 U.S.C. § 78dd-2(g)(2)(A) 18 U.S.C. § 2		$100,000 fine; $200 assessment	60 months	36 months supervised release	United Kingdom	2007 - 2009	Domestic Concern
Villalobos, Nervis Gerardo	8/23/2017 (superseded 4/24/2019)	18 U.S.C. § 1956(h) 18 U.S.C. § 371 (object 15 U.S.C. § 78dd-2, 78dd-3) 18 U.S.C. § 1956(a)(1)(B)(i) 18 U.S.C. § 2									Venezuela	2011 - 2013	

Source: Chart provided by United States for this Phase 4 evaluation.
Note: Certain columns were deleted either when material was not particularly relevant for readers (e.g. District Court and Case Number columns) or where information was only provided for certain entries (e.g. Related Corporate Resolutions) to ensure that the column widths were not too narrow on page.

Table 5. FCPA-related enforcement actions brought by the DOJ against Legal Persons since Phase 3

Case Name	Date	Form of Resolution	Total Resolution Amount	Charges Sanctioned	DOJ Monetary Sanctions (fine unless indicated)	SEC Resolution	Bribe Amount	Profit Amount	Monitor	Individuals Prosecuted	Scheme Dates	Issuer/Domestic Concern?
ABB Ltd (parent); ABB Inc. (subsidiary)	29-Sep-10	DPA (parent) Guilty plea (subsidiary)	$58,334,262	Parent: 18 U.S.C. § 371 (78dd-1 et seq, 18 U.S.C. § 1343, 78m(b)(2)(A), 78m(b)(5), 78ff(a)) 15 U.S.C. § 78dd-2(a) 18 U.S.C. § 2 Subsidiary: 18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2	$19,000,000	Y	$2,200,000	Unknown	N	Y	1997 - 2004	Issuer (parent) Domestic Concern (subsidiary)
Panalpina World Transport (Holding) Ltd. (parent) Panalpina, Inc. (subsidiary)	4-Nov-10	DPA (parent) Guilty plea (subsidiary)	$81,889,369	Parent: 18 U.S.C. § 371 (78dd-3) 15 U.S.C. § 78dd-2 Subsidiary: 18 U.S.C. § 371 (78m(b)(2)(A), 78m(b)(5), 78ff(a)) 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a)	$70,560,000	Y	$49,000,000	Unknown	N	N	2002 - 2009	78dd-3 person (parent) Domestic Concern (subsidiary)
Shell Nigeria Exploration and Production Company Ltd.	4-Nov-10	DPA	$48,100,000	18 U.S.C. § 371 (78dd-3, 78m(b)(2)(A), 78m(b)(5), 78ff(a)) 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a)	$30,000,000	Y	$2,000,000	$7,000,000	N	N	2004 - 2006	78dd-3 person

Transocean Inc. Transocean Ltd.	4-Nov-10	DPA	$20,705,080	18 U.S.C. § 371 (78dd-1, 78m(b)(2)(A), 78m(b)(5), 78ff(a) 15 U.S.C. § 78dd-1 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a)	$13,440,000	Y	$90,000	Unknown	N	N	2002 - 2007	Issuer
Tidewater Marine International, Inc.	4-Nov-10	DPA	$15,671,362	18 U.S.C. § 371 (78dd-2, 78m(b)(2)(A), 78m(b)(5), 78ff(a)) 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a)	$7,350,000	Y	$1,760,000	$6,620,000	N	N	2001 - 2007	Issuer
Pride International, Inc. (parent) Pride Forasol S.A.S. (subsidiary)	4-Nov-10	DPA (parent) Guilty plea (subsidiary)	$56,154,718	Parent: 18 U.S.C. § 371 (78dd-1) 15 U.S.C. § 78dd-1(a) 18 U.S.C. § 2 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a) Subsidiary: 18 U.S.C. § 371 (78dd-1) 15 U.S.C. § 78dd-3 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a) 18 U.S.C. § 2	$32,625,000	Y	$806,000	$13,000,000	N	N	2003 - 2004	Issuer (parent) 78dd-3 person (subsidiary)
Noble Corporation	4-Nov-10	NPA	$8,166,998	N/A	$2,590,000	Y	$79,026	$4,294,933	N	N	2003-2007	Issuer (parent) Domestic concern (subsidiary)

RAE Systems, Inc.	10-Dec-10	NPA	$2,957,012	N/A	$1,700,000	Y	Unknown	Unknown	N	N	2004-2008	Issuer
Alcatel-Lucent, S.A. Alcatel-Lucent France, S.A. Alcatel-Lucent Trade International, A.G. Alcatel Centroamerica S.A.	27-Dec-10	DPA (parent) Guilty Pleas (3 subs)	$137,372,000	Parent: 15 U.S.C. § 78(b)(2)(A) 15 U.S.C. § 78m(b)(2)(B) 15 U.S.C. § 78m(b)(5) 15 U.S.C. § 78ff(a) 18 U.S.C. § 2 Subsidiaries: 18 U.S.C. § 371	$92,000,000	Y	Over $10 million	$48,100,000	Y	Y	2000-2006	Issuer (parent) dd-3 person (subsidiaries)
Maxwell Technologies, Inc.	31-Jan-11	DPA	$14,350,890	15 U.S.C. § 78dd-1 15 U.S.C. § 78m(b)(2)(A) 15 U.S.C. § 78(m)(b)(5)	$8,000,000	Y	$2,789,131	Unknown	N	Y	2002 - 2009	Issuer
Tyson Foods, Inc.	10-Feb-11	DPA	$5,134,477	18 U.S.C. § 371 (78dd-1) 15 U.S.C. § 78dd-1 18 U.S.C. § 2	$4,000,000	Yes	$350,000	$880,000	N	N	1994 - 2006	Issuer
JGC Corporation (Bonny Island)	6-Apr-11	DPA	$218,800,000	18 U.S.C. § 371 (78dd-1, 78dd-2) 15 U.S.C. § 78dd-2	$218,800,000	No	$182,000,000	$195,400,000	Y	Y	1994 - 2004	dd-3 person
Comverse Technology, Inc.	7-Apr-11	NPA	$2,808,501	N/A	$1,200,000	Yes	$536,000	$1,250,000	N	N	2003 - 2006	Issuer

DePuy, Inc. (Johnson & Johnson)	8-Apr-11	DPA	$70,066,316	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2	$21,400,000	Yes	$16,400,000	Approx $24 million	N	N	1998 - 2006	Domestic Concern
Tenaris, S.A.	17-May-11	NPA	$8,928,338	N/A	$3,500,000	Yes	Unknown	$4,786,438	N	N	2006 - 2007	Issuer
Armor Holdings Inc.	13-Jul-11	NPA	$15,980,744	N/A	$10,290,000	Yes	$200,000	$1,000,000	N	N	2001 - 2006	Issuer
Bridgestone Corporation	15-Sep-11	Guilty plea	$28,000,000	18 U.S.C. § 371 (78dd-3) 15 U.S.C. § 1	$28,000,000	No	$2,000,000	$17,103,694	N	Y	1999 - 2007	dd-3 person
Aon Corporation	20-Dec-11	NPA	$16,309,020	N/A	$1,764,000	Yes	$865,000	$1,840,200	N	N	1996 - 2005	Issuer
Deutsche Telekom, AG (parent) Magyar Telekom, Plc. (subsidiary)	29-Dec-11	NPA (parent) DPA (subsidiary)	$95,811,491	Parent: N/A Subsidiary: 15 U.S.C. § 78dd-1 15 U.S.C. § 78m (b)(2)(A) 15 U.S.C. § 78m (b)(5) 15 U.S.C. § 78ff(a)	$4,360,000 (parent) $59,600,000 (subsidiary)	Yes	$6,000,000	Unknown	N	N	2004 - 2006	Issuer
Marubeni Corporation	17-Jan-12	DPA	$54,600,000	18 U.S.C. § 371 (78dd-1, 78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2	$54,600,000	No	Unknown	Unknown	Y	Y	1994 - 2004	dd-3 person
Smith & Nephew, Inc.	6-Feb-12	DPA	$22,200,000	18 U.S.C. § 371 (78dd-2) 15 U.S.C. § 78dd-2 18 U.S.C. § 2 15 U.S.C. § 78m	$16,800,000	Yes (with parent company)	Unknown	Unknown	Y	N	1998 - 2008	Domestic Concern

Lufthansa Technik AG (parent) BizJet International Sales and Support, Inc. (subsidiary)	4-Mar-12	NPA (parent) DPA (subsidiary)	$11,800,000	Parent: N/A Subsidiary: 18 U.S.C. 371 (78dd-2)	$11,800,000	No	Unknown	Unknown	N	Y	2004 - 2010	Domestic Concern
Biomet, Inc.	26-Mar-12	DPA	$22,855,731	18 U.S.C. § 371 (78dd-1) 15 U.S.C. § 78dd-1 18 U.S.C. § 2 15 U.S.C. § 78m	$17,280,000	Yes	$1,500,000	$4,400,000	Y	N	2000 - 2008	Issuer
Data Systems and Solutions, LLC	8-Jun-12	DPA	$8,820,000	18 U.S.C. 371 (78dd-2) 15 U.S.C. § 78dd-2	$8,820,000	No	Unknown	Unknown	N	N	1999 - 2004	Domestic Concern
NORDAM Group, Inc.	6-Jul-12	NPA	$2,000,000	N/A	$2,000,000	No	$1,500,000	$2,480,000	N	N	1999 - 2008	Domestic Concern
Orthofix International, N.V.	10-Jul-12	DPA	$7,445,644	15 U.S.C. § 78m(b)(2)	$2,220,000	Yes	$300,000	Unknown	N	N	2003 - 2010	Issuer
Pfizer H.C.P. Corporation	7-Aug-12	DPA	$60,216,568	18 U.S.C. § 371 (78dd-2 and 78m(b)(2)(A)) 15 U.S.C. § 78dd-2(a) 18 U.S.C. § 2	$15,000,000	Yes	$2,000,000	$7,000,000	N	N	1997 - 2006	Domestic Concern
Tyco International Limited	24-Sep-12	NPA (parent) Guilty Plea (subsidiary)	$26,811,509	Parent: N/A Subsidiary: 18 U.S.C. § 371 (78dd-2)	$13,680,000	Yes	Unknown	$1,153,500	N	N	1999 - 2009	Issuer (parent) Domestic Concern (subsidiary)
Parker Drilling Company	16-Apr-13	DPA	$15,850,000		$11,760,000	Y	$1,250,000	$3,050,000	N	N	2004	Issuer
Ralph Lauren Corporation	22-Apr-13	NPA	1,616,846		$882,000	Y	580,000		N	N	2004-2009	Issuer

Total S.A.	29-May-13	DPA	$398,200,000	$245,200,000	Y	$60,000,000	$147,000,000	Y	N	1995-2004	Issuer
Diebold Inc.	22-Oct-13	DPA	$48,172,942	$25,200,000	Y	$1,750,000		Y	N	2005-2010	Issuer
Weatherford International Ltd Weatherford Services, Ltd.	26-Nov-13	DPA (parent), Guilty Plea (subsidiary)	152,790,616	$87,178,256	Y		$54,486,410	Y	N	1999 - 2009	Issuer (Interational Ltd) dd-3 person (Services Ltd)
Bilfinger SE	9-Dec-13	DPA	$32,000,000	$32,000,000	N	$6,000,000		Y	Y	2003-2005	dd-3
Archer Daniels Midland Company (ADM) Toepfer International (Ukraine) Ltd	20-Dec-13	NPA (parent) Guilty Plea (subsidiary)	$54,000,000	$17,771,613 (Toepfer fines)	Y (ADM)	$22,000,000	100,000,000	N	N	1998-2009, 2002-2008	Issuer (Archer) dd-3 person (Toepfer)
Alcoa World Alumina LLC	9-Jan-14	Plea Agreement	$384,000,000	$209,000,000 (DOJ Penalty) $14,000,000 (DOJ Forfeiture)	Y	$111,200,000		N	N	1993-2006	Domestic Concern
Marubeni Corporation	19-Mar-14	Plea Agreement	$88,000,000	$88,000,000	N	$2 million	$5.5 million	N	Y	2002-2009	dd-3 person

Hewlett-Packard Polska, SP. Z O.O. ZAO Hewlett-Packard A.O. Hewlett-Packard Mexico	9-Apr-14	DPA (Poland) Guilty Plea (ZAO - Russia) NPA (Mexico)	$108,222,474.00		$15,450,224 (DOJ Penalty Poland) $58,772,250 (DOJ Penalty Russia) $2,527,750 (DOJ Penalty HP Mexico)	Y	$600,000 (Poland) $10,000,000 (Russia) $1,410,000 (Mexico)	$16,100,000 (Poland); $10,400,000 (Russia); $2,527,750 (Mexico)	N	N	2006-2010, 2000-2007, 2008-2009	dd-1 (Poland - sub of issuer) dd-3 person (Russia) dd-1 (Mexico - sub of issuer)
In re Bio-Rad Laboratories, Inc.	3-Nov-14	NPA	$55,050,000		$14,350,000	Y			N	N	2005-2010	Issuer
Dallas Airmotive, Inc.	10-Dec-14	DPA	$14,000,000		$14,000,000	N			N	N	2008-2012	Domestic Concern
Avon Products, Inc. Avon Products (China) Co. Ltd.	17-Dec-14	DPA (parent) Guilty Plea (subsidiary)	$135,013,013		$67,648,000	Y	$8,000,000		Y	N	2004-2008	Issuer (Avon) Sub of issuer (Avon Products China)
Alstom S.A. Alstom Network Schweiz AG Alstom Power, Inc. Alstom Grid, Inc.	22-Dec-14	Guilty Plea (Parent & Network) DPA (3 yrs)(Power & Grid)	$772,290,000		$772,290,000	N	$75,000,000	$300,000,000	N	Y	1999-2011	Issuer (Alstom S.A.) dd-3 person (Alstom Network Schweiz AG) Domestic Concern (Alstom Power) Domestic Concern (Alstom Grid)

In re IAP Worldwide Services Inc.	16-Jun-15	NPA	$7,100,000		$7,100,000	N	$1,783,688		N	Y	2006-2008	Domestic Concern
Louis Berger International Inc.	17-Jul-15	DPA	$17,100,000		$17,100,000	N	$3,934,431		Y	Y	1998-2010	Domestic Concern
Parametric Technology Co. Ltd.	16-Feb-16	NPA	$28,072,000		$14,540,000	Y	$1,350,000	$13,000,000	N	N	2006-2011	Issuer
Vimpelcom Ltd. Unitel LLC	18-Feb-16	DPA (parent) Guilty Plea (subsidiary)	$795,326,398.00		$40,000,000 (DOJ Forfeiture) $190,326,398.40 (remaining DOJ criminal penalty)	Y	$114,000,000	$523,098,180	Y	Y	2005-2012	Issuer
Olympus Latin America Inc.	1-Mar-16	DPA	$22,800,000.00		$22,800,000.00	N	$2,999,560	$7,556,566	Y	N	2006-2011	Domestic Concern
BK Medical ApS	21-Jun-16	NPA	$14,884,962		$3,402,000	Y			N	N	2001-2011	Issuer
LATAM Airlines Group S.A.	25-Jul-16	DPA	$22,187,788		$12,750,000	Y	$1,150,000	$6,700,000	Y	N	2006-2007	Issuer
Och-Ziff Capital Management OZ Africa Management GP LLC	29-Sep-16	DPA (parent) Guilty Plea (subsidiary)	$412,100,856.00		$213,055,689	Y	>$100,000,000	$221,933,010	Y	Y	2005-2015	Issuer
Embraer S.A.	24-Oct-16	DPA	$205,485,090		$107,285,090	Y	$5,970,000	$83,816,476	Y	Y	2008-2011	Issuer

JPMorgan Securities (Asia Pacific) Limited	17-Nov-16	NPA	$202,591,405		$72,000,000	Y		$35,000,000	N	N	2006-2013	Issuer
Rolls Royce	20-Dec-16	DPA	$800,305,272		$169,917,710	N	$35,000,000	$162,914,074	N	Y	2000-2013	Domestic Concern
Odebrecht	21-Dec-16	Guilty Plea (parent)	$2,600,000,000		$120,000,000 (DOJ Penalty) (actually paid $93,000,000)	N	$788,000,000	$3,336,000,000	Y	Y	2001-2016	dd-3
Braskem	21-Dec-16	Guilty Plea (parent)	$957.625.336.81		$94,893,800.52	Y	75,000,000	$289,000,000	Y	Y	2002-2014	Issuer
Teva Pharmaceutical Industries	22-Dec-16	DPA (parent) Guilty Plea (sub)	$519,279,190		$283,177,348	Y	$65,200,000	$221,234,303	Y	N	2001-2012	Issuer
General Cable	29-Dec-16	NPA	$75,751,592		$20,469,694.80 (DOJ Penalty)	Y	$13,000,000	$51,000,000	N	N	2003-2015	Issuer
Zimmer Biomet Holdings Inc. JERDS Luxembourg Holding S.ÀR.L	12-Jan-17	DPA (parent) Guilty Plea (sub)	$37,005,910.00		$17,460,300 (DOJ Penalty)	Y	$980,774		Y	N	2010-2013	Issuer
Sociedad Química y Minera de Chile ("SQM")	13-Jan-17	DPA	$30,487,500		$15,487,500	Y	$14,750,000		Y	N	2008-2015	Issuer

Las Vegas Sands Corporation	17-Jan-17	NPA	$15,960,000		$6,960,000	Y			N	N	2006-2009	Issuer
Telia Company AB Coscom LLC	21-Sep-17	DPA (parent), Guilty Plea (sub)	$965,773,949		$40,000,000 (DOJ Forfeiture paid by Telia on behalf of Coscom) $500,000 (DOJ Criminal Fine paid by Telia on behalf of Coscom) $234,103,972 (remaining DOJ Criminal Penalty)	Y	$331,200,000	$457,169,977	N	Y	2007-2012	Issuer
SBM Offshore SBM NV	29-Nov-17	DPA (parent), Guilty Plea (sub)	$478,000,000		$500,000 (DOJ Criminal Fine) $13.2 million (DOJ Forfeiture) $224,300,000 (DOJ Penalty)	N	$180,000,000	$2,800,000,000	N	Y	1996-2012	Domestic Concern (SBM Offshore) dd-3 (SBM NV)

Keppel Offshore & Marine Ltd Keppel Offshore & Marine USA Inc	22-Dec-17	DPA (parent), Guilty Plea (sub)	$422,000,000		$105,554,245 (DOJ Penalty)	N	$55,000,000	$351,800,000	N	Y	2001-2014	dd-3 (sub is domestic concern)
Transport Logistics International, Inc	12-Mar-18	DPA	$2,000,000		$2,000,000	N	$1,700,000	$11,600,000	N	Y	2004-2014	Domestic Concern
Panasonic Avionics Corporation	30-Apr-18	DPA	$280,602,831		$137,403,812	Y	$8,882,972	$122,681,975	Y	N	2007-2016	Domestic Concern (but causing parent Issuer to make false books and records)
Legg Mason, Inc	4-Jun-18	NPA	$64,242,892		$32,625,000	Y	26,250,000	$31,617,891.90	N	N	2005-2008	Issuer
Societe Generale S.A. SGA Societe Generale Acceptance, N.V.	4-Jun-18	DPA (parent) Guilty Plea (subsidiary)	$860,552,888		$585,552,888 (DOJ Penalty, FCPA) $275,000,000 (DOJ Penalty, LIBOR)	N	$90,740,000	$522,815,079	N	N	2005-2011	Domestic Concern and dd-3
Credit Suisse Credit Suisse Hong Kong	5-Jul-18	NPA	$76,853,720		$47,029,916	Y		$46,107,761	N	N	2007-2013	Issuer
Petroleo Brasileiro S.A.	26-Sep-18	NPA	$853,200,000		$85,320,000	Y	$1,000,000,000		N	Y	2004-2012	Issuer

Fresenius Medical Care AG & Co.	25-Feb-19	NPA	$231,715,273.00		$84,715,273	Y		$140,000,000	Y	N	2005-2016	Issuer
Mobile TeleSystems PJSC (MTS) KOLORIT DIZAYN INK LLC (KOLORIT)	6-Mar-19	DPA (parent), Guilty Plea (sub)	$850,000,000		$40,000,000 (DOJ Forfeiture paid by MTS on behalf of Kolorit) $500,000 (DOJ Criminal Fine paid by MTS on behalf of Kolorit) $709,500,000 (remaining DOJ Criminal Penalty)	Y	$420,000,000		Y	Y	2004-2012	Issuer

Walmart Inc. WMT Brasilia S.a.r.l.	20-Jun-19	NPA, Guilty Plea (sub)	$282,000,000 (DOJ and SEC)		$3,624,490 (subsidiary forfeiture) $724,898 (DOJ Criminal Penalty, subsidiary) $137,955,249 (DOJ Criminal Penalty, parent; includes subsidiary forfeiture and fine)	Y		$110,212,320	Y	N	1999-2012	Issuer
Technip FMC PLC Technip USA Inc. (Technip USA)	25-Jun-19	DPA (parent), Guilty Plea (sub)	$296,184,000		$81,852,967	Y	$69,000,000	$141,040,000	N	Y	2003-2014	Issuer & Domestic Concern (Technip FMC) Domestic Concern (Technip USA Inc.)
Microsoft Hungary	22-Jul-19	NPA (sub)	$25,316,946 (DOJ and SEC)		$8,751,795 (criminal penalty)	Y		$14,586,325	N	N	2013-2015	Issuer

Source: Chart provided by United States for this Phase 4 evaluation.
Note: Certain columns were deleted either when material was not particularly relevant for readers (e.g. Term of Resolution, Term of Monitorship) to ensure that the column widths were not too narrow on page.

Table 6. FCPA-related enforcement actions brought by the SEC against Legal and Natural Persons since Phase 3

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
12-10-10	SEC v. RAE Systems	$ 1,147,800	$ 109,212	$ -	$ 1,257,012	Y		$ 1,257,012	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
12-27-10	SEC v. Alcatel-Lucent	$ 45,372,000	$ -	$ -	$ 45,372,000	Y		$ 45,372,000	30A 13(b)(2)(A) 13(b)(2)(B) 13(b)(5)	Y	N	1	
01-24-11	SEC v. Paul W. Jennings [Innospec]	$ 116,092	$ 12,945	$ 100,000	$ 229,037	N		$ 229,037	30A 13(b)(2)(A) 13(b)(2)(B) 13(b)(5) Rules: 13b2-1 13b2-2 13a-14	n/a	n/a		1
01-31-11	SEC v. Maxwell Technologies	$ 5,654,576	$ 696,314	$ -	$ 6,350,890	Y		$ 6,350,890	30A 13(b)(2)(A) 13(b)(2)(B) 13(a) Rules 12b-20 13a-1 13a-13	N	Y	1	
02-10-11	SEC v. Tyson Foods, Inc	$ 880,786	$ 331,691	$ -	$ 1,212,477	Y		$ 1,212,477	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
03-18-11	SEC v IBM	$ 5,300,000	$ 2,700,000	$ 2,000,000	$ 10,000,000	N		$ 10,000,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
03-24-11	In re Ball Corporation	$ -	$ -	$ 300,000	$ 300,000	N		$ 300,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
04-07-11	SEC v. Comverse Technology	$ 1,249,614	$ 358,887	$ -	$ 1,608,501	Y		$ 1,608,501	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
04-08-11	SEC v. Johnson & Johnson	$ 38,227,826	$ 10,438,490	$ -	$ 48,666,316	Y		$ 48,666,316	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
05-03-11	In re Rockwell Automation	$ 1,771,000	$ 590,091	$ 400,000	$ 2,761,091	N		$ 2,761,091	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
05-17-11	Tenaris (DPA)	$ 4,786,438	$ 641,900	$ -	$ 5,428,338	Y		$ 5,428,338	n/a	N	Y	1	
07-13-11	SEC v. Armor Holdings	$ 1,552,306	$ 458,438	$ 3,680,000	$ 5,690,744	Y		$ 5,690,744	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
07-27-11	In re Diageo, plc	$ 11,306,081	$ 2,067,739	$ 3,000,000	$ 16,373,820	N		$ 16,373,820	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
10-13-11	In re Watts Water Tech & Leesen Chang	$ 2,755,815	$ 820,791	$ 225,000	$ 3,801,606	N		$ 3,801,606	Watts: 13(b)(2)(A) 13(b)(2)(B) Chang: Rule 13b2-1 Causing: 13(b)(2)(A) 13(b)(2)(B)	n/a	n/a	1	1

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
12-13-11	SEC v. Sharef, et al. [Siemens] (LITIGATED - 7 indivs)	$ 316,452	$ 97,505	$ 1,443,000	$ 1,856,957	N		$ 1,856,957	30A A&A 30A 13(b)(5) R 13b2-2 A&A: 13(b)(2)(A) 13(b)(2)(B)	n/a	n/a		7
12-20-11	SEC v. Aon International	$ 11,416,814	$ 3,128,206	$ -	$ 14,545,020	Y		$ 14,545,020	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
12-29-11	SEC v. Magyar Telekom and Deutsche Telekom	$ 25,249,772	$ 5,961,719	$ -	$ 31,211,491	Y		$ 31,211,491	MT: 30A 13(b)(2)(A) 13(b)(2)(B) DT: 13(b)(2)(A) 13(b)(2)(B)	N	N	2	
12-29-11	SEC v. Straub, et al. [Magyar Telekom] (LITIGATED - 3 individuals)				$ -	N		$ -	30A A&A 30A 13(b)(5) R 13b2-1 R 13b2-2 A&A: 13(b)(2)(A) 13(b)(2)(B) Straub & Balogh - O/D (officer director) bar	n/a	n/a		3
02-09-12	SEC v. Smith & Nephew	$ 4,028,000	$ 1,398,799	$ -	$ 5,426,799	Y		$ 5,426,799	30A 13(b)(2)(A) 13(b)(2)(B)	Y	Y	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
02-24-12	SEC v. Jackson & Ruehlen [Noble] (LITIGATED)				$ -	N		$ -	30A 13(b)(5) 13b2-1 Both A&A 30A 13(b)(2)(A) 13(b)(2)(B) Jackson (directly) 13b2-2 13a-14	n/a	n/a		2
02-24-12	SEC v. O'Rourke [Noble]	$ -		$ 35,000	$ 35,000	N		$ 35,000	30A 13(b)(2)(A) 13(b)(2)(B) 13(b)(5) 13b2-1	n/a	n/a		1
03-26-12	SEC v. Biomet	$ 4,432,998	$ 1,142,733	$ -	$ 5,575,731	Y		$ 5,575,731	30A 13(b)(2)(A) 13(b)(2)(B)	Y	Y	1	
04-25-12	SEC v. Garth Peterson [Morgan Stanley]	$ 3,654,589		$ -	$ 3,654,589	N		$ 3,654,589	30A 13(b)(5) 206(1) and (2) of the Advisers Act	N	N		1
07-10-12	SEC v. Orthofix International	$ 4,983,644	$ 242,057	$ -	$ 5,225,701	Y		$ 5,225,701	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
08-07-12	SEC v. Wyeth LLC	$ 17,217,831	$ 1,658,793	$ -	$ 18,876,624	N		$ 18,876,624	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
08-07-12	SEC v. Pfizer Inc.	$ 16,032,676	$ 10,307,268	$ -	$ 26,339,944	Y		$ 26,339,944	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
08-16-12	SEC v. Oracle Corporation	$ -		$ 2,000,000	$ 2,000,000	N		$ 2,000,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
09-24-12	SEC v. Tyco International Ltd.	$ 10,564,992	$ 2,566,517	$ -	$ 13,131,509	Y		$ 13,131,509	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
12-17-12	In re Allianz SE	$ 5,315,649	$ 1,765,125	$ 5,315,649	$ 12,396,423	N		$ 12,396,423	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
12-20-12	SEC v. Eli Lilly	$ 13,955,196	$ 6,743,538	$ 8,700,000	$ 29,398,734	N		$ 29,398,734	30A 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
04-05-13	In re Koninklijk Philips Electronics	$ 3,120,597	$ 1,394,581	$ -	$ 4,515,178	N		$ 4,515,178	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
04-16-13	SEC v. Parker Drilling	$ 3,050,000	$ 1,040,818	$ -	$ 4,090,818	Y		$ 4,090,818	30A 13(b)(2)(A) 13(b)(2)(B)	N	N	1	
04-22-13	Ralph Lauren Corporation (NPA)	$ 593,000	$ 141,846	$ -	$ 734,846	Y		$ 734,846	30A 13(b)(2)(A) 13(b)(2)(B)	n/a	n/a	1	
05-29-13	In re Total S.A.	$ 153,000,000	$ -	$ -	$ 153,000,000	Y		$ 153,000,000	30A 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
10-22-13	SEC v. Diebold, Inc	$ 19,719,550	$ 3,253,392	$ -	$ 22,972,942	Y		$ 22,972,942	30A 13(b)(2)(A) 13(b)(2)(B)	Y	Y	1	
10-24-13	In re Stryker Corporation	$ 7,502,635	$ 2,280,888	$ 3,500,000	$ 13,283,523	N		$ 13,283,523	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
11-26-13	SEC v. Weatherford International	$ 90,984,844	$ 4,399,423	$ 1,875,000	$ 97,259,267	Y	$ 31,646,907	$ 65,612,360	30A 13(b)(2)(A) 13(b)(2)(B)	Y	Y	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
12-20-13	SEC v. Archer-Daniels-Midland Co.	$ 33,342,012	$ 3,125,354	$ -	$ 36,467,366	Y		$ 36,467,366	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
01-09-14	In re Alcoa	$ 175,000,000	$ -	$ -	$ 175,000,000	Y	$ 14,000,000	$ 161,000,000	30A 13(b)(2)(A) 13(b)(2)(B)	N	N	1	
04-06-14	In re Hewlett-Packard	$ 29,000,000	$ 5,000,000	$ -	$ 34,000,000	Y	$ 2,527,750	$ 31,472,250	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
07-28-14	In re Smith & Wesson	$ 107,852	$ 21,040	$ 1,906,000	$ 2,034,892	N		$ 2,034,892	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
10-27-14	In re Layne Christensen Co.	$ 3,893,472	$ 858,720	$ 375,000	$ 5,127,192	N		$ 5,127,192	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
11-03-14	In re Bio-Rad Laboratories Inc.	$ 35,100,000	$ 5,600,000	$ -	$ 40,700,000	Y		$ 40,700,000	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
11-17-14	In re Stephen Timms et al [FLIR]	$ -	$ -	$ 70,000	$ 70,000	N		$ 70,000	30A 13(b)(5) R 13b2-1 13(b)(2)(A) 13(b)(2)(B)	n/a	n/a		2
12-15-14	In re Bruker Corporation	$ 1,714,852	$ 310,117	$ 375,000	$ 2,399,969	N		$ 2,399,969	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
12-17-14	SEC v. Avon	$ 52,850,000	$ 14,515,013	$ -	$ 67,365,013	Y		$ 67,365,013	13(b)(2)(A) 13(b)(2)(B)	Y	Y	1	
01-22-15	In re Walid Hatoum [PBSJ]	$ -	$ -	$ 50,000	$ 50,000	N		$ 50,000	30A 13(b)(2)(A) 13(b)(2)(B) 13(b)(5)	n/a	n/a		1

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
01-22-15	PBSJ (DPA)	$ 2,892,504	$ 140,371	$ 375,000	$ 3,407,875	N		$ 3,407,875	30A 13(b)(2)(A) 13(b)(2)(B)	N	N	1	
02-24-15	In re Goodyear Tire & Rubber Company	$ 14,122,525	$ 2,105,540	$ -	$ 16,228,065	N		$ 16,228,065	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
04-08-15	In re Flir Systems Inc.	$ 7,534,000	$ 970,854	$ 1,000,000	$ 9,504,854	N		$ 9,504,854	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
05-20-15	In re BHP Billiton	$ -	$ -	$ 25,000,000	$ 25,000,000	N		$ 25,000,000	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
07-28-15	In re Mead Johnson Nutrition Co.	$ 7,770,000	$ 1,260,000	$ 3,000,000	$ 12,030,000	N		$ 12,030,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
08-12-15	SEC v Vincente Garcia [SAP]	$ 85,965	$ 6,430	$ -	$ 92,395	N		$ 92,395	30A 13(b)(5) 13b2-1	n/a	n/a		1
08-18-15	In re BNY Mellon	$ 8,300,000	$ 1,500,000	$ 5,000,000	$ 14,800,000	N		$ 14,800,000	30A 13(b)(2)(B)	N	N	1	
09-28-15	SEC v Hitachi Ltd.	$ -	$ -	$ 19,000,000	$ 19,000,000	N		$ 19,000,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
10-05-15	In re Bristol-Myers Squibb	$ 11,442,000	$ 500,000	$ 2,750,000	$ 14,692,000	N		$ 14,692,000	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
02-01-16	In re SAP SE	$ 3,700,000	$ 188,896	$ -	$ 3,888,896	N		$ 3,888,896	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
02-04-16	In re Ignacio Cueto Plaza [LAN]	$ -	$ -	$ 75,000	$ 75,000	N		$ 75,000	13(b)(5) 13(b)(2)(A) 13(b)(2)(B)	n/a	n/a		1

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
02-04-16	SEC v SciClone	$ 9,426,000	$ 900,000	$ 2,500,000	$ 12,826,000	N		$ 12,826,000	30A(g) 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
02-16-16	In re Parametric Technology Co [PTC]	$ 11,858,000	$ 1,764,000	$ -	$ 13,622,000	Y		$ 13,622,000	30A 13(b)(2)(A) 13(b)(2)(B)	N	N	1	
02-16-16	Yui Kai Yuan (DPA) [PTC]	$ -	$ -	$ -	$ -	N		$ -	n/a	n/a	n/a		1
02-18-16	SEC v Vimpelcom	$ 375,000,000	$ -	$ -	$ 375,000,000	Y	$ 207,500,000	$ 167,500,000	30A 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
03-01-16	In re Qualcomm	$ -	$ -	$ 7,500,000	$ 7,500,000	N		$ 7,500,000	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
03-03-16	In re Mikhail Gourevitch [Nordion]	$ 100,000	$ 12,950	$ 66,000	$ 178,950	N		$ 178,950	30A 13(b)(5) Rule 13b2-1 13(b)(2)(A)	n/a	n/a		1
03-03-16	In re Nordion (Canada) Inc.	$ -	$ -	$ 375,000	$ 375,000	N		$ 375,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
03-23-16	In re Novartis AG	$ 21,579,217	$ 1,470,887	$ 2,000,000	$ 25,050,104	N		$ 25,050,104	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
04-07-16	In re Las Vegas Sands Corp.	$ -	$ -	$ 9,000,000	$ 9,000,000	N		$ 9,000,000	13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
06-07-16	Nortek (NPA)	$ 291,403	$ 30,655	$ -	$ 322,058	N		$ 322,058	NPA	n/a	n/a	1	
06-07-16	Akamai (NPA)	$ 652,452	$ 19,433	$ -	$ 671,885	N		$ 671,885	NPA	n/a	n/a	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
06-21-16	In re Analogic Corp & Lars Frost	$ 7,672,651	$ 3,810,311	$ 20,000	$ 11,502,962	Y		$ 11,502,962	Analogic 13(b)(2)(A) 13(b)(2)(B) Lars Frost 13(b)(5) Rule 13b2-1 Causing 13(b)(2)(A) 13(b)(2)(B)	N	N	1	1
07-11-16	In re Johnson Controls Inc	$ 11,800,000	$ 1,382,561	$ 1,180,000	$ 14,362,561	N		$ 14,362,561	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
07-25-16	In re LAN Airlines S.A.	$ 6,743,932	$ 2,693,856	$ -	$ 9,437,788	Y		$ 9,437,788	13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
08-11-16	In re Key Energy Services Inc.	$ 5,000,000			$ 5,000,000	N		$ 5,000,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
08-30-16	In re Jun Ping Zhang [Harris Corp.]	$ -	$ -	$ 46,000	$ 46,000	N		$ 46,000	30A 13(b)(5) Rule 13b2-1 13(b)(2)(A)	n/a	n/a		1
08-30-16	In re AstraZeneca	$ 4,325,000	$ 822,000	$ 375,000	$ 5,522,000	N		$ 5,522,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
09-20-16	In re Nu Skin Enterprises Inc.	$ 431,088	$ 34,600	$ 300,000	$ 765,688	N		$ 765,688	13(b)(2)(A) 13(b)(2)(B)	N	N	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
09-28-16	In re Anheuser-Busch InBev	$ 2,712,955	$ 292,381	$ 3,002,955	$ 6,008,291	N		$ 6,008,291	13(b)(2)(A) 13(b)(2)(B) Rule 21F-17(a)	N	Y	1	
09-29-16	In re Och-Ziff Capital Management Group, OZ Management, Daniel Och & Joel Frank	$ 175,086,178	$ 26,132,707	$ -	$ 201,218,885	Y		$ 201,218,885	Och-Ziff 30A 13(b)(2)(A) 13(b)(2)(B) OZ Mgmt §206(1), 206(2) 206(4) and Rule 206(4)-8 Frank 13(b)(2)(A) 13(b)(2)(B) Och Causing 13(b)(2)(A)	Y	N	2	2
09-30-16	In re GlaxoSmith Kline	$ -	$ -	$ 20,000,000	$ 20,000,000	N		$ 20,000,000	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
10-24-16	SEC v Embraer S.A.	$ 83,816,476	$ 14,431,815	$ -	$ 98,248,291	Y	$ 18,398,000	$ 79,850,291	30A 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
11-17-16	In re JP Morgan Chase & Co.	$ 105,507,668	$ 25,083,737	$ -	$ 130,591,405	Y		$ 130,591,405	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
12-21-16	SEC v Braskem, S.A.	$ 325,000,000	$ -	$ -	$ 325,000,000	Y	$ 260,000,000	$ 65,000,000	30A 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
12-22-16	SEC v Teva Pharmaceutical Industries	$ 214,596,170	$ 21,505,654	$ -	$ 236,101,824	Y		$ 236,101,824	30A 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
12-29-16	In re Karl Zimmer [General Cable]	$ -	$ -	$ 20,000	$ 20,000	N		$ 20,000	13(b)(2)(A) 13(b)(2)(B)	n/a	n/a		1
12-29-16	In re General Cable Corporation	$ 51,174,237	$ 4,107,660	$ -	$ 55,281,897	Y		$ 55,281,897	30A 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
01-06-17	In re Cadbury Limited and Mondelez International	$ -	$ -	$ 13,000,000	$ 13,000,000	N		$ 13,000,000	Cadbury Ltd. 13(b)(2)(A) 13(b)(2)(B) Mondelez Int'l 13(b)(2)(A) 13(b)(2)(B)	N	N	1	
01-12-17	In re Biomet, Inc.	$ 5,820,100	$ 702,705	$ 6,500,000	$ 13,022,805	Y		$ 13,022,805	30A 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
01-13-17	In re Sociedad Quimica Y Minera De Chile (SQM)	$ -	$ -	$ 15,000,000	$ 15,000,000	Y		$ 15,000,000	13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
01-18-17	In re Orthofix International	$ 2,928,000	$ 263,375	$ 2,928,000	$ 6,119,375	N		$ 6,119,375	13(b)(2)(A) 13(b)(2)(B)	Y	N	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
01-26-17	SEC v Michael Cohen and Vanya Baros [Och-Ziff]			OPEN to fill		N		$ -	30A A&A 30A violation A&A 13(b)(2)(A) 13(b)(5) 206(1) 206(2) A&A 206(1) 206(2) A&A 206(4) 206(4)-8	n/a	n/a		2
04-24-17	SEC v. Straub, et al. [Magyar Telekom individuals: Struab, Balogh, Morvai]	$ -	$ -	$ 460,000	$ 460,000	N		$ 460,000	30A A&A 30A 13(b)(5) R 13b2-1 R 13b2-2 A&A: 13(b)(2)(A) 13(b)(2)(B)	n/a	n/a		
07-27-17	In re Halliburton Company and Jeannot Lorenz	$ 14,000,000	$ 1,200,000	$ 14,075,000	$ 29,275,000	N		$ 29,275,000	Halliburton 13(b)(2)(A) 13(b)(2)(B) Lorenz 13(b)(2)(A) 13(b)(2)(B) 13 (b)(5) Rule 13b2-1	Y	N	1	1
09-21-17	In re Telia Company AB	$ 457,000,000	$ -	$ -	$ 457,000,000	Y	$ 248,500,000	$ 208,500,000	30A 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
09-28-17	In re Alere Inc	$ 3,328,689	$ 495,196		$ 3,823,885	N		$ 3,823,885	13(b)(2)(A) 13(b)(2)(B)	N	N	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
03-09-18	In re Elbit Imaging Ltd.	$ -	$ -	$ 500,000	$ 500,000	N		$ 500,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
03-26-18	In re Kinross Gold Corporation	$ -	$ -	$ 950,000	$ 950,000	N		$ 950,000	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
04-23-18	In re Dun & Bradstreet Corporation	$ 6,077,820	$ 1,143,664	$ 2,000,000	$ 9,221,484	N		$ 9,221,484	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
04-30-18	In re Panasonic Corporation	$ 126,900,000	$ 16,299,019	$ -	$ 143,199,019	Y		$ 143,199,019	30A 13(b)(2)(A) 13(b)(2)(B) §10(b) 13(a) Rule 10b-5 13a-16 12b-20	N	N	1	
07-02-18	In re Beam Suntory Inc.	$ 5,264,340	$ 917,498	$ 2,000,000	$ 8,181,838	N		$ 8,181,838	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
07-05-18	In re Credit Suisse	$ 24,989,843	$ 4,833,961	$ -	$ 29,823,804	Y		$ 29,823,804	30A 13(b)(2)(B)	N	N	1	
08-27-18	In re Legg Mason, Inc.	$ 27,594,729	$ 6,907,765	$ -	$ 34,502,494	Y		$ 34,502,494	13(b)(2)(B)	N	N	1	
09-04-18	In re Sanofi	$ 17,531,666	$ 2,674,479	$ 5,000,000	$ 25,206,145	N		$ 25,206,145	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
09-06-18	In re Joohyun Bahn	$ 225,000			$ 225,000	N	$ 225,000	$ -	30A 13(b)(5) 13(b)(2)(A) Rule 13b2-1	n/a	n/a		1
09-12-18	In re United Technologies Corporation	$ 9,067,142	$ 919,392	$ 4,000,000	$ 13,986,534	N		$ 13,986,534	30A 13(b)(2)(A) 13(b)(2)(B)	No	No	1	

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
09-25-18	In re Patricio Contesse Gonzalez [SQM]			$ 125,000	$ 125,000	N		$ 125,000	13(b)(2)(A) 13(b)(2)(B) 13(b)(5) Rule 13b2-1 Rule 13b2-2 Rule 13a-14	n/a	n/a		1
09-27-18	In re Petrobras	$ 711,000,000	$ 222,473,797	$ 85,320,000	$ 1,018,793,797	Y	$ 933,473,797	$ 85,320,000	13(a) 13(b)(2)(A) 13(b)(2)(B) 17(a)(2) 17(a)(3)	No	No	1	
09-28-18	In re Stryker			$ 7,800,000	$ 7,800,000	N		$ 7,800,000	13(b)(2)(A) 13(b)(2)(B)	Yes	No	1	
11-19-18	In re Vantage Drilling International	$ 5,000,000			$ 5,000,000	N		$ 5,000,000	13(b)(2)(B)	No	No	1	
12-18-18	In re Paul Margis [Panasonic Corp]			$ 75,000	$ 75,000	N		$ 75,000	13(b)(5) 13(b)(2)(A) 13(b)(2)(B) Rules: 13b2-1 13b2-2	n/a	n/a		1
12-18-18	In re Takeshi "Tyrone" Uonaga [Panasonic Corp]			$ 50,000	$ 50,000	N		$ 50,000	13(b)(5) Rules: 13b2-1 13b2-2 12b-20 13a-16 13(b)(2)(A) 13(b)(2)(B) 13(a)	n/a	n/a		1

Date	Case Name	Disgorge-ment	Pre-judgment interest	Penalty	SEC Total Ordered	DOJ / Other Fine	Amount credited by SEC	SEC total after Credits	Charges	Monitor	Self-Reporting Undertaking w/o Monitor	LPs	NPs
12-26-18	In re Polycom, Inc.	$ 10,672,926	$ 1,833,410	$ 3,800,000	$ 16,306,336	N		$ 16,306,336	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
12-26-18	In re Centrais Eletricas Brasileiras S.A. (Eletrobras)	$ -	$ -	$ 2,500,000	$ 2,500,000	N		$ 2,500,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
02-15-19	In re Coburn and Schwartz [Cognizant]					N			pending	n/a	n/a		2
l02-15-19	In re Cognizant Technologies	$ 16,394,351	$ 2,773,017	$ 6,000,000	$ 25,167,368	N		$ 25,167,368	30A(a) 13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
03-06-19	In re Mobile TeleSystems PJSC (MTS)	$ -	$ -	$ 100,000,000	$ 100,000,000	Y		$ 100,000,000	30A(a) 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
03-29-19	In re Fresenius Medical	$ 135,000,000	$ 12,000,000		$ 147,000,000	N		$ 147,000,000	30A(a) 13(b)(2)(A) 13(b)(2)(B)	Y	N	1	
05-09-19	In re Telefonica Brasil S.A.	$ -	$ -	$ 4,125,000	$ 4,125,000	N		$ 4,125,000	13(b)(2)(A) 13(b)(2)(B)	N	N	1	
06-20-19	In re Walmart Inc.	$ 119,647,735	$ 25,043,437		$ 144,691,172	Y		$ 144,691,172	13(b)(2)(A) 13(b)(2)(B)	N	Y	1	
07-22-19	In re Microsoft Corp	$ 13,780,733	$ 2,784,418		$ 16,565,151	Y		$ 16,565,151	13(b)(2)(A) 13(b)(2)(B)	N	N	1	

Source: Table provided by United States delegation for this Phase 4 evaluation (some columns have been removed to ensure sufficient column width).

ANNEX 2: PHASE 3 RECOMMENDATIONS TO THE UNITED STATES AND ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY IN 2012

	PHASE 3 RECOMMENDATIONS	WRITTEN FOLLOW-UP[390]
Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery		
1.	Regarding the statute of limitations, the Working Group recommends that the United States ensure that the overall limitation period applicable to the foreign bribery offence is sufficient to allow adequate investigation and prosecution (Convention, Article 6).	*Fully implemented*
2.	Concerning the foreign bribery offences in the FCPA, for the purpose of further increasing effectiveness of combating the bribery of foreign public officials in international business transactions, the Working Group recommends that the United States:	
	a. In its periodic review of its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, consider the views of the private sector and civil society, particularly on ways of clarifying the gray areas identified by them (Convention, Article 1, 2009 Anti-Bribery Recommendation VI.i).	*Fully implemented*
	b. Consolidate and summarise publicly available information on the application of the FCPA in relevant sources, including on the affirmative defence for reasonable and bona fide expenses in recent Opinion Procedure Releases and enforcement actions (Convention, Article 1); and	*Partially implemented (*)*
	c. Revise the Criminal Resource Manual to reflect the decision in U.S. v. Kay, which supports the position of the United States that the business nexus test in the FCPA can be broadly interpreted, such that bribes to foreign public officials to obtain or retain business or other improper advantage in the conduct of international business violate the FCPA (Convention, Article 1).	*Partially implemented (*)*
3.	Regarding the use of NPAs and DPAs, the Working Group recommends that the United States:	
	a. Make public any information about the impact of NPAs and DPAs on deterring the bribery of foreign public officials that arises following the Government Accountability Office 2009 Report (Convention, Article 3); and	*Fully implemented*
	b. Where appropriate, make public in each case in which a DPA or NPA is used, more detailed reasons on the choice of a particular type of agreement; the choice of the agreement's terms and duration; and the basis for imposing monitors (Convention, Article 3).	*Fully implemented*
4.	The Working Group recommends that the United States take appropriate steps to verify that, in accordance with the 2009 Anti-Bribery Recommendation,	*Fully implemented*

[390] In March 2013, on the occasion of an additional Follow-up, the Working Group deemed that the two partially implemented recommendations had been fully implemented.

	debarment and arms export license denials are applied equally in practice to domestic and foreign bribery, for instance by making more effective use of the Excluded Parties List System (EPLS) (2009 Anti-Bribery Recommendation XI.i).	
Recommendations for ensuring effective prevention and detection of foreign bribery		
5.	The Working Group recommends that the U.S. pursue additional opportunities to raise awareness with SMEs for the purpose of preventing and detecting foreign bribery (2009 Anti-Bribery Recommendation, III.i).	*Fully implemented*
6.	The Working Group encourages the U.S. to raise awareness of the diligent pursuit of books and records violations under the FCPA, including for misreported facilitation payments (Convention Article 8 and 2009 Anti-Bribery Recommendation VI.ii and X.A.iii).	*Fully implemented*
7.	In order to enhance the effectiveness of the implementation of the 2009 Anti-Bribery Recommendation of Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, the Working Group recommends that the United States clarify the policy on dealing with claims for tax deductions for facilitation payments, and give guidance to help tax auditors identify payments claimed as facilitation payments that are in fact in violation of the FCPA and/or signal that corrupt conduct in violation of the FCPA is also taking place (2009 Anti-Bribery Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions I.i).	*Not implemented*

Follow-up by the Working Group

1. The Working Group will follow-up the detection and prosecution of violations of the bribery provisions of the FCPA by non-issuers, which are not subject to the books and records provisions in the FCPA (2009 Anti-Bribery Recommendation II).

(*): Deemed “Fully implemented” in March 2013 (Additional Follow-up)

ANNEX 3: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government departments and agencies

- Department of Commerce
- Department of State
- Export-Import Bank
- FinCEN
- Millennium Challenge Corporation
- USAID

Law enforcement

- Commodity Futures Trading Commission
- Department of Homeland Security
- Department of Justice
- Federal Bureau of Investigations
- Internal Revenues Service
- Securities Exchange Commission

Private enterprises

- Accenture
- Bechtel
- Cargill
- General Electric
- Google
- Infor
- Medline
- Morgan Stanley
- Navex
- Tyson Food
- World Wide Technology

Academia

- Duke University
- George Washington University
- Harvard University
- New York University
- University of Michigan

Business organisations and auditing associations

- Automotive Compliance Roundtable
- Center for International Private Enterprise
- Center for Responsible Enterprise and Trade
- Deloitte
- Ernest & Young
- Forensic Risk Alliance
- Greater Houston Business Ethics Roundtable
- High Technology Compliance Group
- KPMG
- PWC
- Society for Corporate Compliance and Ethics
- Trace
- U.S. Chamber of Commerce

Legal profession

- Debevoise & Plimpton
- Gibson Dunn
- Katz, Marshall & Banks
- Labaton
- Latham & Watkins
- Miller Chevalier
- Morrison & Foerster
- Paul Hastings
- Pohlmann & Co
- Quinn Emanuel Urquhart & Sullivan
- Ropes & Gray
- Sullivan & Cromwell
- Winston & Strawn

Civil society and Journalists

- CNN
- Financial Times
- Global Financial Integrity
- Global Witness
- Government Accountability Project
- National Whistleblower Center
- Natural Resource Governance Institute
- Transparency International
- Washington Post

ANNEX 4: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

ADS	Automated Directives System
AECA	Arms Export Control Act
AIDAR	USAID Acquisition Regulations
AML/CFT	Anti-Money Laundering/Counter-terrorist financing
AO	Assistance Officer
BSA	Bank Secrecy Act
BSAAG	U.S. Department of the Treasury's Bank Secrecy Act Advisory Group
CDD	Customer Due Diligence Rule
CEA	Commodity Exchange Act
CEP	Corporate Enforcement Policy
CFR	U.S. Code of Federal Regulations
CFTC	Commodity Futures Trading Commission
CTR	Currency Transaction Report
DAC	Development Assistance Committee
DDTC	Department of State's Directorate of Defence Trade Controls
DFI	Development Finance Institution
DHS	Department of Homeland Security
DNFB	Designated non-financial businesses and professions
DOC	Department of Commerce
DOJ	Department of Justice
DOS	Department of State
DPA	Deferred Prosecution Agreement
EDD	Enhanced Due Diligence
FAR	Federal Acquisition Regulations
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigations
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FEPA	Foreign Extortion Prevention Act
FinCEN	Financial Crimes Enforcement Network
FIU	Financial Intelligence Unit
ICE-HSI	Immigration and Costumes Enforcement – Homeland Security Investigations
IRC	Internal Revenue Code
IRS	Internal Revenue Service
IRS-CI	Internal Revenue Service – Criminal Investigation
ITAR	International Traffic in Arms Regulations
ITG	International Tax Group
KARI	Kleptocracy Asset Recovery Initiative
MLA	Mutual legal assistance
NPA	Non-prosecution agreement
NTR	Non-Trial Resolution
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OIG	Office of the Inspector General
PCAOB	Public Company Accounting Oversight Board
PDVSA	Petroleos de Venezuela (Venezuelan SOE)
PEP	Politically Exposed Person
SAR	Suspicious Activity Report

SEC	Securities Exchange Commission
SFO	United Kingdom Serious Fraud Office
SME	Small and Medium Sized Enterprise
SOE	State Owned Enterprise
TI	Transparency International
UNCAC	United Nations Convention Against Corruption
US	The United States of America
USAID	United States Agency for International Development
USC	United States Code
USD	US Dollar
USPS	United States Postal Service
USSG	United States Sentencing Guidelines
Working Group	Working Group on Bribery in International Business Transactions

www.oecd.org/daf/anti-bribery