ADG Insights

Bribery and corruption enforcement landscape

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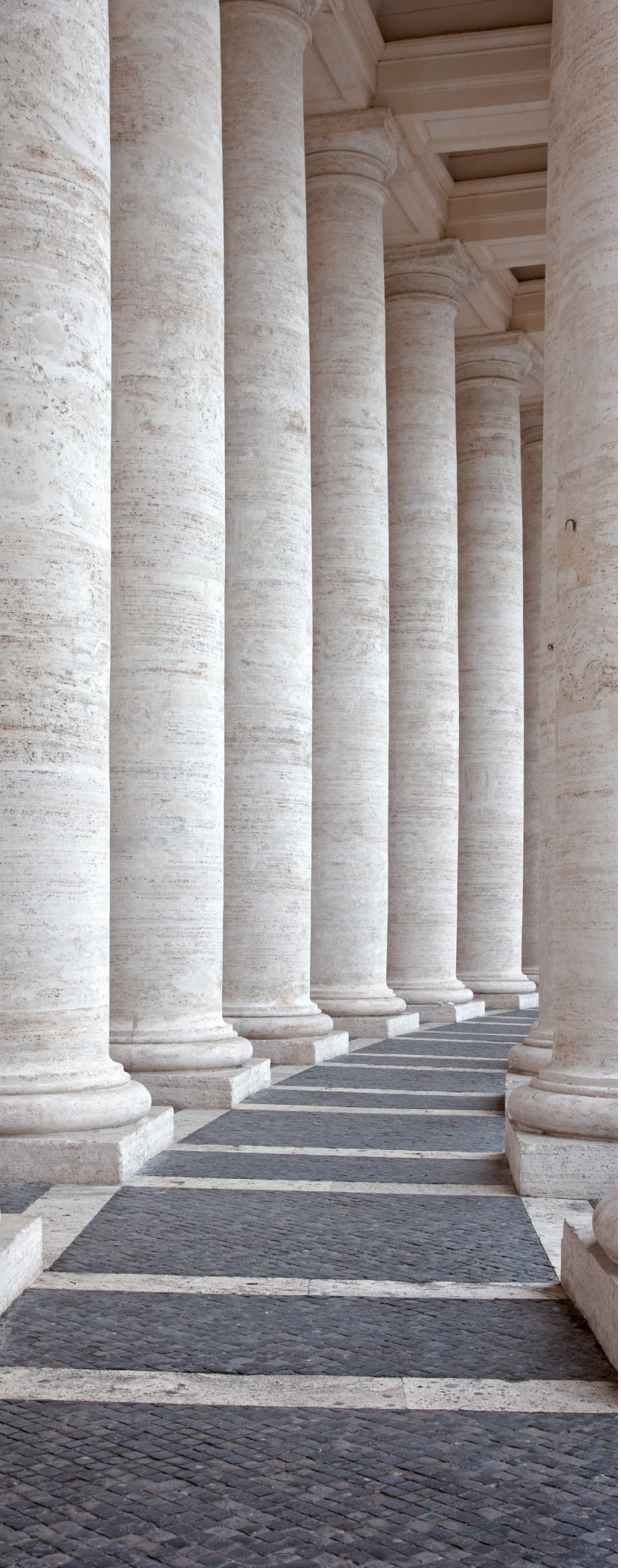
Hogan Lovells



Introduction

Despite some predictions that bribery and corruption enforcement by U.S. enforcement agencies would significantly slow under the Trump administration, it continued in 2018 at a roughly steady pace and global enforcement continued to accelerate. U.S. authorities have recently cooperated with enforcement officials in the United Kingdom, France, and other European countries. A significant cultural change is also underway in Latin America where Brazil's Lava Jato (Car Wash) enforcement operation has convicted more than 200 people to date and Mexico recently elected President Andrés Manuel López Obrador in a landslide after he made curtailing corruption a central campaign issue. In Southeast Asia, there have been some legislative reforms and enforcement successes and Singapore authorities continue to be particularly committed to fighting corruption. However, a serious commitment to curtail corruption and bribery is not yet universal and enforcement efforts vary significantly between jurisdictions.

Although the enforcement landscape is constantly evolving, anti-corruption efforts continue in the United States and abroad. Companies operating in the Aerospace, Defense, and Government Services (ADG) industry sector should continue to track developments that may shape their compliance practices. To aid in that effort we summarize below recent policy changes implemented by the U.S. Department of Justice (DOJ). In addition, we report on the recent resolution of a number of enforcement actions that involved ADG companies.

Revised DOJ policies take hold

The DOJ made a number of policy announcements this past year that will shape corruption and bribery enforcement under the Foreign Corrupt Practices Act (FCPA). To a large degree, the new policies reflect the DOJ's continued commitment to encourage corporate cooperation and self-disclosure, to hold culpable individuals accountable for criminal conduct, and to cooperate with other law enforcement agencies in the United States and abroad.

First, the DOJ incorporated the FCPA Corporate Enforcement Policy (first announced in November 2017) into a comprehensively revised "U.S. Attorneys' Manual" (renamed the Justice Manual).[1] This policy aims to provide sentencing leniency to corporations that meet certain criteria after learning of a possible FCPA violation. Under this policy, there is a presumption of a declination of criminal prosecution and 50 percent off the low-end of the U.S. Sentencing Guidelines (USSG) where a corporation:

a) Voluntarily discloses a possible FCPA violation in a way that qualifies under USSG § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation."

b) Discloses the conduct to the department "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness.

c) Discloses all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.

A company meeting the above criteria may still face criminal prosecution if aggravating circumstances are present. 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."[2] If a company does not meet all of the requirements of the policy, it still may get 25 percent off of the low-end of the guidelines for cooperation.

On July 25, 2018, the deputy assistant attorney general, Matthew S. Miner, announced that the DOJ would extend the FCPA Corporate Enforcement Policy to successor companies that learn of wrongdoing of a predecessor in the course of a merger or acquisition or after such a transaction is complete.[3] He explained that successor companies are often in a position to "right the ship" and should be encouraged to do so. Therefore, successor companies that take the steps outlined in the FCPA Corporate Enforcement Policy will be rewarded for doing so regardless of whether they learn of the problematic conduct while conducting due diligence in advance of an acquisition or if they learn of it after the acquisition is complete.

Deputy Attorney General Rod Rosenstein announced additional changes to DOJ policy that relate to cooperation credit in a November 29, 2018 speech.[4] As memorialized in the 2015 memo titled "Individual Accountability for Corporate Wrongdoing" (known as the Yates Memorandum), the DOJ has been requiring that "to be eligible for any credit for cooperation, a company must identify all individuals involved in or responsible for the conduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct." Rosenstein affirmed that "[f]ocusing on individual wrongdoers is an important aspect of the Department's FCPA program" and noted that the DOJ has announced charges against more than 30 individual defendants and convicted 19 individuals over the past year.[5] However, he also announced that the DOJ would move away from this "all or nothing" cooperation requirement articulated in the Yates Memorandum.

Under revised DOJ policy, corporations seeking cooperation credit in a criminal case must identify all individuals who were "substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct."[6] Rosenstein emphasized that "[w]e want to focus on the individuals who play significant roles in setting a company on a course of criminal conduct. We want to know who authorized the misconduct, and what they knew about it."[7] This policy change recognizes that it is unrealistic to expect corporations investigating alleged activities throughout the company over a long period of time to identify every employee who played any role in the conduct. Rosenstein also acknowledged that this "is particularly challenging when the company and the government want to resolve the matter even though they disagree about the scope of the misconduct." However, Rosenstein made clear that companies that want to limit the scope of their investigation should discuss such limits with the DOJ if they want cooperation credit. "If we find that a company is not operating in good faith to identify individuals who were substantially involved in or responsible for wrongdoing, we will not award any cooperation credit."

Rosenstein announced another important policy change at a New York City Bar Association conference in May 2018. There, he explained that a new "no piling on" policy aims to avoid subjecting defendants to unfair duplicative penalties and enhance the DOJ's relationships with law enforcement partners in the United States and abroad. The policy has four key features. First, federal criminal enforcement authority should not be used against a company for purposes unrelated to the investigation and prosecution of a possible crime (i.e., to persuade a company to pay larger civil or administrative penalties). Second, DOJ lawyers and groups in different departments or offices are to coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture against a company and should strive for "an overall equitable result." That might mean crediting and apportioning financial penalties, fines, and forfeitures to avoid disproportionate punishment. Third, when possible, prosecutors should coordinate with, and consider the amount of fines paid to other enforcement authorities relating to the same misconduct. Prosecutors should evaluate several factors to determine if or when multiple penalties "serve the interests of justice in a particular case." These factors include: (1) the egregiousness of the wrongdoing; (2) statutory mandates regarding penalties; (3) the risk of delay in finalizing a resolution; and (4) the adequacy and timeliness of a company's disclosures and cooperation with the DOJ.

Rosenstein noted that a company's cooperation with a different agency or a foreign government is not a substitute for cooperating with the DOJ. He specifically stated that the DOJ "will not look kindly" on companies that come to the DOJ only after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. He explained that in such instances, the department will act without hesitation to fully vindicate the interests of the United States.

Finally, this past October, Brian Benczkowski, the assistant attorney general for the Criminal Division, announced a policy change relating to the appointment of corporate monitors during the resolution of DOJ criminal investigations. Under the Obama administration, the number of non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) that imposed a corporate monitor as one of its conditions rose dramatically. Benczkowski issued a memorandum revoking an earlier memorandum on the subject penned by former Obama Assistant Attorney General Lanny Breuer.[8] Benczkowski's memo states that despite the potential benefits of a corporate monitor, a monitor "will not be necessary in many corporate criminal resolutions."[9] Benczkowski also stated publicly that the imposition of a monitor is "never meant to be punitive" and should be "the exception, not the rule."[10] The Benczkowski memo identifies a number of factors that the DOJ should consider to determine whether a corporate monitor is needed and states that a monitor "will likely not be necessary" where a company's compliance program is shown to be "effective and appropriately resourced" when a matter is resolved.[11] The factors outlined in the Benczkowski memo suggest that the Criminal Division will be more reluctant to impose costly and burdensome monitors, especially in cases where companies have undertaken remedial steps to reduce or eliminate the source of problematic behavior and have demonstrated the effectiveness of their compliance programs. Companies may therefore be able to avoid the imposition of a corporate monitor by proactively making demonstrable improvements to their compliance and internal control systems (all the way up to date the matter is resolved), changing their corporate culture surrounding the practices at issue, and taking remedial measures to address problematic practices or employees. Although the long-term impact of the changes reflected in the Benczkowski memo are not yet known, the DOJ appointed only one corporate monitor in an FCPA case resolved in 2018.

Enforcement policies in action in the ADG industry

The DOJ's policy statements this past year consistently emphasized that the department was committed to holding individuals accountable and to rewarding corporations that self-disclose, take remedial action, and fully cooperate with investigators with leniency. These policies, along with the newly stated policies to eliminate unfair "piling on" of penalties and avoid the punitive use of corporate monitors are reflected in the 2018 resolutions of several FCPA investigation in the ADG industry.

The DOJ publicly announced four declinations in 2018, one of which involved Guralp Systems Ltd. (GSL), an earthquake technology firm.[12] The DOJ explained in an August 2018 letter to GSL's counsel that it had reached this decision consistent with the FCPA Corporate Enforcement Policy and in consideration of a number of factors including the company's voluntary disclosure of the misconduct to the DOJ and the company's significant remedial efforts. In addition, the DOJ noted that GSL is a UK company, is cooperating with a parallel investigation by the United Kingdom's Serious Fraud Office (SFO) for violations of law relating to the same conduct, and is committed to accepting responsibility for that conduct with the SFO. In what may prove to be good news for corporate defendants, this resolution appears to reflect not only the principles in the DOJ's FCPA Corporate Enforcement Policy but also its desire to avoid "piling on" when other jurisdictions are investigating the same alleged misconduct.[13]

In September 2018 United Technologies Corp. (UTC) agreed to pay US$13.9 million (US$9,067,142 plus interest in disgorgement and a US$4 million penalty) to the U.S. Securities and Exchange Commission (SEC) to resolve charges that it violated the anti-bribery provision of the FCPA, the books and records provision of the FCPA, and failed to maintain a sufficient system of internal accounting controls. The charges related in part to allegations that UTC, through International Aero Engines (IAE) – a joint venture of Pratt & Whitney, a division of UTC – made payments to a Chinese sales agent in an effort to increase sales in China. The government alleged that IAE "disregarded the substantial risk that the agent would use the [payments from IAE] to make improper payments to Chinese airline officials for confidential information used to win the bid." The SEC investigation also included allegations relating to payments made by Otis Elevator, a UTC wholly owned subsidiary, to officials in Azerbaijan and allegations that UTC improperly provided trips and gifts to various other foreign officials in order to obtain business. The resolution with the SEC credited UTC for self-reporting the problematic conduct, cooperating with the investigation, and taking remedial action including terminating employees and third parties responsible for the misconduct. UTC also reportedly enhanced its internal accounting controls and due diligence processes. UTC agreed to the SEC order without admitting or denying any violations of the law, and the DOJ closed its investigation without pursuing any charges.

In April 2018 an avionics company that designs and distributes in-flight entertainment systems and global communications services for airlines and airplane manufacturers agreed to pay a US$137.4 million criminal penalty to resolve charges that it violated the FCPA. The alleged violations related to payments the company made to consultants, which allegedly did little or no actual consulting work. One such consultant was employed by a state-owned airline and was involved in negotiating an amendment to a lucrative contract between the airline and the company.

Finally, in March 2018 Transport Logistics International Inc. (TLI), a nuclear fuel transport company based in Maryland, entered a DPA and agreed to pay a US$2 million criminal penalty to settle charges that it conspired to violate the FCPA's anti-bribery provisions. The DPA follows three guilty pleas entered by individuals involved in the alleged bribery of an official at Joint Stock Company Techsnabexport (TENEX), a Russian uranium-export company owned by the state-owned Russian nuclear energy company. TLI received sentencing credit for substantial cooperation with the investigation but not for voluntarily disclosing the misconduct (the resulting US$21.38 million penalty was reduced to US$2 million based on the company's ability to pay). TLI also agreed to implement an enhanced compliance program and prepare annual reviews and reports on the program for three years. As noted, the DOJ continues to emphasize the importance of prosecuting culpable individuals while offering leniency to companies in exchange for cooperation. In this case, the company received cooperation credit and the DOJ brought wire fraud and/or money laundering charges against individuals who paid the bribes, against individuals who received the bribes, and against middlemen.

Looking forward

We expect that 2019 will see continued enforcement efforts aimed at curtailing corruption and bribery. U.S. officials are likely to build on their already strong relationships with their foreign counterparts, and we expect to see a continued increase in international cooperation. The DOJ's relaxation of the standard for receiving corporate cooperation credit may result in an uptick of negotiated resolutions of ongoing FCPA investigations. We also expect to see the number of resolutions that include compliance monitors continue to fall. Finally, this administration has embraced the use of sanctions prosecutions as a foreign policy tool so we expect the DOJ will not only continue to prosecute culpable individuals under the FCPA, but will also employ other criminal laws, such as sanctions violations and anti-money laundering laws, in conjunction with corruption and bribery investigations.

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Endnotes

1. U.S. Department of Justice, Justice Manual, section 9-47.120, https://www.justice.gov/jm/justice-manual
2. *Id.*
3. Press Release, *Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (July 25, 2018)* https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th
4. Press Release, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018) https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0
5. *Id.*
6. U.S. Department of Justice, Justice Manual, section 9-28.700—The Value of Cooperation, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations?utm_medium=email&utm_source=govdelivery#9-28.210
7. Rosenstein, ***supra*** note 4. Rosenstein also acknowledged that the "all or nothing" approach to cooperation introduced a few years ago was counterproductive in civil cases. Therefore, when criminal liability is not at issue, the DOJ attorneys will now have increased flexibility to accept settlements that reflect cooperation credit without meeting this rigid requirement. Company internal investigations should focus on who authorized the criminal conduct and what they knew, not every conceivable person who was involved.
8. Memorandum from Brian A. Benczkowski, Asst. Attorney General, To All Criminal Division Personnel, Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), available at https://www.justice.gov/opa/speech/file/1100531/download
9. *Id.*
10. Press Release, *Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance* (Oct. 12, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program
11. Benczkowski, ***supra*** note 8 at 2.
12. U.S. Department of Justice, Declinations, https://www.justice.gov/criminal-fraud/pilot-program/declinations
13. The DOJ also demonstrated its willingness to coordinate with enforcement agencies in other countries in resolving its investigation of Petróleo Brasileiro S.A., more commonly known as Petrobras. The DOJ entered a non-prosecution agreement with the company through which the company agreed to pay a criminal penalty of US$853.2 million. However, the DOJ offset this penalty by up to 80 percent to reflect the penalties Petrobras will pay the Brazilian government to resolve Brazilian law violations, and by 10 percent for civil penalties Petrobras must pay to the SEC. As a result, the effective U.S. criminal penalty will be US$85.32 million.

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