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INSIDE THIS PUBLICATION:

A World View of Anti-Corruption Efforts

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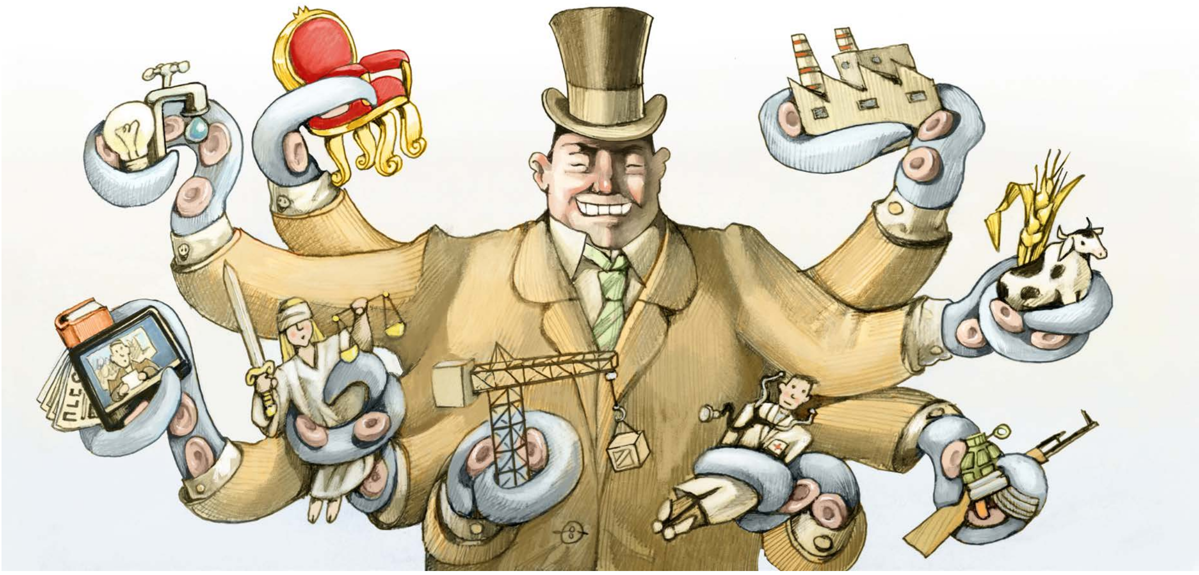
Inside this e-Book

Distilling lessons from the FCPA Pilot Program



A year after the DoJ launched its FCPA pilot program, companies are gaining much-valued insight on how to self-disclose and cooperate with the Criminal Division's Fraud Section, reports **Jaclyn Jaeger**.

One year after implementation of the FCPA pilot program, compliance and legal counsel are starting to receive greater transparency and consistency around how the Criminal Division's Fraud Section measures and credits voluntary self-disclosure and cooperation in corporate resolutions.

Last year, the Criminal Division's Fraud Section implemented the FCPA pilot program, which delineates specified mitigation credit a company can receive if it acts in accordance with standards of self-disclosure, cooperation, and remediation—each of which are carefully defined as part of the rollout of the program.

Under the pilot program, if a criminal fine is still warranted in cases where a company self-discloses an FCPA violation, fully cooperates with the agency, and remediates compliance deficiencies, the company will be eligible to receive up to a 50 percent reduction off the bottom end of the U.S. Sentencing Guidelines fine range. In cases where the company makes no self-disclosure but does fully cooperate and remediates the issue, it could still receive up to a 25 percent reduction.

In cases in which the company has fully satisfied all its obligations, the Department of Justice might decide not to bring a prosecution altogether. It then publishes on its Website cases it has declined to prosecute.

The publication of these declinations is a departure from past practice. Historically, a company would announce in a filing with the Securities and Exchange Commission that it has been notified by the government that it was closing its investigation without bringing an enforcement action, but the government itself doesn't typically make these announcements. Of course, one notable exception was the Morgan Stanley declination announced by the government in 2012.

"The pilot program is a game-changer in terms of what may constitute a declination," says Andrew Levine, a partner at law firm Debevoise & Plimpton. "Traditionally, a declination has involved the Department of Justice exercising its discretion not to prosecute a case that it otherwise had a reasonable basis to bring." Under the pilot program, a declination looks more like a non-prosecution agreement, with a public resolution, statement of relevant facts, and the disgorgement of profits, he says.

To date, seven companies have received declinations attributed to the pilot program alone. "Of course, this number does not include the many cases we routinely decline for various reasons, including insufficient evidence of corporate criminal misconduct," Acting Principal Deputy Assistant Attorney General Trevor McFadden said in May during a keynote address he gave at the American Conference Institute's 7th Brazil Summit on Anti-Corruption.

The pilot program trial period ended April 5. The DoJ is now in the process of evaluating its efficacy, whether to extend it, and what revisions, if any, need to be made to it. "At this point, the program continues as we evaluate it and reach a final decision regarding its permanence," McFadden said.

Declinations explained. "It's not explicitly mentioned in the pilot program, but one factor the DoJ has considered in making declination decisions is whether the SEC intends to pursue a related civil action," says Marc Bohn, counsel at law firm Miller & Chevalier. So far, in three declinations under the pilot program—Nortek, Akamai Technologies, and Johnson Controls—the Justice Department said that it had considered favorably the Commission's parallel enforcement actions in which disgorgement was required.

The Justice Department's willingness to decline bringing a criminal prosecution where an SEC action is sufficient is nothing new. The pilot program is groundbreaking, however, in the sense that it created a whole new category of declinations—one in which "even a company that voluntarily self-discloses, fully cooperates, and remediates will be required to disgorge all profits resulting from the FCPA violation," the pilot program states.

"That's been the biggest shift in terms of how the Department views declinations," says Ryan Rohlfsen, a partner at law firm Ropes & Gray. "If there is a reasonable determination of a crime and of some gain, in some way or another the company is going to have to disgorge that money."

This development was first revealed in September 2016, when the Department of Justice

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Trevor McFadden, Acting Principal Deputy Assistant Attorney General

announced separate resolutions with two private companies—HMT, a storage-tank provider for the oil and gas industry; and NCH, an industrial supply and maintenance company. In those cases, the Justice Department declined to prosecute, but required the companies to disgorge their ill-gotten gains.

In the HMT case, the Department's investigation found that HMT, through its employees and agents, paid approximately $500,000 in bribes to government officials in Venezuela and China to influence those officials' current and future purchasing decisions and thereby secure $2.7 million in net profits. In the NCH case, the Department's investigation found that from 2011 until mid-2013, NCH's subsidiary in China illegally provided things of value worth approximately $44,545 to Chinese government officials connected with sales that generated profits to NCH of approximately $335,342.

Most recently, the Justice Department in a June 21 declination letter said it was closing its investigation against engineering and construction firm CDM Smith. In that case, the Department's investigation found that, from approximately 2011 until approximately 2015, employees of CDM Smith's division responsible for India operations and its subsidiary, CDM India, illegally paid about $1.2 million in bribes to officials in the National Highways Authority of India (NHAI), India's state-owned highway management agency and an "instrumentality" under the FCPA to receive contracts from NHAI. Under the agreement, CDM will disgorge the $4 million in net profits it illegally obtained.

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In a fourth declination with disgorgement, the Justice Department, in a June 16 letter agreement, said it was closing its investigation against industrial-gas supplier Linde. In that case, the Department's investigation found that from November 2006 to December 2009 a Linde unit, Spectra Gases, made corrupt payments to high-level officials at the National High Technology Center of the Republic of Georgia, a state-owned and state-controlled entity. In total, Spectra Gases received $6.4 million from the corrupt conduct, while Linde received $1.43 million. Linde agreed to disgorge and forfeit a total of $11.2 million ($7.8 million in disgorgement and forfeit $3.4 million forfeiture).

As far as overall trends, in all four declination letters—HMT, NCH, Linde, and CDM Smith—the Justice Department listed the following six factors for its declinations:

- Voluntary self-disclosure;
- Thorough and comprehensive internal investigation;
- Full cooperation, including the disclosure of all known relevant facts about the individuals involved;
- Agreement to disgorge profits from the allegedly improper conduct;
- Enhancements made to the compliance program and internal controls; and
- Full remediation.

What distinguishes HMT, NCH, and CDM Smith from other disclosed declinations under the pilot program is that they are privately held companies, whereas Linde is publicly listed in Germany. Thus, none of these declinations were accompanied by SEC enforcement actions.

Self-disclosure benefits. At first blush, the pilot program appears to have changed the way firms think about voluntary self-disclosure. In the pilot program's first year, 22 companies voluntarily disclosed violations, an increase from 13 during the previous year, McFadden noted. "Indeed, we have found that offering leniency to companies that self-report has led to more companies coming forward with information," he said.

"Whether to self-report to the Department of Justice is an incredibly fact-specific determination," Levine says. "Such decision should not be made lightly or without advice from experienced counsel."

Examples of factors a firm must consider include:

» The likelihood of the Justice Department learning of the relevant conduct;
» The company's willingness to cooperate, including providing evidence regarding culpable employees;
» The strength of available defenses, including jurisdictional ones; and
» The possible interests of other U.S. regulators, as well as other anti-corruption bodies throughout the world.

"Indeed, this growing web of anti-corruption enforcement can transform the questions of whether and, if so, how to self-report into a complex puzzle involving many interrelated decisions," Levine says.

Cooperation and remediation, without self-disclosure, also appears to have quantifiable benefits—albeit, with limited credit. For example, Las Vegas Sands, a gaming and resort company, in January 2017 agreed to pay a $6.96 million criminal penalty and entered into a non-prosecution agreement with the Justice Department to resolve an investigation into FCPA violations in connection with business transactions in the People's Republic of China and Macao.

The Justice Department said the $6.96 million criminal penalty reflects a 25 percent reduction off the bottom of the applicable U.S. Sentencing Guidelines fine range for Sands' full cooperation and full remediation. The company received no voluntary disclosure credit, however, "because it did not voluntarily and timely disclose to the Fraud Section the conduct described," the Justice Department stated.

Although the Justice Department would like to see more self-disclosures, the decision to self-disclose may not always be the right one for a firm. "The big debate in the defense community is, 'What's the value of [self-disclosure]?' " Rohlfsen says. The reality is that companies must also take into consideration any potential fines, litigation, and the added cost of likely having to retain a corporate compliance monitor, which may exceed the value of any discount off the Sentencing Guidelines.

Of cases announced in the past year, most companies that have resolved with the Justice Department have been required to retain a corporate compliance monitor. "Although the possibility of declinations has gone up, so has the possibly of getting a monitor," Rohlfsen says.

"My concern is that's going to be a little counter-intuitive and maybe countervailing to the purpose of the pilot program, which is to encourage companies to self-disclose and cooperate," Rohlfsen admits. "Having the possibility of a monitor at the end of the tunnel is a huge concern to companies."

The compliance and legal community will "have to wait and see how this plays out," Rohlfsen adds. They'll want to be on the lookout for more favorable terms and conditions of resolutions and more information on how monitors are selected and under what circumstances, he says.

Another development has come into play as well: Given that the Justice Department announced that it's now making a "concerted effort" to speed up the pace of FCPA investigations, that may have an effect on the way companies resolve their cases with the government. "We're likely to see more DPAs, NPAs, and declinations for companies that are voluntarily disclosing, cooperating, and wrapping up their investigations quickly," Bohn says.

At a high level, however, it's encouraging that the DoJ is sending a strong message that it wants to have a cooperative dialogue with the compliance community, Rohlfsen says. At the end of the day, if you can show that you have an effective, state-of-the art compliance program and the company did everything it reasonably could have done to prevent, detect, report, and remediate any misconduct, "then you have a good argument in front of the Department to get a declination." ■

England: Land of crooks or land of enforcement?

There have been an awful lot of chief executive officers hauled to court recently in England. **Paul Hodgson** asks: Why so many, and why now?

Vomiting into fireplaces, betting £15 million (U.S.$19M) on Sports Direct's share price, paying £1 million (U.S.$1.3M) plus bonuses to certain top managers from his own pocket to keep down staff wages … Mike Ashley, Sports Direct's founder, might seem like just a "power-drinking, money-making machine" to lawyers and judges in the high court, but to his employees earning less than the minimum wage and working in Victorian workhouse conditions, his jolly japes are less amusing.

Ashley is probably the biggest personality to have appeared in Britain's growing rogues' gallery in the last couple of years, though he is not the only one. But why are there so many of them? Is it because there are more "big time" corporate crooks and fraudsters in Britain than elsewhere, or is the U.K.'s enforcement system—from the Serious Fraud Office (SFO) to the Financial Conduct Authority (FCA) to the Metropolitan Police—just better at tracking them down and hauling them into court?

On the one hand, I really can't remember the last time a senior U.S. executive was in court—not unless I go back to the WorldComs, Adelphias, and Tycos of the early millennium. But in the United Kingdom, it is a daily occurrence. It could be just that the FBI is occupied with other issues at the moment, but I don't think it's as simple as that.

So, let's look at a few other examples, just in the last couple of weeks. There's John Varley (the former chief executive of Barclays) and three former colleagues, who were in court earlier in July after an announcement by the SFO in June that they were to be prosecuted over the way Barclays raised billions of pounds from Qatar in 2008. They are the first senior bankers to face criminal charges for events dating back to the banking crisis.

Then there is former Royal Bank of Scotland CEO Fred Goodwin, who narrowly missed a day in court—so far—when his former employer promised to reimburse defrauded investors pennies on the pound for their investment in the bank. And there is Lloyds' handling of its acquisition of HBOS. In early July, redacted portions were disclosed from the FCA investigation into an HBOS lending unit that was exploiting troubled companies by extending unauthorised credit to them. A Thames Valley police investigation led to jail time for six HBOS managers at the unit, while Lloyds disclosed nothing about its knowledge of the investigation. It is now working with the FCA to investigate the cover-up.

And there's British American Tobacco, multinational but headquartered in London, which, according to a *Guardian* newspaper investigation, has been stonewalling tobacco legislation and taxation in Kenya, Uganda, and at least six other African countries. At BAT's annual meeting in March, its chairman Richard Burrows brushed aside questions about the scandal. At the same time, the company is "cooperating" with the SFO about allegations of bribes paid to government officials in several of the countries.

That's a lot of investigations and prosecutions. But it doesn't always work out that way. Notorious security firm G4S is probably most famous for its failure to provide security at the London Olympics. Its latest issue concerns another SFO investigation that saw hundreds of millions of pounds of overcharging for a contract to tag offenders, many of whom were disclosed as being dead or in jail. This case has not been properly resolved at a time when on 10 July it was revealed that the Ministry of Justice had awarded yet another contract to the company for the electronic tagging of offenders.

Then HM Revenue and Customs began to ask questions of financial services firm Anderson Group about a scheme it had been promoting to recruitment agencies to set up thousands of tiny companies—each with a single Philippines-based director—to avoid tax and benefit from government reimbursements. Another *Guardian* investigation showed a web of companies all associated with Anderson majority shareholder Adam Fynn, though all these connections were "removed" from company documents when the newspaper started to ask questions and the thousands of companies were liquidated, making it all but impossible for HMRC to investigate.

> I really can't remember the last time a senior U.S. executive was in court ... But in the United Kingdom, it is a daily occurrence. It could be just that the FBI is occupied with other issues at the moment, but I don't think it's as simple as that.

A statement issued by Anderson Group in response to the *Guardian*'s request for comment just about sums it up: "In all cases our services are provided in accordance with the law as it stands and, where appropriate, under advisement from counsel. If the law changes, then our services do so as appropriate. We constantly seek QC or other professional opinion to ensure that we act within the rules at all times."

So what seems to be the message is that you can have the best laws and enforcement in the world, but every second someone is looking to subvert them. ■

3 Top anti-corruption best practices businesses should adopt

Stories of corruption and bribery feel like a staple in the news today, but in-house counsel still has to worry about a lot more than just bad press. For U.S.-based companies operating across borders, stricter global regulations surrounding corruption and bribery have led to increased enforcement of the Foreign Corrupt Practices Act (FCPA), among other anti-bribery and anti-corruption laws. **Randy Stephens**, VP, Advisory Services, NAVEX Global, defines steps organizations should be taking.

Corruption in business, whether internal or through third-party relationships, can pose financial, reputational, operational and compliance risks. Therefore, anti-bribery and anti-corruption compliance should be top of mind for companies.

These concerns were front and center at a recent webinar I cohosted with Howard Weissman, counsel with Baker McKenzie's compliance and investigations practice group, and Joan Meyer, partner at Baker McKenzie.

Below are anti-bribery and corruption best practices that came to light as we discussed "recognizing and mitigating corruption risks to protect your business."

1. KNOW YOUR REGION

In-house counsel needs to clearly understand the definitions and scope of issues addressed in the regulatory landscape in which they operate, both domestic and international. For example, there is no hard and fast definition under anti-bribery laws of what has "value." And for terms like "corrupt payment," benefits can indirectly be transferred to someone or something other than the direct target of the bribe, such as a charity.

Additionally, in-house counsel should know what could constitute a "business advantage" and who might be considered a "foreign public official" well before these questions are posed by an enforcement agency. The definitions are broadly interpreted by regulators, which is something in-house counsel should keep in mind when assessing the potential risk areas with respect to bribery and corruption.

> Avoid the practice of making facilitation payments ... payments themselves can act as a gateway to actual bribes, intentionally or otherwise.

Also, when considering anti-bribery compliance frameworks, avoid the practice of making facilitation payments. While such payments may be permitted under the U.S. Foreign Corrupt Practices Act, they are prohibited in most other laws such as the UK Bribery Act. The nuances of the FCPA facilitation payment exception can be hard to explain to employees, and payments themselves can act as a gateway to actual bribes, intentionally or otherwise.

2. SWEEP EVERY CORNER

Against the backdrop of anti-corruption regulations and enforcement, corporate legal departments should start with a comprehensive risk assessment. Certification is also worth looking at under the International Organization for Standardization rubric for anti-corruption compliance (ISO 37001).

Regardless of specific certification standards, risk assessment should always account for geography and business partners.

> You can't take anyone else's word on a third party's integrity.

As Howard Weissman stated during our webinar, "You need to ensure that the third parties you're working with are operating and following your company's standards. When you sign them up, send them a copy of your policy and contractually bind them to follow it in doing everything on your behalf. Monitor their performance and make sure." Most importantly, Weissman said, you can't take anyone else's word on a third party's integrity.

In-house counsel must be able to identify red flags, such as payments offered in cash, unusual credit to new customers, or commissions or fees exceeding customary rates for similar services. "If you encounter a red flag, you always have to conduct due diligence through your legal department and document that due diligence," Weissman said.

Weissman also noted that his own company ended up losing a contract based on a refusal to deal with a person likely to trigger anti-corruption red flags. "The important thing was to find the problem, to identify it and to be able to walk away" from the relationship as the red flags were not able to be adequately mitigated.

3. SHARPEN YOUR ENFORCEMENT

Continued improvement of a company's anti-bribery program is needed to stay ahead of corruption risk and prosecution. The U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have been the most aggressive enforcers worldwide, but the U.K's Serious Fraud Office and other jurisdictions have increased their activity against individuals as well as organizations. Enforcement agencies tend to "focus on effective compliance programs. When you have a compliance program, to gain the broadest protections, it cannot be a paper program. You must make sure that you're auditing," said Joan Meyer. "That is very important to an eventual resolution or discussion with enforcement agencies."

> Every in-house counsel should recognize that the first enforcement agency to take on a corruption charge is likely not going to be the last.

Once an anti-corruption investigation starts, a company will realize "the costs of investigating allegations of non-compliance may be even greater than the costs of compliance or even the fines and penalties," Meyer said. There are collateral consequences, such as debarment, suspension, and loss of licenses, as well as dawn raids, extradition, shareholder suits, internal investigation costs, fines, jail time, or loss of contracts.

As several recent high-profile investigations have made clear, every in-house counsel should recognize that the first enforcement agency to take on a corruption charge is likely not going to be the last to look into the same conduct, and possibly additional conduct that comes to light.

RANDY STEPHENS, VP, NAVEX GLOBAL

Randy Stephens, J.D., is a lawyer and compliance specialist, who has worked in roles with legal and compliance responsibility for over 30 years, including operations in Mexico, China and Canada. In 2014 / 2015 clients engaged Randy to train employees or conduct risk and program assessments in Japan, China, Australia, UAE, KSA, Kuwait, Jordan, Qatar, Romania, Serbia, the UK and Canada while also working with clients with offices and operations around the world. Randy has significant in-house experience leading compliance programs and working for some of the largest and most diverse public and private corporations in the United States, e.g. Home Depot, Family Dollar and US Foods. He is the author of numerous compliance related articles and commentary and is regularly featured or quoted as a compliance expert in press and publications. He joined NAVEX Global's team in 2012.

Mexico unveils new anti-corruption law

A new Mexican law cracks down on dishonest business, especially with public servants. But those with strong compliance programs and procedures should have little to fear, experts say. **Jaclyn Jaeger** reports.

It's been a long time coming, but the scope of anti-corruption enforcement in Mexico just got a whole lot broader.

On July 19, Mexico's General Law on Administrative Accountability took effect. It is just one element of a broader anti-corruption legal framework passed by Mexico's Congress last year, implementing the country's National Anti-Corruption System. NAS is tasked with coordinating the efforts of Mexico's federal, state, and municipal government agencies in rooting out corruption among governments, companies, and individuals.

The newly enacted General Law on Administrative Accountability promises far-reaching consequences for any company with operations in the country that does not have a robust anti-corruption compliance program in place. It introduces new administrative sanctions for private parties—both individuals and companies—for serious administrative violations. Previously, only public officials were subject to administrative liability.

"It is being received in the compliance community as a positive step," says Alexandra Wrage, president and founder of TRACE International. Although it is a good step forward on paper, however, the big question is whether and how it will be enforced in practice, she says.

The law applies to companies in Mexico, as well as those based outside of Mexico and additionally applies to their affiliates and officers who do business in Mexico and have direct or indirect contacts with Mexican officials. Furthermore, companies can be held liable for any offenses carried out by employees or third parties acting on their behalf.

Under the law, serious offenses include:

» Bribing public officials;
» Misappropriation of public funds;
» Using influence, economic or political power over a public official to obtain a benefit or to cause damage to a person;
» Using false information during an administrative proceeding to obtain a benefit or advantage or to cause damage to a person;
» Participating in administrative proceedings at the federal, state, or municipal level after having been debarred by law or final resolution by competent authorities;
» Colluding with other private parties to obtain a benefit or advantage in a federal, state, or municipal public procurement process; and
» Hiring current or former public officials who acquired or possess privileged information derived from their office, directly resulting in a competitive advantage.

Potential penalties for violations are also much higher than they were previously. Companies found in violation of Mexico's anti-corruptions law risk serious penalties, including a fine of up to twice the amount of benefits obtained (or up to U.S.$6 million if no monetary benefit was obtained), possible debarment, suspension of activities, or dissolution of the organization.

They could also be deemed ineligible to participate in procurement, leases, services, or state-owned projects for up to 10 years. Individuals face similar sanctions and up to U.S.$600,000, if no monetary benefit was obtained.

Minimizing liability. A company can significantly minimize its liability, however, where it self-reports the misconduct, where the relevant authority determines that the company has in place an adequate integrity policy.

Jonathan Adams, who heads the compliance team in Mexico at law firm Baker McKenzie and is the global compliance practice group's regional coor-

> "For companies that already have a world-class compliance program, we don't foresee them having to do complete overhauls."
>
> Jonathan Adams, Partner, Baker McKenzie

dinator for Latin America, says companies that are already in compliance with the FCPA Resource Guide shouldn't have too much extra leg work to do. "For companies that already have a world-class compliance program, we don't foresee them having to do complete overhauls," he says.

Mexico's law states that an adequate integrity policy includes, at a minimum, the following elements:

- » An organizational procedures manual setting forth the functions and responsibilities of each company's areas, the leadership throughout the company, and a clear chain-of-command;
- » A code of conduct that is communicated to all employees and whose policies and procedures are applied in practice;
- » Adequate and effective controls that are monitored and audited;
- » Internal whistleblower reporting mechanisms and disciplinary procedures for those who act contrary to the company's policies or Mexican law;
- » Training on the integrity measures of the law; and
- » Human resource policies for preventing the hiring of people who may pose a risk to the company.

The "human resource" policy element in the integrity policy is notable, because companies often focus on third-party risk and don't pay as much attention to the risks posed by internal employees. In that aspect, the law effectively acknowledges that not all acts of bribery are initiated by third parties. Making sure you spend at least as much time on potential employee risks as you do on third-party risk is important, Wrage says.

The new regulation also introduced the concept of whistleblowers. Individuals who have committed an administrative offense can receive a reduction in sanctions if they confess and cooperate with authorities. In fact, whistleblowers can earn a potential reduction in sanctions of between 50 and 70 percent.

For organizations, bringing on compliance counsel who have broad familiarity with Mexican law, culture, and practices is another way to reduce their anti-corruption risk in the country. The integrity policy should be reviewed by Mexican counsel to ensure that the terms and concepts used in the law are reflected in the materials, trainings, and the standards themselves, Adams says.

Chief compliance officers want to ensure that, when Mexican authorities look at the company's anti-corruption compliance program, they're seeing terms that are familiar to them, Adams adds. "Having everything in Spanish is very important," he says.

Secondly, as it pertains to potential language barriers, employees should be comfortable and fluent in the language in which they're being interviewed. It's not uncommon for people to say they're fluent in English, Adams says, until the interview process begins and language barrier issues can start to interfere with an effective internal investigation.

Labor and employment laws are another important consideration when conducting employee interviews and before taking any sort of action against employees in Mexico. "Labor laws are a lot more protective with respect to employees here in Mexico than they are in the United States," Adams says.

An action that may be taken by a U.S. company in the normal course of business, such as putting an employee on administrative leave, may be perceived as aggressive or unacceptable in Mexico. Having counsel that are not familiar with these laws can create problems for the organization, Adams says.

Practicing good recordkeeping is also important to keep in mind. "The Mexican legal system is a lot more formal than the U.S. legal system," Adams says. Failing to have documents on hand is "not going to be good enough for purposes of the Mexican law," he says.

Moving forward, however, the real test lies in the implementation of Mexico's anti-corruption regulation in practice. As for the law, itself, Adams contends, "it is definitely something momentous in the history of anti-corruption legislation here in Mexico." ■

NATIONAL ANTICORRUPTION SYSTEM

Below is a message from Mexico's President of the Republic (Presidencia de la República).

The government confirms its commitment to preventing and fighting corruption, transparency and accountability. As a result of the joint efforts of civil society, academia, the private sector and legislators, Mexico has a National Anticorruption System for the first time in its history. The constitutional amendment that created the National Anticorruption System as a forum for coordination between the authorities of all orders of government was published on May 27, 2015.

During the Extraordinary Period of the LXII Legislature, seven secondary legislation packages were passed to prevent and fight corruption:

» **General Law on the National Anticorruption System:** This provides the basis for coordinating the SNA at the federal and local level as well as the characteristics of the National Control System and the National Digital Platform.
» **General Law on Administrative Responsibilities:** This establishes the administrative responsibilities and obligations of public officials to submit declarations on their assets, conflicts of interest and taxes.
» **Law of Control and Accountability of the Federation, as well as amendments to the Law of Fiscal Coordination and the General Law of Government Accounting:** This strengthens the capacity of the Chief Audit Office of the Federation to fight corruption.
» **Amendments to the Organic Law of the Federal Court of Administrative Justice:** The Federal Court of Fiscal and Administrative Justice becomes the new Federal Court of Administrative Justice, which will now be able to sanction both public officials and private individuals for grave offenses.
» **Amendments to the Organic Law of the Attorney General's Office:** These create the Special Prosecutor's Office for Combating Corruption as an autonomous body for investigating and prosecuting acts of corruption.
» **Amendments to the Federal Penal Code:** These establish the sanctions that will be applicable to those who commit acts of corruption: public servants and private individuals.
» **Amendments to the Organic Law of Federal Public Administration:** These strengthen the Public Administration Secretariat's capacity to prevent and fight corruption.

Source: Mexico's President of the Republic


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Compliance lessons from Telia FCPA case

Telia Company shares what compliance lessons it learned following its recent $956M global bribery settlement. Those in the compliance community should take heed, writes **Jaclyn Jaeger**.

If compliance officers learn just one lesson from Telia Company following its recent $956 million global bribery settlement, it's this: Acceptance is the first step to recovery.

As any compliance officer whose company has ever been entangled in a bribery and corruption investigation already knows, most resolutions with authorities begin years before they end. Telia is no exception. Long before the Sweden-based telecommunications company reached a global settlement with U.S. and Dutch authorities and agreed to any financial sanctions, it had already begun its long journey on the road to recovery.

The wrongdoing at issue started in 2007 and continued until at least 2010, over which period senior managers at Telia paid bribes to a government official in Uzbekistan—the daughter of the late Uzbek President Islam Karimov—in exchange for entering the country's telecommunications market. Telia carried out this scheme by acquiring an existing Uzbek telephone operator, Coscom, in 2007 and providing the government official with a 26 percent ownership stake. Telia and Coscom structured and concealed the bribes through various payments including to a shell company that certain Telia and Coscom management knew was beneficially owned by the foreign official.

Over the course of the scheme, Telia admitted to making at least $330 million in illicit payments—bribes that were approved by Telia senior executives and the board of directors.

But it was not until 2012, when Swedish media brought to light the potential illicit payments, that Swedish authorities began a criminal investigation. Telia, too, opened an internal investigation, enlisting the help of external experts to ensure no stone was left unturned.

Two years later, U.S. and Dutch authorities launched their own investigations into the allegations, "from which time we have worked diligently with authorities across those markets and in Sweden," Telia President and CEO Johan Dennelind said during a Sept. 22 press conference at its corporate headquarters in Sweden. Ultimately, the U.S. and Dutch authorities concluded that the company's conduct was in violation of the U.S. Foreign Corrupt Practices Act and Dutch law.

Even before U.S. and Dutch authorities launched investigations, Telia had already started to take remedial actions, beginning in 2013 with the departure of its former chief executive officer, Lars Nyberg, and the establishment of an entirely new board of directors. "Since 2013, the new board and management have worked diligently and responsibly to understand what went wrong, to remedy what has been broken, and to regain trust from all our stakeholders," Dennelind said.

The Department of Justice said Telia received "significant credit" for its "extensive remedial measures and cooperation." Besides terminating all individuals involved in the misconduct, Telia has been working to revamp its global compliance program in several significant ways:

- Implemented an anti-bribery and anti-corruption (ABAC) compliance program: In 2013, Telia implemented for the first time an ABAC compliance program. The Telia board of directors, group executive management, and chief ethics and compliance officer are responsible for the governance and compliance frameworks required to implement the ABAC compliance program. This program is further supported by a group-wide whistleblowing process and "Speak-Up Line."
- Adopted a risk-based approach: Companies in the Eurasia region, where the bribery occurred, received priority in the execution of independent country, institutional, and operational ABAC risk assessments in 2013 and 2014. In 2015, risk mitigation action plans were formulated and implemented in the Eurasia region, and follow-up self-risk assessments were conducted; in 2016, action plans were updated. Self-risk assessments were also carried out in Sweden and Europe for the first time.
- Carried out extensive training: By 2016, over 2,000 Telia employees received ABAC compliance face-to-face training, and over 4,300 completed ABAC e-learning. Furthermore, all country ethics and compliance officers are now required to complete anti-bribery or compliance certification through anti-bribery organization TRACE International or the Society of Corporate Compliance and Ethics. Due diligence experts are encouraged to do the same.
- Revamped its corporate governance structure: At Telia, program implementation is the responsibility of local line organizations as well as group functions, with strong support from the ethics and compliance network. This network includes group and regional ethics and compliance officers, as well as coordinators in each local company who act as focal points of contact for other compliance activities, including for due diligence experts in high-risk markets and the group special investigations office, which handles internal investigations concerning potential corruption or fraud.
- Third-party due diligence: The purpose of third party due care, according to the company's ABAC policy, is to enforce its ABAC principles throughout the supply chain and to all third parties it engages with. "Our ABAC policy requires risk-based due diligence on third parties and inclu-

sion of an anti-corruption clause in high-risk engagement contracts," the policy states.

Negotiating the settlement. Since receiving an initial resolution proposal from the U.S. and Dutch authorities in September 2016, Telia has engaged in constructive discussions with each authority. Through these discussions, Telia was given the opportunity to demonstrate what improvements it had made to its responsible business program, compliance program, and its anti-corruption compliance program, Dennelind said.

"We are accepting our responsibility for historic wrongdoings. Wrongdoings come with a cost."

Johan Dennelind, President & CEO, Telia

Those considerations were recognized and accounted for to the tune of a 25 percent maximum discount off the bottom of the otherwise-applicable U.S. Sentencing Guidelines fine range. Furthermore, the Department of Justice determined that an independent compliance monitor was unnecessary.

Telia on its own continues to enhance its compliance program and internal controls to reduce the risk of future wrongdoing. The company's goals for 2018 include, for example, ensuring that all employees are aware of its ABAC requirements and are familiar with the channels for reporting concerns and potential violations.

Under the terms of its global resolution, Telia will pay a total of $457,169,977 in disgorgement of profits and prejudgment interest with the SEC, and the SEC agreed to credit any disgorged profits that Telia pays to the Swedish Prosecution Authority (SPA) or the Public Prosecution Service of the Netherlands (Openbaar Ministrie, or OM), up to half of the total.

Additionally, Telia will pay the OM a criminal penalty of $274 million, for a total criminal penalty of $548,603,972, and a total resolution amount of more than $1 billion. The Department of Justice agreed to credit the criminal penalty paid to the OM as part of its agreement with the company, and the SEC agreed to credit the $40 million in forfeiture paid to the Department of Justice as part of its agreement with the company. Thus, the combined total amount of criminal and regulatory penalties paid by Telia and Coscom to the U.S., Dutch, and Swedish authorities will be $965,773,949.

The settlement marked "an important day for Telia Company as we come to the closure of a serious and difficult process that has been ongoing for over four years," Dennelind said. "We are accepting our responsibility for historic wrongdoings. Wrongdoings come with a cost."

"What was very important to the outcome of this case, notwithstanding the financial sanction, was the company's swift response in terms of cleaning house, replacing them with the right people, and implementing a real compliance program that they could demonstrate to the government was effective and robust," says David Stuart, a partner at law firm Cravath, Swaine & Moore and lead U.S. counsel to Telia and its subsidiaries.

Demonstrating to the government the efficacy of Telia's compliance efforts was achieved, in part, by Telia's compliance team meeting face-to-face with the Department of Justice and the Securities and Exchange Commission during negotiations. Having the compliance team meet with authorities, answer questions, and show them evidence of the company's compliance controls and processes working really helped, Stuart says.

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> "We have accounted for our solid sustainability work and the major cultural changes that have taken place within the company during the last few years, which have been important factors enabling us to have a constructive dialogue and for the outcome of the settlement. These changes within the company are also a very important platform for shaping the new Telia Company."

Marie Ehrling, Board Chair, Telia

outcome of the settlement," Marie Ehrling, Telia's board chair, said in a statement. "These changes within the company are also a very important platform for shaping the new Telia Company."

Aside from being prepared to demonstrate what remedial measures the company has taken, it's important for other companies that may one day face a criminal investigation to know going into it that the government's level of preparedness with respect to the facts of a case is "almost always at a really high level," says Rachel Skaistis, a partner at Cravath who was lead U.S. counsel in the case with Stuart.

Even if the company conducts a thorough internal investigation, reviews millions of pages of documents, and interviews employees, "regulators have a lot of fact-finding tools that the company does not," Skaistis adds. They can talk to former employees, talk to employees at other companies, serve subpoenas, and much more. The warning here: Don't think you can pull the wool over their eyes; it's not going to happen.

The settlement also ends all known corruption-related investigations concerning Telia. "That doesn't mean we're free to do whatever we want," Dennelind said. "If something goes wrong, we may be investigated again."

During the press conference, Jonas Bengtsson, Telia's general counsel, said "authorities have confirmed that there are no other investigations in any countries worldwide."

The settlement comes at a particularly important time as Telia continues to makes a strategic exit out of Eurasia, which is a "work in progress" that started in September 2015, Dennelind said. The company now has its sights sets on the Nordic and Baltics, where it has decided to divest its assets, he said.

Telia's decision to divest its Eurasia operations brings about another important point for other legal and compliance professionals when engaging with enforcement authorities: "Regular and candid communication is important," Stuart says. Keeping in touch with authorities, updating them on company matters and developments so that they don't learn about them for the first time in the press—such as the decision to exit from a certain high-risk region—is very important to building and maintaining credibility and trust with authorities, he says.

A bribery investigation is just the start of a long recovery process that often takes years, and does not stop with the settlement. Dennelind put it best: "We have come a long way to establish a more sustainable company with a strong focus on governance and compliance—but it is a never-ending journey as we aspire to embed this into our culture making sure that all employees understand the importance of doing the right thing all the time. The resolution and related financial sanction … is a painful reminder of what happens if we don't." ■

COOPERATION AND FCPA COMPLIANCE

For 40 years, the FCPA has made it a serious crime to use bribery to win a business advantage from foreign officials. Violations have resulted in tens of millions of dollars in fines. Executives have been hit with stiff prison sentences. Corporations have been forced to spend millions of dollars—even hundreds of millions of dollars—defending themselves. Yet, bribery rarely begins as a corporate-level initiative, at least among U.S. companies. It is most often the result of a misguided or rogue individual or contractor.

The impact of a bribery investigation, however, is virtually always felt at the corporate level. That's one reason why U.S. corporate leaders have not only stepped up efforts to ensure their own companies are operating cleanly, but that clean business has become the global norm. This is a difficult task, but one that is increasingly viewed as the ultimate solution to the challenge of steering large multi-national organizations away from the rocky shoals of bribery and corruption charges.

But what makes for a successful enterprise-wide compliance system? First, it must account for the gamut of personal interactions with foreign leaders and local social causes. What are the rules regarding a wedding gift to a long-time customer? Or a bar tab for prospective clients? Or supporting an NGO in a developing country, which just happens to be run by the son of the oil minister?

Second, it takes more than an ethical corporate culture to help people navigate so many permutations of a seemingly simple directive. Anti-corruption programs require training employees and contractors on how to keep all interactions above board, maintain appropriate records, and put systems in place to monitor behavior.

While managing these systems has historically been far from the core competencies of most businesses, an increasing number are moving in this direction. As a result, corporate executives who once felt like they were "flying blind" through the field of compliance are embracing the task as a necessary one. This new prioritization shouldn't be surprising. It comes as corporate anxiety has ratcheted up in the face of some recent eye-popping settlements with the government. As compliance programs emerge, so do sources of help from outside the business sector to promote a more cooperative and mutually supportive environment.

The timing of the compliance trend is corresponding with what may be a fresh look at this issue by the regulators themselves. I'm speaking of the federal government. While the U.S. Department of Justice has beefed up its staff in the Criminal Division's Fraud Section's FCPA Unit to investigate cases more quickly and wrap up old investigations, the DoJ is also managing an experimental program in compliance that relies on self-disclosure, cooperation, and remediation. In March, the Justice Department extended this voluntary compliance program by one year. Along with the extension of this voluntary compliance program is a new tone from the DoJ's political leadership.

"The Criminal Division's aims are not to prosecute every company we can, nor to break our own records for the largest fines or longest prison sentences," Trevor N. McFadden, deputy attorney general, recently told a gathering of corporate compliance officers. "Our goal is for companies and individuals to voluntarily comply with the law."

—Harold Kim is EVP of the U.S. Chamber Institute for Legal Reform, www.InstituteForLegalReform.com.

Brazil's largest corruption probe hits new heights

As Brazilian investigators look into massive corruption between public officials and one of the country's biggest firms, scandal-weary Brazilians wonder when it will end, writes **Rodrigo Amaral**.

Brazil's experience in running what is likely the largest corruption investigation ever has reached new heights in the past month as the country's president and other politicians were recorded in suspicious dealings with the president of one of its largest business groups.

The scandal centered around JBS, a food group with a large U.S. presence, has had a double effect on public opinion. On the one hand, it has shown that being a corrupt politician or a crooked businessperson has become a much riskier career choice than ever in Brazil. But it has made clear as well that the traditional beneficiaries of Brazil's crony capitalism remain keen on maintaining their old practices.

The scandal also marks the latest big corporation in Brazil to announce reinforcements to a discredited compliance program. JBS has announced the hiring of Marcelo Proença, a commercial lawyer and a professor at the University of São Paulo, to turn the firms' compliance structures around. It has also hired White & Case, the law office, to help with the quest. The group thus follows the likes of oil giant Petrobras, construction group Odebrecht and petrochemical company Braskem, which all had their arms twisted by prosecutors into adopting anticorruption practices.

According to media reports, JBS has committed to invest 2.3 billion reais, the equivalent to almost $700 million, into the revamping of its compliance and anti-bribery systems. Considering the confessions made by company executives Proença will need every cent of it. Not the least because the problems are concentrated at the very top of the firm.

The whole brouhaha started in mid-May, when recordings of a conversation between JBS' president, Joesley Batista, and president Michel Temer were leaked. In the tape, Batista, a famously connected businessman, explained to the president the efforts he was making to suffocate corruption investigations involving himself, his company, and several politicians.

His endeavors included allegedly paying bribes to prosecutors and judges, as well as a monthly allowance to Eduardo Cunha, a top member of Temer's political party who has been stewing in jail. The goal was to guarantee that Cunha would not sing to prosecutors.

Temer is heard in the tape assenting to the plan and, according to some interpretations, urging Batista to keep up with the good work. The recordings, however, were not fully conclusive about the president's direct involvement with the irregularities, and Temer has been able to muddle through since then.

But Batista's recorded conversation with Temer was just an appetizer for a whole package of revelations made by his brother Wesley Batista (who was also a member of the JBS board) and five other executives. They confessed to making bribery payments in exchange for favorable access to subsidized funding, the approval of executive orders that attended the company's interests and other shady advantages.

For several years, JBS had access to billions of dollars in low-cost loans provided by BNDES, Brazil's development bank, which was employed to expand business to areas such as fashion, dairy products, and energy transmission. The money also helped the group become one of Brazil's national champions by expanding its presence to several foreign markets. JBS operates in the U.S. under well-known brands such as Pilgrim's Choice and Swift, among others.

To achieve its impressive growth, the group confessed having made payments, legal or illegal, to 1,893 officials across the country. One of its executives, Ricardo Saud, used to boast that he controlled the largest voting bloc in the Brazilian Congress.

The confessions also delivered some stories that are set to gain a place of honor in Brazil's already plentiful corruption canon. Aécio Neves, a former presidential candidate, was recorded asking for 2 million reais, or $608,000, to pay legal costs as he answers to several corruption court cases. But his lawyer never saw the money, which was tracked by the police in the bank account of another politician who was once accused of transporting cocaine in his private plane. Neves said that he asked the money as a loan to buy a new house for his mom, although no mention of the parent's housing woes was made in the recorded calls.

The police also filmed Rodrigo Rocha Loures, a close adviser of Temer, picking up a suitcase with 500,000 reais, (U.S.$152,000), in a pizza restaurant in São Paulo. The money was delivered by a JBS executive. Rocha Loures later returned the suitcase to the police, although with 35,000 reais missing. Brazilians promptly joked that Rocha Loures at least was nice enough to offer and pay for the pizza pie, which explained why the money was missing. He later sent the difference to the police via electronic bank transfer.

In his chat with Joesley Batista, Temer told the business to seek Rocha Loures in order to solve some issues with Brazil's competition commission and other government bodies. The president later denied any knowledge of spurious deals and said that Rocha Loures was a naïve, but good-hearted lad. The adviser has been arrested, though, and Temer's few remaining supporters are hoping that his good-hearted nature will extend towards not making a deal with prosecutors to spill the beans about his boss. Four personal advisers that Temer took to the presidency last year are either in jail or being prosecuted.

The scandal has dwarfed the impact of the confessions made by 77 executives of Odebrecht last year and still appears to have some legs on it. But it is possible to take some lessons from it already.

It seems politicians and businesspeople remain unconvinced that the time has come to mend their ways. Temer received Batista in his official home in Brasilia, late at night, and without any mention in the president's agenda. Worst of all, the meeting took place as recently as March, three years after the start of Operation Car Wash, the monumental corruption investigation that is supposedly turning Brazil's political and business worlds upside down. However, not only Temer, but also Neves, Rocha Flores and other characters involved appear to be acting on the assumption that we were back to the happy days of 2013.

There is also some skepticism on whether economic actors used to working in cahoots with the state are learning the right lessons. "It is worrying to see the eventual repetition of JBS Group's modus operandi in similar operations by other organizations, as well as the probable employment of the same kind of irregularities by other economic groups," said Raimundo Carreiro, the president of TCU, the federal audit court, in a statement. "If the facts (revealed by JBS) are proven to be true, we will need to identify the weaknesses of control systems that allowed so many illegal operations without triggering any alerts."

On the other hand, corruption investigations have progressed so much in the past three years that prosecutors have been able to set high standards to accept new plea bargain deals. In order to "outsnitch" Odebrecht, JBS had to present hard evidence such as recordings and trackable bribery money, as well as spreadsheets with the names of hundreds of officials who received payments from the group.

JBS was lucky enough that Brazil's federal prosecutors' office seemed to believe that Temer was making progress in efforts to politically suffocate Operation Car Wash, and therefore it was eager to cut a quick deal in order to crush down the machinations by raising a popular outcry. In fact, it may have been too eager to come up with goods. For the first time, public opinion has expressed wide distaste for a leniency deal signed by the Car Wash team. And that is because the terms of the agreement were considered too favorable for a group of business people who were already under investigation and have breezily confessed buying support from the state in the course of many years.

In exchange for their bombastic material, the Batista brothers and the other JBS executives were allowed to go free after paying symbolic fines. Joesley Batista promptly added woe to injury by flying to the U.S., where he owns a luxury flat on Fifth Avenue in New York, in the comfort of JBS' private plane. He threw more gas on the fire by sending his yacht to Miami right before the scandal broke up, when he would likely have done better by keeping a low profile.

"The feeling is that crime has paid out," said Flavio Rocha, the CEO at retail group Riachuelo, in an interview to newspaper O Estado de São Paulo.

To make matters worse, there are signs that JBS made a huge purchase of dollars right before the scandal broke out, after which the Brazilian currency devaluated sharply due to the hike in political instability. The brothers have also been accused of selling shares of the company a few days before the recordings were made public. JBS' shares have plummeted since then.

JBS is unlikely to escape unscathed from the whole episode. The group has agreed, via J&F, its holding company, to pay a fine 10.8 billion reais, or $3.28 billion, as part of its leniency deal. The deal frees the group from further punishment on corruption charges, but it will have to answer investigations from CVM, the Brazilian SEC, and the tax collection agency on accusations of inside trading and tax evasion. Total fines could reach as much as 31 billion reais, or $9.4 billion, according to estimates by newspaper Estado de São Paulo. As José Roberto Barroso, a member of STF, Brazil's highest court, noted in a public speech, even under a lame duck president like Temer, the Brazilian state has enough tools to perform furious revenge on its enemies. "There is no doubt that JBS will become scorched earth," he forecast.

Public opinion has also reacted angrily to the case, condemning all parties involved, including the Batista brothers. Social media has been swamped by boycott campaigns against JBS brands, and several of Brazil's omnipresent barbecue restaurants have announced that they have stopped buying meat from the group. Most strikingly perhaps was the local Domino's Pizza franchise, which made a very public announcement that it would stop using meat cuts furnished by JBS as the group acts in opposition to its own ethical principles. JBS has also been involved in other operations such as Weak Flesh, which investigates the payment of bribes by meat producers to sanitary inspectors.

"The extent of the irregularities and the bureaucratic way that they were performed are a little surprising, but not the practices themselves," said Maureen Santos, an agribusiness researcher at the Heinrich Boll Foundation in São Paulo. "The sophistication of corruption practices in Brazil has been exposed by the JBS scandal."

It is also not clear what attention the case will get from American authorities. Considering the extent of JBS U.S. operations, DoJ officials should show plenty of interest, and they have been working closely with their Brazilian peers on Operation Car Wash.

JBS is now trying to sell assets such as meat processing in non-strategic markets and non-food activities such as Alpargatas, the makers of Havaianas, a brand of beach flip-flops that is one of Brazil's most widely known fashion icons. Alpargatas, by the way, was purchased by JBS at a cut-price from Camargo Correa, a construction group that was nabbed early by the Carwash Operation.

For CCOs in the United States, it is probably worth keeping in mind that Joesley and Wesley Batista have only been temporarily withdrawn from the group, as the deal with prosecutors states that they will remain only five years away from taking top positions at the company. "Leniency deals should preserve the companies, but demand that control changes hands. And that is because corruption schemes have happened either because a lack of effective monitoring by leaders, or for their own involvement in the irregularities," said Sergio Lazzarini, an economist at Insper, a business school, who is a preeminent expert on Brazil's crony capitalism practices. "Unfortunately, leniency agreements closed in Brazil have preserved the role of current by those who controlled the companies."

With the JBS scandal, the Carwash Operation has hit oil and gas, construction, and agribusiness, three of Brazil's most important business sectors. Who will be next? The rumor mill is turning around the banking sector, which is characterized by a few large players that concentrate the market and exert immense political and economic power. Antonio Palocci, a former Finance minister who is in jail, is expected to close a plea bargain deal with prosecutors soon. According to reports, he will have to deliver foul play in the relationship between banks and governments if he wants to close the deal. The media has reported some banks have sought prosecutors as they try to pre-emptively negotiate leniency agreements. Anyway, Brazil's compliance adventures look unlikely to end any time soon. ■

Global anti-bribery enforcement on the rise

Sharing information and expanding enforcement pipelines are fueling a global crackdown on corruption in general, writes **Jaclyn Jaeger**, but especially in the extractive industry.

Anti-bribery enforcement actions increased dramatically on a global scale over the past year, with the extractive industry facing the brunt of that activity.

Those are just a couple of the findings from the 2016 Global Enforcement Report (GER) conducted by anti-bribery watchdog TRACE International. The GER report provides an updated summary of global anti-bribery enforcement trends, based primarily on cases and investigations tracked in the TRACE Compendium, an online database of cross-border corruption cases.

Neither the TRACE Compendium nor the 2016 GER include matters involving domestic companies bribing domestic government officials. The alleged bribe must have a cross-border component and must involve a government official.

The report says from 2006 through 2016, the United States continued to bring the highest number of enforcement actions over the last decade. Of the global total of 325 enforcement actions concerning the alleged bribery of foreign officials from 1977 to 2016, the U.S. brought 225 of those enforcement actions.

Furthermore, enforcement efforts in the United States more than doubled since last year, with 30 total bribery cases in 2016. Each year, the enforcement pipeline will get larger, and then a whole series of cases will come out all at once. "We certainly saw that in 2016," says Alexandra Wrage, president and founder of TRACE.

"The one message that is very current is whether the pace of the enforcement will stay the same in the United States under the current administration," Wrage says. Even if anti-bribery enforcement in the United States were to slow down a bit, the rest of the world is stepping up in a dramatic fashion, she says.

According to the report, non-U.S. enforcement actions more than doubled last year. "We are seeing more expertise and more of an appetite to go after these cases, and that's a trend that's going to continue," Wrage says. "They know where to look and how to proceed with these cases. We've seen that happen in the United States now for over a decade, and it's beginning to happen elsewhere."

Between the level of international cooperation, the sharing of documentation, and the sharing of tips, "this is truly a global regime now," Wrage says. "I don't think that should give companies that are not serious about compliance any reason to relax."

Foreign bribery investigations. In addition to enforcement actions, the United States also continues to dominate foreign bribery investigations over all other countries by a wide margin. Specifically, the United States was conducting 118 out of a global total of 255 active bribery investigations in 29 countries as of the end of 2016, according to the report.

In comparison, the United Kingdom was conducting 29 active investigations—the second highest number after the United States. Europe as a whole, however, represented 106 investigations—approximately 42 percent of all ongoing investigations, closer in line with the United States.

Below those leading nations, countries in Asia-Pacific and the Americas trailed far behind, with 8 percent and 3 percent of active bribery investigations, respectively. Africa and the Middle East represented less than 1 percent each.

Domestic bribery. Outside the United States, multiple countries increasingly are focused on investigating bribery of their own government officials, rather than on investigating possible bribery of foreign officials. On a practical level, this means multinational companies are more likely to be prosecuted in multiple countries for violating various anti-bribery laws.

The results of the report indicate that this trend may be on the rise, given that twice as many countries are conducting investigations as have brought enforcement actions last year for the alleged bribery of domestic officials. Brazil is leading the way by far, with 22 ongoing investigations, as of the end of 2016, followed by India (13), China (12), and Nigeria (10).

Region-by-region, Asia-Pacific countries were conducting the most investigations (29 percent); followed by the Americas (26 percent); Europe (24 percent); Africa (18 percent); and the Middle East (3 percent).

From an enforcement standpoint, Algeria brought the most, with nine actions, followed by China (8) and Nigeria (7). African countries have undertaken 29 percent of the 78 enforcement actions concerning alleged bribery of domestic officials, followed by Asia Pacific (27 percent); the Americas (23 percent); Europe (12 percent); and the Middle East (9 percent).

Country-by-country bribery. Chinese officials were the alleged recipients of bribes in almost 100 different enforcement events, more than any other country in the report. Iraq followed, and next was Brazil, Nigeria, India, and Russia.

Officials in Asia Pacific were the alleged recipients of bribes in approximately 32 percent of enforcement events, followed by Africa with approximately 22 percent, the Americas (including the U.S.) with approximately 18 percent, the Middle East with approximately 15 percent, and Europe with 14 percent.

In the United States, among the 38 countries where U.S. companies and individuals faced a bribery investigation, Chinese officials were the alleged recipients of bribes in 27 investigations, followed by Brazil and India, each with 12.

Among the 96 total countries where U.S. companies and individuals were subject to a bribery enforcement action between 1977 and 2016, Chinese officials were the alleged recipients of bribes in 43 enforcement actions, followed by Nigeria (18); Iraq (16); Mexico (14); India (11); and Russia (11).

Enforcement by industry. The extractive industry experienced the highest number of investigations, as well as the highest number of enforcement actions (excluding those conducted or brought by the United States) for alleged bribery of foreign or domestic officials. Specifically, the extractive industry represented 19 percent of all non-U.S. investigations and 27 percent of all non-U.S. bribery enforcement actions.

In total, 33 investigations in the extractive industry were the result of domestic bribery and 30 were from foreign bribery. With enforcement actions, 34 resulted from foreign bribery and 12 were from domestic bribery.

The extractive industry has always been vulnerable to corruption risk, because the countries that are rich in natural resources also tend to be hot bed areas for bribery and corruption. Heightening the risk of bribery is that many of these countries are dominated by state-owned entities, where interactions with foreign government officials are commonplace.

Not far behind extractives, the engineering and construction industry represented 18 percent of all non-U.S. investigations and 17 percent of all non-U.S. bribery enforcement actions. In total, 36 investigations in the engineering and construction industry were the result of domestic bribery and 30 from foreign bribery. With enforcement actions, 18 resulted from foreign bribery and 11 from domestic bribery.

Trailing not far behind the extractive industry and engineering/construction industry, manufacturing providers represented 14 percent of all non-U.S. investigations and 14 percent of all non-U.S. bribery enforcement actions, according to the TRACE report. In total, 32 investigations resulted from domestic bribery and 15 from foreign bribery. With enforcement actions, 13 resulted from foreign bribery and 12 from domestic bribery.

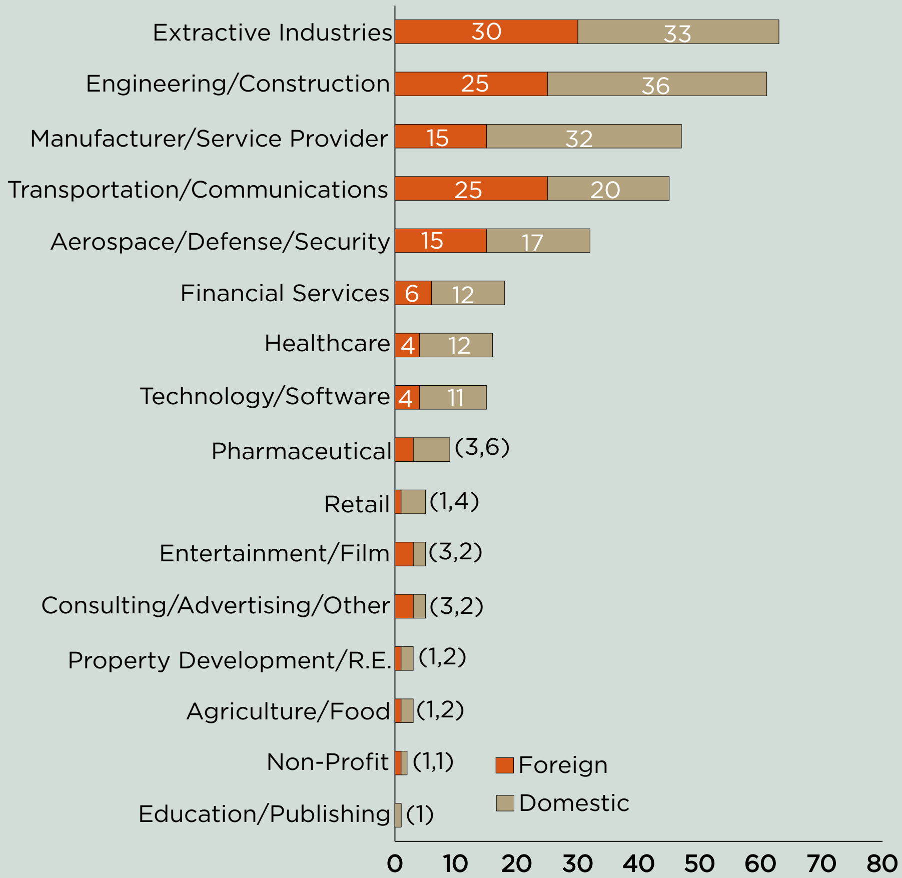
Many other industries—such as technology, agriculture, retail, entertainment, and real estate—experienced bribery investigations and enforcement actions, as well. “No industry should imagine that they’re exempt from enforcement,” Wrage says.

What’s also important to keep in mind is that investigations and enforcement actions often come in waves, so if one company is involved in a scheme, enforcement agencies likely will examine that industry to see if others are engaging in the same practices. A more recent example of that is the handful of companies—Bank of New York Mellon, JPMorgan, Qualcomm—that faced enforcement actions for hiring the relatives of foreign government officials.

One of the main lessons from the report on a practical level is that compliance professionals should ensure they have the right team and have a presence in that countries where they are doing business. Even if you don't have employees on the ground and you're working through agents, make sure you still go to that country and talk to people on the ground and really understand the risks. "It still surprises me when I meet compliance officers who don't have a passport," Wrage says. "You need to get out there and talk to the people who are working in those challenging markets." ■

FOREIGN & DOMESTIC BRIBERY STATS

Investigations concerning bribery of domestic & foreign officials by industry.



Source: TRACE International

Sapin II challenges France's culture of corruption

France's anti-corruption rule reflects its growing interest in embracing whistleblowing and getting clear of U.S. FCPA enforcement actions. **Rodrigo Amaral** has more.

The nepotism scandal involving presidential candidate François Fillon in France has strengthened the commonly held view that French leaders, both in politics and business, can take a somewhat cavalier approach to ethics and corruption. This could change, though, as France plays catch-up with other developed economies and starts enforcing anti-corruption laws that are worth their name.

Fillon has found himself in deep trouble after it became known that French investigators are looking into allegedly illegal payments made to his wife, Penelope Fillon, by his parliamentary office. It has also emerged that his son and daughter have been employed as parliamentary assistants, even though there are doubts about their qualifications to do the jobs they were paid for. The so-called "Penelopegate" may have caused enough uproar to derail Fillon's bid to be the next president of France.

The case has shocked French voters and so have the puzzled reactions of other politicians, who appear unable to understand why so much ado has been made about a practice that is far from unusual in the country. But the outrage illustrates a new development in France that affects not only politicians, but companies too: France's public opinion is no longer taking the ethical missteps of their leaders with merely a shrug. In fact, at least in theory, adepts of corruption practices, both at home and abroad, face a much higher risk of going to jail now in 2017 than in previous years.

The public mood has been enshrined into law since December, when Parliament approved Loi Sapin II, a bill to modernize the economy and fight corruption. The law creates a number of compliance obligations for companies and public organizations, and also emboldens entities such as Agence Française Anticorruption, AFA, a new anti-corruption agency, and Parquet National Financier, PNF, a prosecutor's office, to investigate misdeeds by public and private players alike. It also imposes fines and other punishments to those that even fail to comply with the new requirements, let alone engage in actual foul play.

PNF has been the body behind the Fillon investigation and also the three-year jail term that befell Jérome Cahuzac, a former junior minister of the budget, in December. A relatively new body, PNF was created in 2013 and has incorporated the new eagerness among the French authorities to show that, contrary to the general perception, they are not "soft" on corruption. The approval of Sapin II has been part of this broader effort, but investigators have their work cut out to succeed in changing a view of French elites that is currently widespread at home and abroad. "Why is France so corrupt?" asked the venerable *Foreign Policy* magazine in the wake of the Penelopegate. The answer may very well have something to do with impunity. According to White & Case, only one sentence about a corruption case has been issued by French courts in the past decade.

By approving Sapin II, lawmakers have also strived to remove French corporations from the U.S. Department of Justice's target list. For many years, American prosecutors have been lodging cases against French companies, under the FCPA, for alleged corruption acts committed abroad. Of the ten largest FCPA-related settlements closed so far, two have been made by French groups (Alstom and Total), according to the FCPA blog. Not a few French business leaders see this offensive as a commercial strategy, rather than a legal one; in any case, the growing activities of French multinationals in emerging markets have made them logical targets for the DoJ.

Paul-Albert Iweins, an associate at the Taylor Wessing Law Office in Paris, says that the exposure of French companies to the U.S. justice system has been a main driver of the country's anti-corruption focus. "It is all a result from the U.S. extraterritorial laws," he said. "Until now, the Americans could argue that corruption investigations in France were poorly done and resulted in few material consequences to the companies involved. But now Sapin II provides France with world-class anti-corruption legislation, and French prosecutors will be more capable of telling their American counterparts that they can investigate French companies themselves."

One of the most important novelties introduced by the law has been the ability of prosecutors such as the combative PNF to sign agreements with those accused of wrongdoings to close investigations in exchange of financial penalties and an admission of guilt. The new legal tool, which is similar to America's Deferred Prosecution Agreements (DPA), is known as Convention Judiciaire d'Interêt Public and could be a difference maker in a country where long court cases have killed more than one corruption investigation. "Prosecutors have certainly been empowered," Iweins said.

The law has also created stringent compliance obligations that must be followed by organizations with 500 or more employees or revenues of over €100 million (U.S.$106M). The obligations apply to both French companies and to the subsidiaries of foreign groups. Starting on June 1st, they will need to have in place a proper compliance system that fulfils several criteria, including the adoption of a broadly endorsed code of conduct and the performance of regular mapping exercises to identify corruption risks.

"Risk mapping is probably the core of Sapin II," said Philippe de Montigny, the president of Ethics Intelligence, a consultancy in the French capital. "Companies will need to identify all third parties and the risks that they represent. Then they will have to adopt measures to mitigate this risk," he said.

Companies will also have to guarantee that both staff and management receive regular training about the evolution of the risks faced in their daily jobs. "Training will not be restricted to employees. Top management, including the executive committee, will have to be trained as well," Montigny said.

Sapin II also creates an obligation for firms with more than 500 employees to implement whistleblowing channels and introduces legal mechanisms to protect those who decide to denounce misdeeds by their colleagues or bosses. This is a major development, as the French have a well-documented dislike for whistleblowers, in what experts see as an inheritance from the dark days of collaboration with the Nazis during World War II. "For many years, French companies and the French society have been very reluctant toward the issue of whistleblowing," Montigny said. "The fact that it is imposed now by law constitutes, per se, a sort of revolution."

"The obligation to have confidential whistleblowing systems is not restricted to larger companies. A much higher number of companies must comply with it, including many SMEs," said Franck Poindessault, a partner at Boken. "Additionally, whistleblowing systems will not be limited to the denunciation of corruption practices. They must also encompass issues related to the environment and many others."

As a result, at least in theory, France now has an anti-corruption law that puts it on the same foot as countries such as the United States and the United Kingdom, Poindessault added. The law also provides the authorities with the tools to make sure that companies are taking the new obligations seriously. If an organization does not have a compliance program in place, it can be fined up to €1 million (U.S.$106M), and its managers, up to €200,000 (U.S.$212,110). The AFA will have the power to inspect companies to check that they are complying with the law. Iweins noted that the absence of a compliance system will be treated as a criminal offense, and therefore will not be coverable with a D&O insurance policy. According to the experts, large French multinationals that have been under the scrutiny of American or British officials in recent years are well prepared to face the new requirements, while smaller firms will struggle more to be fully compliant. But even those with mature compliance procedures in place should be careful to adapt them not only to Sapin II, but also to other tough legislation such as data privacy and labor rights. "Foreign companies in France that have to comply with Sapin II must keep in mind that there are some aspects that are specific to the French law," said Raphaël Gauvain, also a partner at Boken. ■

MITIGATING CORRUPTION RISK

Jones Days' commentary on the Sapin II Bill.

Companies that employ at least 500 employees or that are part of a group with at least 500 employees and have an annual gross profit exceeding EUR 100 million would be required to have in place a compliance program to prevent and detect corruption. That would include:

- A corporate code of conduct defining and illustrating conduct to be avoided;
- A procedure for accepting and investigating whistleblower complaints;
- An updated assessment to identify, analyze, and prioritize the risks of corruption;
- Integrity reviews of clients, suppliers, and third parties;
- Internal and external accounting controls to ensure that the company's records are not covering up corruption or influence trafficking offenses;
- Training for employees and managers; and
- A deterrent sanctions policy, including disciplinary action against personnel found to have engaged in misconduct.

Source: Jones Day