



## Developments in anti-bribery and corruption enforcement

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### Overview of the FCPA

The Foreign Corrupt Practices Act of 1977 (FCPA) makes it unlawful for certain persons and entities to make payments or promises of payments to foreign government officials to assist with obtaining or retaining business.<sup>1</sup> The FCPA also requires publicly traded companies (issuers) to maintain accurate books and records and to have a system of internal controls sufficient to provide reasonable assurance that transactions are executed and assets are accounted for in accordance with generally accepted accounting principles (GAAP). The FCPA extends to issuers and their officers, directors, employees, agents and stockholders; violations can result in civil and criminal charges, disgorgement of profits, penalties or fines, and even imprisonment. Two provisions are discussed in the FCPA: anti-bribery provisions and accounting provisions.<sup>2</sup>

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<sup>1</sup> Foreign Corrupt Practices Act (FCPA), U.S. Department of Justice, last modified February 3, 2017, [justice.gov/criminal-fraud/foreign-corrupt-practices-act](https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act).

<sup>2</sup> FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. Department of Justice, Criminal Division; and SEC, Enforcement Division, accessed June 6, 2019, [justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf)

### Anti-bribery provisions

The anti-bribery provisions of the FCPA prohibit any offer, payment, promise of payment, or authorization to pay money or anything of value to any foreign official, foreign political party, or candidate for public office intended to influence any act or decision of such foreign official in order to assist in obtaining or retaining business. Examples of actions taken to obtain or retain business include, but are not limited to, winning a contract, evading taxes or penalties, or obtaining exceptions to regulations.<sup>3</sup> The anti-bribery provisions apply to all U.S. persons and certain foreign issuers of securities as well as foreign firms and persons who make or cause a corrupt payment within the United States.<sup>4</sup>

These provisions apply not only to a successful corrupt payment, but any offer or promise of such payment. The FCPA also prohibits bribes made to any person with the knowledge that some or all the payments may be used by the person, directly or indirectly, to bribe foreign officials or other prohibited recipients.<sup>5</sup>

There are two affirmative defenses to the anti-bribery provisions of the FCPA, as follows:

- The payment was lawful under the written laws of the foreign country.
- The money was spent as part of demonstrating a product or performing a contractual obligation.

These affirmative defenses require the defendant to bear the burden of proof.<sup>6</sup>

### Accounting provisions

The accounting provisions of the FCPA include rules regarding both books and records and internal controls. The books and

records provision requires an issuer to make and keep books, records, and accounts that accurately and fairly reflect the transactions and assets of the company. The internal controls provision requires an issuer to create and maintain a system of internal accounting controls sufficient to provide reasonable assurance that

- transactions are executed as instructed by management,
- transactions are recorded as necessary to permit preparation of financial statements and to maintain accountability for assets,
- access to assets is limited to management's authorization, and
- the recorded accountability for assets is compared with the existing assets and appropriate action is taken with respect to any differences.<sup>7</sup>

The accounting provisions require that all issuers account for their assets and liabilities and income and expenses accurately and in reasonable detail; in this way, the provisions effectively apply to a broader range of violations than solely the anti-bribery provisions. As a result, prosecutors and regulators may invoke these provisions when they cannot fully establish an anti-bribery prosecution or as a mechanism to encourage compromise in settlement negotiations.<sup>8</sup>

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<sup>3</sup> See footnote 2.

<sup>4</sup> See footnote 1.

<sup>5</sup> Investor Bulletin: The Foreign Corrupt Practices Act - Prohibition of the Payment of Bribes to Foreign Officials, SEC, October 2011, [sec.gov/investor/alerts/fcpa.pdf](https://www.sec.gov/investor/alerts/fcpa.pdf).

<sup>6</sup> See footnote 5.

<sup>7</sup> See footnote 5.

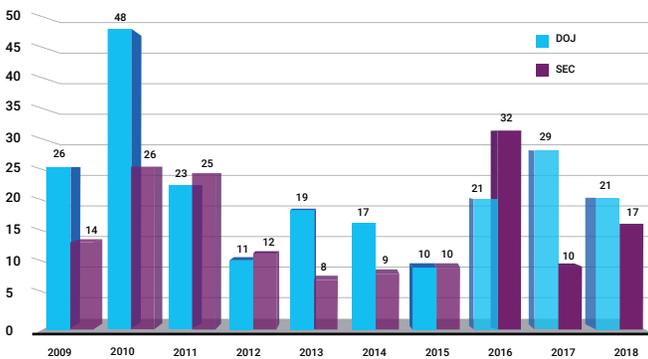
<sup>8</sup> See footnote 2.

## Enforcement of the FCPA

The Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) jointly enforce the FCPA. The SEC brings civil enforcement actions against issuers and their officers, directors, employees, and agents while the DOJ criminally prosecutes issuers and their officers, directors, employees, agents, and domestic concerns. The DOJ also can criminally prosecute foreign persons and entities and has civil anti-bribery enforcement authority over persons and nonissuers subject to the FCPA.<sup>9</sup>

Since 2009, the DOJ and SEC both have pursued numerous FCPA enforcement actions, as illustrated in the accompanying chart.<sup>10</sup>

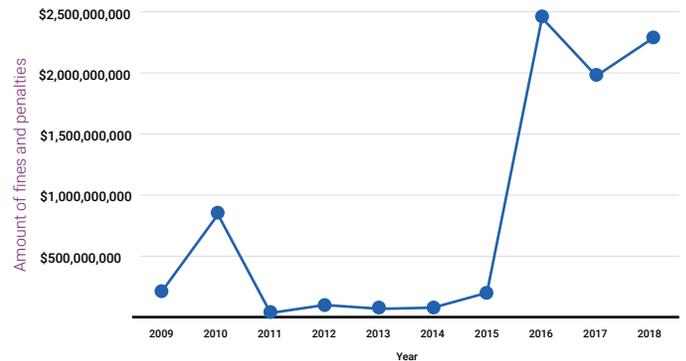
### FCPA enforcement actions



### Trends and developments in investigations and enforcement

Total fines and penalties arising from FCPA enforcement since 2009 have grown exponentially, as shown in the following chart.<sup>11</sup>

### Total fines and penalties per year



Recently, the health care and energy industries have received increased attention related to FCPA enforcement.

For the health care industry, the DOJ with its FCPA and Health Care Fraud Units are collaborating to investigate health care bribery schemes. In a July 25, 2017 speech, Sandra Moser, then-acting chief of DOJ’s Fraud Section, said, “Health care companies operating overseas frequently interact with government officials” and, consequently, the DOJ has “seen a number of significant FCPA cases involving the payment of bribes and kickbacks by health care companies to foreign officials to obtain a wide variety of improper business advantages.” In all instances, violations arose from failures within companies’ compliance programs.<sup>12</sup> There have also been a number of enforcement actions in recent years related to medical device manufacturers and suppliers, including Fresenius Medical Care AG & Co.; Alere, Inc.; and Biomet.<sup>13</sup>

- On March 29, 2019, Fresenius Medical Care AG & Co., a Germany-based provider of products and services for individuals with chronic kidney failure, agreed to pay \$231 million to the SEC and DOJ as part of a global settlement that resolved FCPA violations across multiple countries over nearly a decade.<sup>14</sup>

<sup>9</sup> See footnote 5.

<sup>10</sup> “2018 Year-End FCPA Update,” Gibson Dunn, January 7, 2019, [gibsondunn.com/2018-year-end-fcpa-update/](https://www.gibsondunn.com/2018-year-end-fcpa-update/)

<sup>11</sup> Foreign Corrupt Practices Act Clearinghouse, in Collaboration with Sullivan & Cromwell LLP, Stanford Law School, accessed June 6, 2019, <http://fcpa.stanford.edu/statistics-analytics.html>.

<sup>12</sup> John F. Libby et al, “FCPA and Healthcare: The DOJ’s New Bedfellows,” manatt.com, Oct. 18, 2017, [manatt.com/Insights/Articles/2017/FCPA-and-Healthcare-The-DOJs-New-Bedfellows](https://www.manatt.com/Insights/Articles/2017/FCPA-and-Healthcare-The-DOJs-New-Bedfellows).

<sup>13</sup> Biomet is now known as Zimmer Biomet.

<sup>14</sup> SEC Enforcement Actions: FCPA Cases,” SEC, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>; and “SEC Charges Medical Device Company with FCPA Violations,” SEC, March 29, 2019, <https://www.sec.gov/news/press-release/2019-48>

- On Sept. 28, 2017, Alere Inc., a Massachusetts-based medical manufacturer, agreed to pay \$13 million to settle charges that it engaged in accounting fraud through internal subsidiaries to meet revenue targets and that it made improper payments to foreign officials in certain countries to increase its sales.<sup>15</sup>
- On Jan. 12, 2017, Biomet, an Indiana-based medical device manufacturer, agreed to pay \$30 million to resolve criminal and civil cases for FCPA violations that included making improper payments to Chilean political figures.<sup>16</sup>

The energy industry has long been exposed to a heightened risk of corrupt practices, making it a priority for the DOJ and SEC for several reasons.<sup>17</sup> First, extractive activities are often located in developing countries with emerging markets and less stable governments. Second, energy companies regularly deal with foreign government officials to secure extractive ventures. Third, these companies regularly rely on multiple third parties at all stages of a project, making them more susceptible to FCPA violations. While the energy industry is not a new concern to the DOJ and SEC, it remains a vulnerable area for corruption.<sup>18</sup> Recent cases related to this sector include Centrais Electricas Brasileiras S.A., Vantage Drilling International, and Petroleo Brasileiro S.A.:

- On Dec. 26, 2018, Centrais Electricas Brasileiras S.A., a Brazil-based power generation, transmission and distribution company, agreed to pay a \$2.5 million penalty for violating the accounting provisions of the FCPA after former officials at a subsidiary were involved in a bribery scheme related to the construction of a nuclear power plant.<sup>19</sup>

- On Nov. 19, 2018, Vantage Drilling International, a Houston-based offshore drilling company, agreed to pay \$5 million to settle charges related to its predecessor violating internal accounting provisions of the FCPA.<sup>20</sup>
- On Sept. 27, 2018, Petroleo Brasileiro S.A., a Brazil-based oil and gas company, agreed to pay \$1.78 billion in a global resolution of a bribery and bid-rigging scheme in which the entity filed false financial statements that misled U.S. investors and concealed the massive scheme.<sup>21</sup>

### Increasing international enforcement and global coordination

There has been a growing international effort to enforce anti-bribery regulations in recent years. As the world becomes more interconnected through business transactions, countries are working together to fight bribery and corruption. In a Nov. 9, 2017 speech by Steven Peikin, co-director of the SEC's Enforcement Division, he stated that "in an increasingly international enforcement environment, the U.S. authorities cannot – and should not – go it alone in fighting corruption." He also said that "the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory ... in the past fiscal year alone, the Commission has publicly acknowledged assistance from nineteen different jurisdictions in FCPA matters."<sup>22</sup> With international communities working together to fight corruption, it is essential to streamline coordination through different organizations and associations.

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<sup>15</sup> "SEC Enforcement Actions: FCPA Cases," SEC, [sec.gov/spotlight/fcpa/fcpa-cases.shtml](https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml); and "Medical Manufacturer Settles Accounting Fraud Charges," SEC, Sept. 28, 2017, [sec.gov/news/press-release/2017-178](https://www.sec.gov/news/press-release/2017-178).

<sup>16</sup> "SEC Enforcement Actions: FCPA Cases," SEC, [sec.gov/spotlight/fcpa/fcpa-cases.shtml](https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml); and "Biomet Charged with Repeating FCPA Violations," SEC, Jan. 12, 2017, [sec.gov/news/pressrelease/2017-8.html](https://www.sec.gov/news/pressrelease/2017-8.html).

<sup>17</sup> See United States v. Total S.A., [justice.gov/criminal-fraud/case/united-states-v-total-sa-court-docket-number-113-cr-239](https://www.justice.gov/criminal-fraud/case/united-states-v-total-sa-court-docket-number-113-cr-239); and United States v. Statoil, ASA, [justice.gov/criminal-fraud/case/united-states-v-statoil-asa-court-docket-number-06-cr-960](https://www.justice.gov/criminal-fraud/case/united-states-v-statoil-asa-court-docket-number-06-cr-960) for examples of cases involving extractive companies.

<sup>18</sup> "Maximizing Anti-Corruption through Disclosures about Payments in Extractive Industries," Georgetown Environmental Law Review, Sept. 26, 2017, [gelr.org/2017/09/26/maximizing-anti-corruption-through-disclosures-about-payments-in-extractive-industries/](https://www.gelr.org/2017/09/26/maximizing-anti-corruption-through-disclosures-about-payments-in-extractive-industries/).

<sup>19</sup> "SEC Enforcement Actions: FCPA Cases," SEC, [sec.gov/spotlight/fcpa/fcpa-cases.shtml](https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml); and "SEC Charges Eletrobras with Violating Books and Records and Internal Accounting Controls Provisions of the FCPA," SEC, Dec. 26, 2018, [sec.gov/enforce/34-84973-s](https://www.sec.gov/enforce/34-84973-s).

<sup>20</sup> "SEC Enforcement Actions: FCPA Cases," SEC, [sec.gov/spotlight/fcpa/fcpa-cases.shtml](https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml); and "Vantage Drilling International Agrees to Settle FCPA Charges," SEC, Nov. 19, 2018, [sec.gov/enforce/34-84617-s](https://www.sec.gov/enforce/34-84617-s).

<sup>21</sup> "SEC Enforcement Actions: FCPA Cases," SEC, [sec.gov/spotlight/fcpa/fcpa-cases.shtml](https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml); and "Petrobras Reaches Settlement with SEC for Misleading Investors," SEC, September 27, 2018, <https://www.sec.gov/news/press-release/2018-215>.

<sup>22</sup> "Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act," SEC, Nov. 9, 2017, [sec.gov/news/speech/speech-peikin-2017-11-09](https://www.sec.gov/news/speech/speech-peikin-2017-11-09).

The U.N. Convention Against Corruption ([unodc.org/unodc/en/corruption/uncac.html](https://www.unodc.org/unodc/en/corruption/uncac.html)) and the Organisation for Economic Co-operation and Development ([oecd.org](https://www.oecd.org)) are two bodies that exemplify this cooperation among countries and enforcement bodies.

### U.S. enforcement developments

In November 2017 the DOJ released its FCPA Corporate Enforcement Policy, formalizing a 2016 FCPA pilot program by announcing that when a company self-reports, fully cooperates and timely remediates, DOJ will presume a declination is warranted.<sup>23</sup> This program was intended to bring transparency and accountability to FCPA investigations by providing written guidance that explains how companies could receive credit for self-disclosure and cooperation.

In May 2018, the DOJ announced its Policy on Coordination of Corporate Resolution Penalties. It often happens that multiple authorities investigate the same company for the same violation because the violation falls under several categories. The new policy discourages subjecting companies to multiple investigations for the same conduct through coordination among these different enforcement authorities. The DOJ hopes that this policy will promote fairness and cooperation among these different authorities and between the authorities and companies.<sup>24</sup>

### Use of disgorgement by regulators

Disgorgement is a tool the SEC uses to deprive wrongdoers of their ill-gotten gains. It is meant to be a calculation of illegally obtained profits and gains that are then disgorged and paid to the SEC by the company alleged to have violated the FCPA. Historically, the SEC has disgorged profits dating to the start

of the alleged violation and, in many cases, years prior to the investigation. However, in June 2017, the U.S. Supreme Court ruled in *Kokesh v. SEC* that the SEC's disgorgement remedy was a penalty and thus subject to the five-year statute of limitations.<sup>25</sup> This has significantly affected the SEC's ability to recover ill-gotten gains. Since this ruling, the SEC has focused on trying to move cases forward more quickly and is likely to enter into tolling agreements when possible with companies to voluntarily extend the statute of limitations.

### Use of corporate monitors

In 2018, the DOJ issued guidance on the selection and use of corporate monitors. A monitor is an independent third party who assesses and monitors a company's adherence to an agreement's compliance requirements. These requirements are designed to reduce the risk of another violation by the company. On Oct. 11, 2018, the DOJ issued a memorandum highlighting the department's shift from the use of corporate monitorships to specific periodic reviews and reporting requirements for companies involved in misconduct.<sup>26</sup> The memo provided new guidance on corporate monitorships, including the following directives:

- A monitor will not be necessary for many corporate criminal resolutions.
- Monitors will only be necessary where there is a demonstrated need for, and a clear benefit to be derived from, a monitorship relative to the projected costs and burdens.

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<sup>23</sup> "9-47.120 - FCPA Corporate Enforcement Policy," U.S. Department of Justice, [justice.gov/criminal-fraud/file/838416/download](https://www.justice.gov/criminal-fraud/file/838416/download).

<sup>24</sup> Policy on Coordination of Corporate Resolution Penalties, U.S. Department of Justice, May 9, 2018, [justice.gov/opa/speech/file/1061186/download](https://www.justice.gov/opa/speech/file/1061186/download); and "2018 Mid-Year FCPA Update," Gibson Dunn, July 9, 2018, [gibsondunn.com/2018-mid-year-fcpa-update/](https://www.gibsondunn.com/2018-mid-year-fcpa-update/).

<sup>25</sup> *Kokesh v. Securities and Exchange Commission*, Supreme Court of the United States, October 2016, [supremecourt.gov/opinions/16pdf/16-529\\_1426.pdf](https://www.supremecourt.gov/opinions/16pdf/16-529_1426.pdf); and "2018 Mid-Year FCPA Update," Gibson Dunn, July 9, 2018, [gibsondunn.com/2018-mid-year-fcpa-update/](https://www.gibsondunn.com/2018-mid-year-fcpa-update/).

<sup>26</sup> "Selection of Monitors in Criminal Division Matters," U.S. Department of Justice, Criminal Division, Oct. 11, 2018, [justice.gov/criminal-fraud/file/1100366/download](https://www.justice.gov/criminal-fraud/file/1100366/download).

- Factors to be considered when deciding if a monitor is necessary to include:
  - Whether the misconduct at issue was pervasive across the business organization
  - Whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems
  - Whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future
  - Whether changes in corporate culture and/or leadership are adequate to safeguard against a recurrence of misconduct
  - The particular regions and industry in which the company operates and the nature of the company's clientele.

### Commitment to individual accountability

In recent years, the DOJ and the SEC both have expressed their commitment to holding individuals accountable for corporate misconduct when the facts and the law support doing so. They have also stated that they consider individual liability in every case they investigate. On Sept. 9, 2015, the DOJ published the "Individual Accountability for Corporate Wrongdoing" memorandum authored by Sally Yates, then deputy attorney general (the Yates memo), stating that individual accountability is vital to combat corporate misconduct.<sup>27</sup> On Nov. 29, 2018, former Deputy Attorney General Rod Rosenstein revised the Yates memo to address that the DOJ will (1) continue to focus on individuals in its investigations, (2) end the all-or-nothing approach to obtaining cooperation credit and permit companies to receive credit for cooperation if they identify individuals who were involved in or caused the criminal conduct, and (3) permit greater flexibility and discretion in awarding cooperation credit in civil cases.<sup>28</sup>

Additionally, prosecutors from the DOJ's FCPA Unit have begun charging non-FCPA crimes such as money laundering, mail and wire fraud, Travel Act violations, tax violations and false statements in addition to or instead of FCPA charges. This allows the FCPA Unit to investigate a larger array of illegal or unlawful transactions that may be tied to bribery and corruption.

### Recent cases

Following are summaries of a few example cases involving FCPA violations and the resulting fines and penalties assessed:

#### **Case No. 1: Panasonic Avionics Corporation**

On Dec. 18, 2018, the SEC announced a settled cease-and-desist proceeding with Paul A. Margis, the former CEO of Panasonic Avionics Corporation (PAC). PAC is a U.S. subsidiary of Panasonic, the Japanese electronics company. The SEC alleged that Margis authorized \$1.76 million in payments to three third parties, one of whom was a government official actively negotiating with PAC for a post-retirement position while negotiating with PAC for a major contract extension on behalf of his state-owned airline employer. Margis agreed to pay a civil penalty of \$75,000 to resolve the charges that he circumvented PAC's internal controls, falsified books and records, caused Panasonic to violate the FCPA's accounting provisions and misled external auditors. Further, Panasonic and PAC paid more than \$280 million in an April 2018 DOJ/SEC FCPA resolution.<sup>29</sup>

#### **Case No. 2: Stryker Corporation**

On Sept. 28, 2018, the SEC announced a settled cease-and-desist proceeding against Stryker Corporation, a medical technology company based in Michigan. The allegations related to violations of the FCPA's accounting provisions, including the allegation that Stryker's internal controls were insufficient to detect the risk of

<sup>27</sup> "Individual Accountability for Corporate Wrongdoing," U.S. Department of Justice, Sept. 9, 2015, [justice.gov/archives/dag/file/769036/download](https://www.justice.gov/archives/dag/file/769036/download).

<sup>28</sup> "The 'Yates Memo' Revisited: Pursuing Individuals Remains a DOJ Top Priority – Senior Management and Members of Boards of Directors in Focus," The National Law Review, Dec. 4, 2018, [natlawreview.com/article/yates-memo-revisited-pursuing-individuals-remains-doj-top-priority-senior-management](https://www.natlawreview.com/article/yates-memo-revisited-pursuing-individuals-remains-doj-top-priority-senior-management).

<sup>29</sup> "The Securities and Exchange Commission in the Matter of Paul A. Margis," SEC, Dec. 18, 2018, [sec.gov/litigation/admin/2018/34-84849.pdf](https://www.sec.gov/litigation/admin/2018/34-84849.pdf); "SEC Charges Former Panasonic Executives," SEC, Dec. 18, 2018, [sec.gov/news/press-release/2018-290](https://www.sec.gov/news/press-release/2018-290); and "Panasonic Charged with FCPA and Accounting Fraud Violations," SEC, April 30, 2018, [sec.gov/news/press-release/2018-73](https://www.sec.gov/news/press-release/2018-73).

improper payments in India, China and Kuwait. To resolve these FCPA accounting allegations, and without admitting to or denying the SEC's findings, Stryker consented to the entry of a cease-and-desist order and agreed to pay a \$7.8 million civil penalty. As this was Stryker's second FCPA resolution, the company was also required to retain an independent compliance consultant for an 18-month term.<sup>30</sup>

### **Case No. 3: Elbit Imaging Ltd.**

On March 9, 2018, the SEC settled a cease-and-desist proceeding for alleged FCPA books and records and internal controls violations with Israel-based holding company and issuer Elbit Imaging. The SEC alleged that between 2007 and 2012, Elbit and an indirect subsidiary improperly paid \$27 million to three individuals in connection with real estate projects in Romania and the United States. Without admitting to or denying the allegations, Elbit agreed to pay a \$500,000 civil penalty.<sup>31</sup>

### **Case No. 4: Kinross Gold Corporation**

On March 26, 2018, the SEC settled a cease-and-desist order against Canadian gold mining company Kinross Gold. In 2010, Kinross acquired two subsidiaries that operated mines in Mauritania and Ghana but was slow to implement anticorruption compliance controls. Further, Kinross allegedly failed to respond to multiple internal audits flagging the inadequate controls. Without admitting to or denying the allegations, Kinross agreed to pay a \$950,000 penalty to resolve the charges.<sup>32</sup>

### **Case No. 5: Fresenius Medical Care AG & Co KGaA (FMC)**

On March 29, 2019, the SEC settled a cease-and-desist order against FMC related to its alleged violations of the FCPA across multiple countries for nearly a decade. The order indicated that FMC made improper payments through a variety of schemes, such as channeling bribes through a system of third-party intermediaries, using fake consulting contracts, and falsifying documents. Further, despite having known red flags related to corruption since the early 2000s, FMC did not devote significant resources or attention to compliance. In total, FMC paid nearly \$30 million in bribes to foreign government officials. According to its settlement agreement, FMC agreed to pay \$231 million to resolve SEC and DOJ investigations.<sup>33</sup>

## How practitioners can support companies with compliance programs and investigations of FCPA-related matters

### Performing due diligence related to third-party intermediaries

Third parties are a source of significant risk – 90% of reported FCPA cases involve third-party intermediaries.<sup>34</sup> However, the use of third-party intermediaries often is essential to doing business. To mitigate risk in these relationships, companies should make appropriate inquiries to determine whether existing or prospective third parties appear to be honest and can be reasonably expected to refrain from corrupt practices. The higher the risk of corrupt practices, the broader and deeper third-party due diligence should be.

The DOJ and SEC have provided some guiding principles that should apply as part of risk-based due diligence, including the following:<sup>35</sup>

- Companies should understand the qualifications and associations of its third-party partners, including business reputation and relationship with foreign officials.
- Companies should understand the business rationale for including the third party in the transaction.
- Companies should undertake some form of ongoing monitoring of third-party relationships.

<sup>30</sup> "The Securities and Exchange Commission in the Matter of Stryker Corporation," SEC, Sept. 28, 2018, [sec.gov/litigation/admin/2018/34-84308.pdf](https://www.sec.gov/litigation/admin/2018/34-84308.pdf); and "SEC Charges Stryker a Second Time for FCPA Violations," SEC, Sept. 28, 2018, [sec.gov/news/press-release/2018-222](https://www.sec.gov/news/press-release/2018-222).

<sup>31</sup> "The Securities and Exchange Commission in the Matter of Elbit Imaging LTD.," SEC, March 9, 2018, [sec.gov/litigation/admin/2018/34-82849.pdf](https://www.sec.gov/litigation/admin/2018/34-82849.pdf); and "SEC Charges Elbit Imaging Ltd. With Violating Books and Records and Internal Accounting Controls Provisions of the FCPA," SEC, March 9, 2018, [sec.gov/enforce/34-82849-s](https://www.sec.gov/enforce/34-82849-s).

<sup>32</sup> "The Securities and Exchange Commission in the Matter of Kinross Gold Corporation," SEC, March 26, 2018, [sec.gov/litigation/admin/2018/34-82946.pdf](https://www.sec.gov/litigation/admin/2018/34-82946.pdf); and "Kinross Gold Charged with FCPA Violations," SEC, March 26, 2018, [sec.gov/news/press-release/2018-47](https://www.sec.gov/news/press-release/2018-47).

<sup>33</sup> "The Securities and Exchange Commission in the Matter of Fresenius Medical Care AG & Co. KGaA," SEC, March 29, 2019, [sec.gov/litigation/admin/2019/34-85468.pdf](https://www.sec.gov/litigation/admin/2019/34-85468.pdf); "SEC Charges Medical Device Company with FCPA Violations," SEC, March 29, 2018, [sec.gov/news/press-release/2019-48](https://www.sec.gov/news/press-release/2019-48).

<sup>34</sup> "Third-Party Intermediaries," Foreign Corrupt Practices Act Clearinghouse a collaboration with Sullivan & Cromwell LLP, Stanford Law School, accessed June 6, 2019, [fcpa.stanford.edu/chart-intermediary.html](https://fcpa.stanford.edu/chart-intermediary.html).

<sup>35</sup> See footnote 2.

Additionally, companies should conduct reputation checks, require third parties to complete and attest to a due-diligence questionnaire, and request certifications from third parties that state that they understand and will adhere to anticorruption policies and procedures as well as applicable laws and regulations. With the changing technological landscape and increased international interconnectivity, it is no longer adequate for companies to perform simple database checks. Practitioners can provide support to companies by performing enhanced, risk-based due diligence and background checks on third parties and by developing policies and procedures around such processes.<sup>36</sup>

### Developing, enhancing, and supporting corporate compliance programs

Effective compliance programs are tailored to the company's specific business and to risks associated with that business. A well-constructed, thoughtfully implemented and consistently enforced compliance and ethics program helps prevent, deter, detect, remediate and report misconduct, including FCPA violations. In 2017, the DOJ's Fraud Section published guidance, *Evaluation of Corporate Compliance Programs*, on how it would evaluate the effectiveness of a corporate compliance program in the context of a criminal matter, providing analysis of its expectations in areas such as analysis and remediation of underlying misconduct, risk assessment, third-party management, and training and communications, among others. The guidance was updated by the DOJ in April 2019.<sup>37</sup>

The DOJ and SEC have indicated that they consider the commitment of corporate leaders to a "culture of compliance" critical and expect to see that this commitment is reinforced and implemented by middle managers and employees at all levels of a business. Compliance should begin with the board of directors and senior executives setting the proper tone for the rest of the company.

A company's office of chief compliance officer (CCO) is increasingly crucial and multinational companies are intensifying their commitment and dedicating resources to the CCO's office due to the impact of FCPA and other risks faced in high-risk markets. Practitioners can support the CCO's office by assisting with the development of policies, procedures, and reporting mechanisms to prevent, deter, and detect transactions in a timely manner before it becomes a pervasive issue. Practitioners can also support the development of bribery- and corruption-related training programs and the delivery of such programs to employees.

### Investigating potential violations

To mitigate the monetary and reputational impact of FCPA violations, it is imperative that a company investigate potential violations at the earliest point possible. By initiating internal investigations when a company becomes aware of potential misconduct, it can get ahead of messaging, determine the extent and reach of the potential violation, and mitigate the impact of such violation. If it is determined that a violation has occurred, a company can also be positively impacted by self-disclosure and cooperation with the SEC and DOJ.

Practitioners can support companies in different manners related to potential violations, including, but not limited to: assisting with the internal investigation, developing enhanced policies, procedures, and internal controls to mitigate risk going forward, and developing policies and procedures for detecting and investigating potential violations. Practitioners can also provide services to assist companies in their reporting to the SEC or DOJ.

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<sup>36</sup> In some jurisdictions, access to databases necessary for background checks may require subscriptions and/or specific licenses.

<sup>37</sup> *Evaluation of Corporate Compliance Programs*, U.S. Department of Justice, Criminal Division, last modified April 2019, [justice.gov/criminal-fraud/page/file/937501/download](https://www.justice.gov/criminal-fraud/page/file/937501/download).

While each investigation is unique to its specific circumstances, investigations of potential FCPA violations may include:

- Related-party mapping
- Keyword searches of vendor accounts
- Review of a chart of accounts and analysis of accounts identified where bribes or kickbacks may be concealed
- Email searches and review of communications
- Analysis of contracts and associated records (shipping documents, for example)
- Review and analysis of employee expense reports
- Interviews of relevant personnel
- Review of payments to third-party intermediaries, tracing such funds, and analysis of the business purpose of such payments

## Red flag indicators of potential FCPA violations

A “red flag” is a fact, event, set of circumstances or other information that may indicate a potential compliance concern for illegal or unethical business conduct, particularly with regard to corrupt practices and non-compliance with anti-corruption laws. Red flags may be indicators of potential current or future anticorruption noncompliance and should be evaluated to understand any actual risks and to take measures to mitigate such risks. These factors include, but are not limited to, poor reputation, ties to government and public officials, questionable or unusual circumstances, unusual compensation, questionable accounting or invoicing, and insufficient capabilities. Examples of red flags follow; however, it is not an exhaustive list.<sup>38</sup>

### Poor reputation

- The transaction occurs in, or the party is located in, a country known for widespread corruption. (Refer to the “Corruption Perception Index” published by Transparency International.)<sup>39</sup>
- The party has a poor business reputation or a reputation for unethical conduct, including a history of improper payment practices, criminal enforcement actions or civil actions, or tendency to make prohibited payments or facilitation of payments to officials.
- Other companies have terminated the party for improper conduct.
- Information provided about the party or its services or principals is not supported by corroborating documents or otherwise verifiable by credible data.

### Ties to government and public officials

- The party is retained primarily for its connections to public officials and is recommended by a public official, his or her family member, or his or her close associates.
- The party is a company with an owner, major shareholder, or executive manager who is a public official or has financial or business ties, relationships, or associations with public officials.
- The party makes large or frequent political contributions or makes references to political or charitable donations as a way of influencing official action.

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<sup>38</sup> “Bribery and Corruption Red Flags,” Lockheed Martin, 2018, [lockheedmartin.com/content/dam/lockheed-martin/eo/documents/ethics/corruption-red-flags.pdf](https://lockheedmartin.com/content/dam/lockheed-martin/eo/documents/ethics/corruption-red-flags.pdf).

<sup>39</sup> “Corruption Perceptions Index” website, Transparency International, accessed June 6, 2019, [transparency.org/research/cpi/overview](https://transparency.org/research/cpi/overview).

- The party provides lavish or recurring gifts or entertainment to public officials or insists on dealing with public officials without the participation of other individuals within the company.
- The party engages in government services that involve
  - requests for payment in excess of the amount usually required;
  - invoices that lack detail, appear unofficial, or seem too expensive;
  - large sales with high unit price, low frequency; or
  - requests for unusual methods of payment.

#### Questionable or unusual circumstances

- There is a lack of a written agreement for consulting services.
- The party fails to cooperate with the due diligence process or refuses to answer questions or make representations and warranties.
- The party requests anonymity or insists that their identity remain confidential or that the relationship remain secret.
- The party makes any suggestion that anticorruption compliance policies need not be followed or that otherwise illegal conduct is acceptable because it is the norm or customary in a particular country.
- The cost of services performed by the third party is suspiciously higher than competitors or companies in related industries.
- The party requests approval of a significantly excessive budget or unusual expenditures.

#### Unusual compensation and questionable accounting or invoicing

- Fees, commissions, or volume discounts provided are unusually high compared to the market rate.
- Compensation arrangements are based on a success fee or bonus.
- Substantial up-front payments or unusual advance payments are requested.
- There are requests for payments in third countries or through third parties or shell companies, in a jurisdiction outside the home country that has no relationship to the transaction or the entities involved in the transaction (or when the requested country is an offshore financial center).
- There are requests for payments to P.O. boxes or nonexistent addresses.
- There are requests that payments be made to two or more accounts.
- There are requests for payments in cash, cash equivalent, bearer instruments or other anonymous payments.
- There is a refusal to properly document expenses by not recording or incorrectly recording transactions or other failures to follow accounting procedures and policies.
- Expense reimbursements are at or just below the limit allowed by company policy or payments are made outside of authorization policies.
- There is evidence of over-invoicing, false or backdated invoices, consecutively numbered invoices, or duplicate invoices.
- There are general-purpose or miscellaneous accounts with irregular transactions or no apparent legitimate business purpose.
- There are one-time payments to vendors and other third parties.

### Insufficient capabilities

- The party lacks the staff, facilities or expertise to perform substantial work.
- The party lacks relevant industry/technical experience or any track record with the product, service, field, or industry.
- The party is in a different line of business than that for which it has been engaged.
- The party's business address is a mail drop location, virtual office, or small private office that could not hold a business as large as is claimed.
- The party's plan for performing the work is vague and/or suggests a reliance on contacts or relationships.
- The party is merely a shell company incorporated in an offshore jurisdiction.

### Practice tips

CPAs should be familiar with the FCPA and its implications for their clients. Practitioners can support their clients by sharing their knowledge of this area, both to educate them as well as support them when issues may arise. CPAs should be aware of business dealings, transactions, and operations that their clients conduct globally to understand potential risks related to bribery and corruption.

Due to the continued trend toward global operations, the risks that companies face related to bribery and corruption will only continue to grow. CPAs can provide services to companies that help them address these challenges and risks. At a minimum, CPAs should be generally knowledgeable regarding the following:

- Bribery and corruption red flags
- Characteristics of an effective and robust compliance program
- Types of internal controls that companies operating internationally should maintain

There are multiple ways that CPAs can support clients with bribery and corruption matters, including the following:

- Performing due diligence related to third-party intermediaries
- Developing, enhancing, and supporting corporate compliance programs
- Investigating potential violations

While CPAs can provide services directly to companies, a CPA can also directly support the regulatory bodies, including the SEC and DOJ. For larger or specialized investigations, the SEC and DOJ may look to CPA consultants to assist with their investigations, including document and transaction review and with calculations.

### Additional resources for further information

The SEC and DOJ released a *Resource Guide on the FCPA* in November 2012 to provide helpful information to enterprises of all shapes and sizes.<sup>40</sup> The guide addresses who and what is covered by the FCPA's provisions, the definition of a "foreign official," the nature of facilitating payments, and more topics regarding the FCPA, its provisions, and enforcement.

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<sup>40</sup> See footnote 2.