

UNITED STATES

● Active enforcement

10.4% of global exports

Investigations and cases

In the period 2016-2019, the United States opened at least 72 investigations,¹ commenced 24 cases and concluded 130 cases with sanctions.

The Department of Justice (DoJ) and Securities and Exchange Commission (SEC), the principal enforcement agencies, together recovered more than US\$1 billion in penalties in each of the four years, with the total exceeding US\$2 billion in three of those years.² In recent years, the SEC has recovered more in disgorgement than in civil penalties.³ The DoJ and SEC had 11 instances of coordinating corporate foreign bribery resolutions from 2016 to 2019, compared to only two such instances prior to 2007.⁴ After a sharp decrease in resolved cases and penalties in 2017, enforcement activity under the Foreign Corrupt Practices Act (FCPA), the primary foreign bribery enforcement tool, rebounded in 2018 and 2019.⁵

Brazil, China and Venezuela were the focus of many enforcement actions during this period. At least 15 actions involved corruption in Brazil, resulting in DoJ and SEC sanctions against well-known multinationals such as **Samsung Heavy Industries**, **Walmart** and **Rolls-Royce**.⁶ At least 14 enforcement actions involved China, as some of the world's largest companies violated the FCPA, including **Ericsson**, **Deutsche Bank**, Walmart and **GlaxoSmithKline**.⁷ At least nine enforcement actions concerned corrupt activity in Venezuela, with most cases involving the payment of bribes to officials at the national oil company, **Petróleos de Venezuela S.A.**. The DoJ has criminally charged more than two dozen individuals in its ongoing investigation of the company.⁸

The period 2016-2019 saw several noteworthy foreign bribery case resolutions. In September 2018, **Petrobras** entered into agreements with US and Brazilian authorities and paid a total of US\$1.78 billion in penalties for allegedly facilitating the payment of millions of dollars in bribes to politicians and political parties in Brazil.⁹ In December 2019, Swedish telecommunications company **Ericsson** agreed to pay more than US\$1 billion in civil and criminal fines to resolve an investigation into tens of millions of dollars in improper payments made to government officials in China, Djibouti, Indonesia, Kuwait and Vietnam to win contracts.¹⁰ Ericsson's

¹ The actual number of foreign bribery investigations opened during this period is likely higher, as data is not reported consistently and not published in a central location. See "Transparency of Enforcement Data" for more information.

² Annual totals as reported by *FCPA Blog*, 2016, <https://fcpublog.com/2017/1/3/the-2016-fcpa-enforcement-index/>; 2017, <https://fcpublog.com/2018/1/2/2017-fcpa-enforcement-index/>; 2018, <https://fcpublog.com/2019/1/2/2018-fcpa-enforcement-index/>; 2019, <https://fcpublog.com/2020/01/02/2019-fcpa-enforcement-index/>

³ https://www.cov.com/-/media/files/corporate/publications/2020/01/2019_year_in_review_top_antirruption_enforcement_trends_and_developments.pdf, p. 4.

⁴ <https://www.velaw.com/insights/five-less-predictable-predictions-for-fcpa-enforcement-in-2020/>

⁵ <https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-fcpa-penalties-on-track-for-potential-record-in-2019>

⁶ <https://www.justice.gov/opa/pr/samsung-heavy-industries-company-ltd-agrees-pay-75-million-global-penalties-resolve-foreign>; <https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsiary-agree-pay-137-million-resolve-foreign-corrup>; http://s3.amazonaws.com/fcmd/documents/documents/000/004/518/original/Rolls_Royce_-_Bribery_and_Corruption_Global_Set_DJPR.pdf

⁷ <https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case>; <https://www.sec.gov/enforce/34-86740-s>; For specific reference to China, <https://www.sec.gov/litigation/admin/2019/34-86740.pdf>, p.6; <https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsiary-agree-pay-137-million-resolve-foreign-corrup>; http://s3.amazonaws.com/fcmd/documents/documents/000/004/410/original/GlaxoSmithKline_-_China_Bribery_SECPR.pdf?1475603031

⁸ <https://www.justice.gov/opa/pr/texas-businessman-sentenced-70-months-prison-role-venezuela-bribery-scheme-and-obstruction>

⁹ <https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations>; <https://fcpublog.com/2018/9/28/petrobras-smashes-the-top-ten-list-and-we-explain-why/>

¹⁰ <https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case>

Egyptian subsidiary pleaded guilty to one count of conspiracy to violate the FCPA.¹¹

Swedish telecom **Telia Company AB** agreed to a global foreign bribery resolution in 2017.¹² The same bribery investigation also caught Russian telecom company **Mobile TeleSystems PJSC (MTS)** and Dutch telecom company **VimpelCom Limited**. In March 2019, MTS agreed to pay a total of US\$850 million to resolve civil and criminal FCPA charges,¹³ and in February 2016, VimpelCom entered into a global civil/criminal settlement worth more than US\$795 million.¹⁴ As with Telia, MTS and VimpelCom's deals also included a guilty plea by their Uzbek subsidiaries.¹⁵

The FCPA is enforced disproportionately against companies not based in the US. Non-US companies have fared worse under the Act, both in terms of the average cost of resolving actions and of post-settlement obligations, despite the fact that since 1978, the DOJ and the SEC have brought more enforcement actions against US companies. In 2018 and 2019, there were more enforcement actions against foreign companies than against US companies, and of the FCPA cases brought from 2001 to 2012, around half involved foreign companies.¹⁶

Recent developments

The DOJ adopted a new, more coordinated approach to assessing monetary punishments in foreign bribery actions, involving multiple enforcement

authorities, domestically and abroad. In May 2018, the DOJ instructed prosecutors handling corporate misconduct cases to “consider the totality of fines, penalties and/or forfeiture imposed by all Department components, as well as other law enforcement agencies and regulators”, in order to “avoid the unnecessary imposition of duplicative fines, penalties and/or forfeiture against the company.”¹⁷ This policy resulted in settlements in which the US government credited and apportioned penalties. For example, in a June 2019 foreign bribery settlement with UK-based oil and gas services company TechnipFMC, the DOJ credited the company with the roughly US\$214 million it paid to settle a parallel Brazilian investigation.¹⁸

In 2016, the DOJ adopted a policy of terminating some FCPA cases through declinations for companies that voluntarily self-report FCPA violations, fully cooperate with investigating agencies, remediate conditions at the company, and pay disgorgement, forfeiture or restitution. The DOJ has followed up with a practice known as “declinations with disgorgement”, meaning the DOJ drops charges if the company agrees to pay “disgorgement, forfeiture and/or restitution”.¹⁹ By the end of 2019, 13 cases had been resolved in this manner.²⁰ In 2019, the DOJ issued two declinations involving alleged misconduct by senior leadership in the company. In recent years, the SEC has recovered more in disgorgement than in civil penalties.²¹

In March 2019, the Commodity Futures Trading Commission Division of Enforcement announced it

¹¹ <https://www.justice.gov/usao-sdny/press-release/file/1224266/download>

¹² <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsiary-enter-global-foreign-bribery-resolution-more-965>; <https://www.sec.gov/news/press-release/2017-171>

¹³ <https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsiary-enter-resolutions-850-million-department>

¹⁴ <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>

¹⁵ Plea agreements in *U.S. v. Kolorit Dizayn Ink LLC*, <https://www.justice.gov/opa/press-release/file/1141621/download> and *U.S. v. Unitel LLC*, <https://www.justice.gov/opa/file/827181/download>

¹⁶ <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1087&context=mbelr>, pp.355-356; <http://fcpaprofessor.com/fcpa-enforcement-actions-foreign-companies-oecd-convention-peer-countries-4/>

¹⁷ US Department of Justice, “Policy on Coordination of Corporate Resolution Penalties,” 9 May 2018. <https://www.justice.gov/opa/speech/file/1061186/download>

¹⁸ <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsiary-agree-pay-over-296-million-global-penalties-resolve>

¹⁹ <https://www.justice.gov/criminal-fraud/file/838416/download> (updated March 2019); US Department of Justice, “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance,” 5 April 2016, <https://www.justice.gov/archives/opa/blog-entry/file/838386/download>, p.2.

²⁰ <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>

²¹ Covington, “2019 Year in Review: Top Anti-Corruption Enforcement Trends and Developments,” Winter 2020, p.4. https://www.cov.com/-/media/files/corporate/publications/2020/01/2019_year_in_review_top_anticorruption_enforcement_trends_and_developments.pdf

was expanding its scope to identify conduct that violates the FCPA, as well as US commodity trading law, as commodity market violations are sometimes facilitated through bribery.²² The agency will coordinate with the DoJ and the SEC to address conduct that potentially violates the FCPA.

Increasingly, US enforcement authorities are pairing FCPA charges against the bribe payer with non-FCPA charges against the bribe recipient, who under established case law cannot be charged under the FCPA, but can be charged with other criminal offences associated with the receipt of those bribes – most frequently money laundering.²³ Another significant target of FCPA-related charges are so-called “facilitators” who allegedly participated in the transfer of corrupt proceeds, but for jurisdictional, evidentiary or other reasons are charged with money laundering rather than FCPA counts. Examples of each abound in the 2019 enforcement statistics.²⁴

To expand the enforcement armoury against foreign officials, the US Congress is considering a proposed Foreign Extortion Prevention Act, which would impose criminal liability on any foreign official who “corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value” to influence an official act.²⁵

The US Congress is also considering the Corporate Transparency Act of 2019, which would require corporations and limited liability companies to disclose beneficial ownership information to the US Department of the Treasury’s Financial Crimes Enforcement Network at the time they are formed and every year subsequently.²⁶

There were four notable court decisions directly bearing on FCPA enforcement. The first was a June 2017 ruling by the US Supreme Court that the SEC has a five-year window for seeking the penalty of disgorgement in all corporate enforcement actions.²⁷ The second was in February 2018 when the Supreme Court held that whistleblowers must report alleged corporate misconduct directly to the SEC to qualify for the enhanced anti-retaliation protections under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.²⁸ The third was an August 2018 ruling by the US Court of Appeals for the Second Circuit that a non-resident foreign national cannot be charged under the FCPA unless the government can prove the individual acted either as an “agent” of an American company or while physically present in the United States.²⁹ In the fourth, in September 2019, a federal judge in New York ruled that investors in a Canadian mining company were victims of a bribery scheme involving **Och-Ziff Capital Management Group** (Och-Ziff Case), and were therefore entitled to restitution for their losses. If this ruling is not overturned and the underlying legal principle is adopted in other courts, it could complicate efforts to settle FCPA cases if companies face uncertain legal exposure to victims’ restitution claims stemming from the case.³⁰

Transparency of enforcement information

The US DoJ publishes partial FCPA criminal enforcement statistics in its annual publication “The Fraud Section Year in Review”.³¹ These statistics do not include data on investigations,³² nor do they

²² Sidley Austin LLP, “CFTC Announces Enforcement Advisory for Commodity Exchange Act Violations Involving Foreign Corrupt Practices,” 11 March 2019, <https://tinyurl.com/v4kpau6>

²³ <https://www.gibsondunn.com/2019-year-end-fcpa-update/>

²⁴ <https://www.gibsondunn.com/2019-year-end-fcpa-update/>

²⁵ H.R. 4140. <https://www.congress.gov/bill/116th-congress/house-bill/4140>

²⁶ H.R. 2513. <https://www.congress.gov/bill/116th-congress/house-bill/2513>

²⁷ *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), https://www.supremecourt.gov/opinions/16pdf/16-529_i426.pdf

²⁸ *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 2018, https://www.supremecourt.gov/opinions/17pdf/16-1276_b0nd.pdf

²⁹ *U.S. v. Hoskins*, No. 16-1010 (2nd Cir. 2018), <https://cases.justia.com/federal/appellate-courts/ca2/16-1010/16-1010-2018-08-24.pdf>

³⁰ <https://www.velaw.com/insights/new-ruling-in-och-ziff-case-could-lead-to-a-billion-dollar-restitution-award-and-throws-doubt-on-benefits-of-settling-fcpa-cases/>

³¹ <https://www.justice.gov/criminal-fraud/file/1245236/download>; <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>

³² The DoJ and the SEC do not disclose the number of closed and ongoing FCPA investigations, when investigations commenced or concluded, and whether, when or why agencies decline to pursue enforcement action. Publicly traded companies sometimes disclose information about

identify numbers of enforcement actions resulting in DPAs, non-prosecution agreements or acquittals. The SEC publishes a list of enforcement actions by calendar year.³³ The US government does not publish statistics on mutual legal assistance (MLA) requests received and made.³⁴

The DoJ and the SEC maintain centralised FCPA information web portals that list cases where charges have been filed and public cases that have been resolved.³⁵ They also provide enforcement-related news,³⁶ explain the law and link to the text of the statute.³⁷ Both agencies publicly announce the filing of new enforcement cases and resolutions of closed cases, posting summaries and legal documents on the internet.

US trial and appellate court pleadings, decisions and transcripts can be obtained for a fee on the Public Access to Court Electronic Records (PACER) online repository.³⁸

Beneficial ownership transparency

The US lacks a centralised database of corporate beneficial ownership information, as well as any sort of centralised national register of company information. The SEC collects some beneficial ownership information, but only for publicly traded companies and only in certain circumstances. At the state level, where the process of company formation

and registration takes place, state governments collect minimal ownership data.³⁹

Companies wishing to do business with the US government must register in a public database called the System for Award Management (SAM).⁴⁰ The information in SAM is self-reported by the company and is not reviewed or verified by the government.⁴¹ Companies need only disclose their “highest-level” and “immediate” owners,⁴² who may not be their beneficial owners. Subcontractors are not required to register in the SAM database.⁴³

The US also lacks a central register of beneficial ownership of trusts.⁴⁴ The draft Corporate Transparency Act does not extend to trusts, but does require the Comptroller General of the United States to report to Congress on whether other legal entities, including trusts, should be required to disclose their beneficial owners.

For beneficial ownership data, US authorities must rely on a patchwork of sources: state company registries, financial institutions, the SEC, the Internal Revenue Service and the SAM database. Access to some of these sources requires a subpoena, and the data is not guaranteed to reflect the true beneficial owner(s) of a particular company.

Inadequacies in legal framework

The United States does not commonly seek restitution for the victims of foreign bribery in FCPA

commenced and closed investigations and pending cases in public financial filings required by US securities law. These filings are posted on the SEC's Electronic Data Gathering, Analysis and Retrieval (EDGAR) website. US Securities and Exchange Commission, “EDGAR - Search and Access”, <https://www.sec.gov/edgar/search-and-access>

³³ <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>

³⁴ For example, <https://www.justice.gov/opa/pr/samsung-heavy-industries-company-ltd-agrees-pay-75-million-global-penalties-resolve-foreign>

³⁵ <https://www.justice.gov/criminal-fraud/enforcement-actions>; <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>; <https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml>

³⁶ <https://www.justice.gov/news>; <https://www.sec.gov/news/pressreleases>

³⁷ <https://www.justice.gov/criminal-fraud/statutes-regulations>

³⁸ Currently 10 cents per page. Administrative Office of the US Courts, “PACER – Public Access to Court Electronic Records”, <https://www.pacer.gov/>

³⁹ <https://www.gao.gov/assets/710/702890.pdf>, pp.6-7. Most states do not collect, verify or update beneficial ownership information; <https://fas.org/sgp/crs/misc/R45798.pdf>, p.4.

⁴⁰ <https://sam.gov/SAM/>

⁴¹ <https://www.gao.gov/assets/710/702890.pdf>, p.35.

⁴² 48 CFR § 52.204-17 – Ownership or Control of Offeror, <https://www.law.cornell.edu/cfr/text/48/52.204-17>

⁴³ <https://www.gao.gov/assets/710/702890.pdf>, p.35.

⁴⁴ <https://fas.org/sgp/crs/misc/R45798.pdf>, p.15; https://www.transparency.org/files/content/publication/2015_BOCountryReport_US.pdf, p.2.

enforcement actions. If restitution is ordered, it is usually in cases involving individual, not corporate, defendants, when there are other criminal violations, such as embezzlement and fraud.⁴⁵ However, there have been at least three FCPA cases in which a corporate defendant was ordered to provide compensation, as well as two cases involving individuals.⁴⁶ This issue received renewed attention in September 2019 in the Och-Ziff case previously mentioned. There is debate whether this ruling – which has been challenged – will help or hinder foreign bribery enforcement and whether it will incentivise US enforcement authorities to include known potential victims in foreign bribery settlement processes.⁴⁷

The lack of a centralised company register and beneficial ownership database remains a problem in the United States. The absence of such resources hampers efforts to crack down on many forms of domestic and international corruption.⁴⁸

Whistleblower protection in the United States is inadequate in several respects. Whistleblower protection laws have loopholes, and agencies responsible for enforcing them do not always have the staffing, resources or even desire to do so. Retaliation or reprisal against whistleblowers remains widespread. Legal protections exist, but only a small fraction of whistleblowers who file retaliation claims ultimately prevail through the legal process.⁴⁹

Inadequacies in enforcement system

US law provides that individuals who blow the whistle on foreign bribery and other corporate wrongdoing may be rewarded with a percentage of

the funds the government recovers.⁵⁰ However, the processing of rewards is very slow. In 2019, the Wall Street Journal attributed this growing delay to an increasing “flood” of award requests and whistleblower tips received by the SEC every year.⁵¹

The United States does not expressly prohibit facilitation (“grease”) payments to foreign officials. However, this exception to the FCPA is interpreted relatively narrowly, and is not regarded as a hindrance to US enforcement efforts.⁵²

Recommendations

- Enhance transparency and accountability by publicly reporting in a centralised location statistics detailing the number of investigations commenced, ongoing and concluded without enforcement action; the reason(s) no action was taken in investigations and cases concluded without enforcement action; the facts the company disclosed and why, based on those facts, no action was taken, in investigations and cases concluded without enforcement action that were initiated by a company disclosure; and, for those cases resolved by non-prosecution and deferred prosecutions agreements, the reasons a particular type of agreement was chosen, its terms and duration, and how the company has satisfied or failed to satisfy those terms
- The DoJ and the SEC should also be required to analyse the deterrent effect of non-prosecution and deferred prosecution agreements and the number of referrals provided to and received from other countries
- Introduce a central public register of beneficial ownership
- Establish and implement guidelines for restitution and compensation to victims in foreign bribery cases, including for indirect or diffuse harm.

⁴⁵ <https://www.velaw.com/insights/five-less-predictable-predictions-for-fcpa-enforcement-in-2020/>

⁴⁶ Those cases were in 1979, 1989, 1990, 2009 and 2010. Richard Messick, Legal Remedies for Victims under US Law, 2016, https://www.justiceinitiative.org/uploads/58dc15ea-f2c9-4bfa-894f-0d007145b230/legal-remedies-5-messick-20160601_1.pdf

⁴⁷ <https://www.velaw.com/insights/new-ruling-in-och-ziff-case-could-lead-to-a-billion-dollar-restitution-award-and-throws-doubt-on-benefits-of-settling-fcpa-cases/>

⁴⁸ <https://www.gao.gov/assets/710/702890.pdf>, p.7.

⁴⁹ <https://www.pogo.org/analysis/2019/03/caught-between-conscience-and-career/>

⁵⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, § 922. <https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>

⁵¹ <https://www.wsj.com/articles/whistleblower-challenges-sec-over-delay-on-award-decision-11556668694>

⁵² <https://fcgablog.com/2019/04/15/uber-grease-payments-and-charitable-giving-gone-wrong/>