Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume I: Global Investigations in the United Kingdom and the United States

Third Edition

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It is published annually as a single volume and is also available online, as an e-book and in PDF format.

The volumes

This Guide is in two volumes.

Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume I is then complemented by Volume II's granular look at the detail of various jurisdictions, highlighting, among other things, where they vary from the norm.

Online

The Guide is available to subscribers at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I of the Guide, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
co-publishing@globalinvestigationsreview.com.

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Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The Guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Volume I of the Guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Volume I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

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In Volume II, local experts from national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition we signalled our intention to update and expand both parts of the book as the law and practice evolved. The Guide continues to expand and extend its reach, in both substantive and jurisdictional terms. For this hardback edition, it has even outgrown its original single-book format; the two original parts of the Guide now have separate covers, although the hard copy of the Guide should still be viewed – and used – as a single reference work. All chapters are, of course, made available online and in other digital formats.

In this third edition, we have revised extant chapters to reflect recent developments. Following the global trend of data privacy law considerations becoming weightier in corporate and government investigations – not least after the EU General Data Protection Regulation became directly applicable in all Member States – we have added a chapter on data protection for Volume I, and we have expanded the scope and number data protection questions in Volume II.

In the United Kingdom, an eagerly awaited Court of Appeal reversal has clarified English law on legal privilege, although it remains out of step with other common law jurisdictions in this regard. In the United States, the Department of Justice modified and permanently adopted its enhanced enforcement FCPA Pilot Program, in the form of the Corporate Enforcement Policy, offering a presumption of significant co-operation credit for companies that self-report, remediate and co-operate. In both the United States and the United Kingdom, the enforcement agencies have experienced significant turnover in senior staff, which will no doubt influence enforcement priorities and activity.

Volume II now covers 21 jurisdictions, including Australia, Canada and Mexico, and we expect subsequent editions to have an even broader jurisdictional scope. As corporate investigations and enforcer co-operation crosses more borders – witness the recent Petrobras, Rolls-Royce and Keppel Offshore international, 'global' settlements – we anticipate Volume II will become an increasingly valuable resource for our readers: the external and in-house legal counsel; compliance officers and accounting practitioners; and prosecutors, regulators and advisers operating in this complex environment.

Finally, *The Practitioner's Guide to Global Investigations* has welcomed Ama A Adams and Tara McGrath to the team of eminent editors who have reviewed the content for this edition.

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Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath
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1

Introduction

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams and Tara McGrath[1]

As an introduction to Volume I of the Guide, this chapter addresses UK and US law regarding two critical concepts that a corporate facing an investigation in either or both jurisdictions will need to consider at the outset: corporate criminal liability and double jeopardy. This chapter also sets forth in summary the priorities and challenges corporations face at each stage of an investigation – topics that are explored in more detail in the chapters that follow. One topic not explored, but likely to affect chapters in this guide with a European dimension, is the United Kingdom's decision to leave the European Union, scheduled for 29 March 2019. Considerable uncertainty remains surrounding the consequences, legal and otherwise, of that decision, which we hope will have become clearer by the next edition.

Bases of corporate criminal liability 1.1

When corporate misconduct that potentially implicates multiple jurisdictions is uncovered, a critical preliminary question is: what is the test, in each jurisdiction, for corporate criminal liability? Not all countries have corporate criminal liability, but for those jurisdictions that do, it typically rests on the premise that the acts of certain employees can be attributed to the corporation. However, the category of employees that can trigger corporate liability differs between jurisdictions – in some, it is limited to those with management responsibilities, whereas in others the category of employees who can trigger corporate liability is much broader. Generally speaking, the act triggering corporate liability must occur within the

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scope of the employee's employment activities. The act must also generally be done in the interest of, or for the benefit of, the corporation. The difference between theories of liability across jurisdictions inevitably poses challenges and complicates a company's strategy for dealing with a global investigation, and in some instances can determine the outcome.

1.1.1 Corporate criminal liability in the United Kingdom

In the United Kingdom, there are two main techniques to attribute to a corporate the acts and states of mind of the individuals it employs.

The first is by use of the 'identification principle' whereby, subject to some limited exceptions, a corporate may be held liable for the criminal acts of those who represent its directing mind and will and who control what it does. The relevant test is set out in the leading case of *Tesco Ltd v. Nattrass*:

> *Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company. I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.*[2]

2 *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153; reaffirmed in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218 in which Rose LJ stated: '*Tesco v. Nattrass* is still authoritative … and it is impossible to find a company guilty unless its alter ego is identified. None of the authorities since *Tesco v. Nattrass* … supports the demise of the doctrine of identification: all are concerned with statutory construction of different substantive offences and the appropriate rule of attribution was decided having regard to the legislative intent, namely whether Parliament intended companies to be liable. There is a sound reason for a special rule of attribution in relation to statutory offences rather than common law offences, namely there is, subject to a defence of reasonable practicability, an absolute duty imposed by the statutes. The authorities on statutory offences do not bear on the common law principle in relation to manslaughter. Lord Hoffmann's speech in *Meridian* is a re-statement not an abandonment of existing principles … .'; and *Environment Agency v. St Regis Paper Co. Ltd* [2012] 1 Cr App R 177, at paras. 10-12 in which, at para. 12, Moses LJ said: 'It seems to us that as a matter of statutory construction it is impossible to impose criminal liability for a breach of Regulation 32(1)(g) to

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It is for the judge to decide, as a matter of law, whether there is evidence on which a jury could be sure that a particular individual was a 'directing mind' within the *Tesco* principles; and, if there is such evidence, the jury must then be sure that the particular individual was in fact a directing mind for the purposes of his or her particular actions. A directing mind is not necessarily limited to board directors; it may also be found in a delegate who has full discretion to act independently of instructions from the directors. In short, under the identification principle, before a corporate can be found guilty of a criminal offence, someone who represents its directing mind and will must also be found guilty. There cannot be an aggregation of acts or omissions to attribute the company with criminal conduct; rather, the criminal act or omission must be performed by a single person who can be identified with the corporate for it to be liable.

The second technique of attributing liability to a corporate under English law is that of vicarious liability. Although, in general, in the United Kingdom a corporate entity may not be convicted for the criminal acts of its inferior employees or agents, there are some exceptions, the most important of which concerns statutory offences that impose an absolute duty on the employer, even where the employer has not authorised or consented to the criminal act.[3]

Most significantly, statutory developments in the United Kingdom, starting with the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007, but more significantly the introduction of the Bribery Act 2010 and more recently Part 3 of the Criminal Finances Act 2017 (which came into force on 30 September 2017), represent a policy shift by introducing the strict liability offences of failure to prevent by an 'associated person' committed on behalf of the corporate, unless the corporate can demonstrate that it had adequate (or reasonable) procedures in place to prevent such an offence occurring. These statutes have broad jurisdictional reach. Under the Bribery Act for example, a corporate, falling within the definition of a commercial organisation under the Bribery Act, could be guilty even where no conduct occurred in, and where the associated person has no connection with, the United Kingdom.

The policy of the legislation to improve corporate governance is clear: Ministry of Justice guidance for the Bribery Act refers to the need for a corporate to create

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the company in circumstances other than those where an intention to make a false entry can be attributed by operation of the rule in *Tesco Supermarkets*. There is, in our view, no warrant for imposing liability by virtue of the intentions of one who cannot be said to be the directing mind and will of St. Regis Paper Company.' The identification principle was reaffirmed by the Court of Appeal in *R v. A Ltd, X, Y* [2016] EWCA Crim 1469. Most recently the SFO was unsuccessful in having charges against Barclays Bank PLC reinstated through a voluntary bill of indictment, after all charges against the bank were dismissed in the Crown Court. The reasoning behind Lord Justice Davis's decision cannot be reported until the conclusion of the trial of the individuals, including Barclays' former chief executive officer, https://www.sfo.gov.uk/2018/10/26/barclays-plc-and-barclays-bank-plc/.

3 These statutory offences are referred by Rose LJ in *Attorney General's Reference (No. 2 of 1999)* [2000] 2 Cr App R 207 at 217-218, at footnote 2.

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an 'anti-bribery culture'.[4] Similarly, a corporate is guilty of the offence of corporate manslaughter under the Corporate Manslaughter and Homicide Act 2007 if the way in which its activities are managed or organised causes a person's death where a duty of care was owed. Guidance issued for the corporate offences of failure to prevent the criminal facilitation of tax evasion, which closely mirrors the Bribery Act guidance, also refers to the culture of the organisation. For example, top level commitment should foster 'a culture within the relevant body in which activity intended to facilitate tax evasion is never acceptable'.[5] Each piece of legislation and accompanying guidance invites consideration of the corporate's culture – its attitudes, policies, systems and practices. The test for liability is closer to the test in the regulatory context where liability is based on broad principles and considers governance, and systems and controls. In respect of the new tax offences, the UK government has stated that it expects 'rapid implementation' with companies expected to have a clear time frame and implementation plan in place by the time the offences came into force.

It may be that this model of corporate criminal liability expands, in due course, to all economic crimes; on 13 January 2017 the government issued a Call for Evidence (which ran until the end of March 2017) to examine whether the law on corporate criminal liability in the United Kingdom needs reform. The government said that it was seeking to establish whether there is evidence of corporate crime going unpunished because of the current impediments presented by the identification doctrine, as well as evidence on the costs and benefits of further reform, bearing in mind the significant changes made in certain sectors to tackle misconduct. This, it indicated, would inform government decisions over whether to make further reforms.[6] It set out five options for reform: amendment of the identification doctrine; a strict (vicarious) liability doctrine; a strict (direct) liability offence – effectively a widening of the current offence under section 7 of the UK Bribery Act (section 7 offence); incorporation of the failure-to-prevent wording into substantive offences, but with the burden on the prosecution to establish that the corporate had not taken adequate steps to prevent the unlawful conduct; and possible sector-by-sector regulatory reform (in the form of implementation in other sectors of similar arrangements to the new individual accountability regimes introduced for financial services in the United Kingdom). It is yet to be seen what impact political uncertainty in the United Kingdom will have on this thinking. In the deferred prosecution agreement (DPA) context, the current high threshold for establishing corporate criminal liability in the United Kingdom is a problem inherent in the DPA regime: to enter into a DPA, a prosecutor must satisfy the evidential test, which requires either that the evidential stage of the

4 Ministry of Justice Guidance on the Bribery Act 2010, issued pursuant to section 9 of the Bribery Act 2010.

5 Tackling tax evasion: Government guidance for the corporate offence of failure to prevent the criminal facilitation of tax evasion, 1 September 2017, at page 25.

6 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document, at p. 4.

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Full Code Test in the Code for Crown Prosecutors is satisfied[7] or, that 'there is at least a reasonable suspicion based upon some admissible evidence that [the corporate] has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test'.[8] For that reason many expected DPAs to be used principally for section 7 offences, where the identification principle does not present an obstacle to satisfying the evidential test. The prospect for DPAs to be used for the proposed failure to prevent the facilitation of tax evasion offence is specifically laid out in the government's guidance.[9] Both the first two DPAs in the United Kingdom were for section 7 offences, although XYZ Ltd – anonymised because of ongoing criminal proceedings against individuals – also accepted misconduct in relation to conspiracies to corrupt and to bribe. However, XYZ Ltd was a small company and, as Sir Brian Leveson, President of the Queen's Bench Division, found, 'there is no question but that XYZ spiralled into criminality as a result of the conduct of a small number of senior executives bending to the will of agents'.[10] In other words, the identification principle did not, in that case, present a problem. However, in *Rolls-Royce*, the DPA spanned three decades, and dealt with conduct much of which predated the introduction of the Bribery Act 2010 and which formed the basis of seven counts of conspiracy to corrupt and false accounting. The remaining five counts related to section 7 offences. We can conclude that in that case, despite being considerably larger than XYZ Ltd, the identification principle did not present evidential hurdles in reaching a settlement. At the time of writing, no individual has been charged. The Call for Evidence recognises that 'the effectiveness of the DPA as an alternative disposal is dependent on there being a realistic threat of prosecution', which, they conclude, 'lends weight to the suggestion that the "failure to prevent" model would offer a more realistic threat of successful prosecution than a case built on the application of the identification doctrine.'[11] The failure-to-prevent model as enacted in the Bribery Act and now the Criminal Finances Act is described in the Call for Evidence as having 'some clear advantages'. Apart from being readily applicable to offending by organisations of any size, the government is explicit in the power of the model to effect corporate cultural change by acting as 'an incentive to companies to include the

7 Namely that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case that does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

8 DPA Code of Practice, at para. 1.2(i)(b) (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/).

9 Government Guidance, at p. 13. See footnote 5, above.

10 *SFO v. XYZ Ltd* Case No. U20150856, (Preliminary Redacted) Approved Judgment, dated 8 July 2016, at para. 34.

11 Ministry of Justice, Corporate Liability for Economic Crime: Call for Evidence, Consultation Document, at p. 23.

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prevention of economic crime as an integral part of corporate governance and, should it afford a more realistic threat of prosecution, it might enhance the effectiveness of DPAs as an alternative to criminal prosecution'.[12]

1.1.2 Corporate criminal liability in the United States

The United States has long recognised principles of corporate liability based on common law and statutory bases.[13] The application of these concepts, however, has evolved over time and was most recently shaped by the global financial crisis of 2007–2008, where the spectre of industry and market collapse loomed large. Today, increasing emphasis on individual liability and corporate culture continues to shape and refine this area of law.

In the United States, the common law of agency plays an important role. Specifically, under principles of *respondeat superior*, a company may be held vicariously liable for the illegal acts of any of its agents (including employees and contract personnel) so long as those actions were within the scope of the agents' duties and were intended, even if only in part, to benefit the corporation.[14] An act is considered 'within the scope of an agent's employment' if the individual commits the act as part of his or her general line of work and with at least the partial intent to benefit the corporation.[15] The corporation need not receive an actual benefit and may be liable for these offences even if it directs its agent not to commit the offence.[16]

Moreover, even where no single employee has the requisite intent or knowledge to satisfy the *scienter* element of a crime, courts have recognised a 'collective knowledge doctrine' – where several employees collectively know enough to satisfy the intent or knowledge requirement, courts can impute this collective intent and knowledge to the corporation.[17] While historically courts have used the doctrine to establish knowledge on the part of a corporation, in recent years the doctrine has also been used to establish a corporation's intent (i.e., to establish whether the corporation acted wilfully).[18] This doctrine is not universally accepted and

12 Ibid. at p. 21.

13 Charles Doyle, Congressional Research Service, Corporate Criminal Liability: An Overview of Federal Law 1 (2013).

14 *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 965 (6th Cir. 1998). See also *Hamilton v. Carell,* 243 F.3d 992, 1001 (6th Cir. 2001).

15 *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008) (citing *United States v. Automated Med. Labs.*, 770 F. 2d 399, 406–47 (4th Cir. 1985)).

16 *Automated Med. Labs.*, 770 F.2d at 407.

17 *United States v. Sci. Applications Int'l Corp.*, 555 F. Supp. 2d 40, 55–56 (D.C. Cir. 2008). See also *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738–39 (W.D. Va. 1974).

18 See *United States v. Pac. Gas & Elec. Co.*, No 14-CR-00175-TEH, 2015 WL 9460313 (N.D. Cal. 23 December 2015). There, a grand jury charged the Pacific Gas & Electric Company with violating the Pipeline Safety Act after a gas line erupted causing several deaths and injuries. The company moved to dismiss on the basis that the grand jury received incorrect instructions on, *inter alia*, collective intent. In denying the motion to dismiss, the court held that the collective knowledge of the corporation's employees demonstrated that they wilfully disregarded their legal

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some courts have limited it to circumstances where the company was flagrantly indifferent to the offences being committed.[19]

Additionally, beyond the common law principle of *respondeat superior*, some legislation imposes criminal liability for companies, including in the fields of environmental and antitrust law.[20] Such statutes have the dual effects of forcing companies to internalise the costs of their wrongdoing and of increasing the deterrent effect of the law or regulation. For example, in a field such as environmental law, where misconduct can have tremendous collateral and long-term consequences, the imposition of liability on the company acts as a strong incentive for corporate monitoring of employees and thorough due diligence and risk assessment.

Although corporate criminal liability has been a feature of US law since the nineteenth century,[21] the criminal prosecution of corporations slowed abruptly and significantly – although temporarily – following the ill-fated prosecution of Arthur Andersen in 2002; the conviction (subsequently overturned by the US Supreme Court) resulted in the firm's collapse and job losses for many thousands of innocent employees.[22] In the aftermath of the *Arthur Andersen* case, prosecutors became far more hesitant to unleash the brute force of criminal charges against companies.[23] Although limited prosecutions continued following *Arthur Andersen*, they were further reduced in number when, in the wake of the financial meltdown of 2007–2008, many feared that prosecuting big banks and large employers might lead to further economic turmoil.[24] This idea, that an entity might be 'too big to fail', is now widely rejected by both prosecutors and the public, and there has

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duty to abide by the safety standards outlined in the Act. Id. at *3. Following a jury conviction on five counts, the company sought to have the case set aside; however, the court held that a reasonable juror could have found wilfulness beyond a reasonable doubt based on the evidence presented. *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-00175-TEH, 2016 WL 6804575, at *3 (N.D. Cal. 17 November 2016). See also *United States v. FedEx Corp.*, 2016 U.S. Dist LEXIS 52438 (N.D. Cal. 18 April 2016) (denying FedEx's motion to dismiss, which was premised on the ground that the jury received incorrect instructions on collective intent and collective knowledge).

19 *T.I.M.E.-D.C., Inc.*, 381 F. Supp. at 740.

20 See, e.g., *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995) (imposing a strict liability standard for a violation of the Clean Water Act); *United States v. Weitzenhhoff*, 35 F.3d 1275 (9th Cir. 1993). Contra *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (suggesting that there is a mens rea requirement for violations of the Clean Water Act). See also James Swann and Alex Ruoff, Self-Referral Law Seen as Barrier to New Provider Agreements, Bloomberg BNA (5 May 2016), http://www.bna.com/selfreferral-law-seen-n57982070764/ (discussing the physician self-referral law's imposition of strict liability).

21 For a discussion of the history and development of corporate criminal liability in the United States, see Kathleen F. Brickey, Corporate Criminal Accountability: A Brief History and an Observation, 60 Wash. U. L.Q. 393, 404–15 (1982).

22 *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). For a complete history of Arthur Andersen LLP, see Susan E. Squires et al., Inside Arthur Andersen: Shifting Values, Unexpected Consequences (2003).

23 See Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. Pa. J. Bus. L. 797, 805–07 (2013).

24 See Gretchen Morgenson & Louise Story, Behind the Gentler Approach to Banks by US, *N.Y Times*, 7 July 2011, at A1.

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since been a marked uptick in prosecutions. Today, prosecutors are generally less willing to accept the prospect of dire collateral consequences as justification for not pursuing criminal charges against corporations and have required guilty pleas from large corporations, previously considered 'too big to jail'. As corporations survive – and even thrive – in the wake of guilty pleas, the spectre of the *Arthur Andersen* case recedes and the rigour with which prosecutors pursue companies continues to increase.[25]

In recent years, the United States has increasingly placed emphasis on an organisation's compliance culture and internal controls. The result is that self-reporting, full acceptance of responsibility and the disclosure of all relevant facts concerning culpable individuals (regardless of seniority) now form the basis on which the government awards co-operation credit. The Department of Justice's (DOJ) Justice Manual, the Security and Exchange Commission's (SEC) Seaboard factors, US Sentencing Guidelines and the 'Yates Memorandum', each of which is discussed in detail in later chapters, all reflect this pronounced shift in enforcement priorities. As a recent example, in late 2017 the DOJ introduced the Corporate Enforcement Policy, which creates a rebuttable presumption that the DOJ will grant a declination to a company in regard to Foreign Corrupt Practice Act (FCPA) violations where the company satisfies the requirements for voluntary self-disclosure, co-operation and remediation. The DOJ has also announced that it will use the Policy as non-binding guidance in criminal cases outside the FCPA context.

Although the price of attaining corporate co-operation credit is often painfully high, most companies have no choice but to tolerate it; co-operation typically provides the best prospect for a company to prevent a criminal charge, minimise financial penalties and avoid other harsh collateral consequences, such as the imposition of a monitor. Still, co-operation is not for the faint of heart, and any company operating in the United States or subject to US jurisdiction should carefully consider the far-reaching consequences – both good and bad – of setting off down the often treacherous path of co-operation. Once a company voluntarily discloses misconduct to the government, the ability to defend the case and control the process is effectively relinquished, and a company will find it very difficult to withhold sensitive, embarrassing or even harmful information. Given the highly uncertain alternative to co-operation, however, most companies accept and embrace this new reality from the start of an internal investigation and understand that factual findings far more often than not – if they involve potential criminal misconduct – will be presented to law enforcement.[26]

25 See, e.g., Peter J. Henning, Seeking Guilty Pleas From Corporations While Limiting the Fallout, N.Y. Times Dealbook (5 May 2014), https://dealbook.nytimes.com/2014/05/05/seeking-guilty-pleas-from-corporations-while-limiting-the-fallout/; Francine McKenna, Why the Ghost of Arthur Andersen No Longer Haunts Corporate Criminals, MarketWatch (21 May 2015), https://www.marketwatch.com/story/why-the-ghost-of-arthur-andersen-no-longer-haunts-corporate-criminals-2015-05-21.

26 U.S. Dep't of Justice, Justice Manual 9-28.700 (2015).

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Double jeopardy 1.2

Another key question in any global investigation – where misconduct crosses borders and where more than one enforcement authority may seek to assert jurisdiction – is the extent to which different authorities can sanction the same or similar conduct. While domestic constitutional provisions on double jeopardy are similar between nation states, no universally accepted international norm exists and the protection afforded by the laws in one country may offer no protection in another. This can present a major difficulty to achieving a satisfactory global settlement for a client.

The doctrine of double jeopardy is that a person should not be tried twice for the same offence.[27] Its underlying objective is to bring finality to criminal proceedings against individuals and companies in specific circumstances. Double jeopardy applies to criminal proceedings, but has been held by the European Court of Human Rights (ECtHR) to encompass an administrative penalty, in circumstances where that penalty was classified as a criminal penalty because of the nature of the charges and the severity of the punishment.[28]

In the United Kingdom, there are two essential conditions for the doctrine to apply. First, the case must be 'finally disposed of' and second, any penalty imposed must actually have been enforced or be in the process of being enforced. The rationale for the doctrine is that it confers protection on the person (individual or corporate) from the risk of repeated prosecution by the State with its greater resources.[29] Reflecting similar concerns, the concept of double jeopardy in the United States is rooted in the Fifth Amendment to the US Constitution, which reads in relevant part: 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb'.[30] These twenty words have generated tens – if not hundreds – of thousands of pages of case law and are worthy of a treatise in themselves. Distilled to its essence, however, double jeopardy in the United States applies to prohibit subsequent prosecution or multiple punishments of an individual or corporation for the same conduct.[31] Nevertheless, the doctrine of double jeopardy is complicated by the question of dual sovereignty, which holds that double jeopardy's bar against successive prosecution for the same conduct does not apply when the prior prosecution was brought by a separate sovereign,

27 The *ne bis in idem* or double jeopardy principle is well established both in EU law and under the European Convention on Human Rights. The phrase is derived from the Roman law maxim *nemo debet bis vexari pro una et eadem causa* (a man shall not be twice vexed or tried for the same cause).

28 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

29 The protection is not absolute. A second trial is permitted in defined circumstances. In the United Kingdom, a prosecutor will seek a retrial if a jury has been unable to reach a verdict in the initial trial. A further trial in murder cases may also be permitted in circumstances where compelling new evidence comes to light.

30 U.S. Const. amend. V.

31 See generally Ernest H. Schopler, Annotation, Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent to or Applied in Federal Criminal Cases, 50 L. Ed. 2d 830 (2012).

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for example, the US government is not barred from bringing a case where a state or another country has already prosecuted the defendant for the same conduct or *vice versa*.

1.2.1 Double jeopardy in the United Kingdom

In England, the principle of double jeopardy is well established and has its origins in 12th-century common law and ecclesiastical law. The modern principle of double jeopardy in English law was set out by the Divisional Court in *Fofana v. Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France*:

> *The authorities establish two circumstances in English law that offend the principle of double jeopardy:*
> *(1) Following an acquittal or conviction for an offence, which is the same in fact and law* – autrefois acquit *or* convict*; and*
> *(2) following a trial for any offence which was founded on 'the same or substantially the same facts', where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show 'special circumstances' why another trial should take place.*[32]

The Divisional Court referred expressly to the United Kingdom's adoption of Article 54 of the Schengen Convention and its underlying rationale.[33] This is particularly important, as Article 54 states that a person (or company) whose case has been 'finally disposed of' by one Contracting Party may not be prosecuted by another for the 'same acts', provided that any penalty imposed has been enforced or is in the process of being enforced.[34]

Throughout the judgment, the Court stressed the need to look at the underlying acts behind each charge, rather than the label of the charge itself. In the event, the Court stayed the extradition proceedings on the basis that, although the extradition offence specified in the warrant was not based exactly, or solely, on the same facts as those charged in the UK indictment, there was such significant overlap between them as to require the proceedings to be stayed.[35]

In the case of DePuy International Limited, the Serious Fraud Office (SFO) applied the double jeopardy principle and confirmed that it will likely arise where there is or has been an investigation into the defendant's conduct by another authority overseas and the essence of a criminal offence in England and Wales is the same offence for which the defendant already faces trial, or has been acquitted or convicted. DePuy was a UK subsidiary of Johnson & Johnson, a US company that self-reported to the DOJ and the SEC bribery of foreign officials by DePuy, as well as other offences that did not involve the company, under the FCPA. Johnson

32 [2006] EWHC 744 (Admin), Judgment, at para. 18.

33 Id. at para. 14.

34 In the United Kingdom, the decision to leave the EU adds further uncertainty to the recognition of double jeopardy principle in its application to convictions in other Member States.

35 *Fofana*, Judgment, at para. 29. See footnote 32, above.

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& Johnson agreed to a DPA with the DOJ covering the FCPA violations and a civil sanction with the SEC that encompassed criminal and civil fines amounting to US$70 million.

The DOJ informed the SFO of the criminal conduct and the SFO commenced an investigation into DePuy and Mr Dougall, the company's marketing manager. The SFO took the view that the DPA agreed by the parent company with the DOJ had the legal character of a formally concluded prosecution that punished the same conduct that had formed the basis of the SFO investigation. It determined that the rule against double jeopardy prevented any further criminal sanction being applied in the United Kingdom and instead pursued the company using a civil route to obtain the proceeds of crime. The civil sum obtained by the SFO took into account the global settlement in the United States, including the civil fines paid and recovered of £4.8 million.

Whether a DPA under the United Kingdom's regime would qualify for double jeopardy protection remains an open question. Although entry into a DPA does not constitute a criminal conviction, it does become the final disposal of specific intended criminal proceedings on its expiry and is almost certain to include the enforcement of a fine against the corporate subject. Furthermore, prosecution may follow in the event of a breach of the DPA.

Double jeopardy in the United States 1.2.2

As noted above, the Fifth Amendment to the US Constitution contains a double jeopardy clause. Generally speaking, the double jeopardy clause prohibits the US federal government, or any individual state, from twice prosecuting someone for the same conduct if that person has already been acquitted or convicted (or after certain mistrials once a jury has been empanelled and 'jeopardy has attached').[36] It also prohibits courts from imposing multiple punishments for the same conduct, which may be covered in multiple charges in an indictment.[37] The double jeopardy clause of the Fifth Amendment – unlike its privilege against self-incrimination – applies to both individuals and corporations.[38]

The US Supreme Court, however, has recognised a significant exception to the double jeopardy clause, known as the 'dual sovereignty' doctrine. Pursuant to this doctrine, double jeopardy does not prohibit the federal government from prosecuting a person previously convicted or acquitted by a state, or *vice versa*, or one state from prosecuting a person convicted or acquitted by another.[39] In other words, under this doctrine the US federal government can prosecute individuals and entities for the exact same conduct that they have previously been tried for in

36 See U.S. Const. amend. V; *Martinez v. Illinois*, 134 S. Ct. 2070, 2074.

37 See *Breed v. Jones*, 421 U.S. 519, 528 (1975).

38 See *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (applying double jeopardy to corporate defendants without discussing their status as corporations); *United States v. Sec. Nat'l Bank*, 546 F.2d 492, 494 (2d Cir. 1976).

39 *United States v. Lanza*, 260 U.S. 377, 385 (1922).

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one of the states, regardless of whether they were convicted or acquitted in that prior case.[40]

To blunt the potentially harsh impact of the dual sovereignty exception, the DOJ has adopted a policy that precludes the initiation of federal prosecution following a prior state (or federal) prosecution based on substantially the same facts. The Dual and Successive Prosecution Policy (the Petite Policy) seeks 'to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors'.[41] To overcome this policy, federal prosecutors must not only comply with the standards applicable for commencing any federal prosecution (i.e., that the defendant's conduct constitutes a federal offence and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact), but they must also obtain the approval of the appropriate Assistant Attorney General and establish that (1) the matter involves a substantial federal interest; and (2) the prior prosecution left that federal interest 'demonstrably unvindicated'. It is the second of these two factors that provides the greatest protection against successive prosecutions, as, under this policy, the DOJ 'will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest'.[42] While this presumption can, of course, be overcome (and the policy lists the factors relevant to make such an assessment),[43] federal prosecutors traditionally reserve such challenges for those cases where it perceives the preceding result to have been manifestly unjust.

Notably, the Petite Policy does not expressly preclude the DOJ from bringing criminal charges based on the same conduct previously prosecuted by a foreign sovereign. Nevertheless, similar, if not identical, principles are at play whether the prior prosecution was brought by a state or federal government, or a foreign sovereign. Counsel endeavouring to persuade the DOJ to defer to the foreign result certainly should be prepared to demonstrate why a successive prosecution would contravene that policy. The DOJ will, of course, consider if US interests have been sufficiently redressed by the foreign prosecution.[44] And, in the cases of

40 Notably, the Supreme Court very recently declined to extend the dual sovereignty doctrine to successive prosecutions by Puerto Rico and the United States, concluding that the question of separate sovereignty requires an assessment of the source of the power to punish. *Puerto Rico v.* Sanchez Valle, 136 S. Ct. 1863 (2016). There, the Court held that successive prosecutions may be brought only where two prosecuting authorities derive their power to punish from independent sources; if those authorities draw their power from the same ultimate source, successive prosecutions are prohibited.

41 U.S. Dep't of Justice, Justice Manual 9-2.031 (1999).

42 Id.

43 Id.

44 See *Thompson v. United States*, 444 U.S. 248, 248 (1980) (noting that there is an exception to the Petite Policy where US prosecution would serve 'compelling interests of federal law enforcement').

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corporate criminal activity, it is likely that the DOJ will seek to extract a penalty based on the harm to its interests.

Still, if a prior prosecution by a foreign sovereign has resulted in adequate penalties proportionate to the conduct, the DOJ may well decline or defer the prosecution or, perhaps, offset any US fines or penalties by the amounts paid abroad, particularly in the corporate context. This is particularly likely in the wake of the DOJ's new policy, announced in May 2018 and since incorporated into the DOJ's Justice Manual, to discourage the 'piling on' of multiple penalties by the DOJ and foreign and domestic agencies when they are investigating the same corporate misconduct.[45] The policy articulates certain factors to be used when determining whether the imposition of multiple penalties would nevertheless serve the interest of justice, and therefore there is no certainty that prior prosecution by a foreign sovereign will result in no or lenient punishment by the United States.

The double jeopardy clause generally does not restrict the ability of the US government to pursue successive criminal and administrative remedies for the same conduct.[46] Indeed, while it is more common for administrative investigations to run in parallel with DOJ investigations, double jeopardy is not offended when a criminal prosecution follows the imposition of an administrative sanction (or *vice versa*). As the Supreme Court held in *Hudson v. United States*, the double jeopardy clause does not apply to non-criminal penalties.[47] Though the Court in *Hudson* recognised that criminal charges following in the wake of stinging administrative penalties could potentially implicate double jeopardy concerns, a defendant mounting such a challenge must establish by the 'clearest proof' that the administrative penalty was so punitive as to render it criminal for double jeopardy purposes – a very high hurdle indeed.[48]

The application of double jeopardy in the EU and under the ECHR 1.2.3

Increased focus on combating overseas corruption following the signing of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, has resulted in a rise in multiple prosecutions. A person or company engaging in overseas corruption faces the prospect of prosecution in any signatory country where he, she or the company may have sufficient involvement, either by citizenship or place of incorporation, or as a place where relevant acts took place.

The picture is evolving on both the supranational and national levels, and this is discussed below. The double jeopardy principle is set out in Article 54 of the

45 US Dept. of Justice, Justice Manual §1-12.100; Deputy Att'y Gen. Rod Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (9 May 2018), available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

46 See *Hudson v. United States*, 522 U.S. 93, 96 (1997).

47 Id. at 99.

48 See id.

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1985 Schengen Agreement.[49] On 29 May 2000 the United Kingdom adopted Article 54 of the Schengen Convention and so it presently forms part of the United Kingdom's domestic law.[50] The rationale for the application of the principle across the European Union was made clear in *R v. Gozutok and Brugge*,[51] as permitting finality in criminal proceedings and also engendering mutual trust in national criminal justice systems by requiring that each Member State recognise the criminal laws in force in the others even when the outcome would be different if its own national law had been applied.

The Council Framework Decision 2009 on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (the EU Framework Decision)[52] sets out measures to prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts that might lead to the final disposal of those proceedings in two or more Member States.

The EU Framework Decision is constitutionally binding on the United Kingdom as a Member State and as such must be taken into account by the SFO in its decision whether to open a criminal investigation. The double jeopardy principle is not a bar to a criminal investigation however, and the SFO has very wide discretion in deciding whether to carry out an investigation.[53]

1.2.4 European human rights jurisprudence

1.2.4.1 European Court of Human Rights (ECtHR)

Article 4 of Protocol 7 to the European Convention on Human Rights (ECHR) specifically recognises the double jeopardy principle.[54]

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49 Article 54: 'A person whose trial has been finally disposed of in one contracting party may not be prosecuted in another contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party.'

50 2000/365/EC: Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis.

51 [2003] 2 CMLR 2.

52 2009/948/JHA.

53 Section 1(3) of the Criminal Justice Act 1987; 'The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud.' See also *R (Corner House) v. Director of the SFO* [2008] EWHC 714 (Admin), at para. 51.

54 'Article 4 – Right not to be tried or punished twice

1 No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3 No derogation from this Article shall be made under Article 15 of the Convention.'

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The importance of the principle was emphasised in the ECtHR's Chamber judgment in the case of *Grande Stevens and Others v. Italy*.[55] Here, the applicants received an administrative penalty from Consob, the Italian Companies and Stock Exchange Commission, in respect of providing false or misleading information concerning financial instruments. The penalty took the form of substantial fines and various banning orders. Subsequently, the applicants were committed for trial before the Turin District Court in respect of criminal allegations of market abuse arising out of the same facts.

The applicants argued before the ECtHR that the subsequent criminal proceedings were in breach of Article 4 as the applicants had already been subject to a penalty that was akin to a criminal penalty, even though it was imposed as an administrative penalty. The court accepted their argument and ruled that the administrative penalty should be considered a criminal penalty for the purposes of the ECHR and that Article 4 prevented the criminal proceedings from taking place on the grounds of double jeopardy.[56]

The Court of Justice of the European Union (CJEU) 1.2.4.2

2018 saw three further cases arising in Italy where the principle of double jeopardy was considered, again in relation to administrative penalties imposed by Consob which were severe enough to be considered criminal in nature. All these cases were referred to the CJEU by Italy's Supreme Court of Cassation for a preliminary ruling considering Article 50 of the Charter of Fundamental Rights of the European Union and Article 4, Protocol 7 ECHR.

In the *Ricucci* matter,[57] the defendant had been fined €10.2 million by Consob, as well as being convicted in criminal proceedings resulting in a sentence of four years' imprisonment for alleged market manipulation. The Rome District Court subsequently pardoned Ricucci in a final judgment.

Ricucci challenged Consob's fine in Rome's Court of Appeal, which reduced it to €5 million in 2009. He then took his appeal to Italy's Supreme Court of Cassation, where he argued that his 2008 criminal conviction and subsequent pardon should negate any Consob proceedings. The Court of Appeal asked the CJEU whether the *ne bis in idem* principle in Article 50 gives individuals a direct right that can be applied to negate dual proceedings. The Court also asked the CJEU whether the *ne bis in idem* principle precludes Italy's law allowing

55 *Grande Stevens and Others v. Italy* (4 March 2014) Application Nos. 18640/10, 18647/10, 18668/10 and 18698/10. The judgment is not final.

56 In March 2015, France's Constitutional Court ruled that Airbus executives could not be prosecuted for insider trading because they had been cleared over similar administrative charges by France's Financial Markets Authority, the AMF. In reaching its decision the Court gave considerable weight to the decision of the ECtHR in the *Grande Stevens* case.

57 Case C-537/16: Judgment of the Court (Grand Chamber) of 20 March 2018 (request for a preliminary ruling from the Corte suprema di cassazione – Italy). See also https://globalinvestigationsreview.com/article/1168169/cjeu-italian-defendants-should-not-face-double-jeopardy.

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administrative proceedings to be brought for market manipulation after a defendant has been finally convicted.

The CJEU held that dual proceedings can be pursued if they meet 'an objective of general interest' – in this case, to protect the European Union's financial interests. However, the national legislation must also ensure that proceedings and the severity of penalties are limited to 'what is strictly necessary' where dual proceedings are to be pursued. Italy's market manipulation law did not respect the principle of proportionality, and the CJEU ruled that, if a criminal penalty already punishes misconduct in an 'effective, proportionate and dissuasive manner', administrative proceedings of a criminal nature are gratuitous and so go beyond 'what is strictly necessary'.

In two other cases, *Di Puma* and *Zecca*,[58] appeals were made against Consob fines, with the defendants arguing that they should not face administrative charges for insider trading when a criminal court had found no misconduct. The appeals court asked the CJEU whether, in light of *ne bis in idem*, a court would violate an EU directive that requires Member States to provide 'effective, proportionate and dissuasive penalties' for insider trading if it did not bring administrative sanctions after a criminal court found no wrongdoing.

The CJEU determined in its preliminary ruling that not bringing administrative sanctions after a criminal court has found no misconduct is in accordance with EU law because of the principle of *res judicata*. It ruled that a defendant who is cleared of a criminal charge, should not be the subject of administrative proceedings for the same matter.

The CJEU has considered the application of the double jeopardy principle to the Schengen Agreement in the context of an individual under investigation in Poland and Germany for allegations of extortion.[59] In this case it upheld the German prosecutor's decision that the double jeopardy principle did not apply. The matter had not been finally disposed of as no detailed investigation had taken place.

On 15 November 2016, the CJEU rejected an appeal brought by two applicants who were penalised by the Norwegian Tax Authority for failing to pay tax in 2008 and then convicted of aggravated tax fraud in 2009 by the National Authority for Investigation and Prosecution of Economic Crime. The applicants claimed they were being prosecuted twice for the same misconduct in violation of double jeopardy rules. Rejecting the application, the court held that ECHR double jeopardy rules are not violated where the contracting party could satisfy the court that dual proceedings are sufficiently connected in time and space so as to represent a coherent whole, rather than two sets of proceedings.[60]

58 Joined Cases C-596/16 and C-597/16, *Di Puma and Zecca*.

59 Case C-486/14, *Kossowski*, 29 June 2016.

60 *Case of A and B v. Norway* (Applications nos. 24130/11 and 29758/11) 15 November 2016, lovdata.no/static/EMDN/emd-2011-024130.pdf.

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Double jeopardy in France 1.2.5

Recent developments in France continue to warrant a special mention as the issue of double jeopardy and its application has come before the courts on a number of occasions recently. The appellate courts have recently considered the extent to which domestic law will recognise convictions in the United States as a bar to prosecution, as well as the status of US DPAs in domestic proceedings. On 18 June 2015 a criminal court in Paris acquitted four French corporates that were accused of paying bribes in connection with the United Nations' Oil-for-Food Programme on the grounds that they (or their corporate parents) had already signed DPAs with the DOJ. The rationale given was that it was inconsistent with French international obligations to prosecute the companies for a second time on what the Court found to be the same facts. The prosecutor's appeal against the acquittal was successful and in February 2016 a Paris court fined Total SA €750,000 for corrupting foreign officials.

At the time of writing, criminal proceedings in France against Total are being pursued in relation to separate Iranian corruption conduct that allegedly occurred in 2013. In relation to the same matters, Total entered into a US$245.2 million, three-year deferred prosecution agreement with the DOJ and disgorged US$153 million in an SEC cease-and-desist order. The DPA expired in November 2016.[61]

On 26 February 2018, the Court of Cassation in Paris upheld a decision to fine Swiss energy company Vitol €300,000 for making corrupt payments to the Iraq government as part of the United Nations Oil-For-Food programme.[62] The Court rejected Vitol's argument that it was protected from criminal proceedings in France because it had already been punished in the US. The Court found that double jeopardy did not apply because the company had pleaded guilty to a different charge in US proceedings[63] and stated that France must maintain its right to punish companies that break French law. In its ruling, the Court of Cassation considered double jeopardy protections enshrined in both France's Penal Code and the Charter of Fundamental Rights of the European Union. It concluded that both those protections fail to immunise a company from being prosecuted twice if part of the offence occurred within France and if the misconduct is prosecuted

61 The Court of Cassation will hear appeals from another 14 companies accused of wrongdoing as part of the UN Oil for Food scheme, with more double jeopardy arguments likely to feature in 2019. See https://globalinvestigationsreview.com/article/1168159/vitol-decision-shakes-double-jeopardy-defence-in-france.

62 The fine was in addition to a US$17.5 million sanction Vitol received in the United States in 2007 as part of a plea agreement entered to resolve identical allegations.

63 The company pleaded guilty to a single count of grand larceny in the New York State Supreme Court and paid a US$17.5 million fine, US$4.5 million of which was donated to the state of New York. Vitol admitted in the US plea deal that corrupt payments were made through its employees in France. In total, the company said it paid US$13 million to Iraqi officials between 2001 and 2002 hidden in oil contracts awarded to the company as part of the Oil-For-Food programme.

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by a country that is not bound by French or EU law, such as the United States.[64] This significantly weakens the double jeopardy defence, in circumstances where some of the misconduct occurred in France.

These cases demonstrate the potential unfairness to a corporate that has effectively admitted the offence in another jurisdiction to obtain a DPA and then finds those admissions being used against it in a jurisdiction that does not recognise the DPA under the double jeopardy doctrine.

1.2.6 Conclusion

At first sight, the doctrine of double jeopardy appears to be a substantial protection against repeated prosecution in respect of the same conduct. However, although the doctrine may in some circumstances protect against a similar prosecution within the state, or member group such as the European Union, it may well fail to protect against a prosecution brought by a separate state. France's decision not to apply the principle in circumstances where part of the offence occurred within its sovereign territory is a significant restriction on its scope.

As many countries do not recognise a foreign conviction for the purposes of double jeopardy, it is not possible to reassure a corporate client that a criminal settlement in one jurisdiction will qualify as a settlement in others as well. Further, entering into a DPA in one jurisdiction may risk damaging the client's interests in another if the DPA is not recognised as a bar to prosecution, but the admissions it made to secure the DPA are admissible against it in other jurisdictions.

The picture is uncertain and many questions remain unanswered. These include:

- Should there be international recognition of criminal convictions for the purposes of double jeopardy, to encourage global settlements?
- Should DPAs be given the status of a criminal conviction for the purposes of double jeopardy?
- Should regulatory sanctions qualify for the purposes of double jeopardy?

Until these issues are resolved, a corporate client will only be able to place very limited reliance on the double jeopardy principle as a bar to further prosecution in respect of the same conduct. At present, the only safe course will be to seek to negotiate a global settlement with all the states most likely to take an interest in the conduct, before admitting guilt in any state. Whether this is practicable will vary from case to case.

In relation to individuals, an issue of note was recently referred to the CJEU stemming from a dispute between Hungary and Croatia in the case of *AY*.[65] The

64 Note that as France is a civil law jurisdiction, lower courts are not strictly bound to follow the Court of Cassation's decision.

65 Judgment in Case C-268/17 *AY (Arrest warrant — witness)*. The Court analysed whether any of the grounds for optional non-execution provided for in Article 4(3) of the framework decision applied in the *AY* case and concluded they did not. Those grounds relate to: (1) the decision of the executing judicial authority not to prosecute for the offence on which the European arrest warrant is based; (2) the fact that, in the executing Member State, the judicial authorities have decided to

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Croatian court had sought a preliminary ruling on whether the double jeopardy principle under EU law means Member States may refuse to enforce European arrest warrant (EAW) requests in cases where its investigations treated individuals as witnesses and not suspects. Specifically, Croatia asked whether Hungary could refuse to enforce two EAW requests it issued for an individual, named only as AY to prevent damage to reputation, after AY was treated as a witness rather than a suspect in an investigation conducted by the Hungarian prosecutor's office. In its judgment of July 2018, the CJEU stated that execution of an EAW cannot be refused on the ground that a prosecutor had closed a criminal investigation where during that investigation, the requested person was interviewed as a witness only. The Court stated that the judicial authorities of the Member States must adopt a decision on any EAW communicated to them.

The stages of an investigation 1.3

Issues that at first glance may appear to be isolated or technical can quickly spread across borders and escalate into multifaceted threats to businesses, reputations and careers. Even within jurisdictions, different enforcement authorities operate within their own, often complex, legal and technical frameworks. Any investigation, whether an internal fact-finding inquiry aimed at establishing the size and nature of a problem or one commenced by an enforcement authority, is inevitably a dynamic process. There can be no 'one-size-fits-all' approach and the scope of an investigation can change significantly as it progresses.

Nonetheless, it is possible to identify three broad, and often overlapping, phases to an investigation, namely the commencement, information-gathering and disposal phases. Particular challenges arise, and sometimes recur, at each of these.

Conducting and handling investigations, limiting the damage they cause and bringing them to as swift and efficient a conclusion as possible is an art rather than a science. It requires advisers to anticipate, balance and respond to a wide variety of challenges, and to appreciate the potential ramifications of every interaction with a diverse cast of characters.

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halt proceedings in respect of the offence on which the warrant is based; and (3) the fact that a final judgment has been passed on the requested person in a Member State, in respect of the same acts, which prevents further proceedings. The Court determined the first and third grounds were irrelevant in the case. The Court concluded that an interpretation according to which the execution of a European arrest warrant could be refused where that warrant concerns the same acts as those that have already been the subject of a previous decision, without the identity of the person against whom criminal proceedings are brought being considered relevant, would be manifestly too broad and would entail a risk that the obligation to execute the warrant could be circumvented. As that ground for non-execution constitutes an exception, it must be interpreted strictly and in the light of the need to promote the prevention of crime. The investigation by the Hungarian authorities was conducted, not against AY, but against an unknown person, and the decision that closed that investigation was not taken in respect of AY. The Court concludes from this that the second ground for non-execution does not apply either. See also https://globalinvestigationsreview.com/article/1166589/croatian-case-to-clarify-eaw-double-jeopardy-rules.

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1.3.1 Commencement

When deciding whether or how to commence an investigation, or how best to respond to one already commenced by an enforcement authority, it is axiomatic that the very first task to be carried out must be to establish as precisely as possible the size and shape of the problem. Which corporate entities and individuals are regarded as subjects of the investigation? Which offences are they thought to have committed, and which regulatory provisions might they have infringed? Are any other local or foreign agencies investigating (or likely to investigate) this misconduct?

In some cases (typically those involving alleged breaches of regulatory requirements), the answers will be self-evident from notices confirming the commencement of an investigation or the appointment of investigators, and there may be opportunities to seek to establish more detail through scoping discussions. However, in other cases (typically those involving alleged criminal misconduct), the investigators will not necessarily provide details or opportunities for discussions. In some cases, the first indication an individual or entity receives of an investigation by an enforcement authority will be a requirement to attend an interview or provide documents, or, worse still, a knock at the door from investigating officers. In all cases – whether or not enforcement authorities are already aware of alleged misconduct – steps must be taken immediately upon discovery of the alleged misconduct to preserve and to avoid the destruction or deletion (inadvertent or otherwise) of documents that are, or could become, relevant. In large multinational organisations, identifying the custodians of these documents, drafting and disseminating appropriately inclusive document-retention notices, gathering the material and suspending automatic deletion policies is a substantial undertaking in itself.

Where authorities are not already aware of apparent misconduct, considering whether, when and how to disclose matters to them will be an immediate priority. In some cases, specific regulatory obligations will require disclosures. In others, it may be appropriate to voluntarily report matters to maximise the prospects of a consensual resolution on favourable terms. Both types of disclosures require careful handling. Consideration must be given to potential consequences, both for those individuals or corporates already implicated in alleged misconduct, and for those that may become so. Where information is disclosed voluntarily, wider considerations about whether co-operation will be appropriate and would be likely to encourage the relevant enforcement authority to curtail its investigation (and on which terms) should be borne in mind. Identifying the potential risks and benefits will typically involve assessing the enforcement policy and posture of each agency involved (and often of individual investigators) and its ability and propensity to pass information to other investigating or prosecuting authorities (both within and between jurisdictions).

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These assessments will inform the answers to a number of practical questions:

- Should an initial notification be made before a full internal investigation has been undertaken?
- What should be disclosed at the end of the internal investigation and to whom?
- Should information be disclosed to the authorities orally rather than in writing?
- Will investigators regard anything less than unfettered access to witnesses' first accounts and other underlying documents as true co-operation enabling them to contemplate a negotiated outcome?
- Is it feasible to maintain claims to legal professional privilege or challenge investigators' actions or demands while still seeking to claim that the subjects of the investigation are co-operating?

Choices made at this stage about how much information and control to relinquish over the investigative process and the robustness of the line to be taken with investigators in relation to issues such as privilege can be crucial in setting the tone for the rest of the investigation, and any proceedings that flow from it.

Since the second edition of this text, the Court of Appeal has allowed ENRC's appeal against the first instance decision, upholding its claim to litigation privilege over the disputed documents, including notes of witness interviews.[66] Under the leadership of the new Director of the SFO, Lisa Osofsky, the SFO decided not to appeal that decision. Given the importance of privilege in the context of global investigations, the decision has been welcomed by lawyers across the globe – the Court of Appeal's judgment aligns the law more closely with the law of privilege in the United States and its clear articulation of the applicability of litigation privilege in the context of a criminal investigation is likely to mean that the SFO will be less aggressive in making assertions that privilege claims by companies over documents created during the course of internal investigations are ill-founded. However, it is unlikely that the SFO will be any less willing to request waivers of privilege, particularly since the Court of Appeal judgment was clear that its decision should not 'impact adversely' on the deferred prosecution regime in the United Kingdom, and emphasising the relevance of waiver to an assessment of a corporate's co-operation in reaching resolutions.[67] Therefore, decisions as to the approach taken by a company to privilege, regardless of whether privilege can properly be asserted or not, will continue to be crucial decisions that set the tone and, possibly, direction of an investigation.

In cases involving allegations made by or against directors or employees, early determinations need to be made as to whether any specific whistleblower

66 *SFO v. ENRC* 2018 EWCA Civ 2006.

67 See *SFO v. ENRC* 2018 EWCA Civ 2006 at paras. 115–117, in particular: 'In any event, to determine whether a DPA is in the interests of justice, and whether the terms of the particular DPA are fair, reasonable and proportionate, the court must examine the company's conduct and the extent to which it cooperated with the SFO. Such an examination will consider whether the company was willing to waive any privilege attaching to documents produced during internal investigations, so that it could share those documents with the SFO . . .'

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protection legislation or rules have been engaged and whether action should be taken to suspend or dismiss those individuals.

1.3.2 Information gathering

Once the scope of an investigation has been determined, the process of gathering and analysing relevant information, whether in documentary or electronic form or in the form of witnesses' accounts, commences. Since the advent of the European investigation order (introduced in England and Wales from 31 July 2017), the process of gathering information across borders will be a much simpler and quicker process for enforcement authorities in Europe.[68]

In substantial cross-border investigations, the task of collating relevant material, ascertaining whether it is responsive to requirements to produce documents or provide information (or whether it should otherwise be produced to demonstrate a co-operative stance), and filtering it to remove material exempt from disclosure is time- and resource-intensive. It often requires specialist technical input and expertise. Information should not be treated as a readily portable commodity, and careful consideration should be given to applicable data protection and other confidentiality constraints before information is transferred between jurisdictions or produced to investigating authorities.[69]

Witness interviews during internal investigations raise no fewer questions. When should interviews take place? Who should be present? What material and questions is it appropriate to put to them during such interviews? Should they be represented (and, if so, at whose expense)? Taking a wider view across all jurisdictions in which action could be taken, and from the individual's perspective, is it in the interests of subjects of the investigation to provide information voluntarily, or should they insist on being compelled to do so?

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68 See Criminal Justice (European Investigation Order) Regulations 2017. There are at the time of writing proposals for European production and preservation orders that would, respectively, allow electronic evidence to be requested directly from a service provider in the European Union or oblige a service provider to preserve specific data. In the United Kingdom, the Crime (Overseas Production Orders) Bill is making its way through Parliament, which would, if enacted, allow a UK court, subject to certain requirements, on the application of an appropriate officer (which would include, among others, a police officer, a member of the SFO or a person appointed by the FCA) and provided that an international co-operation agreement were in place, to make an order against a person in that jurisdiction.

69 Recent developments in the United Kingdom and United States are relevant. In the United Kingdom, a decision by the Administrative Court in September 2018 *R (on the Application of KBR Inc) v. The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin) extended section 2 notices, served in the United Kingdom, extraterritorially to foreign companies in respect of documents held outside the jurisdiction when there is a sufficient connection between the company and the jurisdiction. In the United States, following the successful appeal by Microsoft of orders holding it in contempt for failure to comply with a warrant requiring it to produce the contents of a customer's email account stored on a server outside the United States, Congress enacted on 23 March 2018 the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), providing expressly for extraterritorial application and thereafter the United States obtained a fresh warrant against Microsoft.

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Of course, where investigations by the authorities have already begun, investigating authorities will be keen to interview individuals who are suspects. Depending on the nature of the investigation and the allegations against them, it may be open to individuals to remain silent in response to questions (although this course of action may limit their options in any proceedings flowing from the investigation). Conversely, it may serve such individuals' interests to proactively volunteer information to secure more lenient treatment by authorities, or ultimately the courts.

Disposal 1.3.3

As the information gathering progresses, and evidence is assimilated and understood, a decision will need to be reached as to whether this may be resolved through negotiation, or whether the individual or corporate disputes the allegations entirely or is unprepared to reach any resolution or enter into any settlement that requires admissions of misconduct.

Where settlement is an option, from economic, commercial and reputational standpoints, settling with as many investigating authorities as quickly and on the most favourable terms possible is likely to be preferable. Particularly in regulatory enforcement investigations involving corporates, it is often clear from the commencement phase that this will be the most likely outcome, and dialogue throughout the investigation will have to be directed towards this outcome.

It should not be assumed that the process leading to a negotiated disposal is a smooth or simple one. Even in cases involving only one enforcement authority, the legislation and rules governing settlement and the calculation of penalties are complex. Although the discounts available for early settlement are potentially significant, the processes leading to them can involve successive rounds of proposals, counterproposals, representations and negotiations. In criminal investigations, in jurisdictions where it is possible to achieve negotiated outcomes as an alternative to prosecution, although the degree of scrutiny varies depending on which jurisdiction is concerned, such settlements will also be examined by a judge.

Complexity is multiplied where multiple authorities or jurisdictions are involved, or where it is possible that a finding, even if it does not involve any admission of liability, may fuel subsequent litigation from third parties such as erstwhile customers, employees or shareholders.

Although major investigations are unlikely to have progressed to the disposal stage without attracting at least some publicity, it is at this stage that press and political interest will peak. Enforcement authorities usually must make the outcomes of investigations public (and indeed corporate entities themselves may be obliged to do so if their securities are listed).

Other difficult questions arise with negotiated disposals. What will be the size of the fines, if any? For individuals, is there the prospect of imprisonment or other career-threatening penalties? Will it be possible to settle with all interested investigating authorities? For the corporate to bring matters to a close, will it be necessary to assist authorities in their pursuit of individuals? Will the disposal of

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the investigations mark the end of the matter, or simply the start of a new phase of litigation or the commencement of a long process of reporting to a monitor and heightened levels of regulatory scrutiny or supervision? What can be said publicly by the subjects of the investigations?

With these themes in mind, we turn now to a detailed consideration of each stage in the chapters that follow.

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4

Self-Reporting to the Authorities and Other Disclosure Obligations: The US Perspective

Amanda Raad, Sean Seelinger, Arefa Shakeel, Jaime Orloff Feeney and Zaneta Wykowska[1]

Introduction 4.1

While there is typically no formal obligation in the United States to disclose potential wrongdoing to enforcement authorities, there can often be strategic advantages to doing so. Indeed, in some cases, subjects of investigations may avoid some of the most adverse consequences by self-reporting, including reduced penalties and more favourable settlement terms. Additionally, companies in certain regulated sectors may avoid potential debarment even where clear violations occurred. Moreover, US regulators have increasingly been incentivising companies to self-report by offering potential co-operation credit for doing so. US regulators have historically been receptive to parties reporting facts while preserving privilege during the co-operation and reporting process, and are specifically prohibited from conditioning co-operation credit on privilege waiver. Furthermore, the English Court of Appeal recently rejected the lower court's ruling in the *SFO v. ENRC*[2] case that litigation privilege could not apply to materials prepared by counsel in the course of an internal investigation where the company chooses to co-operate with regulators. The decision more closely aligns English law in relation to privilege with that in the United States. However, while the US enforcement regime has created a substantial historical record to analyse, the unique circumstances of each case, as well as changing principles and priorities of regulators, make quantifying such strategic advantages difficult.

1 Amanda Raad is a partner, Sean Seelinger and Arefa Shakeel are counsel, and Jaime Orloff Feeney and Zaneta Wykowska are associates at Ropes & Gray LLP.

2 *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) 8 May 2017.

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With the United States Department of Justice's (DOJ) new FCPA Corporate Enforcement Policy, the Trump administration appears committed to vigorously enforcing the Foreign Corrupt Practices Act (FCPA), including a continued focus on self-reporting and multi-jursidictional co-operation. In 2017, the DOJ brought 27 FCPA actions and the SEC brought eight, with a total of US$934 million in settlements, while the first half of 2018 saw the DOJ bring nine actions and the SEC four, netting more than US$923 million in fines. The DOJ's June 2018 settlement with Société Générale[3] was one of the largest ever in an FCPA case – more than US$585 million to resolve allegations that the bank bribed officials in Libya to secure investments from various Libyan state institutions.

4.2 Mandatory self-reporting to authorities

Prior to considering whether to make a voluntary disclosure, it is important for at least two reasons to determine whether the company has any potential mandatory reporting obligation. First, mandatory reporting obligations often contain specific requirements with respect to the recipient, form, timing and content of the disclosure. Second, any evaluation of whether to self-report will be materially altered if a mandatory report is required, even if that report is in another jurisdiction, given the clear commitment to sharing information between regulators in the United States and abroad. In other words, if a company is required to self-report in at least one jurisdiction, it should consider voluntarily disclosing in other jurisdictions given the likelihood that the government agencies will share information.

In May 2018, the DOJ announced a new formal policy to avoid 'piling on' penalties that are duplicative for the same misconduct. Under the policy, various US enforcement agencies must coordinate with each other and with foreign government agencies when reaching settlements with corporations. However, the DOJ has warned that companies looking to benefit from the new policy should self-disclose wrongdoing to the DOJ. When announcing the policy, Deputy Attorney General Rod Rosenstein specifically remarked that the DOJ 'will not look kindly on companies that come to [the DOJ] after making inadequate disclosures to secure lenient penalties with other agencies or foreign governments. In those instances, the Department will act without hesitation to fully vindicate the interests of the United States.'[4]

3 See 'Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate', available at https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan.

4 See 'Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute', available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

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Case Studies: International Coordination in Enforcement		
	Rolls-Royce	*Keppel Offshore Marine*
Background	Rolls-Royce plc is a UK-based engineering company. In its settlement with the DOJ, Rolls-Royce admitted it made over $35m in commission payments to third parties from 2000 to 2013, which were used to bribe foreign officials in a number of countries. In exchange, those foreign officials provided confidential information and awarded contracts to Rolls-Royce, its subsidiaries and affiliated entities. As part of its resolution with the UK prosecutor, Rolls-Royce also admitted paying bribes or failing to prevent bribery payments in connection with its business operations in various countries between 1989 and 2013. Although Rolls-Royce did not self-report, it did offer substantive co-operation during the investigation.	Keppel Offshore Marine (KOM), a Singaporean marine engineering firm with a private US subsidiary, allegedly bribed officials at Brazil's state-owned oil company, Petrobras, to secure contracts earning it approximately $352m over 13 years. KOM admitted that between 2001 and 2014, it paid $55m in bribes to Brazilian officials through an intermediary, under the guise of legitimate consulting agreements. KOM received substantial credit for co-operation with the DOJ's investigation and for its extensive remedial measures. The company received no credit for self-reporting because the DOJ already knew of the alleged conduct when it was reported as a result of the MPF's existing investigation, which began in 2014, and public reporting of the allegations.
Enforcement	In December 2016, Rolls-Royce entered into a deferred prosecution agreement (DPA) with the DOJ in connection with a criminal information filed in the Southern District of Ohio. The company was charged with conspiracy to commit violations of the FCPA's anti-bribery provisions. Rolls-Royce also entered into settlements with the Serious Fraud Office (SFO) in the UK and the Ministério Público Federal (MPF) in Brazil. In its press release, the DOJ acknowledged its appreciation of the significant assistance provided by the SFO, and further acknowledged its strong relationship with the SFO and MPF in the fight against corruption.	In August 2017, KOM in-house counsel Jeffrey Chow pleaded guilty to conspiracy to violate the FCPA. He faces five years in prison. KOM entered a DPA in connection with a criminal information filed in December 2017 in the Eastern District of New York charging it with conspiracy to violate the FCPA's anti-bribery provisions. In related proceedings, the company settled with the MPF in Brazil and the Attorney General's Chambers in Singapore. The case was the first coordinated FCPA resolution with Singapore, and one of several recently with Brazil. The DOJ reaffirmed its commitment to working with international partners to investigate and prosecute corruption.
Resolution	Rolls-Royce entered into a global settlement of more than $800m with authorities in the UK, the US and Brazil for bribery in Brazil, Thailand, China, India, Russia and other countries. Rolls-Royce entered a DPA with the DOJ and agreed to pay $170m in criminal penalties; a DPA with the SFO and agreed to pay a total fine of £497m; and a leniency agreement and agreed to pay the MPF $25.5m. The DOJ's and SFO's investigations of individuals is ongoing. The resolution is the largest-ever criminal enforcement action against a company in the UK.	Keppel Offshore agreed to a $422m global settlement with US, Brazilian and Singaporean authorities. KOM entered into a DPA with the DOJ, and its US subsidiary entered into a plea agreement. KOM was ordered to pay a criminal penalty of $105.5m to the US. KOM entered into a leniency agreement with the MPF and agreed to pay $211m to Brazil. KOM was issued a conditional warning in lieu of prosecution and agreed to pay $105.5m to Singapore.

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4.2.1 Statutory and regulatory mandatory disclosure obligations

In the United States, most disclosure obligations originate in statute or regulations. Key examples include:

- the Sarbanes-Oxley Act of 2002, which requires the disclosure of all information that has a material financial effect on a public company in periodic financial reports;
- the US Bank Secrecy Act of 1970, which requires financial institutions to disclose certain suspicious transactions or currency transactions in excess of US$10,000;
- the US Anti-Money Laundering Regulations, which require financial institutions to report actual or suspected money laundering under certain circumstances;[5, 6]
- state data breach regulations – 47 of 50 US states have laws requiring companies conducting business in the state to disclose data breaches involving personal information; and
- the Anti-Kickback Enforcement Act of 1986, which requires government contractors to make a 'timely notification' of violations of federal criminal law or overpayments in connection with the award or performance of most federal government contracts or subcontracts, including those performed outside the United States.

4.2.2 Disclosure obligations under existing agreements with the government

In addition to statutory or regulatory-based mandatory disclosure requirements, companies must also evaluate whether they have any mandatory disclosure obligations under pre-existing agreements with the government. For example, if a company is subject to a deferred prosecution agreement (DPA) or corporate integrity agreement (CIA), these agreements often contain self-reporting mandates for any subsequent violations. In many cases, these agreements may require the appointment of independent monitors. While DPAs, CIAs and similar agreements have been used frequently in the United States, other countries are also now seeking to increase use of similar agreements to drive self-reporting and co-operation. Most notably, in the United Kingdom the Serious Fraud Office (SFO) entered into its first DPA, with Standard Bank, in late 2015 and has since entered into three additional DPAs.

See Chapter 32 on monitorships

4.2.3 Other sources of mandatory disclosure obligations

Individuals and companies may also have mandatory disclosure obligations as a result of private contractual agreements as well as membership in professional

5 See, e.g., 31 U.S.C. 5318(g).

6 These requirements are far more limited, however, than those in the United Kingdom under the Proceeds of Crime Act, which imposes broad suspicious activity report filing requirements on all parties in the regulated sector, including financial institutions, lawyers and accountants, upon the knowledge or reasonable suspicion of money laundering. Part 7 of the Proceeds of Crime Act 2002 ss.327-329.

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bodies. Such disclosures between private parties may lead to a disclosure to a regulator by the receiving entity. For example, a subcontractor may be obliged by contract to report issues to the contracting party. That contracting party may subsequently determine that it is subject to its own reporting obligation or may in turn choose to self-report to reduce any potential liability.

Voluntary self-reporting to authorities 4.3

While the DOJ and the US Securities and Exchange Commission (SEC) consider several factors in deciding how to proceed with and resolve investigations and enforcement actions in cases involving corporations, self-reporting and co-operation are important factors for both agencies. Whether to voluntarily self-report to US authorities is a fact-intensive and holistic inquiry. There is no one-size-fits-all approach to this analysis, but those contemplating voluntarily disclosing misconduct to US authorities should keep certain considerations in mind.

Key Considerations in Resolving Enforcement Actions	
US Department of Justice	*US Securities and Exchange Commission*
• Self-disclosure and willingness to co-operate in the investigation • Pervasiveness of wrongdoing within the corporation • Existence and effectiveness of a compliance programme • Meaningful remedial actions	• Self-reporting and investigation of misconduct • Effective compliance procedures and appropriate tone at the top • Whether the case involves a potentially widespread industry practice • Whether the conduct is ongoing

Advantages of voluntarily self-reporting 4.3.1

The primary benefit to self-reporting is to secure potentially reduced penalties through earned co-operation credit and, moreover, to maintain the opportunity to control the flow of information to regulators. In recent years, US regulators have become increasingly vocal about the benefits of self-disclosure and co-operation, with the DOJ even formalising the benefits available to self-disclosing companies first, in its FCPA Pilot Program (Pilot Program),[7] and subsequently the FCPA Corporate Enforcement Policy. Most recently, the former Attorney General, Jeff Sessions, indicated that, when making charging decisions, the DOJ will continue to take into consideration whether companies co-operate and self-disclose their wrongdoing.[8] Yet, co-operation, which inevitably goes hand in hand with a voluntary disclosure, imposes significant demands on corporations and is not without meaningful risk.

7 For more details see, 'The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance' available at https://www.justice.gov/opa/file/838386/download. (FCPA Enforcement Plan and Guidance).

8 See 'Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference', available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual.

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4.3.1.1 DOJ co-operation credit

To encourage self-reporting and co-operation, the DOJ has issued and subsequently revised guidance on the subject for many years. In June 1999, the DOJ issued the Principles of Federal Prosecution of Business Organizations, now known as the 'Holder Memorandum', to articulate and standardise the factors to be considered by federal prosecutors in making charging decisions against corporations.[9] The Holder Memorandum instructed DOJ prosecutors to consider as a factor in bringing charges whether a corporation has timely and voluntarily disclosed wrongdoing and whether it has been willing 'to cooperate in the investigation of its agents.'[10] In 2008, the then Deputy Attorney General, Mark R Filip, added language to the US Attorneys' Manual, now titled the Justice Manual,[11] maintaining that when assessing a corporation's co-operation, a prosecutor may consider 'the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.'[12] Mr Filip also outlined in his memorandum nine factors on which prosecutors base their corporate charging and resolution decisions, the so-called 'Filip Factors', that incorporated some of the language provided initially by Holder in 1999 (Filip Factor Four, a corporation's 'willingness to cooperate in the investigation of [its] agents'), and the addition of Filip Factor Eight: 'the adequacy of prosecution of individuals responsible for the corporation's malfeasance.'[13]

The Yates Memorandum

Building on the prior DOJ guidance, former Deputy Attorney General Sally Quillian Yates issued the Memorandum of Individual Accountability for Corporate Wrongdoing, now known as the 'Yates Memorandum', in September 2015.[14] The Yates Memorandum is still operative and outlines the 'six key steps' prosecutors should take in all investigations of corporate wrongdoing.[15] Some of these steps represent significant – though not drastic – policy changes, whereas others are simply a memorialisation of best practices that have already been in

9 Memorandum from Eric Holder, Deputy Attorney Gen., Dep't of Justice, on Bringing Criminal Charges Against Corps. to Dep't Component Heads and U.S. Attorneys (16 June 1999) (Holder Memorandum), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

10 Id. at 3 (listing eight factors prosecutors should consider in deciding whether to bring charges against corporations that include '[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents . . . .').

11 Justice Manual §§ 9-28.000.

12 Id. §§ 9-28.700 – Value of Cooperation.

13 Memorandum from Deputy Attorney General Mark Filip to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (28 August 2008), at 4.

14 Yates Memorandum, Department of Justice, 9 September 2015, available at http://www.justice.gov/dag/file/769036/download at 3.

15 The DOJ revised the section of the Justice Manual titled 'Principles of Federal Prosecution of Business Organizations' in November 2015 to reflect these steps.

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place in various United States Attorney's Offices across the country. The most significant policy shift in the Yates Memorandum concerns the relationship between a company's co-operation with respect to individual wrongdoers and the company's eligibility to receive co-operation credit. Previously, Filip Factor Four weighed the provision of information regarding culpable individuals as one consideration among many. Under the Yates Memorandum, the identification of responsible individuals is now a 'threshold requirement' for receiving any co-operation credit consideration.[16] On 20 April 2017, then Acting Principal Deputy Assistant Attorney General Trevor N McFadden indicated that the DOJ continues to prioritise the prosecutions of individuals, echoing former Attorney General Jeff Sessions's emphasis on the importance of individual accountability for corporate misconduct.[17]

By making full disclosure and co-operation with regard to individuals a prerequisite for any co-operation credit for the company, the DOJ has raised the stakes. Ms Yates emphasised that a failure to conduct a robust internal investigation is not an excuse, stating that '[c]ompanies may not pick and choose what facts to disclose.'[18] At face value, the Yates Memorandum and Ms Yates's accompanying remarks suggest that a company could conduct a diligent and thorough investigation that still fails to identify culpable individuals despite the best efforts of the company. However, subsequent public statements by Ms Yates and former Assistant Attorney General Leslie Caldwell emphasised the DOJ's willingness to use appropriate discretion. The revised Justice Manual reflects this consideration, noting: 'There may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government.'[19] However, the Justice Manual is clear that in such cases 'the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.'[20] Consequently, the importance of thorough and properly scoped internal investigations has never been greater.

See Chapter 10 on co-operating with authorities

DOJ FCPA Pilot Program and Corporate Enforcement Policy

In April 2016, the DOJ announced through the Fraud Section's revised FCPA Enforcement Plan and Guidance that it was launching a one-year Pilot Program to enhance its efforts to detect and prosecute individuals and companies for violations of the FCPA.[21] The Pilot Program was extended for an additional year on 10 March 2017. On 29 November 2017, Deputy Attorney General Rod

16 Justice Manual § 9-28.700 (2015).

17 See Acting Principal Deputy Assistant Attorney General Trevor N. McFadden of the Justice Department's Criminal Division Speaks at ACI's 19th Annual Conference on Foreign Corrupt Practices Act, available at https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-justice-department-s.

18 Yates Memorandum at 3.

19 Justice Manual § 9-28.700.

20 Id.

21 See FCPA Enforcement Plan and Guidance, supra note 7.

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Rosenstein publicly applauded the Pilot Program, which endeavoured to incentivise voluntary self-disclosure of misconduct, as a 'step forward in fighting corporate crime'.[22] Noting that in the 18 months during which the Pilot Program was in effect, the DOJ's FCPA Unit received 30 voluntary disclosures, compared with 18 in the previous 18-month period, Rosenstein announced that the DOJ would be incorporating a revised FCPA Corporate Enforcement Policy into the Justice Manual.[23] On 1 March 2018, the DOJ announced that it would apply the Corporate Enforcement Policy as non-binding guidance in criminal cases outside the FCPA context.[24] In light of this recent development, the Corporate Enforcement Policy provides valuable guidance to corporations as they investigate misconduct and contemplate voluntary disclosure.

The Pilot Program set forth specific factors that a company had to meet to earn credit for voluntary self-disclosure, which remain in place under the Corporate Enforcement Policy. The disclosure (1) must not be mandated by any law, agreement or contract; (2) must occur prior to an imminent threat of disclosure or government investigation; (3) must be disclosed within a reasonably prompt time after the company becomes aware of the offence; and (4) must include all relevant facts known to the company, including all relevant facts about the individuals involved in any FCPA violation.[25] Both programmes contain specific guidance on the steps a company must take to earn full co-operation credit and to provide timely and appropriate remediation, noting that such steps are consistent with the Yates Memorandum and the Justice Manual's Sentencing Guidelines.

Compared with the Pilot Program, the Corporate Enforcement Policy enhances the benefits available to a company that satisfies all the requirements for voluntary self-disclosure, co-operation and remediation. Under both programmes, companies that fully co-operate with DOJ investigations and implement appropriate remediation in FCPA matters, but that do not voluntarily self-disclose, will be eligible for limited credit, at most a 25 per cent reduction off the bottom of the Sentencing Guidelines fine range. However, when a company has voluntarily self-disclosed, fully co-operated with the DOJ, and has timely and appropriately remediated, the Corporate Enforcement Policy creates a rebuttable presumption, which may be overcome by 'aggravated circumstances' related to the nature and seriousness of the offence, that the DOJ will grant a declination.[26] In contrast, the Pilot Program provided that the DOJ would 'consider' a declination for compa-

22 See 'Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act', available at https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

23 See FCPA Corporate Enforcement Policy, U.S. Dep't of Justice, Justice Manual 9-47.120 available at https://www.justice.gov/criminal-fraud/file/838416/download (Corporate Enforcement Policy).

24 See Jody Godoy, DOJ Expands Leniency Beyond FCPA, Lets Barclays Off (Law360), 1 March 2018, https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off.

25 FCPA Enforcement Plan and Guidance.

26 Corporate Enforcement Policy at Section 1. 'Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of

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nies that met these requirements.[27] Under the new Policy, if the presumption is overcome and a criminal resolution is warranted, DOJ will recommend a 50 per cent reduction off the low end of the Sentencing Guidelines fine range and generally will not require the appointment of a monitor if the company has, at the time of resolution, implemented an effective compliance programme.[28] The DOJ issued seven public declinations under the Pilot Program,[29] a trend that appears to be continuing under the Corporate Enforcement Policy.

On 23 April 2018, the DOJ issued its first declination under the new FCPA Corporate Enforcement Policy. The DOJ declined to prosecute commercial data and analytics provider Dun & Bradstreet in relation to bribery committed by employees of the company's subsidiaries in China.[30] The DOJ stated that the company fulfilled the Enforcement Policy's requirements through (1) prompt voluntary self-disclosure of the misconduct, (2) thorough internal investigation, and (3) thorough co-operation and remediation. Among other things, the DOJ specifically acknowledged Dun & Bradstreet's identification of individuals involved in the misconduct, sharing all relevant facts, making current and former employees available for interviews, providing translations of foreign language documents into English, compliance programme and internal accounting controls enhancements, remedial actions against individuals including termination of employees involved in the misconduct (including an officer of the China subsidiary and other senior employees), and disgorgement of profits through a resolution with the SEC. The SEC separately ordered Dun & Bradstreet to pay disgorgement of over US$6 million, prejudgment interest of over US$1.1 million, and a civil penalty of US$2 million.[31] Dun & Bradstreet did not admit or deny the allegations. According to its order, the SEC considered Dun & Bradstreet's self-disclosure, co-operation and remedial efforts in reaching the agreement. The Dun & Bradstreet declination illustrates that the DOJ under the new administration will continue to recognise companies' efforts at co-operation and self-disclosure.

The Pilot Program and its codification as the Corporate Enforcement Policy has demonstrated the DOJ's commitment rewarding voluntary self-disclosure in FCPA enforcement, and by many accounts has been viewed as very successful.

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the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.'

27 FCPA Enforcement Plan and Guidance at 8-9.

28 Corporate Enforcement Policy at Section 1. The Enforcement Policy provides specific guidance on the criteria for evaluating a corporate compliance programme, while also noting that the criteria may vary based on the size and resources of an organisation. Factors listed in the policy include culture of compliance, compliance resources, the quality and experience of compliance resources, independence and authority of the compliance function, effective risk assessments and risk-based approach, compensation and promotion of compliance employees, compliance-related auditing, and compliance reporting structure.

29 See https://www.justice.gov/criminal-fraud/pilot-program/declinations.

30 See https://www.justice.gov/criminal-fraud/file/1055401/download.

31 See https://www.sec.gov/litigation/admin/2018/34-83088.pdf.

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Benczkowski Memorandum

As part of its ongoing effort to update and clarify its corporate enforcement policies, in October 2018, the DOJ issued new guidance on imposing corporate compliance monitors. Assistant Attorney General Brian Benczkowski outlined the new guidance in a speech at the NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance,[32] which was followed by an official memorandum (the Benczkowski Memorandum).[33] The new policy supplements the 2008 Morford Memorandum, which outlined the principles on selection, scope and duration of monitorships, and supersedes the guidance contained in the 2009 Breuer Memorandum on imposing corporate monitors. Mr Benczkowski explained that the goal of the new guidance was to 'further refine the factors that go into the determination of whether a monitor is needed, as well as clarify and refine the monitor selection process.'

Under the Benczkowski Memorandum, the potential benefits of employing a corporate monitor should be weighed against the cost of a monitor and its impact on the operations of the corporation. In making a determination to impose a corporate monitor, the DOJ will consider a number of factors, including the type of misconduct, the pervasiveness of the conduct and whether it involved senior management, the investments and improvements a company has made to its corporate compliance programme and internal controls, and whether those improvements have been tested to demonstrate that they would prevent or detect similar misconduct in the future. Other factors include whether remedial actions were taken against individuals involved, and the industry and geography in which the company operates and the nature of the company's clientele. The Benczkowski Memorandum provides that 'Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will not be necessary.'[34]

The guidelines are clearly intended to complement the goals articulated in the Corporate Enforcement Policy, giving companies greater incentives to self-disclose and co-operate with DOJ investigations of corporate wrongdoing. A key feature of the Benczkowski Memorandum is that companies can receive meaningful credit, namely avoiding a compliance monitor, by engaging in extensive remediation of their compliance programmes.

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32 See 'Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance' available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

33 See Benczkowski Memorandum, Department of Justice, 11 October 2018, available at https://www.justice.gov/opa/speech/file/1100531/download.

34 Benczkowski Memorandum at 2.

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SEC co-operation credit 4.3.1.2

Although it can be difficult to precisely quantify the benefit of co-operation with the SEC, the Commission will consider general principles of sentencing, especially general deterrence. In both public statements and in practice, the Commission has made clear that companies can receive significant leniency for full co-operation. During a speech on 9 May 2018, SEC Enforcement Division Co-Director Steven Peikin emphasised the importance of co-operation, noting that the SEC would continue to provide 'incentives to those who come forward and provide valuable information' to the SEC.[35]

While the SEC has not entered into any non-prosecution agreements (NPAs) since 2016 and has only entered into three NPAs since their inception in 2010,[36] the SEC nevertheless signalled its continued commitment to using NPAs to reward co-operation through its proposed whistleblower rule amendments. Specifically, the proposed rule amendments would allow the SEC to make award payments to whistleblowers based on money collected as a result of DPAs and NPAs, to 'ensure that whistleblowers are not disadvantaged because of the particular form of an action' that the SEC or another regulator takes.[37] The SEC will, however, set a high bar before entering into an NPA in an FCPA enforcement action. With respect to NPAs entered into with Akamai Technologies, Inc and Nortek, Inc in 2016, Kara Brockmeyer, former Chief of the SEC Enforcement Division's FCPA Unit, stated that 'Akamai and Nortek each promptly tightened their internal controls after discovering the bribes and took swift remedial measures to eliminate the problems. They handled it the right way and got expeditious resolutions as a result.'[38]

Risks in voluntarily self-reporting 4.4

While self-disclosure can reap significant monetary benefits, a company must balance the potential risks against any potential benefit. Self-reporting can give rise to lengthy co-operation obligations and increased government scrutiny. As discussed above, the multi-jurisdictional nature of many 'white-collar' matters means that

35 See 'Keynote Address at the New York City Bar Association's 7th Annual White Collar Crime Institute', available at https:// www.sec.gov/news/speech/speech-peikin-050918.

36 The SEC announced its first NPA in an FCPA case in 2013, when it entered into an NPA with Ralph Lauren Corporation relating to bribes paid to government officials in Argentina. See 'SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct' available at https://www.sec.gov/news/press-release/2013-2013-65htm. The SEC announced its second and third NPAs on 7 June 2016, declining to prosecute US-based internet services provider Akamai Technologies, Inc. and US-based residential and commercial building products manufacturer Nortek, Inc. See 'SEC Announces Two Non-Prosecution Agreements in FCPA Cases' available at https://www.sec.gov/news/pressrelease/2016-109.html.

37 See 'SEC Proposes Whistleblower Rule Amendments' available at https://www.sec.gov/news/press-release/2018-120.

38 See 'SEC Announces Two Non-Prosecution Agreements in FCPA Cases', available at https://www.sec.gov/news/pressrelease/2016-109.html.

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self-reporting may lead to enquiries from global regulators, differing resolutions and ongoing obligations.

Furthermore, the DOJ is likely to impose a stringent bar when evaluating the sufficiency of compliance programmes to determine whether the requirements of the Corporate Enforcement Policy are met or to otherwise reduce liability. In November 2015, the DOJ hired an experienced former in-house compliance officer, Hui Chen, to serve as its Compliance Counsel, to assist prosecutors with the assessment of companies' compliance programmes.[39]

Although Chen resigned from her position in June 2017,[40] during her tenure she helped to formalise the DOJ's guidance to companies who may find themselves under investigation or faced with the decision whether to make a voluntary disclosure. On 8 February 2017, the DOJ published revised guidance for companies called 'Evaluation of Corporate Compliance Programs' (the Guidance). The Guidance is composed of 119 common questions that the DOJ asks when evaluating a company's compliance programme. The Guidance focuses on three overarching areas: (1) company culture, (2) compliance structure and resources, and (3) effectiveness of company policies and procedures. This third category received considerable attention in the Guidance.

Although the content of the Guidance is largely familiar to practitioners, it does give a clearer picture of the DOJ's current approach to corporate compliance. The issuance of the Guidance underscores the DOJ's renewed focus on the operation, rather than the appearance, of corporate compliance programmes. The Guidance suggests that companies should expect to be asked detailed and challenging questions regarding the scope and effectiveness of their compliance programmes. If a company's compliance programme fails to withstand such scrutiny, it risks losing credit for the programme, paying higher penalties or even facing separate violations for inadequate internal controls. While the Guidance remains in place even after Ms Chen's departure, the DOJ has eliminated the Compliance Counsel role. Instead, Assistant Attorney General Benczkowski said, the DOJ will focus on 'building a team of attorneys who offer diverse skill-sets', including compliance experience. [41]

Taking these existing increasingly stringent co-operation standards into consideration, companies considering self-disclosure should carefully assess whether they can meet regulator expectations. If companies fall short, regulators may refuse co-operation credit and use the information obtained through the self-disclosure against the company.

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39 https://www.justice.gov/criminal-fraud/file/790236/download.

40 See 'DOJ Corporate Compliance Watchdog Resigns Citing Trump's Conduct', available at http://thehill.com/homenews/administration/340472-doj-corporate-compliance-watchdog-resigns-cites-trumps-conduct.

41 See 'Criminal division scraps compliance counsel, unveils new hiring strategy' available at https://globalinvestigationsreview.com/article/jac/1175603/criminaldivision-scrapscompliance-counselunveils-new-hiringstrategy.

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Risks in choosing not to self-report 4.5

US regulators have vocally warned that the potential downside of not self-reporting any violation could be significant where the matter is otherwise brought to their attention. In a 5 July 2018 press release announcing an NPA with a Hong Kong-based subsidiary of Credit Suisse Group AG to resolve an investigation into 'princeling' hiring by the bank, the DOJ noted certain steps the firm did not take that limited the amount of co-operation credit it received. Specifically, the bank did not receive voluntary disclosure credit and did not receive full co-operation credit because its 'cooperation was reactive and not proactive.'[42]

Consequently, companies should carefully consider the likelihood that the conduct will be discovered by other means. It is important to consider whether other industry players could affect the company's position. Industry-wide trends may expose a company's misconduct. If regulators undertake an industry-wide investigation into particular practices, which we have observed in recent years with pharmaceutical companies, medical device manufacturers and automobile companies, a company might be exposed by a competitor's self-report or more passively through a third-party subpoena or any investigative demand.

Companies should also be sensitive to increasing whistleblower activity. Current or former employees are incentivised to report potential misconduct to US regulators, which has led to substantial recoveries for the government. The SEC's whistleblower programme has only been in place for a few years, but has been steadily active so far with 57 whistleblower awards, totalling more than US$320 million in payouts up to October 2018. Whistleblowers are eligible to receive awards between 10 per cent and 30 per cent of the money recovered if their 'high-quality original information' leads to enforcement actions in which the SEC orders at least US$1 million.[43] The programme continues to be a priority for the Commission. In March 2018, the SEC announced its largest-ever whistleblower award, with two whistleblowers sharing nearly US$50 million and a third receiving more than US$33 million. Previously, the highest award had been US$30 million, awarded to a non-US resident in September 2014.[44] In September 2018, the SEC awarded its second-highest whistleblower award of US$39 million to one whistleblower, with a second receiving US$15 million.[45] It is therefore important that a company consider the real possibility that its conduct could be exposed by means other than voluntary self-disclosure, and the associated, often expensive, risks associated with not being the first to come forward.

42 See 'Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA', available at https://www.justice.gov/opa/pr/credit-suisse-s-investment-bank-hong-kong-agrees-pay-47-million-criminal-penalty-corrupt.

43 More information is available at the SEC's 'Office of the Whistleblower' site at https://www.sec.gov/whistleblower.

44 See 'SEC Announces Its Largest-Ever Whistleblower Awards' available at https://www.sec.gov/news/press-release/2018-44.

45 See 'SEC Awards More Than $54 Million to Two Whistleblowers' available at https://www.sec.gov/news/press-release/2018-179.

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When deciding not to self-report, a company must ensure that the decision is appropriately considered and documented. If a company decides not to self-report and the government later enquires about the issue, the best defence is that the company conducted a thorough investigation, remediated the issue and had a reasonable basis for not self-reporting to the government. US regulators will look to a company's board of directors to ensure the appropriate steps were taken.[46] The SEC has expressed that the board of directors must exercise oversight and set a strong 'tone at the top' emphasising the importance of compliance.

46 Notification of the board of directors is often required under US law. Section 307 of the Sarbanes-Oxley Act of 2002 requires that an attorney report evidence of a material violation of securities laws or breach of fiduciary duty by the company or any agent 'up-the-ladder' (i.e., first to the chief legal officer or CEO and, thereafter, if appropriate remedial measures are not taken, to the audit committee of the board or other board committee comprised solely of non-employee directors). Wherever possible, it is best to engage the board's disclosure counsel to assist in making this determination.

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Appendix 1

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Amanda N Raad, a US lawyer who is also admitted as a solicitor in England and Wales, serves as co-chair of Ropes & Gray's award-winning global anti-corruption and international risk practice. Amanda has substantial experience negotiating with US regulators on behalf of companies and individuals concerning cross-border matters involving corruption, money laundering and other forms of financial fraud. These matters are often subject to scrutiny by foreign regulators given their multi-jurisdictional nature.

In addition, Amanda proactively works with clients across industries and geographies to identify and mitigate risk. Finally, Amanda advises clients on corporate social responsibility, supply chain compliance and responsible sourcing. Amanda regularly publishes on cross-border issues and is a frequent speaker at conferences, including on sexual misconduct and investigations. Amanda is listed in *GIR*'s Women in Investigations 2018, *Chambers UK*, *The Legal 500 UK*, and *New York Super Lawyers*.

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