Global Investigations Review

The Practitioner's Guide to Global Investigations

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

Fourth Edition

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

2020

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GIR

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalinvestigationsreview.com

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Enquiries concerning editorial content should be directed to the Publisher:
david.samuels@lbresearch.com

ISBN 978-1-83862-228-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Dedicated to the memory of Rod Fletcher, one of the United Kingdom's most highly respected white-collar crime lawyers and a cherished friend.

Acknowledgements

ADDLESHAW GODDARD LLP
ALLEN & OVERY LLP
ANAGNOSTOPOULOS
ASSOCIATION OF CORPORATE INVESTIGATORS
BAKER MCKENZIE LLP
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SULLIVAN & CROMWELL LLP

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WALDEN MACHT & HARAN LLP

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 two-volume work 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 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, vision and intellectual rigour in devising and maintaining this work. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
insight@globalinvestigationsreview.com.

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 companies 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, the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to exact 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.

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 rules evolve and prosecutors' appetites change. The Guide continues to grow and extend its reach, in both substance and geographical scope. By its third edition, it had outgrown its original single-book format; the two 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. Volume I also features tables of cases and legislation along with an index.

In this fourth edition, we have revised extant chapters to keep up with recent developments. To reflect an increased prosecutorial focus on individual accountability and on tone at the top, we have added US and UK chapters on the duties of directors to Volume I, outlining quite divergent corporate governance models. The questionnaire for Volume II authors has been extensively revised and reviewed by the editors and GIR staff. New questions zero in on the growing importance of technology in carrying out and investigating misconduct. There are also questions on economic sanctions, an area of heightened enforcement activity, which GIR has responded to this year with the launch of Just Sanctions (https://globalinvestigationsreview.com/just-sanctions). Volume II also carries regional overviews giving insight into cultural issues and regional coordination by authorities.

Volume II covers 25 jurisdictions, increasing the global coverage, particularly in South America, which continues to rake over recent corruption scandals. As corporate investigations and enforcer co-operation crosses more borders, we anticipate Volume II will become increasingly valuable to our readers: external and in-house counsel; compliance and accounting professionals; and prosecutors and regulators operating in this complex environment.

Acknowledgements

The Editors gratefully acknowledge the insightful contributions of the following lawyers from Clifford Chance: Oliver Pegden in London, Amy Montour and Mary Jane Yoon in New York, and Hena Schommer and Michelle Williams in Washington, DC. The Editors would also especially like to thank Clifford Chance associate Kaitlyn Ferguson in Washington, DC, Chris Stott, senior attorney at Ropes & Gray LLP in London, and Zoe Osborne, partner at Steptoe & Johnson in London.

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath
December 2019
London, New York and Washington, DC

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26

Fines, Disgorgement, Injunctions, Debarment: The US Perspective

Gayle E Littleton, Charles D Riely, Amanda L Azarian and Grace C Signorelli-Cassady[1]

26.1 Introduction

This chapter considers the potential fines, penalties and other collateral consequences that corporates may face in the United States when defending against, or settling an enforcement action with, US regulators.

The US enforcement authorities have a variety of means to seek redress from corporates and individuals, including financial penalties and equitable remedies. The general purpose and policy objectives behind the sanctions are (1) to deter the defendant and others from committing such offences in the future, (2) to protect the public, (3) to punish the defendant and (4) to promote rehabilitation of the defendant.[2] In considering fines and penalties, the US enforcement authorities and courts will consider the facts and circumstances of the matter, including whether the defendant accepts responsibility for the conduct, any remediation that has been effected and co-operation by the defendant with the relevant enforcement authorities.[3]

See Chapter 10 on co-operating with authorities

In recent years, both the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have been successful in extracting significant financial penalties as part of their enforcement actions and settlements.[4] In the fiscal

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2 See, e.g., Department of Justice, Justice Manual § 9-27.110.

3 See, e.g., Department of Justice, Justice Manual § 9-27.420.

4 For example, in 2014, BNP Paribas agreed to plead guilty and pay US$8.9 billion for alleged violations of US economic sanctions in Iran, Sudan and Cuba, of which US$140 million was a fine and US$8.8336 billion was forfeiture. (Department of Justice press release, 'BNP Paribas

year ending 30 September 2015, DOJ collected a total of US$23.1 billion in civil and criminal penalties; in 2016, the combined figure was approximately US$15.3 billion.[5] The SEC obtained orders totalling approximately US$16 billion in disgorgement and penalties for fiscal years 2015 to 2018.[6]

While DOJ has recently emphasised the importance of prosecuting individuals rather than corporates and announced a new policy seeking to 'discourage disproportionate enforcement of laws by multiple authorities', it is too soon to tell whether these policy shifts will lead to a decrease in the total monetary fines and penalties collected.[7] In May 2018, it rolled out a policy to 'avoid the unnecessary

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Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions' (30 June 2014), available at https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial.) In 2016, VimpelCom reached an approximately US$800 million resolution with the US and Dutch authorities over allegations of bribery of an Uzbek government official, of which US$230 million was a criminal penalty to the Department of Justice (DOJ), US$167.5 million was disgorgement and prejudgment interest to the Securities and Exchange Commission (SEC), and US$397.5 million was paid to Dutch prosecutors as a criminal penalty. (Department of Justice press release, 'VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme' (18 February 2016), available at https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.) In a related action, which has been stayed until 31 January 2020, DOJ is also seeking US$850 million in forfeiture of the corrupt proceeds of the alleged scheme (*United States of America v. All Funds Held in Account Number CH1408760000050335300*, 1:16-cv-01257, (S.D.N.Y.) Docket No. 34). In 2018, Société Générale agreed to pay over US$1 billion to US and French authorities to resolve charges relating to bribery of officials in Libya and manipulation of the London Inter-Bank Offered Rate, of which US$860 million was in criminal penalties and US$475 million was in regulatory penalties and disgorgement. (Department of Justice press release, 'Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate' (4 June 2018), available at https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan.) In March 2019, a Russian telecommunications company, Mobile TeleSystems PJSC (MTS), settled Foreign Corrupt Practices Act (FCPA) violations with the SEC and DOJ for a total of US$850 million, none of which will be paid to non-US enforcement authorities. (Department of Justice press release, 'Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter Into Resolutions of $850 Million with the Department of Justice for Paying Bribes In Uzbekistan' (7 March 2019), available at https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department.)

5 Department of Justice press release, 'Justice Department Collects More Than $23 Billion in Civil and Criminal Cases in Fiscal Year 2015' (3 December 2015), available at https://www.justice.gov/opa/pr/justice-department-collects-more-23-billion-civil-and-criminal-cases-fiscal-year-2015; Department of Justice press release, 'Justice Department Collects More Than $15.3 Billion in Civil and Criminal Cases in Fiscal Year 2016' (14 December 2016), available at https://www.justice.gov/opa/pr/justice-department-collects-more-153-billion-civil-and-criminal-cases-fiscal-year-2016.

6 Securities and Exchange Commission, Division of Enforcement Annual Report (2 November 2018), available at https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

7 Department of Justice News, 'Deputy Attorney General Rod Rosenstein Delivers 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.

imposition of duplicative fines, penalties, and/or forfeiture' against a corporate being investigated by multiple enforcement authorities.[8] The policy requires DOJ lawyers from all departments to coordinate internally and, when possible, with 'other federal, state, local, or foreign enforcement authorities' to curb the practice of 'piling on' fines and penalties, 'with the goal of achieving an equitable result'.[9] Regardless, in an active enforcement environment, corporates and individuals who are facing enforcement action should be mindful of the potential consequences and the opportunities to manage and reduce the ultimate fines and penalties.

See Chapter 24 on negotiating global settlements

26.2 Standard criminal fines and penalties available under federal law

26.2.1 Maximum financial penalties

Many federal statutes contain their own fining provisions, which typically include a maximum fine amount. Additionally, for some crimes, the Alternative Fines Act provides for an alternative maximum fine of double the gross gain (or gross loss caused to another) from the unlawful activity.[10] Where a fine is imposed against an officer, director, employee, agent or shareholder of an issuer, the fine may not be paid, directly or indirectly, by the issuer.[11]

In addition, for certain offences, DOJ may seek criminal or civil forfeiture, or both, of property that constitutes, or is derived from proceeds traceable to, the offence.[12] Recent examples of forfeiture include (1) DOJ complaints against

8 Department of Justice, Justice Manual § 1-12.100 – Coordination of Corporate Resolution Penalties in parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct (May 2018).

9 The policy sets out various factors that should be considered when coordinating between multiple DOJ units or enforcement authorities, including 'the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities'. (Department of Justice, Justice Manual § 1-12.100 – Coordination of Corporate Resolution Penalties in parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct (May 2018).) A recent example of this policy in action can be found in the Department's March 2019 US$850 million settlement with MTS and related SEC settlement carrying a civil penalty of US$100 million. According to a press release: 'Consistent with Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct (Justice Manual 1-12.100), the Department of Justice agreed to credit the civil penalty paid to the SEC as part of its agreement with MTS. Thus, the combined total amount of criminal and regulatory penalties paid by MTS and [its subsidiary] to U.S. authorities will be $850 million.' (Department of Justice press release, 'Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter Into Resolutions of $850 Million with the Department of Justice for Paying Bribes In Uzbekistan' (7 March 2019), available at https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department.)

10 See 18 U.S.C. § 3571; *Southern Union Co. v. United States*, 132 S.Ct. 2344, 2350-52 (2012).

11 15 U.S.C. § 78ff(c)(3).

12 See, e.g., 18 U.S.C. § 982(a) (in connection with sentencing persons convicted of certain federal offences, including money laundering and other financial crimes, courts shall order criminal forfeiture of property 'involved in such offense, or any property traceable to such property');

various officials and associates of the sovereign wealth fund, 1MDB, in connection with allegations of an international conspiracy to launder misappropriated funds, seeking civil forfeiture totalling approximately US$1.7 billion[13] and (2) the US Attorney's Office for the District of Nevada obtaining a forfeiture order from the District Court requiring the former president and chief executive officer of MRI International, found guilty on multiple counts of mail and wire fraud and money laundering in connection with a Ponzi scheme, to pay US$813 million.[14]

Defendants may also be required to pay restitution, taking into consideration the amount of loss sustained by each victim, the financial resources of the defendant and any other factors the court deems appropriate.[15]

On 8 October 2019, DOJ issued a non-binding policy memorandum to Criminal Division attorneys that provides 'guidance and an analytical framework' on evaluating a company's ability to pay a criminal fine or criminal monetary

18 U.S.C. § 981(a) (property involved in certain federal offences, including money laundering and other financial crimes, 'or any property traceable to such property', is subject to civil forfeiture). Under civil forfeiture statute 18 U.S.C. § 981(a)(1)(C), property relating to a 'specified unlawful activity' as defined in 18 U.S.C. § 1956(c)(7) is subject to civil forfeiture. Among the 'specified unlawful activities' listed in 18 U.S.C. § 1956(c)(7) are racketeering, bribery of a public official, fraud by or against a foreign bank, export control violations and violations of the FCPA. Further, 28 U.S.C. § 2461(c) 'permits the government to seek *criminal* forfeiture whenever civil forfeiture is available *and* the defendant is found guilty of the offense'. *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011) (original emphasis).

13 Department of Justice press release, 'U.S. Seeks to Recover Approximately $38 Million Allegedly Obtained from Corruption Involving Malaysian Sovereign Wealth Fund' (22 February 2019), available at https://www.justice.gov/opa/pr/us-seeks-recover-approximately-38-million-allegedly-obtained-corruption-involving-malaysian.

14 Department of Justice press release, 'President And CEO Of Las Vegas Investment Company Sentenced to 50 Years in Prison for Running $1.5 Billion Ponzi Scheme' (23 May 2019), available at https://www.justice.gov/opa/pr/president-and-ceo-las-vegas-investment-company-sentenced-50-years-prison-running-15-billion.

15 18 U.S.C. § 3663(a)(1)(B)(i). See, e.g., *United States v. Savoie*, 985 F.2d 612, 619 (1st Cir. 1993) (holding civil settlement did not bar defendant, convicted of racketeering violations, of having to pay restitution of US$93,476.67, as restitution 'is not a civil affair; it is a criminal penalty meant to have deterrent and rehabilitative effects'). In *Kelly v. Robinson*, the Supreme Court commented on restitution as follows: 'The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the Bankruptcy Judge who decided this case noted in *Pellegrino*: "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose".' 479 U.S. 36, 52, 107 S. Ct. 353, 362, 93 L. Ed. 2d 216 (1986).

penalty when inability to pay is claimed.[16] The memo sets forth various legal considerations and relevant factors that should be taken into account if legitimate questions remain after an analysis of an inability-to-pay questionnaire. These factors include background on current financial position, alternative sources of capital, collateral consequences and victim restitution considerations.

26.2.2 United States Sentencing Guidelines

Federal courts in the United States use the United States Sentencing Guidelines (the Sentencing Guidelines) as guidance in considering the aggravating and mitigating circumstances of a crime and imposing a sentence. These apply to both corporates and individuals. Although district courts must consult the Sentencing Guidelines and take them into account, they are not required to apply them.[17] A recent study, in fact, suggests that federal trial judges 'now follow the advisory fraud guideline range in less than half of all cases', providing for sentences 'well below the fraud guideline'.[18]

For corporates, the calculation of the applicable fine is made by (1) identifying a 'base fine',[19] (2) identifying the minimum and maximum multipliers that combined with the base fine create a 'fine range'[20] and (3) considering potential 'departures', upwards or downwards, from the fine range.[21]

In calculating the base fine under the Sentencing Guidelines, the first step is to identify the 'offence level', which depends on the characteristics of the crime. The 'base offence level' is set according to the nature of the conduct or the statute violated, and then the overall offence level will increase or decrease depending on certain factors.[22] For example, for an anti-bribery violation under the Foreign Corrupt Practices Act (FCPA), the base offence level is 12.[23] Factors that may affect the overall offence level include the number of bribes, the dollar amount involved and the position of the foreign official receiving the payment or benefit.[24] The total offence level helps to determine the base fine, which is the greatest of the amount specified in a table that translates the offence level into a base fine, the

16 Department of Justice, Criminal Division, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty (8 October 2019), https://www.justice.gov/opa/speech/file/1207576/download.

17 The Sentencing Guidelines were mandatory until the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

18 Mark Bennett, Justin Levinson and Koichi Hioki, 'Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform', *Iowa Law Review*, 989, Vol. 102:939 (2017); George Pierpoint, 'Is white-collar crime treated more leniently In the US?', BBC News (11 March 2019), available at https://www.bbc.co.uk/news/world-us-canada-47477754.

19 United States Sentencing Commission, Guidelines Manual, § 8C2.4.

20 United States Sentencing Commission, Guidelines Manual, §§ 8C2.6, 8C2.7.

21 United States Sentencing Commission, Guidelines Manual §§ 8C4.1-8C4.11.

22 Base offence levels are set out in Chapter Two of the Guidelines Manual.

23 United States Sentencing Commission, Guidelines Manual § 2C1.1.

24 United States Sentencing Commission, Guidelines Manual §§ 2C1.1(b)(1)-(3).

pecuniary gain to the organisation from the offence, or the pecuniary loss from the offence caused by the organisation, 'to the extent the loss was caused intentionally, knowingly, or recklessly'.[25]

The second step is to calculate the 'culpability score', which yields the minimum and maximum multipliers to be applied to the base fine. The culpability score is based on the characteristics of the defendant. Relevant factors may include the size of the organisation and the degree of participation in, or tolerance of, the wrongdoing; the defendant's prior criminal history; whether the defendant has violated an order or injunction, or violated a condition of probation by committing similar misconduct to that for which probation was ordered; obstruction of justice; the existence of an effective compliance programme; and self-reporting, co-operation and acceptance of responsibility.[26] The potential multipliers can range from 0.05 (a reduction of 20 times the base fine) to 4.0 (four times the base fine), depending on the culpability score. The fine range reflects the minimum and maximum multipliers as applied to the base fine. In addition to the fine, any gain to the corporate from an offence that is not otherwise part of the corporate's restitution or remediation is subject to disgorgement.[27]

Finally, the Sentencing Guidelines allow for upward or downward departures from the fine range. This may include a downward departure for substantial assistance to the government in its investigation of others[28] or remedial costs that exceed the gain to the corporate.[29] Unlike the factors that are considered for calculating the offence level and culpability score, the detriments or benefits that result from departures are not quantified. The court in its discretion imposes a fine within the fine range, or above or below the range by taking into account any departures. For negotiated resolutions, a corporate through its counsel will often negotiate and agree to a downward departure recommendation beyond the low end of the fine range.

Civil penalties 26.3

Civil monetary sanctions can include penalties, disgorgement and prejudgment interest. Each of these has a different purpose and method of calculation.

The SEC may impose civil monetary penalties on any person who violates or causes a violation of the securities laws. The Securities Act of 1933 and the Securities Exchange Act of 1934 authorise three tiers of civil penalties. Less serious civil violations fall into the first tier, where the penalty is no more than US$9,472 for an individual or US$94,713 for a corporate for 'each act or omission' violating the federal securities laws. The second tier applies to violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, for which the maximum penalty is US$94,713 for individuals

25 United States Sentencing Commission, Guidelines Manual § 8C2.4.
26 United States Sentencing Commission, Guidelines Manual § 8C2.5.
27 United States Sentencing Commission, Guidelines Manual § 8C2.9.
28 United States Sentencing Commission, Guidelines Manual § 8C4.1.
29 United States Sentencing Commission, Guidelines Manual § 8C4.9.

and US$473,566 for corporates, again for each act or omission. Finally, the third tier applies to violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement that also directly or indirectly resulted in 'substantial losses . . . to other persons' or 'substantial pecuniary gain to the person who committed the act or omission'.[30] Third-tier penalties have a limit of US$189,427 for individuals and US$947,130 for corporates, for each act or omission.[31] Civil penalties for insider trading depend on the amount of the profits generated by the illicit trading. A district court can order civil penalties up to three times the profit gained or loss avoided by the violative trade.[32]

DOJ likewise may seek civil penalties in certain types of matters, such as violations of federal financial, health, safety, civil rights and environmental laws.[33] For example, the Royal Bank of Scotland agreed to pay a US$4.9 billion civil penalty under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 for its involvement in a scheme that misled investors and failed to disclose significant risks about its residential mortgage-backed securities ultimately contributing to the 2008 financial crisis.[34]

26.4 Disgorgement and prejudgment interest

The SEC may also seek disgorgement to prevent an entity or individual from profiting from illegal conduct and to deter subsequent misconduct.[35] Disgorgement has often accounted for a significant portion of the overall enforcement sanction. For example, in March 2019, Fresenius Medical Care agreed to pay the SEC and DOJ more than US$231 million to settle allegations that it had violated the FCPA, of which US$147 million (the full amount imposed by the SEC and 63 per cent of the total) was disgorgement.[36] Disgorgement can also be sought

30 15 U.S.C. § 78u-2(b); 17 C.F.R. § 201.1001 and Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of 15 January 2019)', available at https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm (effective 15 January 2019). The maximum civil penalty amounts noted above are for violations after 2 November 2015. Maximum civil penalty amounts will be adjusted annually for inflation, as described in 17 C.F.R. § 201.1001.

31 Id.

32 15 U.S.C. § 78u-1(a).

33 See, e.g., 12 U.S.C. § 1833a (providing a civil money penalty provision to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 which allows DOJ to seek civil penalties against persons who violate one of 14 enumerated statutes); 42 U.S.C. § 3614(d)(1)(C) (allowing it to seek civil penalties for violations of the Fair Housing Act of 1968).

34 Department of Justice press release, 'Royal Bank of Scotland Agrees to Pay $4.9 Billion for Financial Crisis-Era Misconduct: Settlement Is Largest Penalty Imposed On A Single Entity By The Justice Department For Financial Crisis-Era Misconduct' (14 August 2018), available at https://www.justice.gov/opa/pr/royal-bank-scotland-agrees-pay-49-billion-financial-crisis-era-misconduct.

35 See *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993); *SEC v. Cavanaugh*, 445 F.3d 105, 117 (2d Cir. 2006) (noting that disgorgement 'has the effect of deterring subsequent fraud').

36 Department of Justice press release, 'Fresenius Medical Care Agrees to Pay $231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges' (29 March 2019), available at https://www.justice.gov/opa/pr/fresenius-medical-care-agrees-pay-231-million-criminal-penalties-and-disgorgement-resolve; Securities and Exchange Commission

in certain circumstances even when DOJ declines to prosecute the corporate under its Corporate Enforcement Policy. For example, it declined to prosecute Cognizant Technology Solutions for violations of the FCPA, yet the company agreed to pay nearly US$20 million in disgorgement, which represented 'all profits fairly attributable to the bribery conduct'.[37]

The SEC's ability to extract large disgorgement payments has been recently limited by a decision issued by the United States Supreme Court that held that the typical five-year limitation period applying to any 'action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise' applies to disgorgement.[38] The SEC had previously taken the position, and some Circuit Courts had held, that disgorgement was an equitable remedy[39] and that the SEC was therefore not constrained by any limitation period when seeking disgorgement. On 5 June 2017, however, the US Supreme Court unanimously rejected the SEC's position in *Kokesh v. SEC*, holding that '[d]isgorgement in the securities-enforcement context is a "penalty" . . . and so disgorgement actions must be commenced within five years of the date the claim accrues'.[40] In so doing, the Supreme Court resolved a Circuit split.[41]

There will be a substantial impact on the amount the SEC is able to recover in certain cases. In *Kokesh v. SEC*, for example, the District Court had ordered the defendant to pay US$34.9 million in disgorgement, of which US$29.9 million

press release, 'SEC Charges Medical Device Company With FCPA Violations' (29 March 2019), available at https://www.sec.gov/news/press-release/2019-48.

37 Department of Justice Declination Letter, 'Re: Cognizant Technology Solutions Corporation' (13 February 2019), available at https://www.justice.gov/criminal-fraud/file/1132666/download.

38 28 U.S.C. § 2462; *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

39 *Kokesh v. SEC*, 137 S.Ct. 1635, 1640-41 (2017); *SEC v. Contorinis,* 743 F.3d 296, 306-07 (2d Cir. 2014) ('[W]hile both criminal forfeiture and disgorgement serve to deprive wrongdoers of their illicit gain, the two remedies reflect different characteristics and purposes – disgorgement is an equitable remedy that prevents unjust enrichment, and criminal forfeiture a statutory legal penalty imposed as punishment. . . . Moreover, unlike disgorgement, which is a discretionary, equitable remedy, criminal forfeiture is mandatory and a creature of statute. Thus, unlike the criminal forfeiture case, the district court's discretion in determining disgorgement is not confined by precise contours of statutory language, but rather serves the broader purposes of equity.').

40 *Kokesh v. SEC*, 137 S.Ct. 1635, 1639 (2017).

41 *Compare SEC v. Graham*, 823 F.3d 1357, 1363-64 (11th Cir. 2016) (holding that § 2462's statute of limitations applies to disgorgement) with *SEC v. Kokesh*, 834 F.3d 1158, 1164-67 (10th Cir. 2016) (holding that the disgorgement sought was neither a penalty nor a forfeiture under § 2462) and *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2011) (holding that disgorgement is not a 'civil penalty' and therefore not subject to the five-year statute of limitations); *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) ('[T]he applicable five-year statute of limitations period [the defendant] invokes applies only to penalties sought by the SEC, not its request for injunctive relief or the disgorgement of ill-gotten gains.'), reinstated in relevant part, 597 F.3d 436, 450 (1st Cir. 2010).

related to conduct outside the limitation period and is therefore now time-barred.[42] As of the 2018 fiscal year end, the SEC estimated that it could 'forgo up to approximately $900 million' in pending cases due to the ruling.[43]

Since *Kokesh v. SEC* was decided, defendants have further sought to rely on the decision to challenge the SEC's statutory authority for seeking disgorgement at all, arguing that, as a penalty, disgorgement is not within the court's equitable powers. Although some courts have been receptive to such challenges,[44] many have construed *Kokesh* narrowly.[45] On 1 November 2019, the Supreme Court granted *certiorari* in *Liu v. SEC*, No. 18-501, to consider whether the SEC can seek disgorgement in actions filed in federal courts.[46] If the Supreme Court determines that the SEC lacks the power to seek disgorgement in such cases, this could curtail the agency's ability to demand significant monetary sanctions in future actions.

The calculation of disgorgement involves quantifying the amount of profits obtained as a result of the illegal conduct and can be complex. Given the challenges in distinguishing between legally and illegally derived profits, in considering the amount to be disgorged, courts have broad discretion and need only consider a 'reasonable approximation of profits causally connected to the violation'.[47] Disgorgement amounts may include both 'direct pecuniary benefit[s]' and 'illicit benefits . . . that are indirect or intangible'.[48] Once the SEC meets its burden of

42 *Kokesh v. SEC*, 137 S.Ct. 1635, 1641 (2017).

43 Securities and Exchange Commission, Division of Enforcement Annual Report (2 November 2018), available at https://www.sec.gov/files/enforcement-annual-report-2018.pdf.

44 *United States v. Latorella*, 2017 WL 2785413, at *4, n. 4 (D. Mass. 27 June 2017), appeal dismissed *sub nom., United States v. Fields*, 2017 WL 6945887 (1st Cir. 19 December 2017). ('It bears noting that [in *Kokesh v. SEC*,] the Supreme Court earlier this month expressly reserved the question "whether courts possess authority to order disgorgement in SEC enforcement proceedings".'); *Osborn v. Griffin*, 865 F.3d 417, 470 n. 1 (6th Cir. 2017) (Merritt, J dissenting) (stating that the theory of 'equitable disgorgement' 'may not even be applicable in SEC contexts for much longer in light of the Supreme Court's' *Kokesh* decision); *SEC v. Arcturus Corp.*, No. 3:13-CV-4861-K, 2018 WL 1701998, at *2 (N.D. Tex. 10 January 2018) ('The Fifth Circuit has repeatedly stated that district courts enjoy "broad discretion" in ordering disgorgement. Unless, and until, current binding authority changes, this Court understands its authority to order disgorgement in SEC proceedings such as this.') (citation omitted).

45 See, e.g., *SEC v. Jammin Java Corp.*, 2017 WL 4286180, at *3 (C.D. Cal. 14 September 2017) (rejecting defendant's contention that 'because the imposition of a penalty is not within the Courts' traditional equity powers, *Kokesh* should be construed so as to eliminate the disgorgement remedy altogether').

46 See, *Liu v. Securities and Exchange Commission*, SCOTUSblog, https://www.scotusblog.com/case-files/cases/liu-v-securities-and-exchange-commission/.

47 See, e.g., *SEC v. Contorinis*, 743 F.3d 296, 304-5 (2d Cir. 2014) (noting that disgorgement must be a 'reasonable approximation of profits causally connected to the violation') (quoting *SEC v. Patel*, 61 F.3d 137, 139-40 (2d Cir. 1995); *Allstate Insurance Co. v. Receivable Finance Co., LLC,* 501 F.3d 398, 413 (5th Cir. 2007) (citing *SEC v. First City*, 890 F.2d 1215, 1231 (D.C. Cir. 1989)); *SEC v. Global Express Capital Real Estate Investment Fund*, I, LLC, 289 Fed. Appx. 183, 190 (9th Cir. 2008); *SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008).

48 *SEC v. Contorinis*, 743 F.3d 296, 306 (2d Cir. 2014).

establishing a reasonable approximation of profits causally connected to the fraud, the burden shifts to the defendant to demonstrate that the gains were not affected by the offence.[49] The final decision rests with the court.

Defendants face significant challenges in trying to reduce disgorgement amounts or carve out certain categories of costs and expenses. Although revenue received from improper conduct may be disgorged, it is less clear whether and how the costs associated with that revenue would be used to reduce the disgorgement amount. Several courts have permitted defendants to deduct expenses that are directly associated with the revenue to be disgorged.[50] On the other hand, courts have generally refused to allow defendants to deduct overhead costs or general business expenses from disgorgement amounts on the basis that they were not directly related to the illegal conduct at issue and would have been incurred irrespective of the conduct.[51] By way of example, courts have denied requests to deduct from revenue expenses related to employees' salaries,[52] capital gains taxes paid in connection with illicit profits[53] and fees paid to clearing agents that could not be directly tied to the illegal sales.[54] As a consequence, 'SEC disgorgement sometimes exceeds the profits gained as a result of the violation'.[55]

Because disgorgement was not generally viewed as a 'fine' or 'penalty' until the Supreme Court's *Kokesh* decision, practitioners had also considered the possibility that an FCPA disgorgement payment might be tax-deductible. As a general matter, Internal Revenue Service (IRS) regulations preclude a tax deduction for penalties and fines paid to government authorities, on the basis that taxpayers should not be permitted to enjoy a tax benefit based on a payment designed to be punitive.[56] However, the Tax Code does not specifically address disgorgement. On 6 May 2016, the Office of the Chief Counsel of the Internal Revenue Service released an advice memorandum stating that the disgorgement payment to the SEC in a corporate FCPA action was not tax-deductible, on the basis that a disgorgement amount would, in its view, fall within Section 162(f) of the Tax Code stating that deductions are not allowed 'for any fine or similar penalty paid

49 *SEC v. Razmilovic*, 738 F.3d 14, 32-33 (2d Cir. 2013).

50 *SEC v. McCaskey*, 2002 WL 850001 at *4 (S.D.N.Y. 26 March 2002) (noting that a court may deduct any 'direct transaction costs' such as brokerage commissions from the disgorgement amount); *SEC v. Shah*, 1993 WL 288285 at *5 (S.D.N.Y. 28 July 1993) (allowing defendant to deduct the commissions paid to his broker to effectuate trades based on inside information). But see *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011) ('it is well established that defendants in a disgorgement action are "not entitled to deduct costs associated with committing their illegal acts"') (quoting *SEC v. Cavanagh*, 2004 WL 1594818 at *30 (S.D.N.Y. 16 July 2004), aff'd, 445 F.3d 105 (2d Cir. 2006).

51 *SEC v. Svoboda*, 409 F. Supp. 2d 331, 345 (S.D.N.Y. 2006); *SEC v. Great Lakes Equities Co.*, 775 F. Supp. 211, 215 (E.D. Mich. 1991). ('[T]here is no basis for deducting the costs of fixed expenses since those expenses would be incurred whether or not the fraud took place.')

52 *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987).

53 *SEC v. Svoboda*, 409 F. Supp. 2d 331, 345 (S.D.N.Y. 2006).

54 *SEC v. Zwick*, 2007 WL 831812 at *23 (S.D.N.Y. 16 March 2007).

55 *Kokesh v. SEC*, 137 S. Ct. 1635, 1644 (2017).

56 26 C.F.R. § 1.162-21.

to a government for the violation of any law'.[57] Following *Kokesh*, the Office of the Chief Counsel of the Internal Revenue Service reaffirmed this position in an advice memorandum of 1 December 2017, noting that because 'as the Supreme Court held, disgorgement payments are penalties and are not compensatory, section 162(f) prohibits a deduction . . . for an amount paid as disgorgement for violating a federal securities law'.[58] Although these internal memoranda are not binding, they reflect the position of the IRS on this matter.

The SEC also generally obtains prejudgment interest on any disgorgement amount. The rules that apply to administrative proceedings cases brought by the SEC require that such amounts be included in any disgorgement.[59] District courts presiding over actions generally may determine whether prejudgment interest is appropriate.[60] The interest rate applied is typically the 'underpayment' rate set by the IRS.[61] There is no single approach for measuring when the clock begins to run on interest calculations. In some cases, it has been measured from the date the ill-gotten funds were received, up to the date of judgment.[62] In others, it may run from multiple dates where the matter involves multiple transactions,[63] or, where the applicable dates are difficult to identify, from the date of the complaint.[64]

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57 See https://www.irs.gov/pub/irs-wd/201619008.pdf.

58 See https://www.irs.gov/pub/irs-wd/201748008.pdf.

59 17 C.F.R. § 201.600(a). In recent years, the SEC has increasingly sought to use administrative proceedings rather than federal court proceedings to enforce the federal securities laws. In 2012, for example, there were nearly twice as many administrative proceedings as civil actions brought by the Commission. See Sonia Steinway, 'SEC "Monetary Penalties Speak Very Loudly," But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach', *Yale Law Journal*, 124:209 (2014). The increased use of administrative proceedings has led to widespread criticism of the Commission around unfairness as well as constitutional challenges around due process. In September 2015, the SEC proposed amendments to the Rules of Practice governing its internal administrative proceedings, which were adopted in July 2016. These amendments, however, do not fully address the concerns that have been raised and challenges to the use of administrative proceedings continue.

60 *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996).

61 Id., 101 F.3d at 1476 (citing SEC Rules and Regulations, 60 Fed. Reg. 32738, 32788 (23 June 1995)). See also 17 C.F.R. § 201.600(b). The underpayment rate charged by the IRS is three percentage points above the federal short-term rate and for purposes of calculating interest on sums disgorged is compounded quarterly. 26 U.S.C. § 6621(a)(2); 17 C.F.R. § 201.600(b).

62 *SEC v. DiBella*, 2008 WL 6965807 at *3 (D. Conn. 18 July 2008); *SEC v. GMC Holding Corp.*, 2009 WL 506872 at *6 (M.D. Fla. 27 February 2009) ('The time frame for the imposition of prejudgment interest usually begins with the date of the unlawful gain and ends at the entry of judgment.') (quoting *SEC v. Yun*, 148 F. Supp. 2d 1287, 1293 (M.D. Fla. 2001).

63 S*EC v. Savino*, 2006 WL 375074 at *18 & n.10 (S.D.N.Y. 16 February 2006) (calculating interest from the first day of the month following each improper trade).

64 *SEC v. United Energy Partners, Inc.*, 2003 WL 223392 at *2 n.12 (N.D. Tex. 28 January 2003), aff'd, 88 F. App'x 744 (5th Cir. 2004) (using date of complaint for accrual of prejudgment interest award where dates on which defendant acquired disgorged funds were not clear); *SEC v. GMC Holding Corp.*, 2009 WL 506872 at *6 (M.D. Fla. 27 February 2009) (same).

Injunctions 26.5

DOJ may also seek affirmative relief through an injunction where it is deemed necessary to advance public interests or enforce government functions. Such injunction actions may be specifically provided for by statute, may be used to enforce statutes that do not specifically provide for injunctive relief or may be sought from an appellate court pursuant to the All Writs Act.[65]

Likewise, the SEC may seek either a preliminary or permanent injunction when it appears that a person is engaged in, or is about to engage in, acts or practices constituting a violation of the securities laws.[66]

Other consequences 26.6

In addition to the criminal and civil penalties noted above, defendants may face other consequences as a result of a US criminal or civil action. For one, defendants may also face civil and criminal forfeiture of assets, including real and personal property constituting, or derived from proceeds traceable to, a violation, or to a conspiracy to commit a violation.[67] For certain offences, courts are required to order that property traceable to an offence be forfeited.[68]

See Chapter 18 on individuals in cross-border proceedings and Chapter 31 on individual penalties

Further, investigation or prosecution by authorities in one jurisdiction may also lead to investigations, prosecutions or resolution short of prosecution by authorities in other jurisdictions. For example, in recent years two international telecommunications companies, Stockholm-based Telia Company and Amsterdam-based VimpelCom Limited, entered into global resolutions to resolve investigations by the SEC, DOJ and Dutch authorities, agreeing to pay nearly US$1 billion and US$800 million in criminal and regulatory penalties, respectively.[69] It is expected that this trend of multinational investigations and co-operation across jurisdictions will continue in the coming years.

See Chapter 24 on negotiating global settlements

Defendants may also face a variety of actions from other US government agencies, international organisations, other corporates or even shareholders and employees, actions which may involve additional litigation and other monetary penalties.

65 28 U.S.C. § 1651(a). See US Department of Justice Civil Resource Manual, 'Injunctions', available at https://www.justice.gov/jm/civil-resource-manual-214-injunctions.

66 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d).

67 See 18 U.S.C. §§ 981, 982; 28 U.S.C. § 2461.

68 See 18 U.S.C. § 982.

69 See Department of Justice press release, 'Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan' (21 September 2017), available at https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965; Department of Justice press release, 'VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme' (18 February 2016), available at https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

See Chapter 32 on monitorships

In addition, in connection with certain types of enforcement actions, such as FCPA enforcement, money laundering and sanctions violations, corporates may also be required to retain corporate compliance monitors. For example, in June 2019, Walmart entered into a three-year non-prosecution agreement pursuant to which it agreed not only to pay a combined penalty of US$137 million but also to retain an independent corporate compliance monitor for two years to resolve the government's FCPA investigation.[70]

Finally, in some circumstances, individuals or entities may be barred or suspended from doing business with the executive branch of the United States government.[71] Debarment may be triggered by a criminal conviction or, in some circumstances, even an adverse civil judgment, and applies to all subdivisions of a corporation unless the decision is limited by its terms to specific divisions or organisational units.[72] Suspension may occur upon adequate evidence that certain wrongdoing was committed and when it is in the public's interest.[73] Like debarment, suspension affects all organisational divisions of a corporation, unless otherwise specified.[74]

26.7 Financial penalties (and prison terms) under specific statutes

By way of example, the fines, penalties and other sanctions associated with particular federal criminal statutes of potential interest are outlined below.

26.7.1 Foreign Corrupt Practices Act

The FCPA criminalises bribery of foreign officials, either directly or through an intermediary, to obtain business or some other benefit. Its anti-bribery provisions apply not only to all US corporates and persons, but also can apply to foreign corporates that issue securities within the United States or file certain reports with the SEC (issuers) and to these issuers' officers and employees, among others. The FCPA also criminalises actions taken in the United States by foreign corporates or their agents that are in furtherance of an improper payment or offer. Further, the FCPA's books and records and internal controls provisions also require corporates whose securities are listed in the United States or who file reports with the SEC to keep accounting records that accurately reflect the corporate's transactions and to maintain a system of internal controls.[75]

70 See Department of Justice press release, 'Walmart Inc. and Brazil-Based Subsidiary Agree to Pay $137 Million to Resolve Foreign Corrupt Practices Act Case' (20 June 2019), available at https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt.

71 48 C.F.R. §§ 9.406-1(c), 9.407-1(d).

72 48 C.F.R. §§ 9.406-1(b), 9.406-2(a).

73 48 C.F.R. §§ 9.407-1(a), 9.407-2(a).

74 48 C.F.R. § 9.407-1(c).

75 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a), 78(m).

Violations of the FCPA can result in heavy penalties. For one, corporate entities may be subject to financial penalties of up to US$2 million per violation of the FCPA's anti-bribery provisions,[76] US$25 million per violation of the FCPA's accounting provisions,[77] or up to twice the gross pecuniary gain or loss from the violation pursuant to the Alternative Fines Act.[78] In addition, civil penalties for FCPA anti-bribery and accounting provisions violations may apply.[79]

Further, certain individuals may be either fined up to US$100,000 (US$250,000 under the Alternative Fines Act or twice the gain or loss from the violation) or imprisoned for up to five years, or both, for a criminal violation of the FCPA's anti-bribery provisions.[80] For criminal violations of the FCPA's accounting provisions, certain individuals can be subject to a fine of up to US$5 million or imprisonment for up to 20 years, or both.[81] Individuals may also face civil penalties for FCPA anti-bribery and accounting provisions violations.[82] Issuers, as defined under the FCPA, are prohibited from paying these individuals' criminal and civil fines.[83]

Moreover, DOJ may also bring a civil action to seek an injunction against domestic concerns and persons other than issuers to prevent a current or imminent FCPA violation.[84] Likewise, the SEC may also seek injunctions to prevent FCPA violations from occurring.[85]

In addition, disgorgement is often a key component of a civil resolution of the FCPA. By way of example, in April 2018, Dun & Bradstreet agreed to pay more than US$9 million to resolve FCPA charges alleging that two Chinese subsidiaries made improper payments to Chinese government officials and third parties to benefit the business, and then falsely recorded these payments as legitimate business expenses. Of the total amount paid by Dun & Bradstreet (more than US$9 million), more than US$6 million was disgorgement.[86]

76 15 U.S.C. §§ 78dd-2(g)(1)(A), 78 dd-3(e)(1)(A), 78ff(c)(1)(A).

77 15 U.S.C. § 78ff(a).

78 18 U.S.C. § 3571 (c)(2), (d).

79 15 U.S.C. §§ 78ff(c)(1)(B), 78u(d)(3); 17 C.F.R. § 201.1001; Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 15, 2019)', available at https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm.

80 15 U.S.C. §§ 78dd-2(g)(2), 78dd-3(e)(2); 18 U.S.C. § 3571 (b)(2), (b)(3), (d).

81 15 U.S.C. § 78ff(a).

82 15 U.S.C. §§ 78ff(c)(2)(B), 78u(d)(3); 17 C.F.R. § 201.1001; Securities and Exchange Commission, 'Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 15, 2019)', available at https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm.

83 15 U.S.C. § 78ff(c)(3).

84 15 U.S.C. §§ 78dd-2(d), 78dd-3(d).

85 15 U.S.C. § 78u(d)(1).

86 Securities and Exchange Commission press release, 'SEC Charges Dun & Bradstreet With FCPA Violations' (23 April 2018), available at https://www.sec.gov/enforce/34-83088-s.

However, for corporates seeking to avoid the heaviest penalties, the FCPA Corporate Enforcement Policy establishes a presumption that, 'absent aggravating circumstances' such as involvement by executive management in the misconduct or significant profit to the corporate from the misconduct, a corporate will receive a declination if it 'has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated'. Moreover, even if aggravating circumstances are present, for a corporate that voluntarily self-discloses, fully co-operates and timely and appropriately remediates, DOJ will still recommend a 50 per cent reduction off the low end of the US Sentencing Guidelines fine range, except in the case of a recidivist.[87]

Recently, on 20 November 2019, the FCPA Corporate Enforcement Policy was amended to clarify that a corporate that voluntarily discloses misconduct need not disclose 'all relevant facts known to it', but simply 'all relevant facts known to it at the time of the disclosure'. In addition, the new policy explains that, for a corporate to fully co-operate, it must identify 'relevant evidence not in the company's possession' that the corporate is aware of.[88] However, the corporate is no longer required to identify opportunities 'to obtain relevant evidence not in the company's possession and not otherwise known to the Department' that the corporate 'is or should be aware of'.[89]

26.7.2 Federal criminal money laundering

The principal federal criminal money laundering statues are 18 USC Sections 1956 and 1957. Section 1956 generally prohibits a person who knows that property represents the proceeds of certain unlawful activities from engaging in financial transactions that either promote further unlawful activity, conceal the proceeds, evade taxes or avoid reporting requirements. Section 1957 also prohibits a person from knowingly engaging in a monetary transaction involving property valued at more than US$10,000 that derives from specified unlawful activities. In regards to both sections, the specified unlawful activities include proceeds resulting from offences involving bribery of a foreign official.[90]

See Chapter 18 on individuals in cross-border proceedings and Chapter 31 on individual penalties

Any violation of Section 1956 is punishable by imprisonment for not more than 20 years, a fine of up to US$500,000 or twice the value of the property involved, or both. In addition, such violations can incur a civil penalty up to the greater of US$10,000 or the value of the property involved in the offence, plus asset forfeiture. For Section 1957, the maximum penalty is 10 years' imprisonment or a fine of up to twice the value of the property involved, or both.[91]

87 Department of Justice, FCPA Corporate Enforcement Policy, available at https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

88 Id.

89 Department of Justice, FCPA Corporate Enforcement Policy (updated March 2019), available at https://www.justice.gov/criminal-fraud/file/838416/download.

90 18 U.S.C. §§ 1956, 1957.

91 Id.

Export controls and trade sanctions 26.7.3

The US Department of the Treasury's Office of Foreign Assets Control (OFAC) administers and enforces most US economic sanctions. However, the US Commerce Department's Bureau of Industry and Security and DOJ National Security Division also enforce some aspects of US sanctions. Generally, these sanctions, such as the blocking of assets and trade restrictions, are used to accomplish national security and foreign policy objectives.

The sanctions can be either comprehensive for a jurisdiction, such as Cuba,[92] or targeted to particular individuals and entities, such as the sanctions imposed on specific Hezbollah officials in July 2019.[93] Typically, US sanctions either restrict activities that take place in the US or restrict activities that involve a 'US person', generally defined widely to include US citizens, permanent residents, persons present in the United States, and corporates organised under the laws of the United States or any jurisdiction therein, as well as those corporates' foreign branches.[94] However, non-US persons and corporates can face penalties under US sanctions as well, including for 'causing' a violation by a US person.[95] For example, in 2017, OFAC entered into a settlement with CSE TransTel, a subsidiary of a Singapore-based corporate, in part for causing US financial institutions to engage in prohibited conduct involving Iran.[96]

Fines for violations of the sanctions regulations can be significant. As of 10 July 2019, OFAC had settled 18 enforcement actions, with civil penalties totalling more than US$1.2 billion.[97] Criminal penalties for wilful violations of OFAC sanctions can include fines ranging up to US$1 million per violation or imprisonment of up to 20 years, or both.[98] Under Title 18, Section 3571, the government can also pursue fines and penalties against an organisation of up to US$500,000 or twice the pecuniary gain or loss derived from the offence, as well as forfeiture under 18 USC Section 981. Further, penalties for violations of the Trading with the Enemy Act, which provides the statutory authority for the Cuba sanctions, can be up to US$89,170 per violation (which may be adjusted for inflation), and criminal penalties can reach US$1 million.[99] Financial penal-

92 Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 83 Fed. Reg. 46347 (10 September 2018).

93 Department of the Treasury, 'Treasury Targets Iranian-Backed Hizballah Officials for Exploiting Lebanon's Political and Financial System' (9 July 2019), available at https://home.treasury.gov/news/press-releases/sm724.

94 See, e.g., 31 C.F.R. §§ 560.312, 560.314.

95 See, e.g., 50 U.S.C. § 1705(a).

96 Department of the Treasury, 'Settlement Agreement' (July 2017), available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/transtel_settlement.pdf.

97 Department of the Treasury, '2019 Enforcement Information', available at https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx.

98 See, e.g., 50 U.S.C. § 1705(c).

99 31 C.F.R. § 501.701; Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act, 83 Fed. Reg. 46347 (10 September 2018) (extending the expiration of Cuba sanctions pursuant to the Trading with the Enemy Act until September 2019).

ties for violations of the International Emergency Economic Powers Act, which underlies other sanctions programmes, are also possible; associated civil penalties can be up to US$250,000 or twice the amount of the unlawful transaction, and criminal penalties permit a fine of up to US$1 million and imprisonment of up to 20 years.[100]

26.7.4 Racketeer Influenced and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides criminal penalties as well as a civil, private cause of action for acts performed as part of a criminal organisation or enterprise.[101] The statute contains variations on the proscribed conduct, but generally criminalises participation in an 'enterprise' in interstate or foreign commerce using ill-gotten gains that result from a 'pattern of racketeering activity'.[102] Such racketeering activity includes mail and wire fraud and money laundering violations under Sections 1956 and 1957, as outlined above.[103]

RICO violations are punishable by fines and imprisonment for up to 20 years, plus forfeiture of any interest acquired or maintained through the violation, any interest in any enterprise that was established, operated, controlled, conducted or participated in as part of the RICO violation (or the property of such an enterprise) and any property constituting or derived from any proceeds that the person obtained, directly or indirectly, from racketeering activity.[104]

Additionally, the government may seek pre-indictment restraining orders for the purpose of preventing defendants from transferring assets the government may potentially seek to have forfeited. To obtain such an order, the government must establish that (1) there is a substantial probability that it will prevail on the forfeiture issue, (2) property will be destroyed or placed beyond the court's reach without the order and (3) the need to maintain the property's availability outweighs the hardship of a restraining order. Pre-indictment restraining orders are effective for 90 days, but can be extended for good cause or as a result of the filing of an information or indictment.[105]

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100 50 U.S.C. § 1705; 31 C.F.R. § 501; Congressional Research Service, 'The International Emergency Economic Powers Act: Origins, Evolution, and Use' (20 March 2019), available at https://fas.org/sgp/crs/natsec/R45618.pdf.

101 18 U.S.C. §§ 1961, et seq.

102 18 U.S.C. § 1962. The first variation makes it unlawful for any person who has received any income derived from a pattern of racketeering activity to use any part of such income or its proceeds to acquire, establish or operate any enterprise involved in interstate or foreign commerce. 18 U.S.C. § 1962(a). The second variation makes it unlawful for any person to engage in a pattern of racketeering activity to acquire or maintain any interest in any enterprise involved in interstate or foreign commerce. 18 U.S.C. § 1962(b). The third variation makes it unlawful for any person employed by or associated with any enterprise involved in interstate or foreign commerce to conduct the enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(c). The statute also makes it unlawful for a person to conspire to participate in the conduct outlined in (a), (b) or (c). 18 U.S.C. § 1962(d).

103 18 U.S.C. § 1961(1).

104 18 U.S.C. § 1963(a).

105 18 U.S.C. § 1963(d).

There are also civil remedies under RICO available to any person injured by a RICO defendant, which include treble damages sustained by the injured party and the cost of the lawsuit, including reasonable attorneys' fees.[106]

Conclusion 26.8

Corporates and individual may face a variety of fines, penalities and other collateral consequences when defending against or settling an enforcement action with US regulators. As has been explained, these risks can be substantial. That said, these risks can be managed, mitigated or avoided by engaging knowledgeable external counsel, who can evaluate the situation, provide advice and thereby enable the corporate or individual to make an informed decision about how to proceed.

106 18 U.S.C. § 1964(c).

Appendix 1

About the Authors

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Gayle Littleton is a partner at Jenner & Block and a member of its investigations, compliance and defence and litigation practices. She focuses on advising and defending corporations in connection with anti-corruption (FCPA), fraud, whistleblower complaints, #MeToo allegations and regulatory compliance matters; conducting complex, worldwide internal investigations; and defending corporations in connection with civil actions brought pursuant to the False Claims Act and the Financial Institutions Reform, Recovery and Enforcement Act. Before joining Jenner & Block, she served as a federal prosecutor for 12 years, working in the US Attorney's Offices for both the Northern District of Illinois and the Northern District of Florida. She served on the team that investigated and prosecuted former Illinois Governor George Ryan's chief of staff. She also investigated and prosecuted high-level white-collar cases and served as senior litigation counsel to the US attorney, where she advised on charging decisions. She graduated from Cornell Law School and served as a law clerk to the Hon. Joseph L Tauro of the US District Court for the District of Massachusetts and the Hon. Gerald W Heaney of the US Court of Appeals for the Eighth Circuit. She is admitted to practise in New York, Illinois and Florida.

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Charles Riely is a partner at Jenner & Block and a member of its investigations, compliance and defence, markets and trading and securities litigation and enforcement practices. Before joining Jenner & Block, he served as a lawyer at the SEC for more than a decade, most recently as assistant regional director for the SEC's Division of Enforcement. While with the SEC, he worked on matters involving disclosure failures by public companies, alleged fraud and regulatory violations by investment advisers and broker-dealers, insider trading, anti-money laundering violations, 'spoofing' and other forms of market manipulation, failure-to-supervise violations, the adequacy of firms' cybersecurity procedures and protections, and a variety of other fraud and regulatory matters. Mr Riely also coordinated investigations with the US Department of Justice and worked on more than a dozen publicly filed SEC enforcement actions in which criminal authorities filed a parallel case. He graduated from the University of Michigan Law School and served as a law clerk to the Honorable Frank Maas of the US District Court for the Southern District of New York. He is admitted to practise in New York.

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ISBN 978-1-83862-228-2