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FCPA SETTLEMENTS

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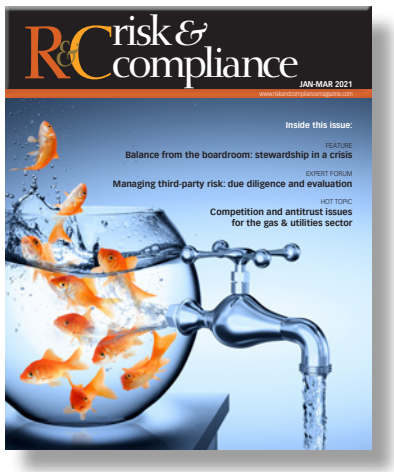

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MINI-ROUNDTABLE

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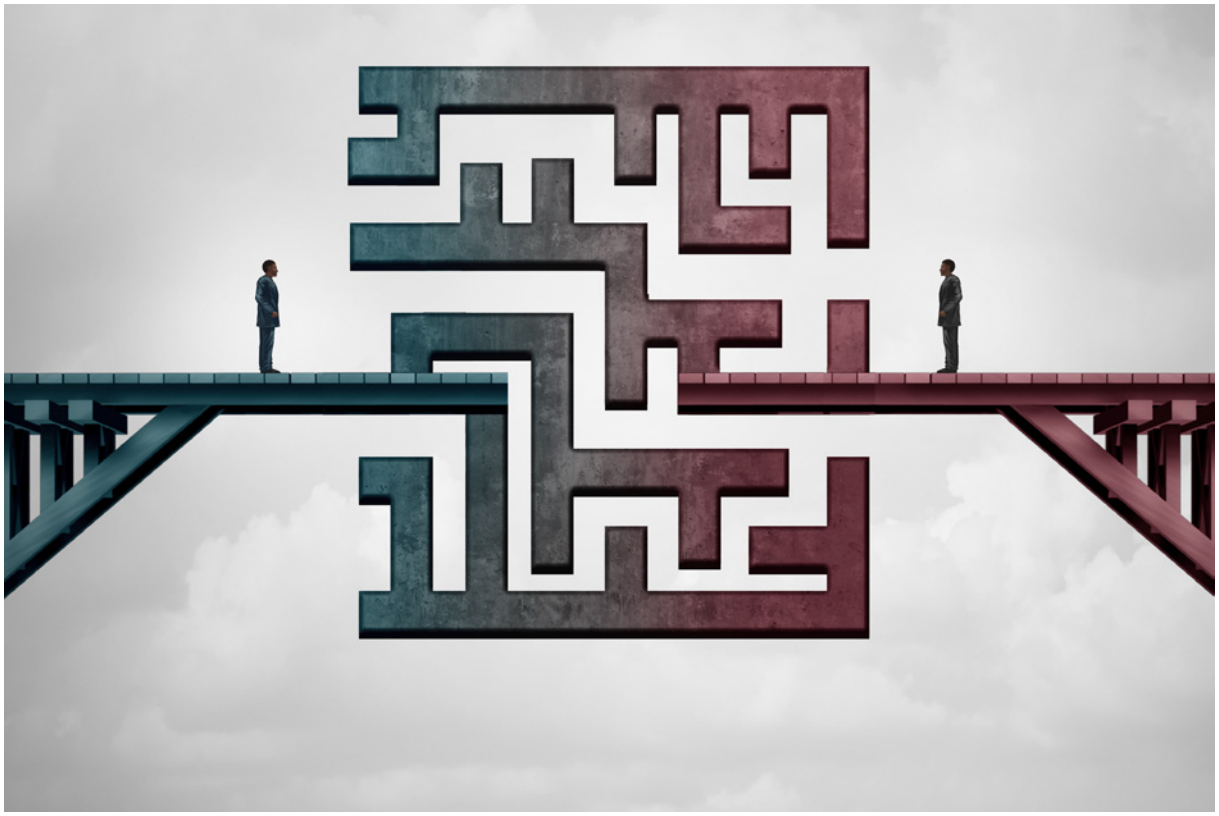

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Paul Peterson is a partner in BDO's forensic investigation and litigation services practice based in Washington, DC. He is a US-trained, internationally experienced forensic accountant focused on fraud investigations, global anti-corruption, litigation support and consulting services around forensic accounting and anti-fraud programmes and controls. He leverages extensive experience as an auditor and forensic accountant to develop and execute investigative procedures and has worked overseas on fraud and corruption matters. From both an audit and investigatory perspective, he has worked with company management, compliance and internal audit departments, internal and external counsel and audit committees and has reported to several enforcement agencies.

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Matthew S. Miner leads Morgan Lewis's white-collar litigation and government investigation practice in Washington, DC, with a particular focus on matters facing the DOJ and Congress. He has significant experience in government and private practice, and in managing investigations involving alleged corporate misconduct. He represents companies and individuals in a wide-range of high-stakes crises, including matters involving the DOJ, SEC, Consumer Financial Protection Bureau, and Office of Foreign Assets Control, as well as internal and audit committee investigations.

R&C: Could you provide an overview of recent Foreign Corrupt Practices Act (FCPA) enforcement activity? What key trends have emerged in a volatile, uncertain trading environment?

Peterson: The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) continue to prioritise Foreign Corrupt Practices Act (FCPA) matters despite the undercurrent of overall disruption caused by coronavirus (COVID-19). COVID-19 has made a huge impact on US businesses, and this obviously has affected the government's investigative approach and the way companies were addressing an FCPA government inquiry. Initially, US enforcement agencies made some concessions as businesses adjusted their approaches to interviewing international employees, capturing data and reviewing supporting documentation. For matters nearing the final stages of government discussions, the initial COVID-19 period delayed some resolutions. However, more recently, agencies and companies have been moving these negotiations along through virtual discussions, as government and company officials have been more accessible after working through the immediate crisis of the pandemic. In July 2020, the DOJ and SEC published the second edition of their 'Resource Guide to the U.S. Foreign Corrupt Practices Act'. This is the first update since they released the guide in November 2012, and it shows their continued focus on the FCPA. The enforcement actions and settlements in 2020 have raised eyebrows as the fines and penalties levied on companies reached new heights. Overall, the DOJ and SEC have pressed forward with combatting overseas corruption regardless of the pandemic. Companies must remain vigilant in their practices to abide by the FCPA provisions.

Miner: The biggest trend has been a continued increase in the amount of cross-border cooperation and coordination on cases. The US is no longer alone in policing governmental bribery, and the trend line is in the direction of greater and greater cross-border enforcement and law enforcement cooperation.

R&C: To what extent has there been an uptick in investigations and prosecutions for FCPA violations in recent years? What are the key priorities and focus areas for regulators?

Peterson: Over the past three years, there has been an ongoing push to coordinate investigations with local in-country regulatory agencies. This effort has been a global push reaching enforcement agencies around the world, and it has provided the DOJ and SEC with further in-country information related to allegations. This coordination has also resulted in multi-country resolutions with penalties divvied up among jurisdictions. Though government financial penalty credits are commonplace, fines are

increasing, and disgorgements levied by the SEC have been significant due to large alleged corrupt payments in these recent matters. A few of the key priorities for US enforcement agencies include individual culpability, proper assessment by the government of company compliance programmes and the emphasis on self-reporting, cooperation and remedial actions. The 2009 comments from former DOJ FCPA prosecutor Mark Mendelsohn still guide a big portion of the DOJ's mission. As Mendelsohn said: "Companies do not pay bribes, individuals do. We will be targeting those that paid the bribe and those that knew of these corrupt dealings, which may include US executives, in-house counsel and compliance and internal audit departments." There has been a concerted effort by the DOJ to formalise the way it evaluates a corporate compliance programme in the wake of an FCPA violation. In June of 2020, the DOJ criminal division published further guidance on what an effective compliance programme looks like, and the guidance is used when considering the enforcement action handed out. Finally, to obtain credit with US authorities, the DOJ relies on companies to self-report, fully cooperate during the government inquiry, and remediate and correct the underlying weakness that led to the violation.

Miner: Case numbers can be deceiving when trying to divine trends and priorities. The FCPA enforcement programme in the US – both at the DOJ and SEC – should be viewed in three- to six-year arcs. That is because it takes a long time to build these cases and gather the necessary evidence to prosecute a case. A resolution that is announced today is not solely the result of the increased efforts or resources deployed by current DOJ or SEC leadership. The case may have bridged different leadership and even presidential administrations. For that reason, not too much should be read into short-term vicissitudes in statistics. For example, although case numbers appeared to decline in 2017 and 2018, only to increase significantly in 2019 and 2020, the prosecutors and supervisors working on cases in the programme were largely the same throughout. Although the federal personnel hiring freeze and government shutdown likely had some impact on the speed of case development in 2017 and 2018, those were external factors that did not have as much to do with prioritisation within the programme. Once the programme was fully funded and resourced in 2019, we saw an uptick in enforcement numbers, but that uptick was largely from cases already in the pipeline. The most significant recent trend in FCPA enforcement is the prioritisation of holding culpable individuals accountable via criminal prosecution. The number of FCPA prosecutions of individuals has grown steadily since 2016, resulting in more federal trials. Those individual prosecutions are very resource intensive, meaning that a corporate resolution that might have taken a certain amount of effort five years ago will require even more effort and resources to prosecute the culpable individuals. That means

greater and more precise fact development, true discovery obligations, an extensive motions practice, and the ability to succeed in obtaining convictions at trial. Tied to all of that is also the greater development of federal case law to help define the reach of the FCPA.

R&C: Could you highlight any significant FCPA cases in recent times? What aspects made them significant and how were they resolved?

Peterson: The Goldman Sachs enforcement action announced by the DOJ on 22 October 2020 was a banner case, as it resulted in the largest penalty in the history of the FCPA, which dates back to 1977. This case stems from Goldman Sachs' involvement in 1MDB, which is an economic development fund created in Malaysia in 2010. According to the DOJ, this matter involved $1.6bn in bribes among various parties. Goldman Sachs received $600m in fees from multiple 1MDB bond deals. Goldman Sachs was fined $3.3bn as part of the resolution of this matter, and its head of Southeast Asia pled guilty to two counts of conspiring to launder money and violating the FCPA. Ultimately, this case was resolved with a deferred prosecution agreement (DPA), and the fine was split up between the US, the UK, Singapore and Hong Kong. This FCPA resolution showcases a level of international coordination that we have not seen before.

Miner: Resolutions that highlight where red flags were identified and ignored are warning signals for companies. Compliance and internal controls functions gather a great degree of information on areas of risk, both episodic and structural risks. Prosecutors know how to get access to this information in their investigations, and they can often see where instances were elevated, but remedial action was not taken. In that sense, data from detection systems can be as damaging when they are ignored as they are helpful when acted upon.

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>
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R&C: For companies that find themselves subject to an FCPA-related investigation, how should they respond? How important

is it to make an early evaluation of potential settlement?

Peterson: When companies begin to investigate allegations of an FCPA violation, there are four tenets to an effective approach in responding. First, an independent investigation with credible external advisers and investigators. It is necessary to define the right internal stakeholders in charge of the investigation, such as the board of directors or forming a special committee, and engage independent third-party investigators, including a law firm with attorneys experienced in DOJ and SEC coordination and forensic accountants. These third parties should have international colleagues or relationships with in-country firms for on-the-ground procedures. Second, consideration of foreign authorities. As we are seeing more cross-border enforcement agency coordination, the company and investigators should consider and possibly anticipate involvement by in-country agencies. This will drive local-based readiness procedures, such as in-country raids and inquiries. Third, proper scoping. It is important to think critically about the allegations coupled with the company's environment to scope the investigation work plan accordingly. There is a tendency to initially overextend scope. The continuous question to ask is: "What do the DOJ and SEC expect us to do?" Then the company should plan for an eventual voluntary disclosure, even though it may be too early to decide that question. Fourth and finally, full cooperation if the company decides to self-disclose. If a decision is made to self-disclose, the investigating parties should consider all areas that would favour the DOJ and SEC giving a credit when they calculate financial penalties.

> **"To use a trite expression, every case is unique. And that needs to be kept in mind at the outset of any investigation of suspected FCPA misconduct."**
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> *Matthew Miner, Morgan, Lewis & Bockius LLP*

Miner: To use a trite expression, every case is unique. And that needs to be kept in mind at the outset of any investigation of suspected FCPA misconduct. Companies need to take prompt action, but the action needs to be graduated and tailored to the specific facts or allegations before it. Common risks should be looked at in the early days, as well. Personnel who were involved in the incident may

have touched many different transactions and geographies. Processes that were exploited may exist throughout the organisation. But in some cases, they are tied to a specific sales channel or acquired entity. For this reason, it is difficult to say that a company must do X or Y without knowing more about what the company is dealing with. The treatment recommendation necessarily follows the diagnosis or at least the preliminary diagnosis. But in those early days, the company should be probing its counsel to understand how the Xs and Ys may change based upon early fact developments and changes in assumptions.

R&C: When considering a settlement, what key factors should companies and their advisers take into account?

Peterson: In recent years, US enforcement agencies have provided transparency around the methodology and components of how financial penalties for FCPA violations are calculated. The DOJ will look to both the US sentencing guidelines and the facts and circumstances of the case, and it will dial up or down the financial penalties. Credit is given for such factors as the following. Disclosing the violation to the US authorities voluntarily. The company's and its advisers' level of cooperation with the DOJ and SEC, including factors such as factual presentations made. The company's compliance with foreign data privacy, confidentiality and discovery laws. Making employees available to the enforcement agencies. Providing translation of foreign materials. The extent of remedial actions taken by the company, including disciplinary actions. Enhancing their anti-corruption compliance programme and controls. Implementing testing and monitoring procedures. And the nature, seriousness and pervasiveness of wrongdoings. These are the principal areas the company and its advisers should take into account when working through the settlement phase of the FCPA engagement.

Miner: It really depends on where the matter is in the investigative process. If a company recognises that it faces potential FCPA liability before it has heard from the government, the very first question the company faces is whether voluntary self-disclosure is in its best interest. The DOJ's FCPA corporate enforcement policy provides more concrete incentives than were available in the past, but those incentives are not certain and, even if the company can obtain a declination of prosecution, it could also face millions of dollars in disgorgement and legal expenses. When negotiating with the government, whether in the self-disclosure context or not, it is critical for a company to focus on its compliance programme adequacy, both at the time the misconduct occurred but also – and perhaps most importantly – at the time the resolution is being negotiated. These considerations can influence a number of factors, from the potential fine amount, to

whether a monitor is imposed, to whether and how a resolution should proceed.

R&C: What role can deferred prosecution agreements (DPAs) play in resolving FCPA enforcement action? What are the merits and drawbacks of pursuing a DPA?

Peterson: DPAs have become the predominant resolution when negotiating the conclusion of an FCPA matter with US enforcement agencies. Prior to agreeing to this resolution, external counsel weighs several factors, including the evidence, strength of the federal government's case and costs involved of alternative resolutions outside the DPA. While the company accepts responsibility that the violations described in the DPA are true, it waives the right to indictment of an FCPA charge and trial. Forgoing this right may lead to more severe fines compared to the DPA and could have impactful reputational damage. However, if a company agrees to the terms and conditions of the DPA, it likely will expedite the resolution of the matter. In addition to the financial penalties associated with the DPA, the terms and conditions traditionally require a company to modify and enhance its compliance programme by establishing an effective anti-corruption programme and a system of internal accounting controls. This compliance programme covers the company's FCPA policies and procedures, oversight activities, training, investigation policies and disciplinary actions, third-party relationships, and M&A protocols. These improvements and an adherence to the DPA will have to be periodically reported to US regulators. Obviously, there are costs associated with these DPA requirements, but the drawbacks of not pursuing a DPA might be far worse.

Miner: The DOJ's corporate FCPA resolutions track into five different lanes: corporate or subsidiary guilty pleas, DPAs, sometimes with a subsidiary guilty plea, non-prosecution agreements, declinations with disgorgement, sometimes with a parallel enforcement action by the SEC or other entity, and deference to a resolution by the SEC or another enforcement entity. Typically, the more significant resolutions fall into the guilty plea or deferred prosecution categories, because they warrant different degrees of court involvement. A guilty plea can also trigger collateral consequences that are not necessarily present with other forms of resolution, for example mandatory exclusion from certain federal programmes. Where conduct is severe, but a guilty plea would trigger disruptive collateral consequences, a DPA can provide a more reasonable resolution for all sides. Of course, if a lesser form of resolution can be reached, that would be more desirable for the resolving company.

R&C: How do you envisage the intensity of FCPA enforcement activity in the months ahead? What advice would you

offer to companies on enhancing their internal controls and processes to avoid regulatory action and penalties?

Peterson: There are two influences that are contributing to an environment where we will see an increase in FCPA violations. First, COVID-19 has put a tremendous strain on companies' governance structures and plans. Office of general counsel, compliance departments and internal audit teams have not been able to execute on oversight and monitoring activities, all while internal controls have changed for the worse to accommodate the remote work environment. With travel not possible or heavily restricted, there is less in-country monitoring of high-risk transactions and third parties. The second influence is the distress and major economic losses companies are sustaining due to the pandemic. This may lead to improper actions and corruption as companies get desperate in continuing as a going concern. With the motivation to increase revenues, employees may opt to circumvent controls, third-party due diligence may be omitted, and transaction approvals waived. This behaviour will likely lead to more FCPA violations. Companies should try to maintain the compliance programme that was in place pre-COVID-19 and push back on relaxing controls, as this may hurt them in the long run – especially if an FCPA violation occurs due to lax operations during this pandemic. According to the SEC enforcement division's 2020 Annual Report – published in November 2020 – there has been a 17 percent decrease in number of enforcement actions compared to 2019. However, the SEC assessed a record-breaking $4.68bn in total monetary remedies, the highest on record. Additionally, the SEC whistleblower programme in 2020 issued awards totalling all-time highs of $175m to 39 individuals. Given the disruption COVID-19 played on the SEC, I believe these numbers are an indication that 2021 will be a banner year in terms of whistleblower activity and enforcement action penalties.

Miner: The DOJ's FCPA unit is at its highest staffing level in history. At the same time, COVID-19 restrictions have limited the unit's ability to travel abroad to develop cases and work with foreign witnesses and law enforcement partners. Similarly, prospective witnesses have not been able to travel to the US or other areas where they might face enforcement interest. All of this will settle out at some point. Cases that have been in the pipeline are clearly being worked, as evidenced by recent resolutions. But those are cases that were at the middle to end of the pipeline. Once travel and face-to-face meetings resume, I expect an uptick in investigative activity tied to the cases that are more at the early stages – at the front to middle of the pipeline. With the number of prosecutors in the unit and the greater degree of cross-border cooperation in recent years, I expect that uptick to be significant. R&C