INSIDE THE MINDS

# International White Collar Enforcement

*Leading Lawyers on Preventative Measures, Regulatory Compliance, and Litigation*

**2015 EDITION**

ASPATORE

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# Foreign Corrupt Practices Act Investigations: Challenges and Strategies for White Collar Attorneys and Their Clients

Richard M. Strassberg and Derek A. Cohen

*Partners*

Goodwin Procter LLP

ASPATORE

## Introduction

The increasing globalization of the world's business has led to a corresponding globalization of law enforcement efforts, which can be seen most prominently in the enforcement of the Foreign Corrupt Practices Act (FCPA).[1] The FCPA is a US statute that prohibits bribes to foreign government officials by US persons, companies, and their employees to secure a business advantage. Foreign nationals acting in the United States also fall within the reach of the FCPA's restrictions. In addition, the FCPA requires public companies listed on US exchanges to maintain strict controls over their books and records to police against such illicit payments.[2]

Enforcement of the FCPA has continued to ratchet up in recent years, and is currently one of the most active areas of investigation and enforcement by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). In just the last two years, the DOJ and the SEC have settled a number of FCPA cases involving the payment of very significant penalties. Some eye-popping examples include the 2013 settlements by Total S.A. for $398 million and Weatherford for $252 million, and the 2014 settlements by Alcoa for $384 million and Hewlett-Packard for $108 million.[3]

In the past several years, the DOJ has also filed a number of criminal cases against individuals.[4] The penalties in such cases can be severe. In April 2010, for example, Charles Paul Edward Jumet was sentenced to eighty-

[1] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494.
[2] 15 U.S.C. § 78m.
[3] *United States v. Hewlett-Packard Polska, SP. ZO.O.*, No. CR-14-202 (N.D. Cal. April 9, 2014), *available at* www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-polska.html (last visited Nov. 12, 2014); *United States v. ZAO Hewlett-Packard A.O.*, No. CR-14-201 (N.D. Cal. April 9, 2014), *available at* www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-zao.html (last visited Nov. 12, 2014); *United States v. Alcoa World Alumina LLC*, No. 14-CR-007 (W.D. Pa. Jan. 9, 2014), *available at* www.justice.gov/criminal/fraud/fcpa/cases/alcoa-world-alumina.html (Last visited Nov. 12, 2014); *United States v. Weatherford Servs. Ltd.*, No. 13-CR-734 (S.D. Tex. Nov. 26, 2013), *available at* www.justice.gov/criminal/fraud/fcpa/cases/weatherford-services-ltd.html (last visited Nov. 12, 2014); *United States v. Weatherford Int'l Ltd.*, No. 13-CR-733 (S.D. Tex. Nov. 26, 2013), *available at* www.justice.gov/criminal/fraud/fcpa/cases/weatherford-international-ltd.html (last visited Nov. 12, 2014); *United States v. Total S.A.*, No. 13-CR-239 (E.D. Va. May 29, 2013), *available at* www.justice.gov/criminal/fraud/fcpa/cases/totalsa.html (last visited Nov. 12, 2014).
[4] *See* John Davis, *FCPA In 2014: A Review of Q3 Enforcement—Part 1*, LAW360 (Nov. 10, 2014), www.law360.com/internationaltrade/articles/594890.

seven months in prison for his role in paying bribes to Panamanian officials in violation of the FCPA.[5] And in May 2014, the 11th Circuit affirmed sentences of fifteen and seven years, respectively, imposed on Joel Esquenazi and Carlos Rodriguez for paying bribes to Haitian officials in violation of the FCPA (as well as for violating other federal statutes).[6] The financial services industry has likewise become a focus of FCPA enforcement. In early 2011, the SEC sent inquiry letters to ten banks, hedge funds, and private equity firms, requesting information about their interactions with sovereign-wealth funds.[7]

In 2013, several executives of Direct Access Partners were charged with violating the FCPA by bribing an official of a state-owned Venezuelan bank.[8] Furthermore, the incentives for whistleblowers provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) may result in more referrals to law enforcement and more FCPA cases targeting the financial services industry.[9]

The focus on FCPA cases is clearly going to continue. In January 2010, the SEC announced the reorganization of its enforcement division, resulting in the creation of five national specialized units, including one devoted solely to FCPA enforcement.[10] The leader of that unit at the time explained that its "primary mission" would be to devise ways to be "more proactive" in enforcement of the FCPA, *id.,* and the current director of the SEC's enforcement division expounded that "the purpose of specialized units was to expand the pie of cases in the Division," Andrew Ceresney, Director, SEC Enforcement Division, Keynote Address at the

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[5] *United States v. Jumet*, No. 09 Cr. 397 (E.D. Va. Apr. 22, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/cases/jumetc.html (last visited Nov. 11, 2014).
[6] *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).
[7] Dionne Searcey & Randall Smith, *SEC Probes Banks, Buyout Shops Over Dealings With Sovereign Funds*, WALL ST. J., Jan. 14, 2011, online.wsj.com/articles/SB10001424052748704307404576080403625366100.
[8] *See* Press Release, U.S. Securities and Exchange Commission, SEC Announces More Charges in Massive Kickback Scheme to Secure Business of Venezuelan Bank (June 12, 2013), *available at* www.sec.gov/News/PressRelease/Detail/PressRelease/1365171574826#.VGFTIzTF9wY (last visited Nov. 11, 2014).
[9] Jennifer Banzaca, *FCPA Compliance Strategies for Hedge Funds and Private Equity Firms*, FCPA REP., June 11. 2014.
[10] *See* Press Release, U.S. Securities and Exchange Commission, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), *available at* www.sec.gov/news/press/2010/2010-5.htm (last visited Nov. 12, 2014).

International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013).[11] With respect to the DOJ, the senior deputy chief of the criminal division's fraud section recently remarked that there are "a bunch" of FCPA cases on deck and that "FCPA prosecutions are going to remain vibrant, aggressive and appropriate."[12]

The government has also sought to expand the jurisdictional reach of the FCPA over foreign individuals. Under the due process clause of the US Constitution, for American courts to exercise personal jurisdiction over FCPA defendants, the defendants must have "minimum contacts" with the United States and such exercise must be reasonable.[13] Two recent decisions in the Southern District of New York suggest that courts will continue to struggle to determine the appropriate reach of personal jurisdiction in FCPA cases. In the first case, *SEC v. Straub*, the court denied defendants' motion to dismiss for lack of personal jurisdiction.[14] The court concluded it had personal jurisdiction of the defendants, foreign executives who had not had any direct contact with the United States, because they had allegedly made false entries in the records of a company that was traded as an ADR on US exchanges, falsely certified to auditors that those records were accurate, and had sent e-mail about a bribe to recipients outside the United States, that passed through US e-mail servers. *Id.*

In the second case, *SEC v. Sharef*, the court granted one defendant's motion to dismiss for lack of personal jurisdiction.[15] The court concluded it did not have personal jurisdiction of the defendant, a foreign executive, because he did not file or sign false financial statements or records for a company with a relationship to the United States, and his only real contact with the United States was his alleged receipt of a phone call from an employee in the this country about the bribe. *Id.* Together, these cases demonstrate that the line

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[11] *available at* www.sec.gov/News/Speech/Detail/Speech/1370540392284#.VGO_7zTF9wY (last visited Nov. 12, 2014).

[12] Rachel Louise Ensign, *The Morning Risk Report: Fines, FCPA on Enforcement Agenda for 2015*, RISK & COMPLIANCE J., Oct. 9, 2014, *available at* http://blogs.wsj.com/riskandcompliance/2014/10/09/the-morning-risk-report-fines-fcpa-on-enforcement-agenda-for-2015/.

[13] *See* Derek A. Cohen et al., *The Ever-Expanding Jurisdiction in FCPA Cases*, CORPORATE COUNSEL, Jan. 24, 2014.

[14] *SEC v. Straub*, 921 F.Supp.2d 244 (S.D.N.Y. 2013).

[15] *SEC v. Sharef*, 924 F.Supp.2d 539 (S.D.N.Y. 2013).

demarcating the existence of personal jurisdiction remains hazy, that even the most marginal of contacts may be adequate to confer personal jurisdiction, and that the enforcement agency has a great deal of power to shape the allegations in the charging document to improve the odds a court finds personal jurisdiction.

Enforcement of the FCPA is also eased by the SEC's rising use of administrative rather than judicial proceedings. Dodd-Frank,[16] passed in 2010, expanded the SEC's authority to resolve cases in administrative proceedings. The chief of the FCPA unit of the SEC's enforcement division explained that the FCPA unit is now "moving towards using administrative proceedings more frequently."[17] One example of this trend is the SEC's decision to file its prominent FCPA case against Bio-Rad Laboratories in an administrative proceeding, which ultimately resulted in disgorgement of over $40 million.[18] This trend is significant because administrative hearings can be favorable to the SEC in a number of ways: proceedings generally must conclude within 300 days of filing, discovery is limited, and evidentiary rules are less stringent.[19] Indeed, the SEC had a perfect record in administrative hearings between October 2013 and September 2014. (Eaglesham, *SEC is Steering.*)

Many other countries have also stepped up their anti-bribery efforts.[20]

For example, in 2010, the United Kingdom passed the Bribery Act, specifically prohibiting UK companies and persons, or others who act in

[16] Dodd–Frank Act, Pub. L. No. 111–203, 124 Stat. 1376-2223 (2010).
[17] Jean Eaglesham, *SEC is Steering More Trials to Judges it Appoints*, WALL ST. J., Oct. 21, 2014, *available at* online.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590.
[18] Press Release, U.S. Securities and Exchange Commission, SEC Charges California-Based Bio-Rad Laboratories With FCPA Violations (Nov. 3, 2014), *available at* www.sec.gov/News/PressRelease/Detail/PressRelease/1370543347364#.VGNzvDTF9wY.
[19] 17 C.F.R. §§ 201.230–201.235, 201.320, 201.360(a)(2); *see also* Peter Henning, *The Debate Over Wall St. Enforcement*, N.Y. TIMES, Oct. 27, 2014, dealbook.nytimes.com/2014/10/27/the-debate-over-wall-st-enforcement/.
[20] *See* TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT 4 (2014) ("The number of formal foreign bribery actions by countries other than the US increased by 71% between 2012 and 2013."); TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT 2 (2010) ("By any calculation, international anti-bribery enforcement is increasing worldwide, as more countries move slowly from enacting anti-bribery laws to initiating actions to identify and prosecute the individuals and companies who break them.").

the UK, from bribing foreign government officials.[21] And in 2013, Canada strengthened its Corruption of Foreign Public Officials Act, adding a record-keeping requirement and increasing penalties, among other things.[22] Moreover, many of the headline-grabbing cases in the past few years have involved substantial cooperation among the enforcement agencies of various countries.

Investigations of activity occurring in various foreign countries around the world pose significant challenges to even the most experienced white collar defense attorneys—challenges that can be different from those involved with domestic investigations. As companies continue to expand operations overseas, especially in the developing world in Asia, Africa, and South and Central America, white collar practitioners will face these challenges on an ever-increasing basis.

**Key Differences between International and Domestic White Collar Issues**

International investigations present challenges that differ from domestic white collar cases in several key ways. By definition, involvement with an international white collar case means involvement with not just US laws, but also the laws of the jurisdiction or jurisdictions where the activity is actually taking place. Navigating the treacherous shoals where the laws of various countries intersect can be tricky business, and present the white collar lawyer with complicated, serious issues that are not typically present in a domestic white collar investigation.

For example, take the situation where white collar counsel has been retained by a US company with sizeable international operations to investigate an anonymous allegation that some of its employees have been bribing foreign government officials so that they can improve the company's bottom line business results in a particular foreign country. Standard practice is for the company, through its outside counsel, to launch an investigation to determine the merits of the allegation. Once counsel and

[21] *See* Bribery Act, 2010, c.23 (Eng.), *available at* www.legislation.gov.uk/ukpga/2010/23/contents.

[22] *See* Corruption of Foreign Officials Act, S.C. 1998, c. 34 (Can.) (as amended June 19, 2013), *available at* http://laws-lois.justice.gc.ca/eng/acts/c-45.2/index.html.

the company ensure that possibly relevant documents, including e-mails and other stored electronic communications, are being preserved, counsel typically tries to collect and review them to see if they can shed light on what happened and help prepare counsel for follow-up interviews of employees implicated in the alleged improper activity. But that review process may itself pose hidden dangers for the uninitiated in conducting international investigations.

*Data Privacy Laws*

Many countries, including Argentina, Japan, Russia, and the member states of the European Union, have enacted privacy and data security laws that cover the handling of personal information—the kind of information likely to be resident in the e-mails and other electronic communications of a company's employees. In practice, these laws impose conditions on a company's ability to access and disclose an employee's e-mail without giving notice and/or obtaining consent from the employee. In fact, many data privacy laws allow for the collection of personal data only on a limited number of bases, defined expressly in the statutes; investigation for possible violations of United States law is not among them.[23] Data privacy laws, such as those adopted by the European Union, also have substantial restrictions on the ability to transfer documents outside the European Union, including to American law offices or to United States law enforcement officials, even if the information was otherwise gathered and accessed appropriately.[24] Violations of these data privacy laws typically carry criminal and civil penalties.[25]

Of course, the last thing in the world white collar counsel wants is to find that their efforts to get to the bottom of an allegation of US criminal activity results in the filing of foreign criminal charges against the client company, or the law firm itself. And, these concerns are not just academic. In September 2009, Magyar Telekom, a Hungarian telecommunications company listed on a US exchange, and therefore covered by the FCPA,

[23] *See, e.g.,* European Union Data Privacy Directive, Council Directive 95/46/EC, 1995 O.J. (L 281/31) (EC), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en.
[24] *See id.* arts. 25, 26 ("Transfer of Personal Data to Third Countries").
[25] *See id.* art. 28 ("Supervisory Authority").

disclosed that the Hungarian National Bureau of Investigation had launched a criminal investigation into the company's internal investigation of possible FCPA violations that the company had initiated using a well-known US law firm.[26] The Hungarian criminal investigation was focused, among other things, on the possible misuse of personal data of employees of the company in the context of the FCPA investigation.[27]

White collar counsel operating in international investigations must stay vigilant to the possibility that actions that are second nature to them when conducting investigations in the US, may pose complicated risks when undertaken overseas.

Knowledge and familiarity with relevant data privacy and labor laws that do not exist in the United States is a must. An awareness of these restrictions allows counsel to structure the necessary fact finding aspects of the investigation in a manner that will also comply with the laws of the particular jurisdiction. In dealing with data privacy laws, for example, counsel may need to ensure that collection of data fits within one of the grounds authorized by the relevant data privacy restrictions, and that the review of the data is handled in the manner required by the statute, including abiding by any restrictions on transferring data to other jurisdictions, like the United States. Counsel also need to be aware of any obligations imposed by a particular jurisdiction to provide notice or obtain consent from employees relating to aspects of the fact gathering and review process.

**National Security and Secrecy Laws**

Another issue of foreign law encountered in conducting some FCPA and other global investigations is the scope of secrecy laws surrounding a country's national security concerns. National security secrecy laws, often applying to military and former military officials, can restrict counsel's ability to gather evidence regarding what transpired if events involved foreign government officials. For example, both the law of the People's Republic of China on Guarding State Secrets and the Secrecy Regulations

[26] *See* MAGYAR TELEKOM PLC., REPORT TO FOREIGN PRIVATE ISSUER (Form 6-K) 2 (2009).
[27] *Id.*

of the People's Liberation Army of China provide substantial restrictions on the disclosure of information deemed by Chinese military officials to be confidential.[28] Because military officials are often involved in overseeing foreign business activity in developing countries, and because, after their military service, former military officials frequently find employment in multinational companies doing business in their country, the issue of secrecy law restrictions can arise in FCPA investigations in various different forms.

White collar counsel who want to explore the backgrounds and relationships of company employees formerly affiliated with the military or the government, may find that the employees are not permitted to disclose relevant information relating to their own backgrounds on pains of breaching the foreign country's secrecy restrictions. The cloak of official state secrecy over the actions of those who may be involved in the conduct under investigation can present a substantial challenge to the fact gathering process, and raise tricky legal issues that need to be addressed by counsel and the company to ensure that a country's national security prohibitions are not violated.

**Limitations on Investigations**

Limitations on investigations by US counsel in foreign countries can severely affect counsel's ability to probe a possible FCPA violation. For example, in China, foreign attorneys are generally not allowed to practice Chinese law, and the use of private investigators is also generally not allowed.[29] These restrictions can be challenging hurdles that the white collar attorney must overcome, often with close coordination with local counsel, to effectively investigate potential wrongdoing overseas.

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[28] *See* Law of the People's Republic of China on Guarding State Secrets (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 5, 1988, effective May 1, 1989, as amended Apr. 29, 2010, effective Oct. 1, 2010) (P.R.C.), *available at* www.cecc.gov/resources/legal-provisions/law-on-the-protection-of-state-secrets-cecc-partial-translation-and.; *see also* Secrecy Regulations of the People's Liberation Army of China (promulgated by the State Counsel of P.R.C. and the Central Military Council of P.R.C., Sept. 23, 1988, as amended Apr. 27, 1993).

[29] *Washington Letter: Restrictions Continue in China for U.S. Lawyers*, AM. BAR ASS'N (October 2012), *available at* www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2012/october/lawyersinchina.html; Notice on Banning the Establishment of Private Organizations with the Nature of a Private Detective Agency, The Ministry of Public Security, 1993 (China).

**Privilege**

International investigations also raise complicated issues about the scope of the attorney client and work product privileges. In the Second Circuit, courts generally apply the privilege law of the jurisdiction in which the privileged relationship was entered into or centered when the communication was sent.[30] Applying this standard, in *Veleron Holding B.V. v. BNP Paribas S.A.*,[31] a court compelled the disclosure of documents after concluding they were governed by the privilege laws of the place where the communications had been made, namely the Netherlands and Russia, and therefore were not shielded from disclosure. And in *Wultz v. Bank of China Ltd.*, a judge held that Chinese law governed communications made in China before American legal proceedings began, and that American law governed communications made after the legal proceedings began.[32] Privilege law varies from jurisdiction to jurisdiction, and which privilege law applies can determine whether communications and documents remain protected. For example, in contrast to American privilege law, the European Court of Justice and several member states of the European Union have declined to apply the attorney client privilege to communications with in-house counsel.[33]

Even if American privilege law applies, international investigations present difficult privilege challenges. Courts in the United States, for instance, generally hold that non-licensed attorneys are not subject to privilege, while the use of non-licensed legal advisors is common in China.[34] And some enforcement agencies outside the United States have the ability to require the production of documents regardless of claims of privilege. Having a clear sense of the privilege protections afforded by the various countries involved in an international investigation is crucial to be able to structure

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[30] *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992).
[31] *Veleron Holding B.V. v. BNP Paribas S.A.*, No. 12-CV-5966, 2014 WL 4184806 (S.D.N.Y. Aug. 22, 2014).
[32] *Wultz v. Bank of China Ltd.*, 979 F.Supp.2d 479 (S.D.N.Y. 2013).
[33] Case C-550/07, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd. v. European Commission*, 2010 E.C.R. I-08301, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=83189&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=264505 (last visited Nov. 17, 2014); Marcus Christian, *Navigating the minefield: Special risks in FCPA cross-border internal investigations*, INSIDE COUNSEL (Apr. 16, 2014), www.insidecounsel.com/2014/04/16/navigating-the-minefield-special-risks-in-fcpa-cro.
[34] *See Wultz*, 979 F. Supp. 2d 479.

the investigation in a manner to avoid having information, thought to be privileged, ruled to be discoverable by third parties.

**Cultural and Language Issues**

Differences in cultural norms also present significant challenges in international white collar investigations. A white collar lawyer has to be well-attuned to cultural differences when gathering facts to avoid reaching inaccurate or incomplete conclusions. For example, in some countries, it is generally considered disrespectful to disagree directly with a higher-level executive; outside counsel authorized by the board to investigate allegations of US law violations are not infrequently viewed by employees as such higher-level officers. As a result, if attorneys investigating allegations of FCPA violations are not careful with the manner in which questions are phrased, the answers they receive may be misleading. Specifically, the extensive use of leading questions that suggest an answer to the witness may bias the results of the investigation. If the cultural norm in a country is for the employees to defer to perceived superiors, witnesses may seem to be agreeing with the question, when the accurate answer is very different. While this concern is always present in an investigation, the risk is substantially higher where different cultural norms are at play in international investigations, heightening the importance of remaining sensitive to local customs and cultural differences, and scrupulously adhering to unbiased questioning.

In addition to cultural norms, there are often language issues, at times necessitating the use of interpreters, which can distort fact finding in international investigations. Translation introduces variables in both how the question is heard and understood by the witness/employee, and how the answer is perceived and recorded by the interviewer. While general concepts are more easily explored across language barriers, the devil is so often in the details in investigations of possible criminal activity. Key issues such as the knowledge and intent of the participants mean that nuances in the communication of the questions and answers can matter dramatically.

**Length and Scope of International Investigations**

The size and scope of FCPA investigations can be massive. While international investigations come in all shapes and sizes, the lure of bribery

as a short cut to increase the bottom line is powerful, especially in countries where there is a long history of such payments being expected by the officials in charge. In cases where initial allegations of impropriety are found to have merit, the prudent course demands that the company fully investigate the scope of such questionable activity; such investigation may focus on entire business units, entire operations in a particular country, and even company operations across entirely different nations.

The investigations can also seem to have no end. While the statute of limitations for most crimes, including the FCPA, is five years, the government can easily extend that period for up to an additional three years simply by making a request for evidence pursuant to a mutual legal assistance treaty with another nation.[35] Section 3292 provides that the statute of limitations for a criminal case can be tolled for up to three years if the government makes an official request of a court or other authority of a foreign country for evidence that is believed to be relevant to that investigation. Given that FCPA cases almost by definition involve activities abroad, it is not hard for the government to satisfy the standards of § 3292 or to make a treaty or other official request to a country for evidence.

The effect of extending the limitations period from five to eight years, combined with the prosecutor's typical arsenal of ways to extend the limitations charge through allegations of conspiracy and continuing conduct, add to the burdens on white collar counsel defending such matters. As time marches on and the people involved in transactions move on or can no longer recall details, counsel may find it hard, or even impossible, to satisfy prosecutors who raise questions about old transactions that, with the help of hindsight, they deem suspicious.

**FCPA Red Flags**

Red flags that raise concerns regarding possible FCPA violations include operations in countries with a history of official corruption; the use of third-party agents or consultants, especially where there are payments to such third parties with little or no backup documentation supporting the nature of the payment; and a lack of transparency in written contracts and the reporting of expenses in the books and records of the company. The use of third-party

[35] *See* 18 U.S.C. § 3292 (2012).

agents and consultants is a particular hot button item because these outsiders have, in many cases, been used as vehicles to funnel illicit payments to foreign officials, their family members, and affiliated parties. Third-party payments can also be used as a means to generate cash, which can then be used by the company employees directly to bribe foreign officials. As a result, contracts that appear to be unnecessary, or that appear to be for inflated amounts, also raise red flags as signs of possible impropriety.[36]

On the other hand, the use of third-party agents and consultants can be perfectly legal. At times, it is necessary for a company to engage local agents and consultants to be able to do business effectively in a particular country. While such transactions merit close examination, they are not in themselves an indication of improper activity. Ensuring that all contracts with third parties have clauses requiring compliance with the restrictions of the FCPA and other laws, and allowing access to third-party records to confirm money was not diverted to any foreign government official, are helpful cautionary steps for a company to take when contracting with outside foreign agents.

Another hot spot for FCPA enforcement is the provision of gifts or entertainment to foreign government officials, including the offering of employment to family members of government officials. The DOJ has taken a very aggressive stance regarding travel and entertainment expenses offered to foreign officials.[37] In some countries, like China, where gift giving and entertaining is a part of the cultural norm when doing business, there may be a lack of awareness by employees that this type of conduct raises substantial FCPA risks.[38]

**Client Strategies: Preventative Measures and Compliance Programs**

Prevention is always the best approach in the area of white collar crime compliance. No company can eliminate the possibility that FCPA violations will occur, but there are some basic steps that a company can take to try to

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[36] *See* THE CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE AND THE ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 22–23 (2012), *available at* www.justice.gov/criminal/fraud/fcpa/guide.pdf.
[37] *See id.* at 15–16.
[38] *See* Richard M. Strassberg & Kyle A. Wombolt, *Beware Foreign Corrupt Practices Act Traps*, N.Y.L.J., July 21, 2008.

limit the risk that it will become the subject of a white collar investigation—even one that turns out to be unfounded at the end of the day.

A robust compliance program is essential in this process.[39] A compliance program should be designed to train employees to avoid FCPA problems, and to monitor for FCPA compliance. Typical aspects of a compliance program will include written directives that explain the basics of the conduct covered by the FCPA and prohibit that conduct by any employee, as well as documented and periodic training with respect to these requirements. As noted above, it may not be clear, especially to employees who are foreign nationals working overseas, that a payment to a government official—which has, historically, been the way to get things done in that country—is, in fact, a serious violation of a felony statute in the United States. Therefore, it is necessary for companies doing business abroad to make sure their employees are educated about the serious consequences of violations in this area.

Additionally, a compliance program should contain a system of checks and balances that allow for monitoring of what employees are actually doing, including a specific focus on the red flag areas that suggest a heightened probability of FCPA concerns. It should be well-known in the company that relevant business practices, including any red flag activity like the use of third-party agents and consultants, would be examined by employees outside the immediate business unit, such as an audit or compliance unit, which will have a clear mandate to fully examine any questionable activity.

Some compliance programs exist in letter, but not in practice: they do not actively monitor what employees are doing. Such compliance programs can be more harmful than helpful, because the government can use the fact that the policy was on the books, but not followed, to argue that the company was aware of the importance of the issue, but intentionally chose not to police for possible violations because it was aware such violations were likely occurring.

Finally, a fulsome compliance policy allows the company and supervisory officers who were not directly involved with the underlying activity to

[39] *See* FCPA: A RESOURCE GUIDE *supra* note 33, at 56–62.

defend their actions when the DOJ or SEC comes calling. The company and its officers can point to the fact that they had a serious compliance program that they were enforcing, and say that even though there may have been a breach, it was a result of rogue activity—not of corrupt corporate culture. That defense can make the difference between a criminal charge that a company might not be able to survive, and a resolution, like a deferred prosecution agreement, that allows the business to continue to exist.

**Conclusion**

In the years to come, we are likely to continue to see substantial activity in the area of international law enforcement focused on FCPA and other anti-bribery laws. These international investigations present unique challenges to the white collar lawyer that require constant vigilance to avoid missteps that could impact the investigation and be detrimental to the client. At the same time, these investigations often present fascinating problems that cry out for the experience and judgment provided by seasoned white collar counsel.

**Key Takeaways**

- Make sure to be aware of all the relevant laws that may impact the international investigation you are involved in before beginning the overseas fact gathering process.
- Establish a plan to ensure the investigation is conducted in compliance with any relevant laws of the jurisdiction you are examining.
- Be aware of the different privilege laws that might apply and structure the investigation and choose its participants accordingly.
- Make sure that the process of gathering evidence takes into account cultural norms and language barriers to prevent distortions in the factual record.
- Keep abreast of new cases and developments. Changes are constantly occurring in how courts interpret the FCPA and in various other countries' laws that may affect the investigation.

***Richard M. Strassberg****, co-chair of Goodwin Procter LLP's Securities Litigation & White Collar Defense Group, chair of its White Collar Crime & Government Investigations Practice and a member of the firm's Executive Committee, specializes in white collar criminal defense, SEC enforcement proceedings, FCPA compliance and investigations, internal investigations, and complex business and financial litigation. Mr. Strassberg is a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America. He has twice been recognized by* The American Lawyer *as "Litigator of the Week" as a result of his securing extraordinary victories in some of the most closely followed white collar cases in the country, including the* Rorech *insider trading case, the* Lane *accounting fraud case and the* KPMG *criminal tax shelter case. In 2014,* Chambers USA *again ranked Mr. Strassberg in Band One, as being among the top 20 New York-based white collar defense lawyers. For several years he has been rated as being among the Top 100 lawyers in New York by* New York Super Lawyers *and is regularly included in* The Best Lawyers in America *and other surveys of the top white collar litigators in the country. Mr. Strassberg is also recognized by his peers as being one of the finest white collar attorneys, twice being cited in Law 360 by white collar partners at other firms as being the white collar lawyer that impressed them, or that they most feared to go up against in court. Mr. Strassberg co-authors a quarterly column on Federal Civil Enforcement in the* New York Law Journal*, has published numerous articles in various legal periodicals, including several on the FCPA, has been a legal commentator on numerous programs, including NPR, Fox News, Dateline and the Financial Management Network, and has been a guest speaker for various organizations, including the American Bar Association, the New York Council of Defense Attorneys, the Federal Bar Council and the Association of the Bar of the City of New York. Prior to joining the firm, Mr. Strassberg was the Chief of the Major Crimes Unit in the U.S. Attorney's Office for the Southern District of New York, responsible for supervising approximately 25 Assistant U.S. Attorneys in the prosecution of white collar criminal cases.*

***Derek A. Cohen*** *is a partner in Goodwin Procter LLP's Securities Litigation and & White Collar Defense Group specializing in white collar criminal investigations and prosecutions, regulatory inquiries and lawsuits, internal corporate investigations and complex commercial litigations. Prior to joining Goodwin Procter, Mr. Cohen served in the Criminal Division of the U.S. Department of Justice from 2010 to 2013, where he was Deputy Director of the Division's Deepwater Horizon Task Force as well as Deputy Chief of the Division's Fraud Section. He also previously served for over six years as an Assistant U.S. Attorney in Philadelphia. During his time at the Justice Department, Mr. Cohen received the Attorney General's Award for Exceptional Service*

*and the FBI Director's Award for Excellence, the highest awards bestowed by each agency. Before that, he practiced white collar criminal defense at two large law firms. Mr. Cohen began his legal career as an Assistant District Attorney in Manhattan immediately following his graduation, with honors, from Boston University School of Law in 1995.*

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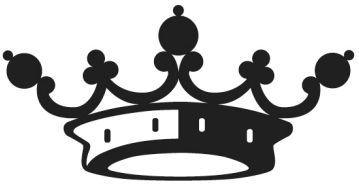

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| **Intelligent Table Comparison:** Inactive | |
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| **Modified DMS:** iw://GOODWINDMS/ACTIVE/80822354/2 | |
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| Embedded Excel | 0 |
| Format changes | 0 |
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