Foreign corrupt practices in US law

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Recent cases involving French companies have triggered a rising interest by European lawyers for the Foreign corrupt practices in US law. This contribution will answer questions raised by a phenomenon that seems new, but, isn't.

History and Overview of the FCPA

The U.S. Foreign Corrupt Practices Act (the "FCPA")[1] was enacted by Congress in 1977 following reports of bribery of foreign officials by U.S. companies in the wake of the Watergate political scandal. The U.S. Government identified hundreds of U.S. companies that paid millions of dollars in bribes to foreign government officials to obtain business outside of the U.S. Specifically, the U.S. Securities & Exchange Commission (the "SEC") found that certain companies used undisclosed "slush funds" to make payments to foreign officials abroad and illegal campaign contributions in the U.S., which were disguised within the companies' reported financial statements. As a result, the FCPA was written to prohibit the act of offering or paying a bribe, as well as falsified accounting records used to disguise a bribe.

The FCPA has both anti-bribery and accounting provisions. The anti-bribery provisions prohibit any payment, offer, promise or authorization of a payment to a foreign official if provided with corrupt intent. Practically, this means that the FCPA prohibits payments made to a foreign official in connection with obtaining new business, retaining existing business, or otherwise securing an improper advantage. The payment must be made to a "foreign official," which includes foreign government officials, executives and employees of state-owned or state-run companies, foreign political parties and political candidates. The FCPA covers payments made directly to foreign officials, as well as payments made indirectly through agents or other middlemen.

[1] 15 U.S.C. §§ 78dd-1, et seq.

The FCPA's anti-bribery provisions apply to three categories of companies and persons: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain foreign persons and entities acting while in the territory of the United States. An "issuer" is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"), or one required to file periodic reports with the SEC under Section 15(d) of the Exchange Act. A "domestic concern" is any individual who is a U.S. citizen, national or resident of the United States, or any business entity that is organized under the laws of the United States or has its principal place of business in the U.S. Issuers and domestic concerns may be subject to the anti-bribery provisions even if they act wholly outside of the United States. The third category covers foreign nationals and business entities that, either directly or through an agent, engage in any act in furtherance of a corrupt practice while in the territory of the United States.

The accounting provisions apply only to issuers and require accurate books and records; not only terms of accurate dollar amounts but also that all transactions are accurately described. These provisions also require issuers to maintain an adequate system of internal controls designed to both prevent and detect improper payments.

The U.S. Government's jurisdiction over foreign companies and individuals can be triggered under any of the categories described above. A number of the foreign companies prosecuted under the FCPA were publicly traded on U.S. exchanges, which meant that they were considered "issuers." Similarly, many multinational companies operate subsidiaries in the United States that are "domestic concerns" as defined by the FCPA. Finally, a wholly foreign company may be criminally liable under the third jurisdictional prong if the company's representatives or agents took any act in furtherance of a corrupt payment while in the United States. This provision is often triggered if someone involved in a bribery scheme attended a meeting in the U.S. related to the scheme or if the bribe involved benefits in the U.S., such as trips to popular U.S. tourist attractions.

Amendments to the FCPA

In 1988, the FCPA was amended to add two affirmative defenses. The first defense, known as the "local law" defense, covers payments that were lawful under the written laws of the foreign country. The second defense relates to reasonable and *bona fide* promotional expense defense, which permits

payments to a public official provided that she can show that the payments were used as part of demonstrating a product or performing a contractual obligation.

The FCPA was revised again in 1998 to comply with the standards outlined in Convention on Combating Bribery of Foreign Officials in International Business Transactions enacted by members of the Organisation for Economic Co-operation and Development (the "OECD Anti-Bribery Convention").[2] The amendments expanded the FCPA in the following five ways:

- Covered payments made to secure "any improper advantage";
- Reached foreign persons who commit an act in furtherance of an improper payment in the United States;
- Expanded the definition of "foreign official" to include individuals within public international organizations;
- Added an alternative basis for jurisdiction based on nationality; and
- Applied criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.

Having set a brief description of the FCPA's actual content, one should acknowledge that it is not as different as many other anti-bribery laws. This should come as no surprise, since the FCPA, as amended, was specifically crafted to conform to the requirements of the OECD Convention. The specificity of the US law lays in, first the functioning of the FCPA enforcement (**I**), and second on the scope recognized to this enforcement (**II**).

I- The functioning the FCPA enforcement authorities

The FCPA enforcement authorities follow specific processes (A), that are set in FCPA resolutions (B).

A. FCPA Enforcement Processes

The FCPA is enforced by the U.S. Department of Justice (the "DOJ" or the "Department") and the SEC. In practice, the DOJ is responsible for

[2] *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2011), *available at* https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

enforcing the criminal provisions of the law, while the SEC's Enforcement Division handles civil enforcement of the FCPA over "issuers." The primary responsibility for prosecuting violations of the FCPA is delegated to the FCPA Unit within the DOJ's Fraud Section, which is part of the DOJ Criminal Division. This unit is comprised of around 30 prosecutors and is based in Washington, D.C. The office is supported by attorneys at U.S. Attorney's Offices located throughout the country, as well as other federal agencies and law enforcement partners, including the Federal Bureau of Investigation's ("FBI") International Corruption Unit and a dedicated FCPA squad of FBI special agents responsible for investigating and supporting the FBI's FCPA cases.

There are various ways in which an FCPA investigation into a company is triggered. Many companies self-disclose misconduct identified through internal channels, such as a financial audit or an internal reporting mechanism. Other times, the enforcement authorities learn of potential misconduct through independent channels, including news reports, information provided by foreign enforcement agencies abroad, and whistleblowers. In addition, the authorities often use information collected as part of ongoing investigations to identify other companies potentially involved in wrongdoing. As an example, if the authorities learn of a third-party agent involved in facilitating improper payments for one company, they often initiate investigations into other companies that work with the same third-party agent. Finally, and increasingly over the last few years, investigations have been undertaken as the result of requests for cooperation from foreign enforcement authorities, either as the product of requests under mutual legal assistance treaties ("MLATs") or a growing network of regular and growing network of informal, cross-border prosecutorial cooperation. Interestingly, professional relationships developed as part of regular meetings of the OECD working group on bribery have proven to be an increasing source of leads, referrals, and information-sharing.

As part of any FCPA investigation, the DOJ will conduct its own investigative processes to collect evidence and witnesses. When a company cooperates with the DOJ's investigation, the Department will also request information collected as part of the company's own internal investigation, including witness statements, key documents, and/or underlying financial records. U.S. enforcement authorities often use existing diplomatic processes with foreign countries to access witnesses or evidence that may be located abroad; one such process involves filing a MLAT with a foreign government requesting information located within that jurisdiction that is not directly obtainable from the U.S.

B. FCPA Resolutions

While DOJ prosecutors are free, in certain instances, to resolve cases without judicial oversight or review, their discretion is nevertheless guided by numerous, published procedures and guides.

General remarks on DOJ's prosecutions mechanisms

In deciding how to resolve an FCPA case, DOJ attorneys are guided by the U.S. Attorney's Manual; in particular, the *Principles of Federal Prosecution* and the *Principles of Federal Prosecution of Business Organizations*.[3] This guidance requires prosecutors to consider whether a substantial federal interest would be served by prosecuting the individual or business entity, whether the person or entity has been subject to effective prosecution in another jurisdiction, and whether there is an adequate non-criminal alternative to prosecution available. As part of this analysis for business entities, DOJ attorneys review a variety of case-specific factors, including: (1) the nature and seriousness of the offense, (2) the pervasiveness of wrongdoing within the corporation, (3) the corporation's history of similar misconduct, (4) the company's willingness to cooperate, (5) whether the company had a pre-existing compliance program, (6) the corporation's timely and voluntary disclosure of wrongdoing, if applicable, (7) remedial actions taken by the corporation, (8) collateral consequences arising from a prosecution, (9) the adequacy of non-criminal remedies, such as civil or regulatory enforcement actions, and (10) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.[4] For cases against individuals, the DOJ also considers whether the person has been subject to effective prosecution in another jurisdiction.[5]

The DOJ resolves FCPA matters with companies and individuals using one of four mechanisms: a guilty plea agreement, a deferred prosecution agreement ("DPA"), a non-prosecution agreement ("NPA"), or a declination. Under a guilty plea agreement, the defendant admits to the facts supporting the charge and pleads guilty. The plea agreement itself must be approved by a court and results in a criminal conviction. A DPA involves the filing of a charging document with the court together with a simultaneous request that

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[3] *See* U.S. Attorneys' Manual ("USAM") § 9-28.000, available at www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

[4] *Id* § 9-28.300, available at https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.300.

[5] *See* USAM § 9-27.000, available at https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution.

the court defer the prosecution for an agreed upon timeline, usually three years. If the company or individual abides by the conditions of the agreement, the DOJ will dismiss the charges with prejudice at the conclusion of the DPA's term, which means that no further prosecution can be brought based upon the conduct identified in the DPA. A NPA is similar to a DPA but is not filed with a court. Instead, the DOJ maintains the right to file charges but agrees to refrain from doing so if the company or individual complies with the agreement throughout the term. A declination is a decision by the DOJ not to bring an FCPA enforcement action against a company or individual, though some declinations expressly reserve the DOJ's right to reopen the matter if pertinent information is later identified. Whether all of these different forms of resolution should be deemed a 'final' action for purposes of the doctrine of *ne bis in idem* remains largely unresolved. Both a plea agreement and a DPA result in final action by a court that would, under established principles of double jeopardy in the United States, preclude a further prosecution by federal authorities. Whether a declination or NPA should receive similar treatment – or more pertinently – be relied upon in a trans-national setting remains an open question.[6]

Criminal fines imposed as part of an FCPA settlement are calculated based on a series of formulas contained in a manual called the *United States Sentencing Guidelines* ("USSG").[7] Under the USSG, the most significant factors in the calculation of corporate criminal fines in FCPA cases is the benefit or "gain" received from the improper payment. Though "gain" is a legal concept defined in the USSG and is not an accounting concept, it translates roughly to the gross margin.[8] A company's gain is then used to calculate a "base fine" amount, which can be made higher depending on certain aggravating factors, such as whether there were multiple bribe payments or whether the conduct involved high-level foreign officials in decision-making positions. In cases involving multiple projects, the gain on the different projects is added together to calculate the base fine. Once a base fine figure is calculated, the USSG calculates multipliers derived from the company's "culpability score," which is calculated by considering various factors, such as whether high-level personnel

[6] In the recent case of SBM Offshore, DOJ reopened an investigation closed in 2014 when new facts came to light during an investigation of the same conduct by Brazilian authorities. DOJ relied, in that instance, on language in its declination letter that reserved the right to reopen the case if new facts came to light. *United States v. SBM Offshore, NV,* No. 17-CR-00686 (S.D. Tex. 2017).

[7] *See* United States Sentencing Commission Guidelines Manual, Chapter Eight—Sentencing of Organizations (Nov. 1, 2016), *available at* https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8.

[8] For unprofitable projects, the amount of the improper payment or benefit is used as a substitute for "gain."

participated in, condoned or were willfully ignorant of the offense, whether the company had an effective compliance program at the time of the offense, whether the company obstructed justice or had a prior history of similar misconduct, and the degree to which the company self-reported the misconduct, cooperated with the DOJ's investigation, and accepted responsibility. The relevant culpability score corresponds to multipliers that are applied to the base fine, which results in the fine range.

In practice, in reaching its settlements, the DOJ has consistently discounted the potential fine substantially from the lowest amount calculated as the fine range. These discounts can range from 25 to 50 percent depending upon the extent of the company's cooperation and whether or not it voluntarily self-reported. The amount of the fine can also be reduced based upon the company's demonstrated ability to pay. Finally, although not required by law, the DOJ has consistently offset any fine by amounts paid to foreign jurisdiction to resolve the same or substantially similar conduct.[9]

Recent Guidance from U.S. Enforcement Authorities

Over the last two decades, the FCPA gained international attention as the result of the increased number and size of settlements involving companies, both domestic and foreign. Despite the increased number of enforcement actions, much of the DOJ and SEC's interpretation of the law remained untested by U.S. courts due to the significant risks associated with litigating FCPA cases. In response to growing questions from companies about the priorities and processes of the authorities responsible for enforcing the law, in 2012, the DOJ and SEC jointly published a manual titled *A Resource*

[9] *See* Press Release, U.S. Department of Justice Office of Public Affairs, *SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries* (Nov. 29, 2017) ("In calculating its fine, the Department credited SBM's payment of penalties to the [Dutch Public Prosecutor's Office] Openbaar Ministerie and the payment of penalties likely to be paid to the Brazilian Ministério Público Federal (MPF)."), *available at* https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case; *see* Press Release, U.S. Department of Justice Office of Public Affairs, *Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case* (Dec. 22 2017) ("In related proceedings, the company settled with the Ministério Público Federal (MPF) in Brazil and the Attorney General's Chambers (AGC) in Singapore. The United States will credit the amount the company pays to Brazil and Singapore under their respective agreements, with Brazil receiving $211,108,490, equal to 50 percent of the total criminal penalty, and Singapore receiving up to $105,554,245, equal to 25 percent of the total criminal penalty."), *available at* https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties.

Guide to the U.S. Foreign Corrupt Practices Act.[10] This guidance was intended to provide the public with more insight into various topics related to the FCPA, including the scope of the law's coverage and how U.S. authorities interpret various provisions of the law.

In April 2016, the DOJ issued the *FCPA Enforcement Plan and Guidance*, which included a one-year pilot program aimed at incentivizing companies to self-disclose potential FCPA issues, fully cooperate with the DOJ in the investigation of those issues, and remediate any issues identified in connection with the misconduct.[11] This guidance, which is often referred to as the 2016 Pilot Program, detailed specific benefits available to companies that meet these standards, including a reduction of penalties, an increased likelihood of a declination of prosecution for all disclosed criminal offenses, and the avoidance of a compliance monitor.

In November 2017, the DOJ issued the *FCPA Corporate Enforcement Policy*, which formalized certain FCPA enforcement practices and priorities previously issued by the Department.[12] The FCPA Corporate Enforcement Policy supersedes the 2016 Pilot Program and is intended to provide companies with additional incentives to self-disclose and cooperate with the DOJ once they learn of misconduct. Specifically, the Policy states that if a company voluntarily self-discloses misconduct in an FCPA matter, fully cooperates with the DOJ in its investigation, and timely and appropriately remediates, there is presumption that the company will receive a declination from prosecution, absent aggravating circumstances involving the seriousness of the offense, or the nature of the offender. The Policy also states that if such aggravating circumstances exist but the company otherwise has met the disclosure, cooperation and remediation standards, it will receive a 50 percent reduction off the low end of the USSG fine range; however the company is still required to pay all disgorgement, forfeiture, and restitution resulting from the misconduct at issue. For instances where a company does not self-report misconduct but fully cooperates and appropriately remediates, the company will receive up to a 25 percent reduction off the low end of the USSG fine range.

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[10] *See* A Resource Guide to the U.S. Foreign Corrupt Practices Act, *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[11] *See* The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance, *available at* https://www.justice.gov/archives/opa/blog-entry/file/838386/download.

[12] *See* USAM § 9-47.120 ("FCPA Corporate Enforcement Policy"), *available at* https://www.justice.gov/criminal-fraud/file/838416/download.

II- The FCPA's Extraterritorial Jurisdictional Reach

The FCPA's extraterritorial jurisdictional reach seems to have been a surprise for foreign companies. It is however not new. Indeed, the FCPA was amended in 1998 to expand U.S. jurisdiction to conform to the OECD's requirement that participating countries exercise both "national" and "extraterritorial jurisdiction." (A). Specific issues deriving from this extensive territorial jurisdictional reach have partly been considered by the actual practice (B).

A. An instrument that tackles international corruption

The non-contentious nature of the FCPA settlements and the extraterritorial jurisdictional scope of the FCPA have favored the expansion of US enforcement authorities reach. Hence, multiple cases recently involved non-US companies, which is a natural evolution due to the strong efficiency of FCPA's rules on US companies.

Expansion of the US enforcement authorities reach

The FCPA's broad view of jurisdiction is based on principles within the OECD Anti-Bribery Convention, which encourages participating countries to adopt anti-bribery laws that reach conduct anywhere in the world committed by a country's nationals, and which also allows jurisdiction to be asserted over any scheme that is committed, even in small part, within the country's borders. The OECD Anti-Bribery Convention expects members to implement measures to establish jurisdiction over conduct when it is committed by one of the member countries nationals and where the offense "is committed in whole or in part" in the member's territory.[13] Practically, this means that most corruption cases will necessarily implicate the laws of at least two or more countries, all of which have concurrent jurisdiction over the same conduct.[14]

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[13] *See* OECD Anti-Bribery Convention, Article 4, para. 1 (2011), *available at* https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

[14] While art. 4.3 of the OECD Convention contemplates coordination of investigations upon the request of a Member State, the DOJ has taken the position that this provision does not create any self-executing rights for companies or individuals subject to investigation and is advisory in nature. *See United States v. Jeong*, 624 F.3d 706, 711 (5th Cir. 2010).

Under this framework, U.S. enforcement authorities have become increasingly assertive in expanding what conduct they target and how far they can reach under the FCPA. The absence of judicial oversight of the U.S. Government's view—in large measure because most FCPA claims are resolved by settlement—has contributed to a steady expansion of U.S. jurisdiction.

Moreover, the DOJ typically considers the jurisdictional analysis to be wholly separate from its decision of how to resolve a matter, which means that once the Department identifies conduct that occurred in the U.S. sufficient to support a violation of the FCPA, it will pursue an enforcement action against the company or individual without regard to the strength of the relevant jurisdictional nexus. Foreign companies have unsuccessfully argued to the DOJ that a settlement should look different depending on where the majority of the misconduct occurred. Under this theory, a case where the majority of misconduct occurred outside of the U.S.'s jurisdiction should be treated differently than a similar case involving misconduct committed primarily within the U.S. Instead, as discussed further below, the DOJ takes the position the strength of the U.S.'s interest in a matter is weighed against the interests of other jurisdictions when deciding how best to divide the overall penalty amount in a global settlement, but is simply not relevant to the size of any criminal penalty or the form of resolution.

Focus on Non-U.S. Companies?

Much has been written about the fact that a number of recent FCPA settlements involved European companies and many question whether foreign companies are specifically targeted by the DOJ.[15] In our experience, the reason has less to do with any policy or bias of the DOJ and more to do with the difference in timing of when companies became the subject to anti-bribery laws in their home country and the corresponding enhancements made to companies' compliance programs to prevent and detect potential corruption. The FCPA was enacted forty years ago, while analogous laws in many European countries are much more recent. The result is that many American companies have had decades to conform their behavior and culture to comply with the FCPA and develop effective compliance programs. Many of the recent FCPA cases involving European companies cover misconduct that began in the late 1990s and early 2000s—often before the conduct was unlawful in their home countries. Though most U.S. companies were familiar

[15] As of January 2018, eight of the top 10 FCPA enforcement actions of all time (based on assessed penalties) involved foreign corporations.

with the FCPA by that point in time, many European companies were just beginning to understand the FCPA's broad jurisdictional reach and adopt corresponding compliance standards and practices. If we are correct, we expect that, in the coming years, the disproportionate number of "foreign" settlements will diminish, as foreign companies become more adept with compliance enhancements; or, at a minimum, we can expect that Western European companies will less frequently be the target of charges and that enforcement priorities will shift to less-evolved jurisdictions.

B. Uncertainties raised by multiple national authorities' competence

The growing efficiency of non-US anti-corruption laws have raised the questions of double jeopardy as well as the recognition of Parallel Enforcement Actions by Other Jurisdictions by US authorities. Those two questions are still subject to perpetual evolution and have pushed to create global anti-bribery enforcement efforts.

Double Jeopardy

The DOJ will not decline to prosecute a corporate entity based solely on the existence of a prior or pending resolution with foreign law enforcement agencies for the same conduct. The U.S. courts have consistently refused to recognize the common law rule of *ne bis in idem*, reasoning that because the laws of two (or more) sovereigns are involved, the conduct is distinct and is, in fact, not being punished twice. In light of this, multinational companies must grapple with the problems posed by the risk of double jeopardy. While there is no uniform international rule of law prohibiting successive prosecutions by different countries, internationally the common law principle of *ne bis in idem*, which precludes serial prosecution for the same conduct even by different sovereigns, is fairly widely recognized. However, under the "dual sovereignty" doctrine recognized in the U.S. legal system, U.S. courts have held that if a single act simultaneously violates the laws of two sovereigns, the actor has committed two distinct offenses. Therefore, so long as each sovereign prosecutes based on its laws, the actor may be charged and convicted of both offenses.[16]

[16] *See* Erin M. Cranman, Comment, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 EMORY INT'L L. REV. 1641, 1642 (2000) *("Although the Supreme Court has yet to hear a case concerning successive prosecutions by the United States and a foreign government, courts of appeals have uniformly held that the dual sovereignty would apply in such a situation. See, e.g., United States v. Rezaq, 134 F.3d 1121, 1128 (D.C. Cir. 1998); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984), cert. denied, 470 U.S. 1031 (1985); United States v. McRary, 616 F.2d 181,*

Companies and individuals have attempted—without much success—to use provisions of the OECD Anti-Bribery Convention to resist successive prosecutions related to the same underlying conduct or, at the very least, to argue that participating states should coordinate to minimize the burden of responding to multiple investigations and (potentially conflicting) demands for information. When more than one member state has jurisdiction over a particular offense, the OECD Anti-Bribery Convention obligates the parties, upon the request of one, to consult in order to "determine the most appropriate jurisdiction for prosecution";[17] however, the OECD Anti-Bribery Convention does not explicitly prohibit instances where multiple jurisdictions seek to prosecute an actor for the same conduct. When challenged, U.S. courts have upheld successive prosecutions by two different countries on the basis that the OECD Anti-Bribery Convention does not prohibit two signatory countries from prosecuting the same offense and instead require only that the signatories with concurrent jurisdiction over a relevant offense must, "at the request of one of them," consult on jurisdiction.[18]

Recognition of Parallel Enforcement Actions by Other Jurisdictions

Though the DOJ refuses to entirely defer to prior prosecution in other jurisdiction, the Department consistently recognizes parallel settlements with foreign enforcement authorities as a consideration when resolving corporate matters and typically reduces the penalty calculations by the amount paid to other authorities. It is the Department's standard practice to credit related settlements with foreign agencies after a final fine amount is calculated using the USSG methodology and applying any further reductions based on a company's disclosure, cooperation, and/or remediation.

When deciding potential penalties owed by a company, the DOJ typically evaluates potential misconduct under the FCPA's framework and does not consider whether a lesser penalty or fine amount would be imposed by the jurisdiction in which the conduct was committed or, in the case of a foreign company, where that company resides.[19] The DOJ uses the USSG as

185 (5th Cir. 1980), cert. denied, 456 U.S. 1011 (1982); United States v. Richardson, 580 F.2d 946, 947 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979)").

[17] *See* Article 4.3, *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

[18] *U.S. v. Jeong*, 624 F.3d 706, 711 (5th Cir. 2010).

[19] Though the FCPA includes an affirmative defense if the defendant can show that the "payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country" at the time of the offense, the fact that certain

the basis for deciding the total amount of penalty that should be owed by a company involved in misconduct, even if that amount is ultimately shared by multiple jurisdictions. In practice, this means that even if a fine paid to another jurisdiction is satisfactory under that jurisdiction's applicable anti-bribery law, the DOJ will still assess whether the USSG calculations result in a higher fine amount. If so, the Department will likely take the position that the difference should be paid to the U.S. or another country involved in a global resolution.

Global Anti-Bribery Enforcement Efforts

Increased coordination between FCPA prosecutors and their foreign counterparts means that companies involved in potential misconduct are likely to find themselves carrying out a multi-jurisdictional investigation that requires parallel negotiations with law enforcement authorities in several countries.

In recent years, U.S. authorities have significantly increased the level of coordination and information-sharing with their foreign counterparts. At the investigation stage, the DOJ is exchanging a greater number of documents, witnesses, financial records, and related leads with foreign law enforcement entities. At the settlement phase, the improved international cooperation is evident through the increase in joint settlements involving the DOJ and many foreign law enforcement agencies.

Companies involved in multi-jurisdictional investigations must be aware of legal problems caused by cross-border investigations, which may involve concerns around data protection, IP controls, relevant blocking statutes, and the availability and scope of attorney-client privilege protections. For example, it is common for the DOJ to request copies of key documents, correspondence or other records identified during a company's investigation, the production of which may trigger data protection laws in countries where the data was collected and/or resides. Many of these risks can be managed through familiarity with the relevant rules and candor with U.S. enforcement authorities when an information request triggers potential liability by a foreign jurisdiction. In recent years, the DOJ's FCPA Unit has been willing to use MLAT requests submitted to foreign governments as a way to collect certain information without requiring a company to run afoul of blocking statutes or data protection restrictions in place in the relevant jurisdictions. Conversely,

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offenses would not be prosecuted under local law is insufficient to trigger the local law defense. In practice, this defense is rarely triggered as most countries have written laws and regulations prohibiting bribery of public officials, even if those laws are infrequently, if ever, enforced.

the DOJ has grown increasingly sensitive to the risks posed by so-called "me-too" prosecutions, in which states that have not participated in the investigation or resolution of a matter later seek evidence from the DOJ in order to undertake a successive prosecution of their own. While the DOJ is constrained by the terms of MLATs, it has increasingly refused requests for voluntary cooperation under these circumstances, recognizing the inherent unfairness of multiple, successive punishments and the need for certainty and finality by corporations cooperating in DOJ investigations.

Recently, there has been a significant increase in the DOJ and SEC's use of global settlements to resolve matters that have been investigated by enforcement authorities in multiple jurisdictions.[20] Under this type of resolution, U.S. enforcement agencies will impose a total penalty on the company (as calculated by the USSG), but will deduct amounts paid or to be paid to other jurisdictions. The recent global settlements have involved amounts paid to authorities in a number of jurisdictions, including Brazil, the United Kingdom, Singapore, Sweden, the Netherlands, and Switzerland. As a practical matter, the most successful litigation strategies for companies involved in multi-jurisdictional investigations have involved the encouragement of joint, global resolutions, in which every national stakeholder can participate simultaneously.

[20] *See* Press Release, U.S. Department of Justice Office of Public Affairs, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (Dec. 21, 2016), *available at* https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve; Press Release, U.S. Department of Justice Office of Public Affairs, *Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case* (Jan. 17, 2017), *available at* https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act; Press Release, U.S. Department of Justice Office of Public Affairs, *Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan* (Sep. 21, 2017), *available at* https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965; Press Release, U.S. Department of Justice Office of Public Affairs, *Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case* (Dec. 22, 2017), *available at* https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties.