Global bribery and corruption review
2016

Our annual review of global developments in anti-bribery and corruption regulation and enforcement, with a look ahead to 2017 trends.
Executive summary

No review of this type would be complete without touching on the what-ifs. But that’s no easy task: it’s impossible to predict the bribery and corruption landscape around the world with 100% certainty. It is possible, though, to examine trends and to project what might happen under a given set of circumstances in a given country at a given time. We also draw on our work day-to-day advising clients like you. This spans compliance, investigations, and enforcement, as well as dealing with regulators and other authorities.

As we head into uncertain times, the circumstances we talk about here are fast changing. So this report can only guide you to a point. Beyond that, we’re on hand for when you need to know more.

Here are the topics we cover:

**Agencies combine their efforts**
In the United States, the FBI has added to its FCPA unit, creating three dedicated investigative teams. The DOJ and SEC often work as one to enforce the FCPA. And the list of foreign law enforcement agencies — from Austria to Gibraltar to the UAE — that cooperate with U.S. authorities grows each year. With these measures in place, coordinated, cross-border, corporate enforcement actions look set to rise.

**Privilege and cooperation**
In the UK, mixed messages are circling what the SFO and the English courts expect when it comes to cooperation, especially around the vexed issue of privilege. The SFO can’t, at least formally, treat the assertion of privilege as a lack of cooperation. But it clearly seeks to encourage and reward waiver. It is also prepared to litigate over “false or exaggerated” claims to privilege concerning materials produced during an internal investigation. We weigh up the benefits and the risks of cooperation, and where we stand on privilege.

**Anticorruption enforcement reaches a milestone**
In Latin America, governmental bodies have begun to improve anticorruption enforcement. From investigations to international collaboration, Brazil has revamped its approach to corruption and has seen notable results. Mexico has new and revised laws that bring about a raft of changes, from penalties for private individuals to protection for whistleblowers. We report on Mexico and Argentina as well.

**Cross-border investigations**
For the most part, investigations of any sort are unwelcome, challenging, and time-consuming; they’re fast becoming commonplace for global companies. They bring myriad issues to contend with — local laws, authorities, internal stakeholders, and so on. If mishandled, these can create conflicting obligations. But there are steps you can take to minimize the impact of an investigation, if you know the pitfalls.
A varied enforcement environment
Draft amendments to China’s Anti-Unfair Competition Law, if enacted, will see Chinese law take a step closer to Western legislation. Australia is adapting its legislative approach to corporate crime. Meanwhile, South East Asia faces a challenging year, as anticorruption enforcement in the region remains unpredictable, with a few exceptions such as Singapore.

Detection and enforcement are on the agenda
Africa has an embedded bribery and corruption problem as well as other barriers to doing business, but it has reached a turning point.

A focus on compliance
Drawing on our global study Steering the Course, we offer a glimpse of compliance in the real world. For more on the study and to get full access to the results, please visit www.hoganlovellsabc.com. We can help you make your compliance program a living, breathing document that you keep in sync with the regulatory environment.
Contents

Executive summary 2
U.S. bribery and corruption outlook 7
UK: Is cooperation really worthwhile? 17
Developments in Latin America 24
Notable progress in the region 25
New anticorruption measures in Mexico 30
Argentina cracks down on corporate corruption 33
Cross-border investigations – a growing risk 37
Developments in Asia Pacific 48
China: Draft amendments to the AUCL redefine commercial bribery 49
South East Asia 51
Australia: A fresh approach on the horizon 60
Africa: Be prepared to go the extra mile 63
Compliance – are you steering the course that satisfies the authorities? 69
References 74
One firm, one team 76
Our team 78
About Hogan Lovells 79
SEC’s FCPA enforcement actions
2016

1 February
SAP SE

4 February
SciClone Pharmaceuticals

4 February
Ignacio Cueto Plaza

16 February
VimpelCom – PTC

1 March
Qualcomm

2 March
Novartis AG

7 June
Nortek

21 June
Analogic Corp and Lars Frost

7 June
Nokia

7 April
Las Vegas Sands

16 February
VimpelCom – PTC

4 February
SciClone Pharmaceuticals

4 February
Ignacio Cueto Plaza
U.S. bribery and corruption outlook

Lillian S. Hardy and Stephanie Yonekura

Nations across the globe increasingly focus on preventing bribery and corruption and are coordinating their efforts to do so more than ever before. In the United States, this effort is led by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), which share jurisdiction to enforce the Foreign Corrupt Practices Act (FCPA).

To undergo an FCPA investigation entails significant risk. Since 2008, at least 10 corporations have agreed to pay more than US$300m in penalties to resolve such investigations. Defense costs associated with a global bribery or corruption investigation can also run into millions before any penalties are assessed.

Each year, we defend many corporations in FCPA investigations and counsel others on how to minimize FCPA risk. And of course, we track the enforcement landscape to best represent and advise our clients. A number of developments that emerged during 2016 will have broad implications for the coming year.

Corporate FCPA enforcement actions escalate

DOJ resolved two corporate FCPA investigations in 2015 — its fewest number of resolved corporate cases in a year since 2003. In 2016, Andrew Weissmann, Chief of DOJ Criminal Division’s Fraud Section, promised that this dip did not “tell the whole story.” He emphasized that a different picture would emerge over the long term. But, he also pointed out that the complexity of prosecuting more individuals has affected the speed at which corporate investigations get resolved. A jump in criminal FCPA resolutions in 2016 and a stream of actions against individuals support his assertions. More significantly, the SEC resolved 23 FCPA corporate actions in 2016, more than double the nine corporate actions it resolved the year before.
The 2015 dip in corporate enforcement actions may in part relate to FBI resources being reorganized. In March 2015, the FBI announced plans for three dedicated FCPA teams in New York, Washington, D.C. and Los Angeles. Although this transition may have delayed some investigations, the new teams have reportedly tripled the FBI’s FCPA investigative resources.²

In the first full year since DOJ Deputy Attorney General Sally Yates announced in a memo that DOJ would vigorously pursue culpable individuals for corporate wrongdoing, DOJ and the SEC reached FCPA settlements with 24 distinct corporate groups. Six of these investigations have so far resulted in criminal or civil actions against individuals, though it’s unclear whether these numbers are an outgrowth of the policies in the Yates Memo. As the Deputy Attorney General herself indicated in a May interview, corporate investigations develop over a long period. So the effects of this new focus — to the extent that it is new — will not be known for some time.³

Beyond the individual enforcement actions linked to corporate resolutions reached in 2016, DOJ’s investigation into corruption at Venezuela’s state-owned, state-controlled energy company, Petróleos de Venezuela, S.A. (PDVSA), resulted in six guilty pleas from individuals. Three U.S. businessmen pleaded guilty to FCPA violations related to their efforts to secure energy contracts from PDVSA. Their pleas followed those of three PDVSA foreign officials who had accepted bribes from the Americans and conspired with them to launder the proceeds. In addition, a U.S. citizen and former high-ranking official of Guinea was arrested and charged with laundering the proceeds of bribes received from a Chinese conglomerate.

The SEC resolved 23 FCPA corporate actions in 2016, more than double the nine corporate actions it resolved the year before.

The SEC also settled one FCPA-related administrative proceeding against an executive at a Chinese subsidiary of Harris Corporation but will forego any action against the corporation. Jun Ping Zhang, a former executive at the subsidiary, agreed to pay a US$46,000 civil penalty to resolve allegations that he helped bribe Chinese government officials to retain business for Harris. Ping allegedly supported his sales staff’s efforts to submit false expense reports and use the cash reimbursed to buy gifts for government officials.

In 2011, the Harris Corporation bought CareFx Corporation. As part of that deal, Harris picked up a CareFx subsidiary, Hunan CareFx Information Technology, LLC, which provided electronic records management software to government healthcare providers. The SEC alleged that employees at the subsidiary made improper gifts to Chinese government officials worth at least US$200,000 and up to US$1m. The gift recipients ultimately awarded contracts worth more than US$9.6m to CareFX.
Harris’s due diligence while buying CareFx didn’t uncover the FCPA violations. But, the SEC was convinced that Harris’s post-purchase compliance program, which included an anonymous complaint hotline, allowed the company to detect the misconduct five months later in September 2011. Ping was relieved of his duties as chairman and CEO of CareFx China in April 2012 and ended his services at Harris in July 2012. The SEC did not indict Harris due to “the company’s efforts at self-policing that led to the discovery of Ping’s misconduct shortly after the acquisition, prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC’s investigation.”

FCPA pilot program

Six months after the Yates Memo, DOJ’s Fraud Section released the Foreign Corrupt Practices Act Enforcement Plan and Guidance. This memo outlines a pilot program that allows fine reductions beyond what is available under the U.S. Sentencing Guidelines. To earn such a reduction, as a threshold matter, companies must disclose all relevant facts about individuals involved in wrongdoing consistent with the Yates Memo and disgorge all profits resulting from any FCPA violation. The program runs for a year from 5 April 2016. It grants the most extensive reductions to companies that voluntarily self-disclose possible FCPA violations, fully cooperate with investigators, and implement timely and appropriate remediation.

Top 10 FCPA enforcement actions of all time

1. Siemens, Germany
   US$800m
   2008
2. Alstom, France
   US$772m
   2014
3. KBR/Halliburton, United States
   US$579m
   2009
4. Och-Ziff Capital Management Group LLC, United States
   US$412m
   2016
5. BAE, UK
   US$400m
   2010
6. Total SA, France
   US$398m
   2013
7. VimpelCom, Holland
   US$397.6m
   2016
8. Alcoa, United States
   US$384m
   2014
   US$365m
   2010
10. Technip SA, France
    US$338m
    2010

Source: www.fcpablog.com
The program promotes greater accountability for individuals and corporations and enhances the Fraud Section’s ability to prosecute individuals by motivating companies to self-disclose and cooperate with investigators. Assistant Attorney General Leslie Caldwell explained that the program provides a concrete incentive for companies to self-report FCPA violations and to secure evidence — that might otherwise be hard for prosecutors to get — about individuals responsible for the FCPA violation.

Ms Caldwell acknowledges that, in recent years, self-reports have plummeted. She attributes this to a perception that companies that don’t self-disclose but cooperate when the government learns of an FCPA violation are not treated much more harshly than those that investigate and self-disclose on their own. The program tries to dispel this view. It makes clear that companies that don’t self-disclose will get at best a 25% reduction from the bottom end of the Sentencing Guidelines fine range. In contrast, corporations that meet the program’s other requirements and do self-disclose may qualify for a reduction of up to 50% or a declination of prosecution.

Mr Weissmann has explained that DOJ has added 10 lawyers and five supervisors to its FCPA unit. They focus on companies that don’t self-disclose and on parts of the world where there’s a misperception that investigations are unlikely. He explained that the extra FCPA enforcement resources will provide the “stick” side of the carrot and stick approach the Fraud Section has designed to encourage self-disclosure.

The program also explains that prosecutors may issue “declinations of prosecutions” to some corporations that self-disclose and meet the cooperation and remediation requirements. DOJ will reportedly consider the seriousness of the offense in deciding whether a declination is appropriate. It has indicated that a declination is unlikely if executive management was involved in the wrongdoing, the company made a significant profit from the misconduct in relation to the company’s size and wealth, or the company has any history of non-compliance or resolved a separate matter with DOJ within the last five years.

DOJ has issued five declination letters since it announced the program. In three cases — Akamai Technologies, Inc.; Nortek, Inc.; and Johnson Controls, Inc. — the letters neither made any factual findings nor required any disgorgement. In those cases, parallel SEC investigations did require disgorgement. The SEC’s allegations in those cases involved alleged bribery schemes executed by the companies’ Chinese subsidiaries. But it’s not clear whether those schemes had a U.S. link that would have supported FCPA anti-bribery charges in the first place. So, the extent to which these declinations represent a significant break from pre-pilot program charging practices remains unclear.
The FCPA Enforcement Plan and Guidance outlines a pilot program that allows fine reductions beyond what is available under the U.S. Sentencing Guidelines.

Declination letters issued to HMT LLC and to NCH Corporation, in contrast, described DOJ’s investigative findings and required each company to pay disgorgement to the U.S. Treasury. This distinction may be because HMT and NCH are both privately held companies — HMT produces above-ground storage tanks for oil and gas and NCH manufactures cleaning products — and are thus not subject to an SEC action. In these two instances, the companies did not agree to any ongoing reporting or cooperation obligations as would likely have been required if they had resolved the action through a non-prosecution agreement.

DOJ appears to be motivated to highlight the benefits of the pilot program extensively to motivate companies to self-disclose. Even in cases in which DOJ does file charges, it may seek to underscore the benefits of self-disclosure by highlighting penalty reductions for those that self-disclose misconduct and by seeking harsher penalties from those that do not. SEC Division of Enforcement Director Andrew Ceresney has said as much, explaining that: “I have emphasized before, if we learn the company made the decision not to self-report after learning of misconduct, there will be consequences.”

Joint FCA/FCPA enforcement actions

On 1 March 2016, DOJ announced that Olympus Corporation of the Americas entered into two deferred prosecution agreements through which it agreed to pay US$646m to resolve criminal charges under the Anti-Kickback Statute (AKS) and the FCPA. Olympus will pay US$312.4m as a criminal penalty for violations of the statute, US$310.8m to settle related civil claims under the False Claims Act (FCA) and similar state statutes, and a criminal penalty of US$22.8m for violations of the FCPA. This case is unusual in that Olympus was investigated at the same time for violations of the FCA and the FCPA, which prohibit similar conduct.

The AKS is a criminal law that bans knowing and willful “remuneration” to induce or reward patient referrals or to generate business involving goods or services payable by the Federal healthcare programs — for example, drugs, medical supplies and devices. Violating the AKS also renders any claim, tainted by a banned kickback, false for purposes of the FCA. In the Olympus case, a whistleblower alleged violations of the AKS that induced physicians and hospitals to buy Olympus equipment, supplies, or consumables. The alleged false claims then arose when the physicians or their affiliated hospitals submitted claims to Medicare or Medicaid for procedures performed on Olympus medical equipment, which was tainted by the kickbacks.
The case alleged that the unlawful inducements to buy Olympus equipment extended beyond U.S. borders. The foreign conduct supported allegations that Olympus’s inducements to physicians and administrators who were employed by state-owned or state-controlled hospitals violated the FCPA. The FCPA bans paying or offering to pay “anything of value” to a “foreign official” to influence them in an act to “obtain or retain business.” U.S. enforcement officials have for years maintained that physicians employed by state-owned or state-controlled hospitals count as “foreign officials.” Thus, inducements paid to healthcare providers at these institutions were alleged to have violated the FCPA.

Until now, it has been rare for a company facing FCA charges to also face an FCPA enforcement action for parallel conduct. The Olympus case suggests this may be changing despite the fact that DOJ’s Civil Division handles FCA investigations while its Criminal Fraud Division handles FCPA investigations.

Although the Olympus case arose in the healthcare context and involved the AKS, any corporate corruption investigation of a multinational has the potential to involve both domestic corruption laws and the FCPA. Allegations that a corporation made corrupt payments to a domestic government official and so filed a false claim for government reimbursement could lead to discovery of overseas conduct that would also attract FCPA scrutiny. Increased cooperation between DOJ’s civil and criminal divisions may increase enforcement risk for multinationals that both contract with the U.S. federal government and have contacts with foreign government officials.

International cooperation is vital to enforcement officials

SEC Chair Mary Jo White noted that fighting bribery and corruption is a global effort. She called on the global regulatory community to be more effective and better coordinated. She explained that U.S. FCPA enforcement efforts depend on cooperation and help from the SEC’s international counterparts and that it received help from entities in an expanding list of countries — including Austria, Bermuda, the British Virgin Islands, Canada, the Cayman Islands, Cyprus, Denmark, Estonia, Finland, Gibraltar, Ireland, Latvia, Liechtenstein, the Marshall Islands, the Netherlands, Norway, Spain, Sweden, Switzerland and the UAE — in the last fiscal year.11

DOJ officials have also explained that its enhanced ability to cooperate with foreign governments is important to its international enforcement efforts. Ms Caldwell has stated that “[c]ollaboration and coordination among multiple regulators in cross-border matters is the future of major white collar criminal enforcement.”12 She noted that the VimpelCom investigation would not have been possible without
help from law enforcement and prosecutors in Belgium, France, Ireland, Latvia, Luxembourg, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom.

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International investigations do raise concerns for companies that fear they will unfairly be asked to pay penalties to regulators from multiple countries for the same conduct. Addressing this concern, Ms Caldwell has explained that in the VimpelCom case, DOJ calculated the total criminal sanctions based on the offense conduct and other factors and then reduced the share payable to the United States to account for penalties imposed by other countries. A similar approach may have been taken in the settlements with Odebrecht S.A. and Braskem S.A. through which Odebrecht agreed to pay Brazilian, U.S. and Swiss enforcement fines totaling approximately US$3.5bn and Braskem agreed to pay fines and disgorgement totaling approximately US$957m. Ms Caldwell also noted that U.S. prosecutors are becoming more adept at working with other countries to avoid putting companies in the middle of a turf battle.

Looking ahead

With the FBI’s three dedicated FCPA teams in place and increased cooperation from foreign law enforcement entities, the uptick in FCPA enforcement in 2016 looks like it will continue. One FBI veteran explained that the FBI will focus its resources in geographical regions and industry sectors where it has the best chance of building a strong case. The same FBI official reported that the Bureau works most closely with countries in Europe and Latin America, including Brazil and Mexico, and has strong relationships with Australia, Japan, Hong Kong, and Singapore.

In August 2016, Mexico announced changes to its anticorruption regime. Regulations that penalize individuals and corporations that engage in bribery, bid rigging, and other acts will come into effect on 19 July 2017. This more aggressive Mexican enforcement regime follows the SEC’s announcement that Houston-based Key Energy Services, Inc. will pay US$5m in disgorgement to resolve allegations that it funneled payments to an employee of Mexico’s state-owned oil company, Petróleos Mexicanos, to win opportunities to provide rig-based oil well services. These two developments suggest that U.S. law enforcement officials may have increasingly helpful partners in Mexican law enforcement agencies. For more on Mexico, see “New anticorruption measures in Mexico” on page 30.
The actions settled in 2016 also reflect that China remains a hot spot for FCPA investigations. Of the 24 corporate enforcement actions the SEC and DOJ settled, 12 involved bribes to Chinese government officials. Most of these enforcement actions didn’t support criminal charges from DOJ but rather SEC proceedings for violations of the FCPA’s internal control and books and records provisions. Despite the rarity of criminal bribery charges growing out of these investigations, the high volume of actions involving corruption in China cannot be ignored. Corporations doing business in China should scrutinize their compliance programs to minimize this risk. For more on China, see “China: Draft amendments to the AUCL redefine commercial bribery” on page 49.

Lillian S. Hardy
Lillian is a partner in our Washington, D.C. office who has managed wide-ranging investigations for clients on five continents, helping them to identify the core issues and develop strategies to resolve them. Lillian also works with companies to develop and improve their compliance programs.

Stephanie Yonekura
Stephanie is a partner in our Los Angeles office who brings a unique perspective to any internal investigation. Having served as the Acting U.S. Attorney in Los Angeles, the largest DOJ office outside of Washington DC, Stephanie knows the hot-button issues that are considered in every stage of any government investigation.

Rebecca H. Umhofer, a professional support lawyer in our Washington office, also contributed to this article.
And that poses the million-dollar question (in some cases, quite literally): how much cooperation is enough to satisfy the SFO? And perhaps more fundamentally: do the benefits of cooperation always outweigh the risks of a prosecution? Should you ever stand your ground and force the SFO to prove its case?

A number of cases shed light on what the SFO and the English courts expect when it comes to cooperation.

Candid cooperation

Standard Bank, with which the SFO entered the UK’s first Deferred Prosecution Agreement (DPA), was credited for self-reporting at an early stage and then cooperating in full on the investigation. The bank self-reported within a month of staff in its Tanzanian sister company raising concerns internally, before the bank’s external lawyers had started, let alone completed, an internal investigation.

As Sir Brian Leveson recorded in his judgment, in which he confirmed that a DPA with Standard Bank was appropriate in principle: “cooperation includes identifying relevant witnesses, disclosing their accounts and the documents shown to them […] Where practicable it will involve making witnesses available for interview when requested. In this regard, Standard Bank fully cooperated with the SFO from the earliest possible date by, among other things, providing a summary of first accounts of interviewees, facilitating the interviews of current employees, providing timely and complete responses to requests for information and material and providing access to its document review platform.”

Rigorous cooperation

In 2016 the SFO secured another DPA, this time with a “small to medium-sized company” (XYZ Limited). XYZ, whose identity has not been made public to avoid prejudicing ongoing proceedings, presumably prosecutions of the people involved, operates for the most part in Asia, apparently in the steel industry. From June 2004 to June 2012, through a small but important group of its employees and agents, XYZ offered and/or paid bribes to secure contracts in foreign jurisdictions. Of the 74 contracts examined, 28 were “implicated,” according to the SFO. In other words, the SFO considered evidence existed that suggested that these contracts resulted from bribes. The SFO charged XYZ with offenses under both old and new bribery laws: namely, conspiracy to bribe and conspiracy to corrupt, contrary to Section 1 of the Criminal Law Act 1977; and failure to prevent bribery, contrary to Section 7 of the UK Bribery Act 2010.
Much like Standard Bank, XYZ was praised for its swift self-reporting. It also carried out a broad-based internal investigation, made witnesses available to the SFO and responded in full and on time to all document requests, “save for those [documents] subject to a proper claim of legal privilege.”

**Misguided cooperation**

The case of Sweett Group Plc, against which the SFO secured its first conviction for overseas bribery by a company in December 2015 following a guilty plea, is an example of what happens when a company fails to meet the SFO’s expectations on cooperation. The court sentenced Sweett to pay £2.35m, including confiscation, a fine, and the SFO’s legal costs.

At the sentencing hearing in February 2016, issues regarding Sweett’s internal investigation became public. At one stage, the SFO apparently told Sweett to stop investigating “to avoid trampling on the evidence.” It considered that Sweett was not cooperating because it did not hand over certain information from its internal investigation, including witness accounts that Sweett’s lawyers had documented.

Sweett had argued these witness accounts were legally privileged. The competing understandings of “cooperation” came to a head when Sweett announced to the market that it was cooperating with the SFO, only to be forced to retract this by the SFO. Despite the rebuke from the SFO, the judge recorded that from July 2015 onwards, some seven to eight months after self-reporting, Sweett had “progressively co-operated with the SFO.”

**Case studies compared**

Did Sweett fare worse than Standard Bank, given the former’s alleged lack of cooperation? A comparison between the two outcomes is not straightforward. First, Standard Bank’s wrongdoing was worse, involving bribery of public officials, whereas Sweett’s case involved commercial/private sector bribery. While both are illegal under the UK Bribery Act, the relevant sentencing guidelines and the DPA Code of Practice make clear that bribing public officials carries stiffer penalties. Second, Standard Bank is a financial institution in a regulated sector. It’s clear that the SFO and the judge considered that it must be held to a high standard.

It is nevertheless striking when you compare Standard Bank and Sweett side-by-side. Cooperation with the SFO and early self-reporting seem to have weighed lightly in the balance when it came to the financial penalty. Each received a one-third discount on their fine, as is standard where there’s a guilty plea and under a DPA. The judge also credited Sweett for cooperating with the SFO, even though belatedly.

But the XYZ case shows that early and full cooperation can make a difference. Whereas in Standard Bank’s case there was a single instance, albeit a serious one, in which it had failed to prevent bribery, in XYZ’s case there had been
systemic bribery over a prolonged period. The judge was willing, given that the company had “cooperated fully with the SFO’s investigation, [made] early admissions voluntarily and reporting the offending to the SFO, and […] assisted throughout with the SFO investigation,” to contemplate giving a 50% discount on the fine. He stated that this “could be appropriate not least to encourage others how to conduct themselves when confronting criminality.”

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In the event, the judge capped XYZ’s fine at a level it could afford without facing insolvency. The judge also warned that no account would have been taken of its financial position if its parent had known of the corrupt practices or had used XYZ as a vehicle through which to make corrupt payments, with the intent that it could be “cut loose” if the criminality were discovered.

No guaranteed benefits to disclosure
A counterexample that highlights the limits to the benefits of cooperation is the predicament of Soma Oil and Gas. Soma had been under investigation by the SFO since July 2015 on suspicion of making improper payments to officials in Somalia’s Ministry of Petroleum, which granted Soma permission to explore the country for oil reserves. Unusually, Soma applied for a judicial review, seeking an order that the SFO speed up or stop its investigation or that the agency disclose more about its criminal inquiry.

Soma argued that this was appropriate given its level of cooperation. It noted, for example, that it had waived privilege over specific legal advice, facilitated interviews between the SFO and senior members of management, interviewed officials at Somalia’s Ministry of Petroleum suspected of accepting bribes, and disclosed witness statements to the SFO. Soma expressed concern that the SFO’s alleged delays in completing its investigation stopped it from finding partners for contracts and put it at risk of insolvency.

As a matter of English administrative law, Soma’s application faced a high hurdle: English courts are slow to interfere with investigatory and prosecuting bodies. One judge described the application as “extraordinary” and a “somewhat ambitious claim designed to require the SFO to bring an ongoing investigation to an end.” As a result, the application failed.

Nevertheless, Soma had a partial success in that the SFO wrote a letter that, in effect, provided the confirmation that Soma had sought, that is, that there was no realistic prospect of charges. The SFO allowed Soma to share that letter with its investors but characterized this as a “unique exception” to its usual policy, not something that sets a precedent.
Waiving privilege — cooperation or capitulation?
The SFO has not been clear or consistent on whether it views assertions of legal professional privilege as a lack of cooperation. Its guidance on self-reporting, published in 2009 and withdrawn in 2012, made no reference to privilege. The then director, Mr Alderman, recognized as much in an open letter he sent in December 2009. He went on to say that he “had an issue concerning the factual report following [an internal] investigation. Some have said to me that that document itself is covered by privilege. If that is right, then I do not see how the SFO could possibly enter into any discussions with the corporate about remediation. I would expect to see this report together with any notes of interviews during the course of the investigation that we thought relevant. If that involves a waiver of privilege then we would expect that waiver.”

The new guidance published in October 2012 also makes no reference to privilege. It stated that “in considering whether a self-reporting corporate body has been genuinely proactive, prosecutors will consider whether it has provided sufficient information, including making witnesses available and disclosing the details of any internal investigation, about the operation of the corporate body in its entirety.”

Privilege in internal investigations
Lord Neuberger, the President of the UK Supreme Court, addressed privilege in corporate internal investigations in a speech he gave extrajudicially in March 2016. He said that “[legal professional privilege] is a very valuable right, and it is a big and irrevocable step to waive it. However, given the cost and uncertainty of litigation and the SFO’s self-evident desire to get as much self-reporting and cooperation as possible, there must normally be a strong argument for co-operating — albeit that the investigations and self-reporting must be rigorous and full, the cooperation must be plain, and there must be a preparedness to compensate victims.”
In a speech in March 2016, SFO General Counsel Alun Milford stressed the SFO’s willingness to litigate over “false or exaggerated claims of privilege,” which it would regard as “uncooperative.” Mr Milford said that proper assertions of privilege would not be regarded as a lack of cooperation, although he undermined that point by going on to say that a waiver of privilege in respect of witness accounts would be regarded as a “significant mark of cooperation.”

The SFO has not been clear or consistent on whether it views assertions of legal professional privilege as a lack of cooperation.

In an article of 4 April 2016 in The Lawyer magazine, Ben Morgan, Joint Head of Bribery & Corruption at the SFO, again said that the SFO did not require companies to waive privilege. But he stressed that, in the SFO’s view, witness accounts given during an internal investigation “are not automatically covered by litigation privilege — though it is possible to conceive of situations where privilege might arise.”

Matthew Wagstaff, the other Joint Head of Bribery & Corruption at the SFO, noted in a speech the following month that “there are those who accuse the SFO of double standards; of saying on the one hand that we respect a company’s right to privilege but then on the other hand insisting on access to, for example, witness accounts so as to, in effect, make waiver of privilege a condition of co-operation.” Mr Wagstaff sought to square the apparent circle by saying that “requiring a corporate to provide us with the factual narrative that underpins any self-report does not, of itself, give rise to a demand that privilege be waived.”

We address the comparative practice in the United States on page 45.

**Witness accounts in internal investigations**

According to press reports, the SFO is engaged in proceedings against the mining company ENRC to get disclosure of documentation that ENRC has withheld on the grounds of privilege. The proceedings are being held in private, and as such very few details are known.

Nevertheless, it is to be hoped that the issue of whether witness accounts taken in an internal investigation attract privilege will be judicially clarified in the near-term. It’s one thing for the SFO to give companies clear guidance that they must waive privilege to be regarded as self-reporting. That allows an informed decision to be made about whether the cost of handing over incriminating material is a price worth paying for the potential benefits of lenient treatment — “potential benefits” because the SFO is unwilling to guarantee whether it might use the material in a subsequent prosecution.
It’s another matter for companies to conduct an internal investigation, often at considerable expense, and then face the prospect of either disclosing their findings voluntarily or being compelled to do so under the SFO’s statutory powers. There’s a risk here of creating a perverse incentive for companies to avoid conducting internal investigations at all. An internal investigation would in effect guarantee that the SFO would find out about any wrongdoing, whereas that’s only a possibility if there is no internal investigation.

The SFO has expressed frustration in the face of questions about its approach to privilege. In a speech in September 2016, Mr Morgan referred to “the near obsession with the subject of privilege in articles and blogs.” Legal professional privilege has been described as “…a fundamental condition on which the administration of justice as a whole rests”15 and “…a fundamental human right.”16 If privilege is zealously guarded, that is for good reason given its importance.

It might seem more convenient for the SFO if companies either never asserted privilege or capitulated in the face of challenges to such assertions. But the SFO has stumbled twice in recent years due to its over-reliance on the work product of companies’ external advisers. As we reported in 2013, the SFO faced a claim for damages by the Tchenguiz brothers over allegations that it had relied too heavily on the work product of Kaupthing’s liquidators, and its prosecution of Victor Dahdaleh collapsed because the SFO had based much of its case on witness statements from an internal investigation conducted by U.S. lawyers who decided they could not give evidence at Mr Dahdaleh’s trial.

Is there a viable alternative to cooperation?

It is not unreasonable to ask whether the best option for a company facing an allegation of involvement in foreign bribery will always be to launch headlong into a wide-ranging and costly internal investigation. There are good reasons to conduct internal investigations, including good corporate governance; uncovering misconduct by officers, employees or agents; and complying with rules that apply to regulated sectors such as banking.
But an internal investigation that entails conducting witness interviews and collecting documents from far and wide may mean collecting evidence that the SFO would find it legally or practically difficult or even impossible to get otherwise. The company may choose to disclose such materials to the SFO as part of its self-reporting. But as noted, that may not be a real choice if (as the SFO has asserted) the materials are not privileged and can be seized by the SFO. It remains to be established in court whether that assertion is right as a matter of English law.

If you decide not to conduct an internal investigation, it is not a decision you should take lightly. If there’s evidence of misconduct that the SFO (or, for that matter, the criminal authorities in other countries) can gather and deploy in a prosecution, the resulting reputational and financial damage can be serious. Nevertheless, it has never been the law that suspects must build a case against themselves and deliver it to the prosecution on a plate.

Michael Roberts
Michael is a partner in our London office specializing in fraud and white collar crime. Michael has handled internal investigations in numerous jurisdictions, and regularly advises clients on all aspects of compliance issues.

Maggie Christiansen and Alex Hohl, senior associates in our London office, also contributed to this article.
Developments in Latin America

Argentina
The government has sent to Congress a new anticorruption bill. If enacted, it would expand criminal liability from people to companies.

Brazil
New enforcers have emerged, from judges to public prosecutors to the federal police, signaling a change in approach to anticorruption enforcement.

Colombia
Having committed to enhancing its prevention policies and building its enforcement capacity, the country now has to follow through.

Mexico
Reforms to anticorruption laws include alterations to 14 constitutional articles, drafting of two new general laws, and revision of five existing laws.
The legal and enforcement overview

2016 was a busy year for anticorruption enforcement in Latin America. Providing adequate treatment of anticorruption enforcement in the 20 countries and six dependencies that comprise Latin America would require an entire book. There are, however, common elements among these countries’ laws that are worth understanding.

First, more or less every country in the region criminalizes attempted corruption, active bribery (giving a bribe), and passive bribery (receiving a bribe) by individuals.

Second, Latin American laws are based on civil code principles and do not generally have corporate criminal liability — despite being a requirement for membership of the Organisation for Economic Co-operation and Development. Instead, many countries in the region impose civil fines and debarment from public procurement on companies that violate their anticorruption laws. For example, in 2014, Brazil introduced civil fines against companies for corruption offenses in the Clean Companies Act, while Colombia, in February 2016, increased the financial sanctions imposed on companies in Law 1778.

Two notable exceptions are Chile, which has had criminal liability for corporations since 2009, and Argentina, which in October 2016 introduced reforms that include corporate criminal liability. (See “Argentina cracks down on corporate corruption” on page 33.)

Although having laws on the books marks a significant step, it is only the first one. Traditionally, anticorruption enforcement in Latin America has been weak, whether because of laws that have provided protection to elected politicians, lack of an independent and transparent judiciary, a tradition of passive prosecutors, or all three.

But that is starting to change: in 2016, Brazil began to flex its enforcement muscles. In addition, on 18 July 2016, Mexico’s new National Anticorruption System was signed into law, with the objective to coordinate the efforts of all Mexican governmental bodies — at federal, state, and municipal levels — involved in anticorruption enforcement. (See “New anticorruption measures in Mexico” on page 30.)
In 2016, an earthquake of social, political, and economic forces in Brazil produced the tidal wave of enforcement known as Operation Lava Jato. The operation changes the way Brazil approaches investigations, plea agreements, cooperation, and international collaboration.

**Law enforcement trends**

Brazil was the epicenter of several major international law enforcement trends. First, cooperation between Brazil and other countries is bearing fruit. This is reflected in the recent US$205m settlement in the Embraer case and in the US$342m SBM Offshore NV settlement with Brazilian prosecutors and Petrobras. The latter followed a 2014 settlement with the Dutch Prosecutor’s Office.

In late 2016, Odebrecht, the giant multinational construction conglomerate, entered into discussions with authorities in Brazil, Switzerland, and the United States to resolve its corruption cases. Also, Lava Jato alone has resulted in US$1bn being repatriated and reimbursed to Petrobras, and over 100 international cooperation requests issued.

Second, Brazil’s federal prosecutors, the Ministério Publico Federal (MPF), in partnership with the Brazilian federal police, have undertaken investigations to combat corruption in the public sector. The Lava Jato scandal has implicated more than 20 construction companies and over 100 individuals in alleged corruption, bribery, and antitrust violations, and spawned operations colorfully named Operation Radioactivity, Operation Pripyat, Operation Brotherhood, and the like.

Accused political figures include former presidents Fernando Collor de Mello and Luís Inácio Lula da Silva, high-ranking members of impeached President Dilma Rousseff’s government, members of the Brazilian congress, including the former speaker of the lower house of congress, and, most recently, the former governor of the State of Rio de Janeiro. The media are reporting on the cooperation between Brazil and U.S. enforcement authorities. In addition, shareholders have brought federal securities class actions in the United States against Brazilian companies such as Petrobras, Braskem, and Eletrobras.

Another ongoing operation, the Zelotes Operation, is investigating 70 companies, including large multinationals in banking and pharmaceuticals, for roughly BRL 19 billion in bribes allegedly paid to members of Brazil’s tax appellate council to reduce fines or dismiss tax evasion claims. Some of the companies have American depositary receipts listed on the NYSE and are under watch by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ).
The success of these operations has been in large part a result of aggressive information gathering. After the tutelage of international law enforcement agencies, such as the FBI, Brazilian authorities are deploying advanced and proactive investigative techniques such as wiretaps, and entering into cooperation and leniency agreements with individuals who can provide an inside look at otherwise secret payoffs. These techniques have resulted in an unprecedented challenge to entrenched interests in Brazil, including politicians and captains of industry once thought untouchable.

New enforcers on the scene

Within this enforcement environment, Brazil has seen an array of enforcers emerge. Investigative judges in Curitiba, Rio de Janeiro, and Brasilia, the MPF, State of São Paulo and Rio de Janeiro public prosecutors, and the federal police have been joined by other agencies exercising their authority.

For example, the Embraer settlement could signal a more active role for the Comissão de Valores Mobiliários (CVM), Brazil’s Securities and Exchange Commission, in corruption investigations. Until now, the MPF and the Ministry of Transparency (formerly the Comptroller General), as well as the federal audit court (the Tribunal de Contas da União, or TCU) and the attorney-general’s office, have played significant roles in resolving bribery cases in Brazil. In Embraer’s settlement, the CVM acted alongside prosecutors in both countries and alongside its U.S. counterpart, the SEC, and imposed a BRL 6m fine on the aerospace company.

The Conselho Administrativo de Defesa Econômica (CADE), the Brazilian antitrust enforcer, has long used leniency agreements to break up cartels. CADE has been active in resolving cases with construction companies implicated in Lava Jato through leniency agreements. The TCU focuses on government agencies and mixed capital companies, but wants to expand its jurisdiction to include private companies.

State audit courts also have stepped up audits and investigations of possible wrongdoing, such as the São Paulo State’s audit court’s investigation of possible irregularities in public tenders for train maintenance contracts. The Ministry of Transparency also may be a signatory to the leniency agreements that may be entered into by Odebrecht, potentially signaling a bigger role for the Ministry of Transparency.
Joint monitorships

Brazilian and U.S. anticorruption efforts may be even more closely linked if the Embraer settlement presages the future. Under contemporaneous settlements announced on 24 October 2016, Embraer agreed to hire an independent compliance monitor for up to three years and to share the monitor reports imposed under the U.S. settlement with Brazilian prosecutors as well as with the DOJ. Monitors are used to oversee the fulfillment of compliance obligations by companies that enter into deferred prosecution or plea agreements with U.S. authorities. Monitors report to the government during the monitoring period (but are paid by the company) and evaluate whether the company has an effective compliance program. If the monitor finds the company has not met this requirement, the monitoring period can be extended.

Embraer’s settlement represented the first Foreign Corrupt Practices Act case that saw a simultaneous resolution in Brazil, and the first instance where a company has parallel U.S.–Brazil reporting responsibilities. The United States and UK imposed a joint monitorship on Innospec in 2010 following corruption investigations by both jurisdictions. But although the U.S. authorities — and the UK at least in that one case — impose monitorships on companies as a condition in settlements, this kind of oversight is unusual in Brazil.

Brazilian Supreme Court puts some teeth back into enforcement

One of the more notable rulings that increased the effectiveness of Brazilian anticorruption efforts came from the Supreme Court. In February 2016, the Brazilian Federal Supreme Court (Supremo Tribunal Federal, or STF) held that a defendant must start serving a prison sentence after an intermediate appellate court’s confirmation of the defendant’s criminal conviction.

Previously, defendants could delay serving their sentences for 10 or more years while their appeals played out in the appellate courts and even the Supreme Court of Brazil, which oftentimes allowed them to eventually invoke the applicable statutes of limitations to avoid serving their sentences altogether. On 5 October 2016, the STF reaffirmed this ruling. These two rulings make judicial sentencing decisions much more effective — and they increase the incentives for convicted individuals to negotiate pleas and cooperate.
Colombia

Although not yet as active in enforcement, Colombia has been busy laying the groundwork for increased activity through new legislation. On 2 February 2016, Colombia passed Law 1778 as a reaction to observations made by the Working Group on Bribery In International Business Transactions. Law 1778 creates corporate liability for bribery and increases potential sanctions up to Col$137,891,000,000 (roughly US$45m at current exchange rates).

Colombia also made country commitments at the Anticorruption Summit in London in May 2016. These commitments include enhancing prevention policies, holding individuals and companies accountable, and building enforcement capacity. Time will tell whether Colombia and other participants of the London summit follow through on their commitments.

Conclusion

Latin America is rich in possibilities for multinationals seeking to expand, but also fraught with risks. The region will remain an area where political, social, and economic forces can combine to reduce corruption and increase transparency, but there are still endemic structural problems in many countries.
New anticorruption measures in Mexico

Luis Enrique Graham and Jim McGovern

On 18 July 2016, Mexican President Peña Nieto announced the approval of sweeping changes to Mexico’s anticorruption laws. The reforms included alterations to 14 constitutional articles, drafting of two new general laws, and revision of five existing laws.

The new anticorruption measures are the culmination of several years’ process, which originated with a citizen petition and the work of civil society groups. These grassroots efforts resulted in constitutional reform in 2015, and the recently passed laws are the statutory implementation of this reform.

Among the protections in the new laws, and the revisions to existing laws, are provisions to create an independent anticorruption prosecutor, strengthened whistleblower protections for individuals, and mechanisms to enhance cooperation among Mexican government entities at the local and national levels.

One of the newly drafted laws is the General Law for Administrative Responsibility, which is meant to protect against public and administrative bodies engaging in corrupt activities. These include bribery, collusion in public bidding, influence peddling, misallocation of public resources, wrongful recruitment of ex-public officials, and the use of false information to apply for administrative applications. To this end, public officials will be obliged to disclose existing assets, potential conflicts of interest, and their tax information to ensure that they are not taking bribes or misallocating public resources.

Sanctions under the new regime

Changes in the criminal code have also created penalties for private individuals engaged in corrupt activities. For example, a private individual who improperly influences a public official for personal gain may be subject to sanctions under the new regime, including fines or imprisonment for up to six years. Private parties who hold a public contract and who use false or forged information to obtain a benefit for themselves or third parties on that contract may be fined or imprisoned for up to nine years.

Companies may also be sanctioned for the actions of individuals acting on their behalf or for their benefit. These companies may be sanctioned as much as twice the amount that they benefited from the actions of the individuals, as well as the company being made ineligible to participate in procurement, leases, services or state-owned projects for up to 10 years, in addition to compensatory and/or punitive damages. Other potential sanctions against companies can include government dissolution of partnerships.
Compliance policies and reporting systems

However, companies can protect themselves by putting in place “integrity policies” — that is, compliance and anticorruption policies — deemed adequate by the relevant authority. The law provides that the companies implementing such policies can be protected if they have adopted an organization and procedures manual that is clear and complete, that includes the responsibilities of each company’s division, and that specifies the chain of command and leadership for the company.

The policy must also include adequate whistleblower and reporting systems that create a method of reporting corruption to the appropriate authorities and include measures for disciplining employees that act against the company’s policy and Mexican law. Companies may also receive a cooperation credit that reduces the percentage of their sanction if the company self-reports violations and actively cooperates in any government investigation.

One of the newly drafted laws is the General Law for Administrative Responsibility, which is meant to protect against public and administrative bodies engaging in corrupt activities.
Global corporations face greater scrutiny

Companies doing business in Mexico should bear in mind that in the present global environment, investigations by one governing authority can often lead to further investigations by foreign governments. As a result, global corporations face tightening scrutiny from Mexican authorities, and might also bear risks of being prosecuted by foreign authorities including the U.S. Department of Justice, the U.S. Securities and Exchange Commission (SEC), and the UK Serious Fraud Office for actions that take place in Mexico but touch these other jurisdictions.

In one recent example, Key Energy, a Houston, Texas-based energy company, agreed in August 2016 to a US$5m settlement with the SEC on charges that its Mexican subsidiary paid bribes to Petróleos Mexicanos, or Pemex, the Mexican state-owned oil company, which Key Energy then recorded as legitimate expenses. The bribe was paid to a Pemex employee for advice and inside information during Key Energy’s negotiations with Pemex.

Companies doing business in Mexico, and those considering doing business there, should take steps to understand the new Mexican anticorruption regime, and the expanding web of potential liability from Mexican, U.S., European, and other foreign authorities related to corruption and fraud.

Luis Enrique Graham
Luis is a partner in our Mexico City office who works with clients concerned with investigations and anticorruption regulations, including the Foreign Corrupt Practices Act and local anticorruption regulations throughout Latin America.

Jim McGovern
Jim is a partner in our New York office who has more than 20 years of experience investigating and prosecuting domestic and international financial crimes. In his prior role as Chief of the Criminal Division in the Eastern District of New York, he supervised some of the most significant Foreign Corrupt Practices Act, commercial bribery, and securities and corporate fraud cases in the past decade.
Argentina cracks down on corporate corruption

David Gurfinkel, Allende & Brea

The backlash against corruption sweeping across Latin America has gained support in Argentina, which looks set to pass a new anticorruption bill. This follows the change in government in December 2015 after 12 years under the Kirchner family.

Former president Cristina Fernández de Kirchner and former vice-president Amado Boudou face investigations for corruption. Cases include alleged bribery, embezzlement, and money laundering — episodes that fueled the call for change. Another call came from the Organisation for Economic Co-operation and Development (OECD). Although a non-OECD member, Argentina is party to the OECD’s Anti-bribery Convention, which sets standards to criminalize bribery of foreign public officials in international business deals.

Yet as it stands, the Argentine legal system neither investigates nor prosecutes companies for corruption, leaving them to act with impunity, but at a cost. In 2015, Argentina ranked 107th out of 168 countries/territories in Transparency International’s Corruption Perceptions Index, below neighboring Uruguay, ranked 21st; Chile, ranked 23rd; Brazil, ranked 76th; and Bolivia, ranked 99th.

If enacted, the law would expand criminal liability from people to companies. We expect Congress to approve the bill during the first semester of 2017, which promises changes in Argentina.

Compliance matters

Local companies will need a compliance program, and foreign corporations familiar with compliance will need a more detailed due diligence process than in the past. Under the law, if you acquire a company that later gets caught up in a corruption scandal, you might be liable as one for any sanctions. You would also become responsible for the criminal offenses of third parties that work with the acquired company.

You must satisfy yourself that your due diligence is sound enough to uncover corruption and that your compliance program can withstand scrutiny under both local and cross-border investigations.

Your compliance program should address the corruption risks specific to your company. It must allow you to prevent, detect, correct, and report any corruption offense. The starting point should be a code of conduct that covers directors and employees through to third parties and business partners. You’ll need training programs and risk assessments, and these cannot be one-offs. Among other things, you should include a hotline to register complaints from third parties and a whistleblowers policy that protects the whistleblower from retaliation.
Lessons in enforcement
Criminal courts will enforce the law, but they lack experience of company law or corruption in companies. Prosecutors are in the same situation, too, and this may well turn into the Achilles heel of Argentina’s anticorruption drive. To avoid this, training from the Anticorruption Office (Oficina Anticorrupción) will be vital.
Sanctions available include fines of between 1% and 20% of the previous years’ turnover and suspension of the company’s brands, patents, and activities for up to 10 years. There’s also a ban on any activity related to government for up to 10 years. And beyond that, the reputational risk is huge.

In 2015, Argentina ranked 107th out of 168 countries/territories in Transparency International’s Corruption Perceptions Index.

A set of rules determines the damages a company will have to pay. These relate to the sums involved — the bribes and the profits — and the seniority of the wrongdoers. If senior management were involved, the penalty would rise to 10% to 20% of the previous years’ turnover. Other criteria relate to the duration and severity of the damage caused.

Unwanted expense or must-have compliance program
Far from being solely punitive, the new bill incentivizes companies and corporations to take an active approach to anticorruption. Those that profit from bribes will most likely get caught out. But even then they can avoid sanctions if they cooperate with the investigation and can show there were adequate measures in place to stop or at least catch corruption.
Companies that self-report and give evidence that identifies others involved may see their penalties reduced by up to 50%. But although the new law would grant concessions under certain circumstances, it remains better to avoid bribery and corruption before it takes hold.
While compliance might on the surface look like an unwanted expense, compared with the sanctions and the negative publicity derived from being involved in a corruption scandal, it’s an investment. Over the long term we expect foreign investors accustomed to extraterritorial anticorruption laws, such as the U.S. Foreign Corrupt Practices Act and the UK Bribery Act, will favor Argentina as a country to invest in. Local companies that embrace the law will reap the benefits, too.
Andrés E. Tarakdjian, a senior associate at Allende & Brea, also contributed to this article.

David Gurfinkel
David is a partner at Allende & Brea who focuses his practice on bribery and corruption investigations and on the implementation of compliance programs within Argentine and South American global corporations. He has also developed an extensive practice in complex commercial disputes, arbitration, and bankruptcy.

Andrés E. Tarakdjian, a senior associate at Allende & Brea, also contributed to this article.
Cross-border investigations – a growing risk

Alexei Dudko, Sebastian Lach, and Antonin Lévy

Enforcement actions and legislative activities continue to soar. Interagency cooperation is on a spike, too, and this increases the risk of double jeopardy. Taken together, these signal that global companies face a growing risk of cross-border investigations. And whether internal or authority driven, this creates challenges.

For a start, when under investigation, you have to confirm that you comply with local laws and customs. Other, more practical challenges include the need for a consistent approach to your response and active communication, plus the need to manage stakeholders from headquarters as well as locally.

Meanwhile, you have to satisfy the home authority — the Securities and Exchange Commission (SEC), Serious Fraud Office (SFO), and Department of Justice (DOJ), for example.

All this can lead to conflicting obligations. On the one hand you must comply with local and international laws; on the other, you must comply with an enforcement agency that accepts nothing less than your complete cooperation.

Well before a cross-border investigation starts and before tensions mount, you must consider all potential issues. You can then put in place measures to enable you to comply with the authorities yet protect your interests. Data privacy rules, blocking statutes, state secret rules, and local labor law specifics — these are just some of the issues you may come up against.

Data privacy rules

Data privacy laws become relevant in Europe; they’re also established in Asia and other regions. With broad legal frameworks, the laws apply to all kinds of processing, not only to automated processing of employee data. As an example, merely granting remote access is often regarded as data transfer. In Europe, in particular, the ruling on the invalidity of the Safe Harbor framework and the new European Data Protection Regulation has resulted in an even more regulated environment.

In Russia, data privacy rules include an individual’s constitutional rights to private life, personal and family secrets, privacy of correspondence, and rights to personal data related to the individual. In practice, this concept makes it unlawful, and it may even trigger criminal liability, to review an employee’s computer and work emails without their consent (or transfer them across borders). It’s important, then, to get all consents before any such data can be processed and reviewed.
Violate these rules and you risk fines, regulatory and criminal liability, inadmissibility of evidence, reputational damage, loss of employment, and more. The inadmissibility of evidence — according to German courts — can conflict with requests from, for example, U.S. authorities to implement efficient sanctions.

It’s vital that you take all relevant data protection requirements into account before you act, to avoid violating data privacy rules. If necessary, seek local legal advice from counsels with specific investigations experience. Then document the decision-making behind the procedures you follow. This enables you to show the assessment you made, if needed. It can also help if you need to explain issues around local data protection laws to U.S. authorities — for example, to justify why you can’t produce certain documents or why you couldn’t conduct certain investigative measures.

Data privacy laws apply to all kinds of processing, not only to automated processing of employee data.

Steps you can take to reduce the risk of breaking data privacy rules include:

– limiting the investigation, for example in terms of scope, number of employees, search terms, and time. This results in a more targeted investigation;

– keeping investigated employees informed before/during/after the investigation;

– redacting and disclosing information only on a need-to-know basis;

– conducting all or parts of the investigation in the specific country or at least in the EU, to avoid cross-border data transfers; and

– involving the works council, data protection officer and/or data protection authority, which is a statutory requirement in some jurisdictions.
Are you in financial services?

Regulatory enforcement affects all parts of the financial services sector, from banks and asset managers to insurers and market infrastructure providers. When it comes to investigations, no two situations are the same. But every investigation has things that are vital to get right — and things that are easy to get wrong, some of which can be hard to unpick later on. We’ve drawn on our experience of handling complex investigations, including LIBOR, FX, and precious metals, with numerous authorities and agencies in different jurisdictions to create a Financial Investigations Roadmap.

This free online resource will guide you through the practical pitfalls and strategic considerations in internal and regulator-led investigations specific to the financial industry. Read our practical tips for investigations of all shapes and sizes, from internal investigations to global investigations involving multiple authorities and law enforcement agencies. As fines escalate and regulators get tougher, it is more important than ever to get an investigation on the right track from the start.

Please visit:

www.hoganlovellsinvestigationsroadmap.com
Works councils or equivalent bodies can hinder investigations. Under German law, for example, depending on existing agreements, works councils have control rights in data protection matters. In certain cases they have even blocked investigations, arguing that the investigative measures violated data protection.

**Blocking statutes**

Blocking statutes can ban not only data collection and transfer but also in-country investigative measures, such as interviewing witnesses. These statutes can be explicit, contained in criminal law, or scattered among civil, criminal, and employment laws. This creates several gray areas.

An example of an explicit blocking statute can be found in France, where “it is prohibited for any person to request, seek or disclose [...] documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of constituting evidence in view of foreign judicial or administrative proceedings or in relation thereto.” So, sending documents or information abroad from France is not allowed, whether on request or of your own accord, if such communication is intended for foreign proceedings. It can only be sent abroad through international cooperation mechanisms, for example those in the Hague Conventions or in mutual legal assistance treaties.

The blocking statute in Switzerland comes under criminal law. It bans “activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official.” These activities could include internal investigations, particularly in cases where U.S. authorities ask for information that is then collected in an investigation. The law was enacted in 1935 and a federal decision in 1988 broadened the scope.

Since 2005 there has been evidence that the Zurich criminal prosecuting authorities have adopted a more lenient approach toward attorneys collecting evidence in Switzerland for foreign proceedings. Most Swiss scholars praise the Zurich approach, but as yet, there has been no federal decision since 1988. Until such a decision is handed down, authorization must be sought by either a general waiver or via the applicable bilateral or multilateral treaties.

As with data privacy laws, you should assess early on in an investigation whether or not blocking statutes apply. If they do, you should consider getting approval from the appropriate authority or setting up the investigation in a different way to avoid liability. Even where a specific blocking statute is not in place, you should consider the jurisdictional reach of any formal investigation or authority before documents are transferred between jurisdictions.

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**These statutes can be explicit, contained in criminal law, or scattered among civil, criminal, and employment laws.**

As a result of these issues, foreign laws may limit how much corporations can cooperate with DOJ investigators. With that in mind, the guidance memo announcing the FCPA
pilot program explained that if a company claims that a foreign law prevents it from meeting the program’s requirements, “the Fraud Section should closely evaluate the validity of that claim and should take the impediment into consideration in assessing whether the company has fully cooperated.”

It added that the company would have to show why it cannot cooperate in full. Although the DOJ recognizes the issues that European data protection laws may pose, companies that exaggerate the degree to which foreign laws inhibit them may find U.S. investigators quick to engage the help of foreign law enforcement. And that could trigger additional foreign investigations.

State secret rules
China provides an example of where state secret rules apply. Article 9 of the State Secrets Protection Law of the People’s Republic of China (2010) describes state secrets as confidential matters that, if disclosed, are likely to endanger the security or the interests of the state with respect to politics, the economy, national defense, foreign policy, and so forth:

- major policy decisions on state affairs;
- the construction of national defense and activities of the armed forces;
- diplomatic and foreign affairs, as well as those relating to secrecy obligations undertaken with respect to overseas parties;
- the national economy and social development;
- matters relating to science and technology;
- the safeguarding and maintenance of national security and ongoing investigations of criminal offenses; and
- any other matters as determined by the state department in charge of the administration of the protection of state secrets.

The last item is a catch-all — and both vague and broad. It gives the authorities, in most cases the State Secrets Bureau, discretion to decide what a state secret is. The State Secrets Bureau doesn’t publish what it considers state secrets, and its internal provisions and documents are themselves classified as state secrets. In short, information doesn’t have to be explicit in the state secrets law to be protected.

Information doesn’t have to be explicit in the state secrets law to be protected.

Examples of state secrets may include a lot more than unpublicized government policies and undisclosed economic statistics data. They may extend to technical and operational trade secrets of central state-owned enterprises, undisclosed material information of listed state-owned enterprises, and confidential information of political parties that come under Article 9.

Strictly speaking, unlawful buying, obtaining, possessing, copying, recording, selling, or transmitting of state secrets may all violate the state secrets law (although it is unclear how the law is enforced). Theft, spying into, buying, or unlawful supply of state secrets, including for a foreign organization, entity, or individual; and unlawful possession of state secrets
and refusal to explain the source of the secrets or the purpose of the possession, may give rise to criminal liability.

So, it’s vital to consider potential state secret implications before you transfer data. We recommend you also consult a local legal expert when you come across information that may contain state secrets. Even outside of countries known for their state secret rules, you should be aware that the rule could apply, especially in sensitive industries such as defense and IT.

Labor laws and interviews

Another area in many cross-border investigations is labor law. There are a number of factors: the scope of the right to put employees on garden leave during an investigation, the duty of employees to cooperate in the investigation, the duties of the company to provide the employee with their own counsel, and the right to implement disciplinary sanctions differ in many countries.

Local labor laws, together with regulations of local bar associations, affect what instructions you give an employee during an interview. This also depends on cultural considerations. In Germany, for example, it’s considered best practice to tell the employee that they do not have to provide information if it might incriminate them in a crime or administrative offense. In other countries such information would be considered inappropriate and may create tensions.

Confidentiality and privilege

Maintaining privilege can be vital to protect your company’s interests. Local privilege rules differ from country to country. In many cases, the scope of what is protected by attorney–client privilege is much lower compared with the United States.

Sophisticated data retention approaches that safeguard confidentiality and legal privilege are vital in every sensitive internal investigation. This is even more true because most internal investigations bear the risk of follow-up litigation.

To safeguard such confidentiality, you can take several steps. Privileged documents and information should, of course, be labeled as “Attorney Work Product — Privileged and Confidential,” and the use of a so-called extranet should be considered. Here, extranet means an online data room in the sphere of a law firm. Without digital or physical copies within the client’s own custody and control, this approach cuts the number of documents authorities can seize as the information stays in the custody of outside counsel.

Approaches to confidentiality and privilege vary by jurisdiction, as the following pages show.
Professional secrecy in France
In France, any exchange between a person and their lawyer is privileged as professional secrecy, regardless of its nature, content, or label. But professional secrecy doesn’t protect a document exchanged with a third party, regardless of its nature or content. Furthermore, professional secrecy only applies to bar-registered attorneys, as in-house lawyers are not attorneys under French law. So, privilege doesn’t protect in-house counsel’s work product and communication within the company.

Professional secrecy covers any exchange between an employee and their lawyer, even when performed through the company’s communication systems (e.g. email address, internal mail service, and so on). But it doesn’t cover the employee in exchanges with the company’s lawyer, whose client is solely the company, which is covered. This would also be the case for minutes of an employee’s interview by the company’s external counsel.

No protection for in-house counsel under German law
Documents created in-house are generally not protected by privilege under German law. Even documents created by outside counsel are not necessarily privileged if in the custody of the company. Only individual — more recent — case law provides a higher protection of attorney work products.

Europe – privilege protection relies on outside counsel
In an EU context, case law has established that communication between management and in-house counsel is not protected. Privilege in general only applies to correspondence with external counsel related to investigation, internal notes limited to reporting advice of external counsel, and preparatory internal documents drawn up to seek external advice. To grant privilege protection in Europe, outside counsel must be an EU/EEA-qualified attorney.

Russia limits privilege to advocates only
In Russia, privilege covers only communication between the client and an advocate, that is, an admitted member of the bar. Other lawyers, including both in-house counsel and employees of law firms who do not have an advocate’s status, do not benefit from privilege. Only an advocate has immunity from being questioned as a witness in a criminal investigation. We recommend an advocate conducts employee interviews and the most sensitive communication to the client in relation to the investigation.
China hardly recognizes attorney–client privilege

At the far end of the spectrum is China, where there is no attorney–client privilege. The Lawyers Law of the People’s Republic of China (2012) bans attorneys from disclosing private information of their clients, or other information that the clients or other persons are unwilling to disclose, if the privacy or information is obtained during the provision of services. (That is, unless the information relates to impending or ongoing activities of the clients or the other persons that will harm national or public security, or seriously harm the personal security of other persons.) This rule imposes a duty of confidentiality on attorneys, but does not grant any privilege against disclosure of information in litigation.

But Chinese law does provide a limited form of attorney–client privilege in criminal litigation. The Criminal Procedure Law of the People’s Republic of China (2012) provides that defense lawyers are entitled to keep confidential the information of their clients, if the information is obtained while providing services. That is, as above, unless the information relates to activities that will cause harm.

This privilege is limited because only defense lawyers can exercise it. Clients can neither exercise it themselves nor ask their defense lawyers to exercise it. It remains unclear when and how defense lawyers can exercise this privilege because “information” and “during the provision of services” is not defined. It’s also unclear if the privilege survives after the end of the legal services. As a practical matter, this limited privilege is rarely a successful means to limit disclosure of information by defense lawyers in the middle of a criminal investigation.

Privilege under fire in the UK

Even in the UK, where privilege covers a wider range of documents, we have seen increasing pressure from the SFO for companies to waive privilege over certain documents if they wish to be considered “cooperative” for the purposes of a potential Deferred Prosecution Agreement. (See our article on page 17 “UK: Is cooperation really worthwhile?” for more on this.)
United States – questioning DOJ’s approach to privilege

In the United States, to get full credit under the Foreign Corrupt Practices Act (FCPA) pilot program, you must, among other things, disclose “all relevant facts, including all facts implicating individuals (as required by the Yates Memo)” and disclose all facts picked up during an internal investigation, “including attribution of facts to specific sources where such attribution does not violate the attorney–client privilege.”

This raises issues about the DOJ’s approach to attorney–client privilege in investigations. After the Yates Memo, Deputy Attorney General Sally Yates said in a speech that facts are not privileged. She recognized that if a law firm interviews an employee during an investigation, the notes and memos from that interview may be protected by attorney–client privilege or as attorney work product. But although the company need not produce the protected materials, “to earn cooperation credit, the corporation does need to produce all relevant facts — including the facts learned through those interviews — unless identical information has already been provided.” 17

So, the DOJ has adopted a formalistic view toward privilege waiver, and it’s unclear whether the courts will agree. Until this case law develops, if you cooperate yet disclose “just the facts,” you run the risk that doing so will waive privilege, because separating the facts from the communication through which the attorney learned the facts may be difficult. The program’s requirement that cooperation requires all facts to be attributed to specific sources also increases the risk of a waiver.
Strategic considerations
On top of having to comply with local laws and customs, you need a consistent approach and communication. You need to satisfy the demands of the home authority, too. Because investigations often involve different authorities and different stakeholders, you risk losing control. But you can reduce this risk if you manage the investigation well.

Assess the factual matrix early on, to get a good set of facts to work with all over the world and to stay ahead of the game. Keep control over documents and processes. Your aim here is to make sure all stakeholders act in line with your general and global strategy instead of a “solo strategy.”

Assess the need for self-disclosure and cooperation country by country and as early as possible, taking into account potential communication between authorities. And if you do make such communication, it must be consistent and maybe even simultaneously all over the world.
Developments in Asia Pacific

**Australia**
The Federal Government has maintained its strong approach to corporate crime, and reforms that broaden its anti-bribery and corruption laws are expected.

**China**
Draft amendments to the Anti-Unfair Competition Law include provisions that address commercial bribery, and these bring significant changes to the regime.

**South East Asia**
Regulatory, commercial, and political pressures mean multinationals come up against complex compliance issues. These are matched by effective anticorruption legislation and enforcement, which differ by jurisdiction.
The results include major enforcement actions against both high- and low-ranking corrupt officials; an enforcement action against GlaxoSmithKline, leading to China’s first and only major criminal corruption case against a corporate entity; and rising administrative actions across the country to enforce pricing, competition, and anticorruption laws.

While those activities continue, this year has seen extensive legislation and rule-making, as China tries to build a legal regime and rule of law to further support the enforcement actions taking place. One such piece of legislation is the draft amendments to the Anti-Unfair Competition Law (AUCL), initially released for public comment in February of this year, and recently approved for submission to the Standing Committee of the National People’s Congress for consideration. The draft proposes significant changes in antitrust, unfair competition, false advertising, and intellectual property theft, among other areas. The most significant changes, however, come in the provisions addressing commercial bribery. In fact, these changes reconfigure the entire regime.

Commercial bribery redefined

The current AUCL bans bribes made in the purchase or sale of products. It includes a specific safe harbor for discounts or rebates recorded in the accounting records of the parties involved. The revised amendments, in contrast, treat as bribery any economic benefits provided to counterparties or third parties in order to secure business opportunities or competitive advantages. So, anything of value given that creates any benefit has the potential to be considered a bribe.

For multinational companies, this brings Chinese law more in line with Western legislation such as the U.S. Foreign Corrupt Practices Act. It also makes explicit that bribes made through third parties also constitute a bribe offense — a previous gray area in the law.

Eugene Chen

Under the Xi Jinping administration, China has made sweeping changes to tackle bribery and corruption.
Corporate liability for bribes
Most controversially, the amendments to the AUCL create a new corporate offense. In the draft, where an employee engages in bribery that creates opportunities or advantages for his or her employer, the bribery is considered the conduct of the company as if it sanctioned the bribe. This brings Chinese law closer in line with the UK Bribery Act. But unlike the Bribery Act, which allows a company a defense if it can prove it had “adequate procedures” in place to prevent bribery, the amendment to the AUCL offers no such option. The only defense against strict liability is where the company can show that the employee’s bribe conduct was against the company’s interest, without any explanation as to what constitutes such exonerating circumstances. So as a multinational, you may face strict liability for the conduct of any of your employees engaged in bribery unless you can demonstrate some form of cognizable harm.

Sanctions
At present, penalties for commercial bribery comprise a maximum fine of 200,000 RMB (roughly US$29,000), plus clawback of unlawful revenue, with the bulk coming from the clawback. The draft proposes a penalty of 10%–30% of illegal revenue, creating the scope for bigger penalties, because there is greater discretion to set the level of the fine.

Outlook for the year ahead
The draft amendments now go to the Standing Committee of the National People’s Congress for deliberation. This is the final procedural step before enactment of the law, and while some laws have taken considerably longer, it is possible we could see passage of the law within 2017.

We anticipate enforcement agencies may struggle to apply what will be a largely reformulated law. Companies may struggle as well, as they try to understand the ramifications of the strict corporate liability provision. However, we suspect that many multinationals will find it easier to roll out and enforce their compliance messages to Chinese colleagues, now that Chinese anticorruption law becomes increasingly similar to its international counterparts.

Eugene Chen
Eugene is a partner in our Shanghai office who has experience in the United States and China. Eugene focuses primarily on internal investigations, local and international anticorruption enforcement actions, and complex commercial disputes.
It is not uncommon for us to investigate a regulatory or compliance issue and find employees in the company demonstrate a complete lack of concern that regulators might take action. In such cases, unfortunately, it is (corrupt) business as usual.

The good news is that the anticorruption landscape in South East Asia is improving, albeit slowly. With increasing regulatory, commercial, and political pressures across the region, you’ve got increasingly effective anticorruption legislation and enforcement. This essentially means on the one hand there’s a growing chance of getting caught, investigated, and prosecuted, but on the other hand an increasing acknowledgment on the part of regulators of the complex compliance issues that face multinationals operating in the region.

**Vietnam**

As indicated by its 112th place in the Corruption Perceptions Index (CPI), corruption in Vietnam is seen as being a major issue — from daily, low-level facilitation payments to high-level corruption scandals surrounding the rigging of tender bids. To date, little domestic enforcement action has been taken against government officials and none against companies.

But it is only a matter of time before the Vietnam anticorruption authorities wake up to the significant credibility and revenue deficit they face compared with their counterparts in the United States, the UK, and Singapore by not strongly imposing fines and other sanctions for corrupt practices.

**What’s the forecast with/without the TPP?**

Until recently, much anticipation surrounded the Trans-Pacific Partnership (TPP) trade deal. It would tighten economic ties between its 12 signatory states, including Vietnam. According to the World Bank, TPP has the potential to lift GDP in Vietnam by as much as 10% by 2030. Current forecasts predict it will continue to hover around 6% in 2017–18.

Because the standards of regulation vary within the signatory states, the TPP contains provisions that would look to harmonize certain regulations, including Article 26, which requires the signatories to implement comprehensive anti-bribery laws. But Donald Trump’s election win sparks the prospect that the United States may pull out of the agreement, and in effect assign the TPP to the ashes of history as a trade deal that never quite made it off the ground. What is certain is that if the TPP does fail, a question mark will hang over whether Vietnam follows through on Article 26 and enacts tougher anti-bribery legislation.
Knowing who you’re doing business with

Bribery and corruption span most sectors in Vietnam. So as a foreign investor, you must examine and understand the local laws and regulations as well as the particular corruption risks in your business sector. While Vietnam’s enforcement agencies may — for now — turn a blind eye to corrupt practices, U.S. and UK authorities certainly will not.

To avoid getting caught out, it’s essential that you retain compliance oversight of the companies with whom you do business. You should do your utmost to shield yourself from businesses that don’t share your compliance standards. Conducting regular due diligence on your business counterparts and ensuring they have a good compliance team in place is a good start. It might also be prudent to include audit rights in your contracts with third-party service providers, which should help monitor money flows within their organizations and determine whether they are legitimate.

Thailand

Thailand’s economy — with the help of significant foreign direct investment — continues to grow, but in some ways the country’s anticorruption legal framework is struggling to keep pace. Despite progress in developing its legislative framework, local enforcement has been found lacking where some corruption cases appear to be pursued for political motivations.

Yes, there have been legislative developments …

In the early 2000s, Thailand did well on Transparency International’s CPI; it ranked between 60th and 64th for a number of years. It then dropped to the low 100s but later improved: in 2015 it ranked 76th. That’s partly because in the last couple of years it strengthened its anticorruption laws. Some reforms appear to send a strong message such as extending the scope of liability for corruption offenses to companies and agents — principles already long established in the U.S. and UK anticorruption regimes. It has also widened the definition of “public official” to include not only Thai public officials but also foreign officials in Thailand. There are other legislative amendments, however, that look more like window dressing. For example, the extension of the death penalty for serious corruption offenses to foreigners as well as locals is unlikely to be enforced in the foreseeable future.

… but enforcement affected by vested interests and political instability?

The paucity of corruption cases being brought shows actual enforcement needs some improvement. There have been a few high-profile cases such as the case of former prime minister Yingluck Shinawatra, the sister of exiled former prime minister Thaksin Shinawatra. Ms Shinawatra faces a potential prison conviction for corruption charges that stem from her management of a rice subsidy scheme, which hints at continuing tensions between the ruling junta government and the Shinawatra political dynasty.
There are, however, signs that anticorruption enforcement is moving in the right direction. For example, the government claims it removed in the last few years 175 middle- to low-ranking officials from their posts because of suspected corruption. It has also, in October 2016, opened a specialized anticorruption court to speed up prosecutions.

What’s next?
The recent death of Thailand’s King Bhumibol Adulyadej has led to a prolonged period of mourning, during which further legislative developments in this space are appropriately expected to be limited. It is also now expected that elections forecast for 2017 may well be delayed to 2018 because of the king’s death, which may have an impact on the enforcement landscape. But any fears of a renewed period of political uncertainty have quickly dissipated as Crown Prince Maha Vajiralongkorn was formally crowned King Rama X.

Foreseeing the move toward Western-style anticorruption enforcement
The general picture in Thailand is that local anticorruption enforcement has still some way to go. But we are already seeing local laws incorporating many of the established principles under anticorruption laws in the United States and UK. So whether your company comes under the umbrella of Thai local law and/or extraterritorial laws such as the U.S. Foreign Corrupt Practices Act and UK Bribery Act, the implementation and maintenance of a sophisticated and risk-based compliance program is important. If you can prove you have a proper program in place and that you’re taking steps to remediate any issues, you’re likely to get better treatment from local Thai and overseas regulators alike.

Indonesia
On the whole, Indonesia is becoming more transparent, as evidenced by its rise in Transparency International’s CPI rankings, from 118th to 88th over the past four years. Efforts to create a safe and sophisticated commercial environment managed by a more open central and regional government reflect this. The emergent middle classes have provided companies with new consumers and contributed to the public sphere with an increasingly powerful voice on issues of national interest. Indeed, Indonesia is open for business.

However, the reality remains that the corruption risks facing multinationals operating in Indonesia are real. Indonesia’s economy has grown fast over the last decade, and this has at times overwhelmed its ambitious but relatively immature regulatory framework. Regulators are becoming increasingly mature in the business of enforcement and balancing vested political interests, but there are still areas where regulations overlap and lack consistency when it comes to implementation. And distracted by the potentially lucrative commercial opportunities in Indonesia, overseas market entrants have been lulled into a false sense of security that corruption is not a serious issue.
Which sectors are more compliance ready?

Our experience has shown that established companies in the energy, natural resources, and infrastructure sectors have been most active in trying to embed robust anticorruption compliance programs. Similarly, companies in the pharma/medical sectors have also been alert in seeking to address corruption risks in Indonesia.

Besides that, in telecoms and financial services, we are seeing more robust compliance practices starting to be implemented, but there is still room for improvement as the government makes a concerted push to develop regulations and enhance transparency in these sectors.

Finally, companies in the newest sectors of Indonesia’s emerging economy — covering fintech and e-commerce — are finding compliance a challenge. In particular, it has proved challenging for companies in this space to navigate data privacy and cybersecurity regulations, which are inadequate with reference to the rapid pace of technological innovation.

Mitigating risks surrounding government officials

In a country where we see present or former government officials involved in big business deals, public sector corruption remains a challenge. Most public sector corruption involves employees of a government body or a state-owned enterprise, and that has been president Joko Widodo’s focus. Mr Widodo has made some inroads since being elected in 2014 on an anti-graft platform. He has cut bureaucracy and with it the scope for corrupt interactions with government officials. That in turn has improved perceptions about how safe your investment in Indonesia will be.

For example, to set up a company used to require a long and layered process, and each stage in that process provided an opportunity to bribe. Those multiple stages (and multiple opportunities to bribe) have been cut to a straightforward three-hour process to obtain the eight required investment licenses from the Investment Coordination Board.
Are the judges impartial?
Corruption involving the judiciary remains problematic, which has led to some inconsistency when it comes to prosecuting corruption cases. There can sometimes be little difference between the sentences handed down for low- and high-threshold offenses. But public scrutiny of judicial authority has increased. For example, there is now a process in place where complaints can be brought before the Judicial Commission to investigate court decisions. This is a clear sign of the government’s efforts to restore public confidence in the judiciary by enhancing the supervisory function within the judiciary and therefore enabling anticorruption policy to be more strictly enforced.

Importance of management buy-in, strict implementation of policies, and training
As Indonesia’s anticorruption enforcement framework matures, companies should be proactive in conducting regular, interactive training sessions and strictly implementing policies in framing their interactions with local government officials. Until there are further improvements in the regulatory and enforcement framework, corruption risk will remain an ongoing feature of doing business in Indonesia and should be addressed with full buy-in from management.

Malaysia
Malaysia was until recently seen as best placed to catch up with Singapore in terms of anticorruption enforcement, but that reputation has clearly taken a hit in the last 18 months. Transparency International’s 2015 CPI ranked Malaysia 54th out of 168 countries. Singapore ranked 8th. It may be the case that Malaysia has merely been better than other countries at downplaying its lack of transparency in recent years.

The fallout from 1MDB
This change in perception is mainly down to the fallout from 1MDB (1Malaysia Development Berhad), the state investment fund from which prime minister Najib Razak allegedly siphoned money. It has made investors doubt whether there is any degree of transparency in the country (at any level of government). This makes it hard to confidently do business there.

Corruption may have also hindered the ability of the country’s anticorruption agencies to effectively function. In the wake of 1MDB, there has been criticism in some quarters that the investigations of both the Malaysian Anti-Corruption Commission and the attorney-general have proved ineffective. Former attorney-general Abdul Gani Patail, who hinted at an investigation, was retired on the grounds of ill health. His replacement, Mohamed Apandi Ali, then cleared the prime minister of wrongdoing, saying there was no proof he knew of the transfers of large sums to his personal bank account.
The inability of Malaysia’s anticorruption agencies to find any wrongdoing has not deterred other international regulators from Singapore, Switzerland, the United States, and the UK from conducting their own investigations and making the case a regular feature in headlines around the world.

In light of this, foreign investors in sectors like manufacturing and oil and gas have been affected. Their concerns centre on how to operate in a country apparently engulfed in corruption at the highest political level. Key performance indicators show that the economy has been affected by the corruption allegations surrounding 1MDB. In particular, the Malaysian ringgit has been particularly volatile as investor confidence in the Najib administration’s ability to govern has been shaken.

Where will enforcement go from here?
Anticorruption enforcement is unpredictable, and there’s a chance it may grind to a halt or slowdown, creating the risk that local enforcement action won’t arise. But it appears that the international regulatory lens is focusing on Malaysia after 1MDB, and in particular on oil and gas investments in the country.

A wake-up call to modernize your compliance to international standards
1MDB should serve as a wake-up call and a reminder to ready your compliance program for a new era. You should prioritize your compliance spend in the corruption “hot spot” areas where your business is most at risk. Corruption cases inevitably involve multiple transnational flows of money, and so while it might look like local enforcement agencies have lost touch, remember the anticorruption compliance standards expected by the U.S. Department of Justice, the U.S. Securities and Exchange Commission and the UK Serious Fraud Office are very high indeed.

Singapore
While it may have been the view in the past that Singapore is a “safe haven” amid a plethora of highly corrupt countries, the reality is that Singapore as the regional financial hub can experience collateral damage from the corrupt acts committed in neighboring countries.

The 1MDB case emanating from Malaysia is a case in point. Singapore bore the repercussions when authorities, jolted into a state of alert, canceled two banking licenses for lax due diligence. The scandal turned out to be an awakening for both the authorities and the financial institutions (in particular banks).
Beware of corruption’s link to money laundering

Even though money laundering may not always be linked to corruption, it’s important to recognize that corrupt practices — in both the public and the private sectors — often result in illicit funds moving from A to B. As the regional financial hub, Singapore has recognized it can do more to counter money laundering and has quickly taken action. We have seen the regulators move skillfully to strike a balance between tightening regulation and giving multinationals headquartered in Singapore the financial freedom to build their business in South East Asia.

When the Financial Action Task Force published its mutual evaluation report on money laundering, it stressed that Singapore wasn’t doing enough on investigating and enforcing against terrorist financing and cross-border money laundering risks. And in Singapore’s typically proactive fashion, the authorities have taken prompt action. For example, the Monetary Authority of Singapore has recently restructured to enable it to more effectively examine and counter money laundering risks.

What’s the solution?
Well, that depends …

The link between bribery and money laundering and how to address the problem depends on whether you’re a financial institution or a corporate.

Financial institutions need a different approach from corporates to the same problem. As a bank or insurance company, you should make sure you know your customer and tighten your due diligence process for onboarding individual and company clients. If, for example, you have 5,000 mid-level private wealth customers who are all Singapore passport holders and you know they are professionals — doctors, lawyers, and so on — the risk profile of such clients is perhaps medium to low. So you can apply reasonably cost-effective resources. But the same can’t be said for higher risk clients who have political connections or are primarily based in other parts of South East Asia.

... and remember, it is not just banks that need to be concerned

While banks seem like obvious targets for money laundering, it affects other industries, too — casinos, insurance, luxury goods, real estate, and more. Because the risks and methods of money laundering differ by sector, your best defense is a risk assessment designed for your business. You should look at how your products or services could be used to launder money, then mold your internal controls to fill any cracks. Corporate structures, beneficial owners, and fast turnaround deals mean ownership changes hands quickly, so it is crucial that you repeat these risk assessment checks, too.
Tough calls now may save your company later

In South East Asia, the cost of corruption definitely outweighs the cost of compliance in the long term. It makes sense, then, to do everything you can to minimize the risk of bribery and corruption, even if it calls for reducing short-term profits by investing in compliance or in extreme cases walking away from profitable business.

That may be a tough and possibly unpopular call within your organization, and so it demands a top-down, zero tolerance approach. Alongside this you need risk assessments and due diligence, which are not cheap — they’re intensive, and you need to repeat them to ensure ongoing effectiveness. And beyond that, there’s the necessity to change the mindset of your employees, to get them to take on board that corruption ultimately hurts the bottom line. So education and constant training, universally supported from the top and effectively deployed by those at mid-level, are vital.

No matter which sector you’re in, there is no substitute for knowing with whom you’re doing business. Whether you run a casino where people put down $1m in cash to buy chips, whether you are an insurance company that sells first-class investment products, or whether you’re a global bank with Asian private wealth clients, the answer is the same: make sure you understand the business you’re getting into.

We take a broader look at compliance on page 69 in “Compliance — are you steering the course that satisfies the authorities?”

Maurice Burke
Maurice is a partner in our Singapore office who is widely recognized as one of the leading dispute practitioners in his field. Maurice represents clients in dispute resolution, investigation and contentious regulatory matters across the region, including in Singapore, Indonesia, Thailand, Malaysia, and the Philippines.

Chalid Heyder
Chalid is a partner at Dewi Negara Fachri & Partners and has more than 16 years’ experience in dispute resolution in Indonesia. Chalid has extensive experience in criminal and corruption matters as well as internal investigations.

Anton Seilern, a senior associate in our Singapore office, and Wataru Kawai and Adam Mickley, associates in our Singapore office, also contributed to this article.
Recognizing this issue, the Federal Government has committed significant funds to maintain a strong regulatory approach to corporate crime.

In 2015, the Senate referred an inquiry into foreign bribery to the Senate Economics References Committee. Although this lapsed at the end of the 44th Parliament as a result of the general election, the new government has readopted the inquiry. The Committee is due to report by 30 June 2017.

Reforms we expect to see

The inquiry has led to a focus on the provision regarding bribery of a foreign public official, which is in Division 70 of the Australian Criminal Code. While the provision has broad jurisdictional scope — Australia was among the first jurisdictions to introduce corporate liability for defective “corporate cultures” — experience has shown the need to address challenges and concerns around corporate crime and non-compliance.

The submissions to the inquiry are indicative of the changes we expect in the coming years, namely:

Broadening the provision’s scope

At present, the provision addressing foreign bribery applies only to bribery of a foreign public official. Many of the submissions propose expanding this to include private instances of bribery.

There have also been proposals to introduce an “associate” provision, akin to the UK legislation, to allow greater regulation of foreign subsidiaries and intermediaries.

Removal of the facilitation payment defense

Australia has a defense for the offense of bribery of foreign public officials in circumstances where the benefit was minor, where the conduct was to secure performance of a routine action, and where records were kept of the transaction. The subjective nature of this defense causes uncertainty, and it is likely we will see the defense abolished so that Australian businesses have greater clarity on how they should conduct their business.

Introduction of a deferred prosecution scheme

We also expect to see a deferred prosecution scheme similar to the approach taken by other jurisdictions, such as the United States.
What is a compliant corporate culture?

A company in Australia can be liable for criminal conduct where it is shown that it authorized or permitted the commission of the offense. One way to determine such permission or authorization is by reference to the company’s corporate culture. The Criminal Code defines corporate culture as “an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.” This has been criticized for its breadth and for limiting to date the accountability of companies themselves. As a result, there have been calls for greater clarity as to the meaning and application of this provision.

Changes outside the inquiry

In November 2016, the Federal Parliament passed the Fair Work (Registered Organisations) Bill 2014. The bill will introduce protections for trade union whistleblowers that will change the landscape of reporting of misconduct in Australia. The Federal Government has also committed to extending these protections to whistleblowers in companies and public sector organizations within 18 months. This will likely lead to more investigations starting in Australia.

Australia is also set to strengthen ties with other jurisdictions, as a reflection of the transnational nature of these issues. In November, China’s Anti-Money Laundering Monitoring and Analysis Center and the Australian Transaction Reports and Analysis Centre agreed to share financial intelligence and to collaborate in fighting against money laundering and terrorism financing.
Africa has the youngest population in the world, with 60% under the age of 25.
Africa: Be prepared to go the extra mile

Tony Canny, Liam Naidoo, and Crispin Rapinet

Africa has become an attractive investment destination with the potential to thrive, as investors look further afield than the more established markets such as Kenya, Nigeria, and South Africa. Plus, with rising costs in Asia, manufacturers have started to look elsewhere, to Ethiopia and Rwanda, for example.

Africa is open to foreign investment and industrialization because they bring the potential to create jobs and in turn cut poverty.

The continent has a market of one billion people, including a growing middle class. Sub-Saharan Africa, in particular, has a growing working-age population that will both need and want to join the labor force.

33%

Rising middle classes and increasing disposable incomes are changing consumer habits. Manufacturing is now the top business function, attracting 33% of FDI.

China is a big foreign investor into Africa; indeed, almost all African countries benefit in some way from Chinese investment. Construction, manufacturing and financial services account for some 50% of China’s foreign direct investment (FDI).

Barriers to doing business

But Africa has a well-known corruption problem. For various reasons, bribery and corruption remain rampant throughout the continent. That’s partly because, historically, the economy has been run in a way that makes it hard to detect bribery and corruption and partly because it seems to have become pretty much normalized. The barriers to doing business are not coming down: there’s a massive gap in infrastructure, for example, and there’s widespread corruption. And while this isn’t unique to Africa, of course, certain conditions make it more susceptible than other areas.

US$38bn

World Bank estimates an investment of over US$38bn a year for the next 10 years is needed to plug Africa’s infrastructure gaps.

To increase responsible investment, a number of African leaders have made public their stances on anti-bribery and corruption. In the last six years, presidents Buhari, Condé, and Magufuli of Nigeria, Guinea, and Tanzania respectively were each democratically elected to the presidency of their countries on promises to tackle corruption. They’re also enshrining their anticorruption attitudes in law.
2050

The Economist predicts Nigeria will become the world’s 12th largest economy by 2050.

Law and enforcement

In Nigeria, a new Money Laundering (Prevention and Prohibition) Bill 2016 passed through its second reading in the Nigerian House of Representatives earlier in the year. The bill bans money laundering, expands the scope of money laundering, and protects employees of certain institutions, bodies, and professions if they discover and report money laundering. It also places more onerous due diligence and reporting obligations on businesses and regulators.

Enforcement action tends to lag behind legislative change, which means investments you make today may come to be scrutinized in five or 10 years, and they’ll be judged by tomorrow’s standards and expectations.

Before you embark on business relationships with companies in Africa, there are measures you should take to protect your business and your reputation. As a first step, you should familiarize yourself with the risk in the country you plan to invest in, that is, both the risk of bribery and corruption in the industry you operate in and the risk of your falling foul of local laws.

Keep in mind that on top of local laws you must comply with extraterritorial bribery and corruption laws, such as the U.S. Foreign Corrupt Practices Act and the UK Bribery Act. You will need to carry out due diligence on all your partners — third parties as well as counterparties — to investigate their liabilities and obligations and to check for bribery risk, because you can be held liable for corrupt practices of your partners when they act on your behalf. Sanctions can include criminal fines, imprisonment of CEOs and employees, and damages costs.

Due diligence and risk assessments

But it is often hard to carry out thorough due diligence in Africa because the continent lacks adequate record-keeping to provide the information needed. Company registries in sub-Saharan Africa and North Africa are not as sophisticated as in other places. There’s a lack of standard registration processes and publicly available information, and for example, sole traders and partnerships may not be registered. Press freedom is limited in many jurisdictions, too, making it hard to get independent sources on the integrity of politically exposed people. There are sometimes rumors that are difficult to get to the bottom of, and it can be hard to identify exactly who a company’s beneficial owners are — again, because of poor of record-keeping.

You should be prepared to go much further than you would have to in other jurisdictions. In each country you might want to use a local law specialist who knows the country and its nuances inside out. It would certainly be worth your while to build relationships with local counsel who are well versed in local laws and who understand first hand how best to conduct due diligence processes in Africa.
Different legal systems/governing law

- OHADA Napoleonic jurisdictions
- Common law jurisdictions
- Traditional Napoleonic jurisdictions
- Mixed Roman-Dutch/common law jurisdictions
They’ll know what level of offers, taxes, and other payments you should expect to have to make. They’ll know the most appropriate government organizations for the legal facilitation of transactions as well. That said, there are several layers of complexity around getting good, practical local law advice.

Using third-party business partners is common in Africa; they may be sales agents, consultants or joint venture partners. Working on your behalf, their conduct is considered sanctioned by you. Their bribing an official, for example, is considered your bribing the official. In other words, you could be held liable for any illegal acts they take part in. So you should investigate as best you can their past business conduct, ownership structure, their internal controls to stop bribery, and so on.

Companies investing in Africa must remember that dealing in Africa differs from dealing in other developing countries. You need to be sensitive to the jurisdiction you want to invest in and you need to understand the local environment from the start so you can build your compliance procedures around them. Be wary of investing in companies that don’t have an anticorruption compliance program in place. And don’t wait for a corruption incident to arise before you put in place compliance and mitigation procedures. Enforcement agencies and prosecutors will expect to see your detailed risk assessment and compliance programs before taking into account your defense to any corruption allegations.

**Tony Canny**
Tony is a partner in our Johannesburg office who focuses on investigations, white-collar crime, and fraud (IWCF). He handles high-profile white-collar crime matters in South Africa on behalf of entities across several industries. Tony started the South African IWCF practice group in 1991.

**Liam Naidoo**
Liam is a counsel in our London office who focuses on business crime, fraud, bribery and corruption. Liam’s practice particularly focuses on the management of internal investigations following allegations of corrupt activity of employees, agents, and other third parties.

**Crispin Rapinet**
Crispin is a partner in London who leads our global Investigations, White Collar and Fraud practice. Crispin has wide-ranging experience in international and cross-border issues arising out of complex fraud, bribery and corruption, insolvency, and asset recovery situations.
CCOs must have free rein

Both Andrew Weissmann, Chief of DOJ Criminal Division’s Fraud Section, and Stephen Cohen, Associate Director of Enforcement at the Securities and Exchange Commission, have explained that the enforcement agencies will examine the quality of the compliance programs at companies under FCPA scrutiny. Companies able to show their chief compliance officer (CCO) operates independently — and has adequate resources and authority — are more likely to escape FCPA liability.

Mr Cohen added that he would ask questions to determine the level of independence the CCO enjoys. These would cover:

- whether the CCO is part of the senior management team and a participant in regular meetings of that group;
- who in the company has authority to fire the CCO;  
- whether the CCO has a direct reporting line to the board;  
- who at the company can overturn a decision by the CCO; and  
- how the compliance budget is set.

Although CCO independence is important, Mr Weissmann emphasized that integration with business units is vital. He explained that business units should take charge of at least part of the compliance function so the CCO does not become “a policeman who tells the business unit what it cannot do.”

When compliance falls short

The position remains unclear in the UK. There hasn’t been a case that shows what the Serious Fraud Office (SFO) would or wouldn’t accept as a strong compliance program. But there are indications from two Deferred Prosecution Agreements (DPAs). The facts suggest a compliance program will be scrutinized both for its content and for its practical implementation to decide whether it satisfies the “adequate procedures” defense under the UK Bribery Act.

So, the message from both sides of the Atlantic is a watertight policy on paper is not enough. Investigators want evidence of full integration within your operations and with your employees.

Standard Bank’s DPA showed the company had detailed anti-bribery and corruption (AB&C) policies and procedures in place when investigated.
But there was no attempt to rely on the “adequate procedures” defense, presumably because the bank had simply relied on its sister company, Stanbic Bank Tanzania (SBT), to check the local agent that was found to have bribed.

The bank relied on a two-page checklist from SBT, which acknowledged the agent was high risk, but asserted the agent was appropriate to appoint. Accordingly, the bank took no further action. Had the bank delved deeper, it would have become clear relatively quickly that the agent was providing no actual “services” in return for the US$6m it was being paid and that one of the agent’s shareholders was a senior government official with influence over the government’s decision regarding the deal.

No one-size-fits-all program

In February, Mr Weissmann publicly anticipated the DOJ would publish a list of questions companies could expect to be asked if Ms Chen were to assess their compliance program.24 He anticipated the list would include questions in four categories:

- What does a low-level employee think/know about the compliance function?
- What are management and the board doing in terms of compliance?
- Is responsibility for compliance shared with the business units, or is it concentrated at the compliance function?
- Do compliance personnel have the right expertise (do they have the right background and resources)?

Although the DOJ hasn’t published the questions Ms Chen will use to evaluate compliance programs, the guidance memo announcing the FCPA pilot program24 laid out the criteria for an effective compliance program. It acknowledged that the DOJ’s expectations may vary based on the size and resources of the organization but identified the following general criteria:

- an established culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
- sufficient dedicated resources to the compliance function;
- compliance personnel of the quality and with the experience to understand and identify transactions identified as posing a potential risk;
- independence of the compliance function;
- a compliance program tailored to the results of an effective risk assessment;
- compensation and promotion of compliance personnel commensurate with other employees;
- appropriate auditing of the compliance program to assure its effectiveness; and
- appropriate reporting structure of compliance personnel within the company.
No such guidance has come from the SFO. But the criticisms leveled against Standard Bank show that companies must implement adequately detailed compliance programs. They must also, on a risk-adjusted basis, conduct due diligence themselves rather than rely on others, especially those with a vested interest in the outcome of a deal. Any compliance program, no matter how well drafted, must be adequate for the demands of the industry and the location in which each part of the company operates. It cannot be reduced to a box-ticking exercise.

Monitoring and reviewing compliance and ethics is critical to understanding how effective a company’s compliance program is, and how to minimize risks in the future.

Compliance in the real world

Despite the illustrations above, data we collected for our global study Steering the Course provide a snapshot into the reality of major companies’ compliance programs. The study was based on interviews with more than 600 CCOs, heads of legal, or equivalents of companies with revenues over US$350m. Its findings show that only 39% of CCOs report directly to the CFO or general counsel. More than half of CCOs admit their advice to the CEO gets filtered by others. And perhaps more tellingly, 44% of companies admit that AB&C is not a standing item on the board agenda.
When we examined the granular elements of a compliance program, further issues arose. By way of example, 40% of the companies did not have a whistleblowing hotline, suggesting either that AB&C is not a top priority or that some of the cultural sensitivities around whistleblowing, in continental Europe in particular, still prevail.

Training and local engagement also matter, as many as 53% of companies have trained only half or less than half of their staff worldwide. Implementation of policies will suffer due to this lack of a tailored approach and lack of training and will no doubt result in similar issues to those experienced by SBT.

A growing and fundamental element of any compliance program concerns the approach to third parties. Many of the big risks lie with agents and distributors acting for companies in jurisdictions where they may have less visibility about events on the ground. This risk is even greater where it’s illegal for foreign companies to transact without a local partner. China and Brazil, for example, require foreign firms to take a local partner to enter their markets.

Refer to our third-party report available on www.hoganlovellsabc.com

Nonetheless, our research shows that companies don’t do enough to mitigate this risk, with 42% failing to keep a record of all third parties and nearly half (46%) not including AB&C clauses in their third-party contracts.

These are basic and important steps you can take to try to make sure you have adequate procedures in place. Companies leave themselves open to huge risk of enforcement by not putting in place such procedures.

Public statements and official guidance from the DOJ in 2016, as well as recent decisions in SFO investigations make clear that the overall compliance environment in which allegedly criminal conduct arises is increasingly important to prosecutors. Corporations should expect that the resources and authority they grant to their compliance program will be scrutinized and could significantly affect the outcome of any investigation.

For more on our Steering the Course study and for full access to our compliance guide, please visit www.hoganlovellsabc.com.
Steering the Course
It’s not as easy as ABC

Lack of support within the business

60% Cultural differences

Impact of lack of tone at the top

43% Wouldn’t walk away from a high risk contract

41% Of CEOs don’t do regular training

39% Don’t openly support AB&C within the business

57% Financial incentives for whistleblowing

56% Compulsory whistleblowing arrangements

57% Annual external reporting on compliance

58% Lack of cooperation

Profits over prevention

57% Biggest challenge is sales pressure

59% Fear losing their jobs if they don’t meet sales targets

53% AB&C is seen as an unnecessary headache

49% AB&C remains a taboo subject

28% U.S.
39% Asia
45% UK
49% Continental Europe

40% AB&C is not a priority for the CEO

The ideal world

What CCOs want

62% International code of best practice

54% Industry guidelines on adequate procedures

54% Removing legal requirement to work through third parties

43% Impact of lack of tone at the top

49% UK
39% Continental Europe
28% U.S.
References

1. Trace Trends, Q&A with DOJ Fraud Chief Andrew Weissmann, Trace Anti-bribery and Compliance Solutions (26 Jan. 2016), http://www.traceinternational.org/blog/750/Q_A_with_DOJ_Fraud_Chief_Andrew_Weissmann.


4. The specific requirements for full credit under the pilot program are discussed in our prior client alert available at http://www.hoganlovells.com/doj-fraud-section-announces-fcpa-enforcement-pilot-program.

5. See Todd, supra note 3.

6. Id.


8. See Trace Trends, supra note 1.


13. Id.


16. R (Morgan Grenfell Ltd) v Special Commissioners [2003] 1 AC 563, per Lord Hoffmann.


One firm, one team

Africa
Tony Canny
Partner, Johannesburg
T +27 11 775 6363
tony.canny@hoganlovells.com

SJ Thema
Partner, Johannesburg
T +27 11 775 6386
sj.thema@hoganlovells.com

Asia
Steven N. Robinson
Partner, Beijing
T +86 10 6582 9568
steven.robinson@hoganlovells.com

Jun Wei
Partner, Beijing
T +86 10 6582 9488
jun.wei@hoganlovells.com

Jeff Olson
Partner, Ho Chi Minh City
T +84 8 3825 6370
jeffolson@hoganlovells.com

Mark Lin
Partner, Hong Kong
T +852 2840 5091
mark.lin@hoganlovells.com

Chalid Heyder
Partner, Jakarta
T +62 21 5291 7451
chalid.heyder@dnfp.com

Eugene Chen
Partner, Shanghai
T +86 21 6122 3858
eugene.chen@hoganlovells.com

Maurice Burke
Partner, Singapore
T +65 63022 558
maurice.burke@hoganlovells.com

Rika Beppu
Partner, Tokyo
T +81 3 5157 8251
rika.beppu@hoganlovells.com

Wataru Kamoto
Partner, Tokyo
T +81 3 5157 8163
wataru.kamoto@hoganlovells.com

Chris Melville
Partner, Ulaanbaatar
T +976 7012 8900
chris.melville@hoganlovells.com

Australia
Scott Harris
Partner, Sydney
T +61 2 9093 3510
scott.harris@hoganlovells.com

Europe
László Partos
Partner, Budapest
T +36 1 565 4480
lazslo.partos@hoganlovells.co.hu

Juergen Johannes Witte
Partner, Dusseldorf
T +49 211 1368 520
juergen.witte@hoganlovells.com

Tim Wybitul
Partner, Frankfurt
T +49 69 96236 321
tim.wybitul@hoganlovells.com

Tanja Eisenblätter
Partner, Hamburg
T +49 40 41993 284
tanja.eisenblaetter@hoganlovells.com

Liam Naidoo
Counsel, London
+44 20 7296 5887
liam.naidoo@hoganlovells.com

Crispin Rapinet
Partner, London
T +44 20 7296 5167
crispin.rapinet@hoganlovells.com

Michael Roberts
Partner, London
T +44 20 7296 5387
michael.roberts@hoganlovells.com

Ivan Shiu
Partner, London
T +44 20 7296 2834
ivan.shiu@hoganlovells.com

José Luis Huerta
Partner, Madrid
T +34 91 349 82 66
joseluis.huerta@hoganlovells.com
Our team

The Hogan Lovells Global Bribery and Corruption Task Force offers international clients informed advice in a number of areas of risk, from reactive incident response measures to the development of proactive strategies for managing potential exposure through compliance programs.

Our task force brings together a cross-jurisdictional team of partners from Hogan Lovells international network with more than 25 years of experience in large-scale investigations. The task force has real experience on the ground in the U.S. and Europe (including the UK, Germany, Poland, Spain, Italy, and France), as well as in Russia, Asia (including China and Hong Kong), the Middle East, Latin America and Africa. Hogan Lovells is a recognized leader in investigations and fraud work, being ranked in the top tier of leading legal directories.

“Hogan Lovells is among an exclusive group of firms that field top-level investigations specialists right across the globe. This is reflected in the quantity, quality and breadth of matters it handles. The firm has a truly impressive number of senior investigations lawyers within its ranks.”

Global Investigations Review (GIR) 30, 2016
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