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CORPORATE FRAUD & CORRUPTION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in corporate fraud & corruption.





UNITED STATES

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Respondents



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G. Scott Hulsey is a former high-ranking Department of Justice official and corporate chief compliance officer who serves as counsel in white-collar criminal and regulatory enforcement matters. He represents individuals and institutions in complex international government investigations and trials, particularly those involving Asia and the EMEA regions. As a former federal prosecutor at the US Attorney's Office for the Northern District of Georgia, he was responsible for investigating and prosecuting complex criminal, money laundering and civil asset forfeiture matters against large-scale, international criminal organisations. He has successfully tried more than 60 federal and state cases over the course of his career.



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William F. McGovern's practice focuses on high-stakes cross-border government enforcement and investigation matters, with a particular emphasis on matters with an Asia nexus. He counsels high-net-worth individuals, public companies, investment advisers, proprietary trading firms, and officers and directors facing sensitive investigations or criminal enforcement proceedings, often conducted by multiple government agencies, including the US Securities and Exchange Commission (SEC), the US Department of Justice, the US Commodity Futures Trading Commission, the Hong Kong Independent Commission Against Corruption, and the Hong Kong Securities and Futures Commission.

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Q. How is the new US government administration planning to approach issues of fraud and corruption differently than the previous administration?

A. The Biden administration is expected to take a more aggressive stance against financial and corporate fraud, consistent with the Obama administration's approach. While prosecutions of corporate executives increased under Trump, many view enforcement against corporations and banks themselves to have eased – something that is expected to be reversed under Attorney General Merrick Garland. Relatedly, this more assertive approach to fraud and corruption is expected to include a focus on pandemic-related fraud. Moving forward, the Consumer Financial Protection Bureau, which was largely sidelined in the previous administration, is expected to be revitalised, and its leadership replaced, resulting in more enforcement actions on behalf of consumers. Separately, the Biden administration aims to pursue criminal climate litigation against corporations and corporate executives.

Q. To what extent have you seen a notable rise in the level of corporate fraud, bribery and corruption uncovered in the US?

A. In connection with COVID-19 and workers shifting to remote work, there have been reports of an increase in fraud observed by employees over the last half of 2020. The Association of Certified Fraud Examiners (ACFE) reported in December 2020 that 79 percent of the respondents to its survey, which was comprised of in-house examiners, professional services firms, law enforcement and government or regulatory agencies, noted an increase in fraud, and 90 percent expected a continued increase in fraud over the next 12 months. Particularly relevant to corporate fraud has been an increase in payment fraud. With new leadership at the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) we may well see a more vigorous approach to uncovering corporate fraud.

Q. Have there been any legal and regulatory changes implemented in the US designed to combat fraud and

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corruption? What penalties do companies face for failure to comply?

A. Congress passed an amendment to the National Defence Authorisation Act for the 2021 fiscal year. Under the Act, tipsters can receive up to 30 percent of the monetary penalties collected in an enforcement action brought by the Department of Treasury or the DOJ. The Act also included new rules for beneficial owners of US companies that requires them to register the true owner of the companies, ending anonymous shell companies. The DOJ has indicated that it will prioritise allegations of corporate bribery. Foreign Corrupt Practices Act (FCPA) regulations apply to anyone working for or on behalf of a company that does business within the US. With the new administration ramping up, there has been a significant change in the leadership of the DOJ, SEC and other criminal and regulatory bodies. We expect that in the coming months, the newly installed leaders of these agencies will define their priorities and perhaps propose additional rulemaking.

Q. In light of COVID-19, have you seen a pattern of US Department of Justice (DOJ) fines and financial penalties being reduced pursuant to ‘inability to pay’ considerations?

A. Although not new, since the DOJ issued new guidance in 2019 and 2020 adding transparency, the DOJ’s ‘inability to pay’ process has been increasingly invoked by corporations in support of reduced financial penalties. Sargeant Marine Inc, for example, pleaded guilty to violating the FCPA by bribing foreign officials in three other countries. For these charges, the minimum fine under the DOJ guidelines would have been around \$120m. After raising an inability to pay claim, it settled in September 2020 for a reduced fine of \$16.6m. As the negative financial impacts of the pandemic continue to reverberate through 2021, more claims can be expected. Corporations still must prove their inability to pay, as the DOJ can be expected to treat these claims the same as in normal times.



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Q. How does the US address instances of fraud and corruption that take place outside its national borders?

A. The FCPA is the best-known ‘tool’ available to the DOJ for policing bribery occurring outside of the US. US companies, as well as foreign corporations with registered securities in the US, fall within its ambit. US authorities, however, have been expanding their global reach in other ways. The most recent example is *United States v. Napout*, decided by the Second Circuit in 2020. There, the US Attorney’s Office for the Eastern District of New York charged two former officials of Latin American football associations with ‘honest services’ fraud in connection with a commercial bribery scheme. More particularly, the defendants were convicted by a jury of taking bribes from local companies in exchange for the granting of football marketing and broadcasting rights. This case did not fall within the scope of the FCPA because the unlawful payments were not directed to government officials. Still, a sufficient US nexus was deemed to exist where bribes either were received in or originated from US financial accounts. This case is indicative of an increasingly



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aggressive approach by US authorities to address overseas crime, even when limited to private actors.

Q. What role are whistleblowers playing in the fight against corporate fraud and corruption? What are some trends or recent developments in US whistleblower programmes that may impact corporate compliance programmes?

A. Whistleblowers are now playing a central role in uncovering corporate fraud and tax underpayment. Despite the pandemic, existing whistleblower programmes at the SEC, Commodity Futures Trading Commission (CFTC) and Internal Revenue Service (IRS) are drawing in more tips and paying out more awards than ever before. The IRS had a budget for 2020 of \$11.8bn, while the SEC had a budget of \$403m. In 2020, the IRS received 9077 tips from whistleblowers. The SEC received 6911 – an increase of 1699 tips from 2019. In terms of awards, in 2020 the IRS paid out 169 awards in the amount of \$86,619,032. The SEC paid out 39 awards totalling \$175m – an increase from eight awards totalling \$60m the year prior. The Department of Treasury

is enhancing its whistleblower programmes aimed at uncovering money laundering abuses. The SEC announced a new rule for its whistleblower programme, effective 23 October 2020. Among other changes, this rule largely changed the procedures for determining whistleblower award amounts. Further, the SEC is no longer permitted to raise the award amount above 30 percent of the aggregate amount of disgorgement and penalties. However, the rule also gives the SEC the ability to raise award amounts of \$5m or less.

Q. What advice can you offer to companies on conducting an internal investigation to follow up on suspicions of fraud or corruption?

A. According to a recent report by PwC, only 56 percent of companies surveyed conducted an investigation into their ‘worst incident’ last year. This deficiency stems in part from difficulties posed by the pandemic, such as travel restrictions and social distancing measures. These hurdles can be expected to persist, as remote working seems likely to stay – at least in some capacity – in a post-COVID-19 world. To overcome these obstacles,

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companies might consider increasing their investments in technology. We are learning that interviews can still be conducted with some effectiveness and securely over digital platforms, like Zoom and WebEx. Further, anti-fraud technology, including artificial intelligence software, can help to identify suspicious patterns and monitor compliance. □

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