



## Important Developments in Fraud, Corruption, and Enforcement, 2020-Present

**Matt Stennes, Medtronic, Inc.**

**Joe Thompson, U.S. Attorney's Office – District of Minnesota**

**Nelson Dong, Dorsey & Whitney LLP**

**Caitlin L.D. Hull, Dorsey & Whitney LLP**

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## Guest and Dorsey Speakers



**Joseph H. Thompson**  
Assistant U.S. Attorney, U.S.  
Attorney's Office, District  
of Minnesota



**Matthew Stennes**  
Vice President, Chief Litigation  
and Investigations Counsel  
Medtronic, Inc.



**Nelson G. Dong**  
Partner  
Dorsey & Whitney LLP  
dong.nelson@dorsey.com  
Seattle, Washington  
(206) 903-8871



**Caitlin L.D. Hull**  
Associate  
Dorsey & Whitney LLP  
hull.caitlin@dorsey.com  
Minneapolis, Minnesota  
(612) 492-6773



## Foreign Corrupt Practices Act 15 U.S.C. § 78dd-1 *et seq.*

- **Anti-bribery provisions** make it unlawful for a U.S. person or agent thereof:
  - to make an offer, promise, or payment
  - of money or anything of value
  - to a foreign government official acting in his or her official capacity
  - with corrupt intent
  - to obtain or retain business
- **Accounting provisions** require **issuers** to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls
  - Do not apply to private companies or non-profits

## FCPA: 2020 Enforcement Overview



SETTLEMENTS = \$2.78B



12 ENFORCEMENT ACTIONS  
AGAINST COMPANIES



36 INDIVIDUALS  
INDICTED OR CHARGED

## FCPA: Largest Corporate Settlements (Paid to U.S. Gov't)

1. **Goldman Sachs Group Inc. (United States): \$3.3 billion (2020)**
2. **Airbus SE (Netherlands/France): \$2.09 billion (2020)**
3. **Petróleo Brasileiro S.A. – Petrobras (Brazil): \$1.78 billion (2018)**
4. **Telefonaktiebolaget LM Ericsson (Sweden): \$1.06 billion (2019)**
5. **Telia Company AB (Sweden): \$1.01 billion (2017)**
6. **MTS (Russia): \$850 million (2019)**
7. **Siemens (Germany): \$800 million (2008)**
8. **VimpelCom (Netherlands): \$795 million (2016)**
9. **Alstom (France): \$772 million (2014)**
10. **Société Générale S.A. (France): \$585 million (2018)**



Source: FCPA Blog

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## FCPA: Largest Corporate Settlements

1. **Goldman Sachs Group Inc. (United States): \$3.3 billion (2020)**

On October 22, 2020, the DOJ announced a deferred prosecution agreement with Goldman Sachs and its Malaysian subsidiary, Goldman Sachs (Malaysia) Sdn. Bhd. (GS Malaysia). The deferred prosecution agreement involved resolved charges of conspiracy to violate the anti-bribery provisions of the FCPA, based on allegations related to a scheme to pay over \$1 billion in bribes to Malaysian and Abu Dhabi officials to obtain business for Goldman Sachs, including its role in underwriting approximately \$6.5 billion in three bond deals for 1Malaysia Development Bhd. (1MDB), for which Goldman Sachs earned hundreds of millions in fees.

<https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion>



### JUSTICE NEWS

Department of Justice  
Office of Public Affairs

FOR IMMEDIATE RELEASE

Thursday, October 22, 2020

**Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion**

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## FCPA: Largest Corporate Settlements

### 2. Airbus SE (Netherlands/France): \$2.09 billion (2020)

On January 31, 2020, the DOJ announced a deferred prosecution agreement with Airbus SE related to charges of conspiracy to violate the anti-bribery provisions of the FCPA. According to the DOJ, “[t]he FCPA charge arose out of Airbus’s scheme to offer and pay bribes to foreign officials, including Chinese officials, in order to obtain and retain business, including contracts to sell aircraft. The AECA charge stems from Airbus’s willful failure to disclose political contributions, commissions or fees to the U.S. government, as required under the ITAR, in connection with the sale or export of defense articles and defense services to the Armed Forces of a foreign country or international organization.”

<https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>

#### JUSTICE NEWS

Department of Justice  
Office of Public Affairs

FOR IMMEDIATE RELEASE

Friday, January 31, 2020

**Airbus Agrees to Pay over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case**



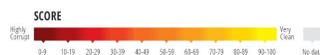
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## FCPA: Transparency International Heat Map 2020



### CORRUPTION PERCEPTIONS INDEX 2020

The perceived levels of public sector corruption in 180 countries/territories around the world.



#cpi2020

[www.transparency.org/cpi](http://www.transparency.org/cpi)

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## FCPA: Transparency International Heat Map 2020

**Transparency International** is a “global coalition against corruption,” which ranks 179 countries in terms of perceived levels of public sector corruption.

### 2020 Rankings of Note (1 = Least Risk / 179 = Most Risk):

- |                                 |   |
|---------------------------------|---|
| 1. Denmark / New Zealand (TIED) | 78. China / Argentina / Solomon Islands / Bahrain / Kuwait (TIED) |
| 9. Germany                      | 95. Brazil  |
| 11. Canada                      | 176. Venezuela / Yemen (TIED)                                     |
| 25. United States               | 178. Syria  |
|                                 | 179. Somalia / South Sudan (TIED)                                 |



<https://www.transparency.org/en/cpi/2020/index/nzl>

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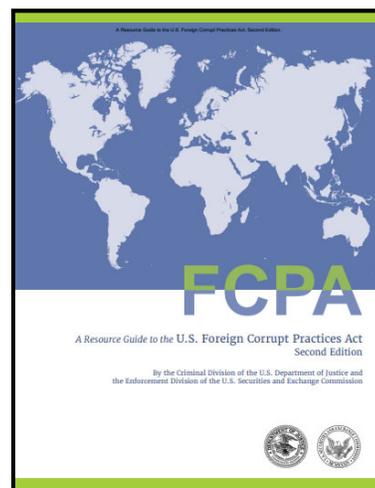
## Guidance from the DOJ on FCPA Compliance

### DOJ/SEC Resource Guide on FCPA, Second Edition (July 2020)

Updates include:

- “Foreign official” definition;
- Jurisdictional reach; and
- Added “hallmark” of successful compliance program: **“Investigation, Analysis, and Remediation of Misconduct”**

<https://www.justice.gov/criminal-fraud/fcpa-resource-guide>



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## Guidance from the DOJ on FCPA Compliance

### Foreign Official Definition

- Any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.
- “Broadly applies,” and construed to cover “state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation,” as well as government-funded higher education institutions

## Guidance from the DOJ on FCPA Compliance

### Jurisdictional Reach

- References *United States v. Hoskins*, 902 F.3d 69, 76-97 (2d Cir. 2018)
  - Second Circuit found that individuals can be criminally prosecuted for conspiracy to violate the FCPA anti-bribery provisions or aiding and abetting an FCPA anti-bribery violation, only if that individual’s conduct and role fall into one of the specifically enumerated categories expressly listed in the FCPA’s anti-bribery provisions (US citizen, employed by US company, acting while in the United States)
- Noted other jurisdictions (N.D. Ill.) have rejected *Hoskins* and permitted conspiracy and aiding and abetting charges to proceed even if not in the class of people who can be liable for a substantive FCPA violation
- Also noted that accounting provisions do not fall within *Hoskins*

## Guidance from the DOJ on FCPA Compliance

### **New hallmark of successful compliance program:** **“Investigation, Analysis, and Remediation of Misconduct”**

- “The truest measure of an effective compliance program is how it responds to misconduct. Accordingly, **for a compliance program to be truly effective, it should have a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents.** An effective investigations structure will also have an established means of documenting the company’s response, including any disciplinary or remediation measures taken. In addition to having a mechanism for responding to the specific incident of misconduct, the company’s program should also **integrate lessons learned from any misconduct into the company’s policies, training, and controls.** To do so, a company will need to analyze the root causes of the misconduct to timely and appropriately remediate those causes to prevent future compliance breaches.”

## Guidance from the DOJ on FCPA Compliance

### **FCPA Resource Guide: Compliance Program Case Study**

- U.S.-based financial institution real estate transaction with government agency in China, no prosecution
- “Robust” compliance program included:
  - Extensive training (including of senior officials in charge of the transaction)
  - Extensive due diligence on the government entities and special-purpose vehicles (SPVs) used by the government
    - Review Chinese government records
    - Speaking with Shanghai real estate market experts
    - On-site visit and pre-textual call to office
    - Interviewing SVP management
    - Searching media records
    - Conducting background checks

## Guidance from the DOJ on FCPA Compliance

### Prosecutor Guide: Evaluation of Compliance Programs (June 2020)

- No “rigid formula to assess the effectiveness of corporate compliance programs.”
- Instead, answer the following questions based on various “individualized” considerations, including: “company’s size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company’s operations, that might impact its compliance program.”

1. “Is the corporation’s compliance program well designed?”
2. “Is the program being applied earnestly and in good faith?’ In other words, is the program adequately resourced and empowered to function effectively?”
3. “Does the corporation’s compliance program work’ in practice?”

Source: U.S. Department of Justice Criminal Division, <https://www.justice.gov/criminal-fraud/page/file/937501/download>



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## Compliance Hot Topic: Bring-Your-Own-Device Issues

### **Practical / Cultural Issues in Monitoring Communications on Personal Devices Used for Business Purposes:**

- Policies / Handbooks
  - Prepare policies and handbooks to provide notice to employees that the company may require access
- Training
  - Provide training regarding appropriate use of devices
- Collection resources (iPhones v. Androids)
  - Be prepared to collect devices remotely and/or in-person, as necessary

### **Similar issues with personal communication applications, including WeChat and personal email accounts**



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## China Initiative

- “China Initiative” announced on Nov. 1, 2018
  - To date, the DOJ has announced charges to over 60 individuals in connection with the initiative
    - Source: [Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018](#)
- Biden Administration quiet, but DOJ website contains updates March 9, 2021, and indictments announced as recently as April 21, 2021
- Likely to be a continued focus



## COVID Impact on Enforcement

### DOJ Announced 474 Individuals Charged in COVID-Related Fraud Actions (\$569 million)

- Thus far, mostly low-hanging fruit (e.g., affirmative misrepresentations on applications) falling under one of three programs:
  - Paycheck Protection Program (PPP)
  - Economic Injury Disaster Loan (EIDL) program
  - Unemployment Insurance (UI) programs
- Likely to see more complex investigations and cases arising in the **securities fraud** and **tax fraud** context in the coming years, with a lessened focus on loan-related activity

### Onslaught of FCA Cases?

- 17% increase in *qui tam* cases filed from 2019 to 2020

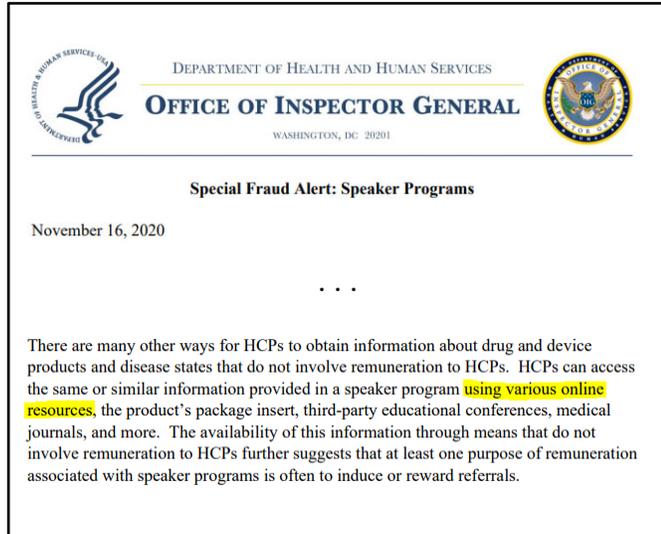
## COVID Impact on Enforcement

The pandemic has also brought some lesser-discussed changes and/or potential changes to enforcement matters

For example, the Department of Health and Human Services issued a “Special Fraud Alert” suggesting changes to the way implicit benefits will be assessed:

- With training and conferences available via Zoom, does traveling become an implicit perk?

<https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/SpecialFraudAlertSpeakerPrograms.pdf>



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## DOJ Priority Predictions

### Recent Biden Administration DOJ Nominations / Appointments:

- Attorney General: Merrick Garland
- Deputy Attorney General: Lisa Monaco
- DOJ Fraud Section Chief: Kenneth Polite (Morgan Lewis)
- Assistant AG for the Office of Legal Counsel: Christopher Schroeder
- Administrator of the Drug Enforcement Administration: Anne Milgram (Former NY AG)



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## Final Thoughts



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**Nelson G. Dong**  
Partner  
dong.nelson@dorsey.com  
Seattle, Washington  
(206) 903-8871

A partner in Dorsey's Corporate group, Chair of the National Security Law practice and co-Chair of the Asia-Pacific practice, Nelson has substantial experience in counseling e-commerce, semiconductor, electronics, computer hardware and software, and biomedical and biotechnology companies with special expertise in domestic and international technology licensing, outsourcing and manufacturing in Asia and U.S. export control matters.

He has frequently written about intellectual property law, U.S. export control law, technology related business transactions between the U.S. and Asian or European countries, international strategic alliances, the Exon-Florio law on foreign investments in U.S. technology companies, university-based technology transfer, academic entrepreneurship, academic conflicts of interest and the financing and organization of high technology businesses. He has lectured on such topics throughout the United States and in Austria, Canada, England, the Netherlands, Hong Kong and the People's Republic of China.



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**Caitlin L.D. Hull**

Associate

Dorsey & Whitney LLP

[hull.caitlin@dorsey.com](mailto:hull.caitlin@dorsey.com)

Minneapolis, Minnesota

(612) 492-6773

As a trial associate in Dorsey's Government Enforcement and Corporate Investigations Group, Caitlin utilizes strategic, creative thinking to represent clients in corporate investigations, government enforcement actions, fraud and securities litigation, and other complex commercial disputes. She believes that understanding each client's business objectives is crucial to devising the ideal investigation or litigation strategy, and enjoys helping clients pursue their best possible outcomes.

Caitlin maintains an extensive investigations practice, with significant experience conducting defensible investigations of Foreign Corrupt Practice Act ("FCPA"), False Claims Act ("FCA"), securities fraud, embezzlement, and insider trading issues. Among other federal and state agencies, Caitlin has experience navigating investigations involving the U.S. Department of Justice, U.S. Department of Health and Human Services, and the Internal Revenue Service. In addition, Caitlin regularly conducts investigations involving #MeToo discrimination, harassment, and retaliation allegations, and enjoys conducting workplace cultural reviews designed to proactively identify opportunities for clients to mitigate risk and improve the workplace environment. Caitlin also advises clients on anti-corruption and FCPA compliance, including developing effective and practical policies, conducting employee trainings, and assisting in corporate due diligence reviews.

In her litigation practice, Caitlin focuses primarily on white collar and securities issues involving the FCA, Securities Exchange Act, Racketeer Influenced and Corrupt Organizations Act ("RICO"), tax fraud, common law fraud, and other related issues. She is skilled in efficiently and practically navigating all stages of litigation on behalf of both individual and corporate clients. In addition, Caitlin has experience representing financial institutions in arbitrations and other regulatory matters before the Financial Industry Regulatory Authority ("FINRA"). Caitlin is also committed to maintaining an active pro bono practice, and routinely represents criminal defendants and appellants in both federal and state court.

