Debevoise & Plimpton

June 2016
Volume 7
Number 11

FCPA Update

A Global Anti-Corruption Newsletter

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New Limitations Placed on SEC's Disgorgement Remedy: The Impact on FCPA Enforcement

On May 26, 2016, the Eleventh Circuit Court of Appeals ("Eleventh Circuit" or "Court") rejected an attempt by the Securities and Exchange Commission ("SEC") to seek disgorgement and declaratory relief for conduct that occurred more than five years before claims were filed. In *SEC v. Graham*,[1] a panel of the Eleventh Circuit held that the disgorgement and declaratory relief sought by the SEC were subject to the statute of limitations set forth in 28 U.S.C. § 2462, which prevents the government from enforcing "any civil fine, penalty, or forfeiture" after five years

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1. *SEC v. Graham*, No. 14-13562, slip op. (11th Cir. May 26, 2016).

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from when the claim first accrued.[2] The ruling represents a potentially significant constraint on a remedy that has dominated the SEC's FCPA enforcement program since 2004.

The SEC's Reliance on the Disgorgement Remedy in FCPA Cases

Disgorgement is a remedy that seeks to deprive a person or company of the benefit of an illicit bargain. In *Graham*, the Eleventh Circuit described the remedy by quoting Black's Law Dictionary: "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion."[3] As the Supreme Court put it in *United States v. Ursery*, the remedy is "designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct."[4] The SEC is expressly authorized to pursue disgorgement in addition to civil monetary penalties.[5]

Prior to 2004, the SEC had never sought disgorgement in connection with any FCPA resolution or civil proceeding. In the coordinated settlements reached by the SEC and DOJ with ABB Ltd. on July 6, 2004, however, the SEC obtained disgorgement and prejudgment interest totaling $5.9 million and the DOJ exacted a penalty of $10.5 million from two of ABB's subsidiaries.[6] Since that time, many high-profile, coordinated SEC and DOJ resolutions have included the same division of disgorgement and penalties between the two agencies, including, for example, the resolution with Siemens AG, in which a penalty of $450 million was paid as part of the resolution with the DOJ and disgorgement of $350 million was paid as part of the resolution with the SEC.[7] In some cases, even where there is no bribery

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2. The Supreme Court has already held that a violation for purposes of Section 2462 accrues when the violative conduct occurs, not when it is discovered, and that the five-year limitation period in Section 2462 applies to civil monetary penalties sought by the SEC. *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013). In two pre-*Gabelli* decisions, the D.C. and Ninth Circuits ruled that the SEC's disgorgement remedy was not subject to Section 2462's five-year limitations period because the relief was "equitable" in nature. *See Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2011) (holding the disgorgement is not a penalty "at least so long as the disgorged amount is causally related to the wrongdoing"); *SEC v. Rind*, 991 F.2d 1486 (9th Cir. 1993) (holding that disgorgement is an equitable remedy and such remedies are inherently not subject to Section 2462).
3. *SEC v. Graham*, slip op. at 12 (quoting Black's Law Dictionary (10th ed. 2014)).
4. 518 U.S. 267, 284 (1996) (the description in *Ursery* is of the "forfeiture" remedy, which the Eleventh Circuit held in *Graham* is the equivalent of disgorgement).
5. *See, e.g.*, Securities Exchange Act of 1934, § 21B(e), 15 U.S.C. § 78-u2(e) ("[i]n any proceeding in which the Commission . . . may impose a penalty under this section, the Commission . . . may enter an order requiring an accounting and disgorgement, including reasonable interest").
6. SEC Litigation Release No. 18775 (July 6, 2004), *available at* www.sec.gov/litigation/litreleases/lr18755.htm; DOJ Press Release 04-465 (July 6, 2004), *available at* www.justice.gov/archive/opa/pr/2004/July/04_crm_465.htm.
7. SEC Litigation Release No. 20829 (Dec. 15, 2008), *available at* www.sec.gov/litigation/litreleases/2008/lr20829.htm; DOJ Press Release (Dec. 15, 2008), *available at* www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

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charge or any parallel criminal enforcement, the SEC still seeks disgorgement. In the recent resolution with Novartis, for example, the SEC obtained $23 million in disgorgement and pre-judgment interest, and an additional $2 million in civil penalties, as part of a resolution involving allegations of books and records and internal controls violations, but where bribery was not charged.[8]

"The Eleventh Circuit's ruling in *Graham* is the first time that a limitations period has been applied to the SEC's disgorgement remedy. . . . The most immediate effect of *Graham* is likely to come in the form of more frequent and earlier requests from the SEC for tolling agreements from those being investigated for potential FCPA violations . . . ."

New Limitations on the Disgorgement Remedy in *Graham*

At issue in *Graham* was the question whether the five-year statute of limitations for suits by the government to enforce "any civil fine, penalty, or forfeiture" also applied to SEC actions seeking disgorgement.[9] The Court held that disgorgement is "effectively synonymous" with forfeiture as it is used in the limitations statute, which effectively barred the remedy because the SEC's claim was brought more than five years after it had accrued. The Court allowed SEC claims for injunctive relief to move forward on the grounds that such relief is equitable and forward-looking in nature.

Factual Background of *Graham*

The SEC filed a civil enforcement action in the U.S. District Court for the Southern District of Florida in January 2013 alleging that from November 2004 to July 2008, the defendants operated an elaborate Ponzi scheme, using a vast web of entities to sell unregistered securities in the guise of real estate investments.[10] The defendants

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8. SEC Exchange Act Release No. 77431; In the Matter of Novartis AG (March 23, 2016), *available at* www.sec.gov/litigation/admin/2016/34-77431.pdf. In a recent audio blog post, Professor Michael Koehler discussed with Colby Smith of Debevoise & Plimpton LLP the propriety of using the disgorgement remedy in cases where bribery has not been charged. See fcpaprofessor.com/fcpa-flash-conversation-colby-smith/.

9. 28 U.S.C. § 2462. *Graham* also addressed whether a suit by the SEC seeking a declaratory judgment of a violation of the law also constituted a penalty that was barred by the statute of limitations.

10. An "investment contract" qualifies as a security under § 2(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77b(a)(1). For the formative interpretation of an investment contract with remarkably similar facts, see *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

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allegedly guaranteed instant equity appreciation and extraordinarily high returns for buying into aging condominium developments that the company planned to refurbish into five-star luxury resorts. In addition to a civil monetary penalty, the SEC sought *(i)* a declaration that defendants violated the federal securities laws, *(ii)* a permanent injunction from future violations of the federal securities laws, and *(iii)* disgorgement of all profits with prejudgment interest.

On cross-motions for summary judgment, the district court, without reaching the merits of the motions, dismissed the SEC's complaint as time-barred. The court held that it lacked subject matter jurisdiction because Section 2462 was jurisdictional in nature, and the SEC failed to allege any acts of offering or selling a security by any of the individual defendants in the five years prior to filing its complaint. The district court also held that Section 2462 applied to all of the SEC's remedies, not just the civil monetary penalties.[11]

The Eleventh Circuit's Ruling

The Eleventh Circuit affirmed the district court's ruling that the five-year statute of limitations in Section 2462 applied to preclude the SEC from seeking disgorgement and declaratory relief for conduct alleged in the Complaint. In so doing, the Eleventh Circuit declined to decide whether Section 2462 is jurisdictional in nature, but instead focused on the plain language of Section 2462 to dismiss the SEC's disgorgement and declaratory relief claims as time-barred.

With respect to the SEC's request for injunctive relief, the Eleventh Circuit rejected the district court's holding that the SEC's request for an injunction was "nothing short of a penalty" and therefore covered by Section 2462. Citing to its prior decisions in *U.S. v. Banks* and *Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, the Eleventh Circuit held that legal precedent foreclosed the argument that Section 2462 applied to injunctions, because they are equitable in nature.

Although the Court recognized that the term "penalty" is not defined in Section 2462, it went on to examine the common definition of "penalty," which it held confirmed that a penalty is backward-looking in time and intended to address "a wrong done in the past." Injunctions, on the other hand, "typically look forward in time," and are therefore not a penalty within the meaning of Section 2462. In a lengthy footnote, the Eleventh Circuit admonished the SEC for seeking what

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11. In *Gabelli*, the Supreme Court unanimously held that Section 2462 applies to civil monetary penalties sought by the SEC.

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is commonly referred to as an "obey-the-law" injunction, which as the Court noted it had "repeatedly" said is unenforceable, citing similar views from the Second Circuit.[12] In a firm warning that a broad obey-the-law injunction would not survive scrutiny, the Court suggested that the SEC could seek injunctive relief provided it was "specific and narrow enough that the parties would be afforded sufficient warning to conform their conduct."

The Eleventh Circuit then applied this same backward looking/forward looking framework to determine whether the intent of the other relief sought by the SEC was to punish, rather than to stop ongoing or future harm. In considering disgorgement, the Eleventh Circuit agreed with the district court that, "for the purposes of Section 2462 forfeiture and disgorgement are effectively synonyms." The Court sharply rejected the SEC's attempt to find a distinction between forfeiture and disgorgement by focusing on the technical definitions, instead of the words' ordinary meanings, particularly because Section 2462 applies to a wide variety of agency actions and contexts. The Court compared dictionary definitions and found no meaningful difference between the two, noting that even under the definitions advocated by the SEC, "disgorgement is imposed for a wrongdoing and can be considered as a subset of forfeiture." In considering declaratory relief, the Eleventh Circuit noted that a "public declaration that the defendants violated the law does little other than label the defendants as wrongdoers." The Court found that declaratory relief therefore also fit the definition of a "penalty," and is subject to Section 2462.

Potential Impact of the *Graham* Decision on FCPA Cases

The Eleventh Circuit's ruling in *Graham* is the first time that a limitations period has been applied to the SEC's disgorgement remedy. While two other cases have held that disgorgement is an equitable remedy that is subject only to the potentially more flexible concept of laches, *Graham* is the first ruling on the impact of Section 2462 to come after the Supreme Court's 2013 ruling in *Gabelli*, and *Graham* is unequivocal in finding that the SEC's pursuit of disgorgement is time-barred after five years.[13] In light of the SEC's extensive use of disgorgement in FCPA cases, and given the complex and lengthy investigations that surround many FCPA matters, if the *Graham* analysis becomes widely followed in other circuits, its impact could be significant.

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12. "Repeatedly we have said . . . "obey-the-law" injunctions are unenforceable." *Graham*, No. 14-13562, slip op. at 9 n.2. In making this point, the Court endorsed the Second Circuit's important finding in *SEC v. Goble*, 682 F.3d 934, 952 (11th Cir. 2012), that these injunctions violate Rule 65(d) of the Federal Rules of Civil Procedure requiring that an injunction specifically states its terms in the four corners of the injunction.

13. *See* footnote 2, *supra*.

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The most immediate effect of *Graham* is likely to come in the form of more frequent and earlier requests from the SEC for tolling agreements from those being investigated for potential FCPA violations – despite the fact that the SEC's former Director of Enforcement said in August 2009 that tolling should not become a common practice.[14] Those involved in drawn out investigations or enforcement proceedings will need to weigh even more carefully the potential drawbacks of entering into such agreements with the SEC Staff.

Another possible impact of the *Graham* decision is on settlement negotiations with the SEC Staff. When confronted with statute of limitations arguments in past negotiations, the SEC Staff has often responded by citing their broad ability to seek monetary relief in the form of disgorgement, even when a penalty would be time-barred. The *Graham* ruling now provides defense counsel with ammunition to challenge the SEC Staff's position. This could have an especially significant impact on older FCPA cases where substantial disgorgement can potentially be attributable to violations occurring long in the past.

It remains to be seen whether the Supreme Court may consider that *Graham* gives rise to a circuit split with the D.C. and Ninth Circuits that warrants review, or whether further development of the law will be allowed in light of the Supreme Court's *Gabelli* ruling.[15] For now, however, there can be no doubt that the *Graham* decision presents a significant setback for the SEC, particularly as the SEC continues to pursue claims based on FCPA violations that might have occurred many years before they were discovered. Undoubtedly, there will be more to come.

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14. Robert Khuzami, then the Director of Enforcement, announced in August 2009 a change in the SEC's internal policy for seeking tolling agreements, making approval of the Director of the Division of Enforcement a pre-requisite for all tolling agreements. In announcing the policy change, Khuzami noted that tolling agreements "have become far too common" and they can "impose a significant cost of delay" as well as "undermine our message of prompt accountability for wrongdoing." *See Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement* (August 5, 2009), *available at* www.sec.gov/news/speech/2009/spch080509rk.htm.

15. As of the deadline for this issue of *FCPA Update*, the SEC had not filed a Petition for a Writ of Certiorari seeking review of the *Graham* case.

Colombia Adopts New Law on Transnational Corruption

Colombia ranks roughly at the midpoint of Transparency International's corruption perception index: 83rd out of 168 countries, with a score of 37 out of 100, tying Benin, China, Liberia, and Sri Lanka.[1] Despite this unflattering score, Colombia previously has taken various steps in an effort to combat corruption. These include joining relevant international conventions[2] and enacting various domestic laws, such as Law 599 of 2002 (Criminal Code) and Law 1474 of 2011 (*Estatuto Anticorrupción*).[3] Until recently, however, Colombia's anti-corruption efforts have mostly targeted individuals and not companies.

For this reason, Colombia's adoption in February of Law 1778 of 2016 (*Ley Antisoborno*) has the potential to be a watershed moment. The law created a regime of direct administrative liability for legal entities involved in transnational corruption. It vested authority within the Colombian government, through its Superintendence of Companies, to impose sanctions and fines, not only on legal entities registered in Colombia, but also foreign parent companies of Colombian subsidiaries and foreign subsidiaries of Colombian companies. The possibility of corporate fines up to US $40 million should attract the attention of companies conducting business in Colombia. Also notable is the administrative nature of enforcement against companies – a first in Colombia for conduct involving corruption, which has usually been left to criminal prosecutors and criminal courts, through significantly longer proceedings.[4] While potentially quite significant, the ultimate impact of Law 1778 will hinge on how the Superintendence of Companies ultimately enforces the law, similar to Brazil's 2013 adoption of the Clean Company Act.

I. Overview of Colombia's Anti-Corruption Landscape

Colombia's anti-corruption legislation is multifaceted, as Colombia is a party to a number of international treaties against corruption that inform its domestic legislation. These treaties include the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2013),[5]

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1. Corruption by Country/Territory, Transparency International, https://www.transparency.org/country/#COL.
2. *See infra* Section I.
3. *Secretaría General del Senado, Congreso de la República de Colombia, www.secretariasenado.gov.co.*
4. *See infra* Section II.
5. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD: Better Policies for Better Lives (2016), http://www.oecd.org/corruption/oecdantibriberyconvention.htm.

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United Nations Convention Against Corruption (2006),[6] and Inter-American Convention Against Corruption (1999).[7] Colombia previously enacted legislation targeting bribery of domestic and foreign public officials in furtherance of its obligations under these treaties. Such laws include Law 599 of 2000 (Criminal Code), which has been revised periodically to increase penalties, broaden the scope of crimes related to bribery and corruption, and extend some degree of liability to companies.[8]

Colombia also established two government entities to help fight corruption. In particular, the 1991 Constitution established the *Procuraduría General de la Nación* (in charge of disciplinary action against government officials)[9] and the *Contraloría General de la República* (in charge of safeguarding public funds).[10] The jurisdiction of these two entities includes investigating and imposing administrative sanctions on government officials who commit acts of corruption.

According to its latest year-end report, the *Procuraduría* received 90,000 complaints against government officials in 2015 (not all of them related to corruption) and launched almost 17,000 investigations during that same year. These investigations led to 690 sanctions against officials from all levels of government.[11] The latest report from the *Contraloría* for 2014 to 2015 shows more than 5,000 ongoing investigations for fiscal responsibility of government officials, involving roughly US $9 billion in potentially compromised public funds.[12] However, these proceedings do not necessarily lead to criminal prosecution. The *Fiscalía General de la Nación* (equivalent to the U.S. Department of Justice) has set up a special unit to investigate crimes against the "public administration" (i.e., corruption), staffed by 22 prosecutors (according to the latest public data available) who apparently went from investigating over 200 new cases in 2008 to less than 100 in 2014, with no perceptible reduction in criminal offenses to account for reduced enforcement activity.[13]

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6. United Nations Convention against Corruption, UNODC: United Nations Office on Drugs and Crime (2016), https://www.unodc.org/unodc/en/treaties/CAC/.
7. Inter-American Convention Against Corruption, Multilateral Treaties, https://www.oas.org/juridico/english/treaties/b-58.html.
8. L. 599, art. 403-407, julio 24, 2000, Secretaría General del Senado, Congreso de la República de Colombia, www.secretariasenado.gov.co.
9. Constitución Política de Colombia [C.P.] art. 275-284, Secretaría General del Senado, Congreso de la República de Colombia, www.secretariasenado.gov.co.
10. *Id.*, art. 267-274.
11. Performance Report 2015, pp. 31-37, Procuraduría General de la Nación (March 2016), http://www.procuraduria.gov.co/portal/index.jsp?option=co.gov.pgn.portal.frontend.component.pagefactory.gel.InformeGestionComponentPageFactory.
12. Performance Report 2014-2015, pp. 156-158, Contraloría General de la República, http://www.contraloriagen.gov.co/.
13. Statistics Report 2014, pp. 71, 82, Fiscalía General de la Nación, http://www.fiscalia.gov.co/colombia/gestion/estadisticas/.

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Traditionally, legal entities (*personas jurídicas*) have not been subject to criminal liability in Colombia.[14] However, the Code of Criminal Procedure of 2004 authorized a criminal court to order the interim suspension of a legal entity's operations, where such entity is devoted "totally or partially" to commit crimes, including corruption. A criminal court may also order the cancellation of the legal entity's inscription in the register of companies if it finds, when deciding on the criminal liability of individual defendants, that the legal entity was in fact used as a conduit for committing crimes.[15]

"The possibility of corporate fines of up to US $40 million should attract the attention of companies conducting business in Colombia . . . ."

In 2011, Colombia enacted Law 1474, commonly known as the Anti-corruption Statute (*Estatuto Anticorrupción*), which hardened the penalties and broadened the scope of crimes related to domestic and transnational corruption by individuals.[16] Additionally, Law 1474 made Article 91 of the Code of Criminal Procedure applicable to sanction legal entities that "sought to benefit from the commission of a crime against the Administration [including domestic and transnational corruption and bribery] … committed by its officers or directors."[17] That same article created fines (up to US $400,000) against legal entities that, through their officers or directors, or with their knowledge, participated in the commission of certain crimes, including domestic and transnational bribery and corruption. The article, however, appeared to require a criminal court to find that such crime had been committed through or with the knowledge of a company's officers or directors before the Superintendence of Companies could impose the fine on a company; in other words, this law maintained the approach of vicarious liability for legal entities.

Adding to the existing anti-corruption legislation, and in response to its obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Colombia enacted Law 1778 of 2016.[18] The OECD Convention envisioned the liability of legal entities for acts

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14. L. 599, art. 29, *supra* note 8.
15. L. 906, art. 91, 2004, Secretaría General del Senado, Congreso de la República de Colombia, www.secretariasenado.gov.co.
16. L. 1474, art. 1-4, 13-40, julio 12, 2011, Secretaría General del Senado, Congreso de la República de Colombia, www.secretariasenado.gov.co.
17. *Id.*, art. 34.
18. L. 1778, febrero 2, 2016, Presidencia de la República, www.presidencia.gov.co.

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of transnational bribery as a key tool for fighting corruption.[19] In that regard, the new law provides the Colombian government, through the Superintendence of Companies, with important enforcement authority and, notably, creates a regime of direct administrative liability for legal entities involved in transnational corruption.[20]

II. Key Provisions of Law 1778

A. Overview and Jurisdiction

Law 1778 of 2016, for the first time under Colombian law, established an *administrative* procedure for the investigation and sanctioning of *legal entities* involved in acts of transnational bribery or corruption, not subject to and independent from parallel criminal proceedings. In other words, the law imposes *direct* administrative liability on legal entities for acts of transnational corruption. The law is clear, unlike Law 1474, in stating that the administrative liability of a legal entity for acts of transnational corruption does not depend upon a previous finding of criminal liability by a criminal court against its officers or directors.[21]

Article 2 of Law 1778 has a broad reach, making legal entities administratively liable for the acts not only of their employees, officers, directors, and subsidiaries, but also for those of contractors and associates – terms not defined in the law. The definition of transnational bribery is similarly far-reaching, including the offering, giving, or promising to give anything of value to a foreign public official, in exchange for an act, omission, or delay of action by such official that is related to an "international transaction" – another undefined term.[22]

The Superintendence will have jurisdiction over all legal entities registered in Colombia, and the foreign parent companies of Colombian subsidiaries, as well as the foreign subsidiaries of Colombian companies. The parent's liability depends on a showing that such parent "tolerated or consented" in the bribery.[23]

Law 1778 also amends Article 34 of Law 1474 (referred to above) to increase the monetary penalties against legal entities for acts of *domestic* corruption. However, such sanctions may be imposed by the Superintendence *only after* a criminal court has issued a final ruling against the officers or directors of the legal entity for bribery or attempted bribery.[24] In other words, it maintains the vicarious-liability approach to sanction legal entities involved in domestic corruption.

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19. OECD Convention, art. 2, *supra* note 5.
20. L. 1778, art. 2-3, *supra* note 18.
21. *Id.*, art. 2-4.
22. *Id.*, art. 2.
23. *Id.*, art. 2-3.
24. *Id.*, art. 35.

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B. Fines and Other Sanctions

The Superintendence may assess fines of up to 200,000 monthly minimum wages, which translates (using the minimum monthly wage for 2016) to approximately US $40.5 million. Additionally, the Superintendence may (*i*) prohibit the legal entity from contracting with any State or State-owned entity for up to 20 years; (*ii*) order the legal entity to publish in its webpage and in other media an extract of the resolution through which it was sanctioned, for up to one year; and (*iii*) prevent the legal entity from receiving any government subsidy or benefit for up to five years. Any sanctions imposed will be published in the company's certificate of incorporation and good standing (*registro mercantil*).[25]

In perhaps its most detailed provisions, the Law sets forth specific rules for calculating fines. The Law provides detailed guidance for assessing aggravating and mitigating factors, including (*i*) economic benefit obtained or sought by the transgressor; (*ii*) financial solvency of the legal entity; (*iii*) whether the legal entity is a repeat offender; (*iv*) whether the legal entity sought to obstruct the investigation or refused to cooperate; (*v*) use of an intermediary or any means to obscure the infraction or the benefits bestowed upon the public official; (*vi*) admission of guilt before the formal evidence-gathering by the Superintendence begins (for first-time offenders); (*vii*) existence and implementation of compliance programs; (*viii*) compliance with interim measures; (*ix*) adequacy of the pre-transaction due diligence (for assessing liability of the successor in interest); and (*x*) whether the legal entity has denounced the employees involved in the commission of the transnational bribery.[26]

Notably, Law 1778 also extends liability, in case of a merger or acquisition, to the successor in interest of the legal entity that committed the infraction, including any entity that acquired control of the transgressor.[27]

Finally, the statute of limitations for sanctions is ten years from the infraction, and this term is tolled upon the filing of administrative charges by the Superintendence.[28] From the time of filing administrative charges, the Superintendence has a renewed term of ten years to impose a sanction.[29]

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25. *Id.*, art. 5-7.
26. *Id.*, art. 7.
27. *Id.*, art. 6.
28. *Id.*, art. 9.
29. *Id.*

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C. Waiver or Reduction of Fines for Self-reporting

Law 1778 has taken a practical approach on enforcement, encouraging self-reporting and incentivizing companies to implement strong compliance programs. Under Article 19 of Law 1778, legal entities that self-report to the Superintendence and cooperate with the investigation by providing evidence of the infraction are eligible for a waiver or reduction of the penalties.

The Superintendence has discretion to decide whether to waive the penalties or reduce them, and to what extent, taking into account (i) whether the information provided is useful for the investigation and prosecution of the individuals involved in the transnational bribery; and (ii) the promptness of the cooperation with the Superintendence.[30]

Waiver of the penalties is available only if the legal entity self-reports before the Superintendence has initiated its investigation and has not performed the contract (if any) that is derived from the international transaction tainted by corruption.[31] If the legal entity cooperates after the Superintendence initiated an investigation, it may still benefit from a reduced sanction (up to 50% reduction).[32] After performance of a contract, the legal entity can benefit only from a reduced sanction.[33]

It should be noted that, under Article 29 of Law 1778, the Prosecutor General (*Fiscal General de la Nación*) will report to the relevant foreign authorities any act of bribery or corruption that it has notice of that may have been committed by companies or individuals domiciled in a foreign jurisdiction.[34]

D. Additional Fines for Failure to Provide Information

In a move to prevent legal entities from hiding or refusing to disclose information needed in the investigation, Law 1778 creates hefty fines that may be imposed by the Superintendence, even on third parties not under investigation, for refusing to disclose information.[35] Although the law does not expressly exempt privileged communications from production, the Constitutional guarantee of the attorney-client privilege cannot be overwritten by this provision, and entities may refuse to produce privileged documents, as long as no general exception to the privilege is applicable.[36]

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30. *Id.*, art. 19.
31. *Id.*, art. 19.2.
32. *Id.*, art. 19.3.
33. *Id.*, art. 19.2-19.3.
34. *Id.*, art. 29.
35. *Id.*, art. 21.
36. C.P., art. 74, *supra* note 9.

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Any legal entity, including but not limited to the transgressor, who refuses to disclose to the Superintendence any document or information that the Superintendence requests during the course of an investigation, or otherwise hides or prevents access to them, will be sanctioned with a fine of up to 200,000 times the minimum monthly wage, which translates (using the minimum monthly wage for 2016) to approximately US $40.5 million. The sanction does not relieve the legal entity from disclosing the information requested and additional sanctions may be imposed if the legal entity continues to refuse to provide the information.[37]

"Law 1778 of 2016, for the first time under Colombian law, established an *administrative* procedure for the investigation and sanctioning of *legal entities* involved in acts of transactional bribery or corruption . . . ."

E. Fines for Domestic Corruption

Article 35 of Law 1778 expands the vicarious administrative liability for companies organized under the laws of Colombia and subsidiaries of foreign companies registered in Colombia whose officers or directors are found guilty of bribery or attempted bribery. After a criminal court issues a final ruling sentencing such officers or directors, the Superintendence may impose any or all of the sanctions discussed above against the company or subsidiary that employed those officers or directors. Sanctions may be imposed only if the company or subsidiary benefited from the crime committed by its officers or directors.[38]

The Superintendence will also weigh the following mitigating factors in imposing a sanction (*i*) the existence and implementation of compliance programs; (*ii*) the adequacy of the pre-transaction due diligence (for assessing the liability of the successor in interest); and (*iii*) whether the legal entity has denounced the employees involved in the commission of the crime and provided evidence for their prosecution.[39]

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37. L. 1778, art. 21, *supra* note 18.
38. *Id.*, art. 35.
39. *Id.*

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III. Conclusion

Issuance of Law 1778 underscores ongoing attention in Colombia to anti-corruption enforcement and provides the Colombian government, through the Superintendence of Companies, with important enforcement authority, in line with international obligations under the OECD Convention. The creation of direct administrative liability for companies, coupled with an administrative proceeding and significant sanctions – reviewable by administrative courts (which are part of the judiciary in Colombia) – provide evidence that Colombia is taking clear steps to implement stronger anti-corruption laws. Companies subject to Law 1778 have more reason than ever to review existing practices and to assess how improvements can be made to assure compliance with Colombian anti-corruption laws that may apply to their conduct.

Companies doing business in Colombia must understand that they now may be liable also for acts of joint venture partners or contractors, and are required to report any acts of corruption committed by such third parties, or risk sanctions by the Superintendence.[40] Companies accordingly should consider strengthening their due diligence policies for vetting business partners and explore further the possibility of including contractual indemnities in case of a sanction for an act of corruption committed by such partner.

In the end, the law is not without its challenges. It leaves to the Superintendence, or perhaps the President through regulation, to determine what an "international transaction" is, as well as whom or what is deemed to be an "associate" of a legal entity – which seems to include joint venture partners. Nevertheless, the days when companies faced a limited risk within Colombia for vicarious liability – capped at actual damages suffered by the victim and a fine of up to US $400,000 – after years of a criminal proceeding against an employee, seem to be over. The anti-corruption stakes in Colombia have been raised, and now the key question is how and to what extent the Superintendence will enforce the new law.

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40. *Id.*, art. 2.

FCPA Update

FCPA Update is a publication of
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