FCPA Update

A Global Anti-Corruption Newsletter

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Shopping Trips, Chats, and Joint Ventures: Two Recent FCPA Cases Highlight Classic FCPA Risks

In August, U.S. authorities resolved two FCPA investigations that highlight classic FCPA risks. First, Corficolombiana agreed to pay more than $80 million to settle charges in connection with bribes paid by a joint venture to secure lucrative contracts for highway infrastructure projects in Colombia. This was the first FCPA case in 2023 brought in parallel by DOJ and the SEC, and it marks the first FCPA action coordinated with Colombian authorities. Second, 3M Company agreed to pay more than $6 million in connection with a subsidiary's provision of improper travel benefits to employees of state-owned health care facilities in China to boost sales. Those benefits included entertainment and side trips arranged in alternate itineraries by complicit third-party travel agents that were communicated to officials in person or via WeChat.

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With these cases (and two others brought at the close of the fiscal year[1]), U.S. authorities have now brought cases against 11 companies in 2023, imposing approximately $630 million in penalties. That surpasses 2022 figures in terms of number of actions (10), particularly from the SEC, but is well short in terms of penalty amounts imposed ($1.5 billion). The lull in penalty sums is likely due to a lack of DOJ participation in most of the settled actions. This may simply reflect DOJ's prioritization of cases involving a national security component.[2]
In the meantime, these two resolutions highlight fundamental aspects of FCPA enforcement.

Grupo Aval / Corficolombiana

On August 10, 2023, Colombian conglomerate Grupo Aval Acciones y Valores S.A. ("Grupo Aval") and its merchant banking subsidiary Corporación Financiera Colombiana S.A. ("Corficolombiana") agreed to pay more than $80 million to resolve bribery-related investigations brought by DOJ, the SEC, and Colombian authorities. According to the settlement papers, Corficolombiana—through its former president—authorized the payment of bribes to government officials in the executive and legislative branches and to an executive at a state-owned infrastructure agency to secure a highway project contract for a joint venture.[3]

The Alleged Facts

Grupo Aval's shares are listed on the NYSE, and it is an issuer for purposes of the FCPA. Certain of Grupo Aval's officers sit on the board of its subsidiary and agent, Corficolombiana—the largest finance corporation in Colombia, which has a strong record of financing infrastructure projects.[4]

In 2009, the Colombian government opened bidding for its largest-ever highway infrastructure project—the Ruta del Sol II—and Corficolombiana sought partnerships

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1. Media company Clear Channel Outdoor agreed to pay approximately $26 million to settle SEC charges alleging FCPA violations in China, and specialty chemicals company Albemarle agreed to pay approximately $218 million to resolve DOJ and SEC investigations related to alleged FCPA violations in China, India, Indonesia, the United Arab Emirates, and Vietnam. *See, e.g.*, Order, *In re Clear Channel Outdoor Holdings, Inc.*, Securities Exchange Act Release No. 98615 (Sept. 28, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98615.pdf; Non- Prosecution Agreement, *In re Albemarle Corp.* (Sept. 28, 2023), https://www.justice.gov/media/1316796/dl?inline; Order, *Albemarle Corp.*, Securities Exchange Act Release No. 98622 (Sept. 29, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98622.pdf.

2. *See* Marshall Miller, Principal Associate Deputy Attorney General, "Remarks at the Global Investigations Review Annual Meeting" (Sept. 21, 2023), https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-remarks-global.

3. Deferred Prosecution Agreement, *United States. v. Corporación Financiera Colombiana S.A.*, Case No. 8:23-cr-00262-PJM (D. Md. Aug. 10, 2023) ["Corficolombiana DPA"]; Order, *In re Grupo Aval Acciones y Valores S.A. and Corporación Financiera Colombiana S.A.*, Securities Exchange Act Release No. 98103 (Aug. 10, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98103.pdf ["Corficolombiana Order"].

4. Corficolombiana DPA, Attachment A ¶ 1; Corficolombiana Order § III.

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to bid on behalf of Grupo Aval. Corficolombiana's former president negotiated a bid with Brazilian engineering and construction company Odebrecht, and they were awarded the project. Together with a third company, Corficolombiana (through a subsidiary, Episol) and Odebrecht formed a joint venture comprised of both an entity to manage the project and a construction consortium to execute the awarded projects. Odebrecht was the majority participant in the joint venture with a 62% interest; Corficolombiana owned 33%, but through its former president and Episol it maintained influence over the joint venture's financial and accounting operations, including nominating and appointing employees to monitor and approve third-party obligations.[5]

According to the DPA, Corficolombiana's former president met with Odebrecht executives in Colombia in 2012 and agreed that he would be the point person for any discussions relating to bribes to be paid to government officials.[6] In 2013, an

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Odebrecht senior executive agreed to pay two lobbyist intermediaries success fees—knowing that a portion would be paid as bribes—in connection with approving a $350 million highway extension to the original contract scope.[7] Corficolombiana's former president, informed by the Odebrecht executive, authorized the bribes through the joint venture, and the extension was approved without a new public tender. While Corficolombiana's former president agreed with the plan to pay the bribes, he "insisted that the bribe payments not be made by Corficolombiana, but rather by Odebrecht" or the joint venture, and he ultimately agreed that Corficolombiana would pay its portion of the bribes through its subsidiary by reimbursing Odebrecht or paying directly through the joint venture.[8] Then, to secure approval of updated financing obligations, the Odebrecht executive agreed to pay additional bribes, which Corficolombiana's former president again approved, via illicit campaign contributions.[9]

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5. Corficolombiana Order ¶¶ 3-7; Corficolombiana DPA, Attachment A ¶¶ 4-6, 17-18.
6. Corficolombiana DPA, Attachment A ¶ 19.
7. Corficolombiana Order ¶¶ 8-11.
8. Corficolombiana DPA, Attachment A ¶ 27.
9. *Id.* ¶¶ 20-25; Corficolombiana Order ¶¶ 8-12.

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The SEC's Order found that Corficolombiana's former president caused the joint venture to pay approximately $28 million in bribes from 2014 through 2016, both through the joint venture partner and through the joint venture itself by reimbursing or directly paying third-party vendors associated with the lobbyists for fictitious expenses using no-work contracts and sham invoices. These fictitious expenses (related to work that was handled internally or never performed) were recorded as legitimate business expenses in the books and records of the joint venture and Corficolombiana and ultimately reported on the financial statements of the issuer, Grupo Aval. The former Corficolombiana president also signed various sub-certifications that falsely stated that he was unaware of illegal acts.[10]

The Resolution

To settle DOJ's action, Corficolombiana entered into a three-year DPA with DOJ in connection with a criminal information charging it with conspiracy to violate the FCPA's anti-bribery provisions. DOJ imposed a $40.6 million criminal fine, but agreed to credit up to half of that against amounts paid to Colombia's Superintendency of Industry and Commerce for violations of Colombian antitrust laws related to the same conduct—so long as Corficolombiana drops within three months its appeal of that resolution.[11]

To settle the SEC's action, both Grupo Aval and Corficolombiana consented to a cease-and-desist order that found that Corficolombiana violated the FCPA's anti-bribery provisions and caused Grupo Aval's violations of the books and records and internal accounting controls provisions. In addition to the criminal fine imposed by DOJ, the SEC required disgorgement and prejudgment interest of approximately $40.3 million.[12]

Corficolombiana did not voluntarily self-disclose the wrongdoing, but did receive cooperation and remediation credit. According to the DPA, for example, Corficolombiana promptly took remedial measures including, among other things,

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10. Corficolombiana Order ¶¶ 12-17, 21.

11. Corficolombiana DPA ¶¶ 4(i), 8. DOJ's penalty reflects a 30% discount off the bottom of the applicable Sentencing Guidelines range, which demonstrates some benefits from the updated Corporate Enforcement and Voluntary Self-Disclosure Policy, which now provides that companies that fully cooperate and remediate (even without voluntarily self-disclosing) can still receive a discount of up to 50% off the low end of the Guidelines range (up from the 25% discount cap available for similarly situated companies under the policy's prior iteration). *See* Debevoise Update, "DOJ Offers New Incentives in Revised Corporate Enforcement Policy" (Jan. 24, 2023), https://www.debevoise.com/insights/publications/2023/01/doj-offers-new-incentives-in-revised.

12. Corficolombiana Order ¶¶ 23-24, IV.C. DOJ also required forfeiture of $28.6 million, but credited that amount against disgorgement paid to the SEC. Corficolombiana DPA ¶ 10.

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"taking actions to enhance its corporate governance and controls at joint venture entities, as well as improving its oversight of non-controlled joint ventures and investments." It also enhanced its third-party intermediary risk management process.[13]

3M Company

On August 25, 2023, 3M Company ("3M"), a global manufacturer of products and services headquartered in the United States, agreed to pay more than $6.5 million to settle SEC charges that it violated the FCPA's books and records and internal accounting controls provisions in connection with providing overseas travel to government officials in China.[14]

The Alleged Facts

According to the SEC's Order, as part of its marketing and outreach efforts, employees of one of 3M's China-based subsidiaries ("3M-China") arranged for health care officials at Chinese state-owned entity customers to attend overseas conferences, to visit health care facilities, and to participate in other educational events. The SEC found that, between 2014 and 2018, some of these ostensibly legitimate marketing expenditures were a pretext to provide "tourism activities"—including shopping trips, guided tours, and day trips—to the officials to help obtain and retain business. 3M-China employees tracked the before/after sales impact and "return on investment" of the provision of overseas trips to government officials, and the SEC found that 3M improperly obtained increased sales of at least $3.5 million tied to the improper trips.[15]

3M-China employees, including a former marketing manager and employees in the sales, marketing, and professional services departments, selected influential officials to attend overseas educational events. With the aid of two complicit third-party travel agencies, 3M-China employees created official itineraries detailing legitimate business, training, and marketing activities that officials were to participate in during a 3M-funded trip. 3M-China employees submitted these official itineraries to 3M's compliance personnel for approval. Then, 3M-China employees and complicit travel agencies created secret, alternate itineraries consisting primarily of tourism activities near the educational events. These alternate itineraries were circulated via hand delivery or personal WeChat messages to the officials, who were asked to keep the alternate itineraries hidden. 3M-China employees falsified internal compliance

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13. DPA ¶ 4(e).
14. Order, *In re 3M Company*, Securities Exchange Act Release No. 98222 (Aug. 25, 2023), https://www.sec.gov//litigation/admin/2023/34-98222.pdf ("3M Order").
15. *Id.* ¶¶ 8, 10, 11.

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documents that denied or omitted mention that tourism activities were part of the planned trips. 3M-China provided the activities on the alternate itineraries to improperly induce officials to purchase 3M products.[16]

The Order also found that, where 3M-China could not directly reimburse trip expenses related to tourism activities, it colluded with one of the travel agencies to inflate billing invoices for otherwise legitimate travel costs. Employees of 3M-China also submitted invoices directly to the travel agency for reimbursement or allowed the travel agency to direct 3M-China distributors to pay portions of non-reimbursable expenses. The SEC found that 3M lacked sufficient oversight over funds provided to the travel agencies; 3M's payments to the travel agency were vaguely designated as "marketing" funds; and spending was left to the discretion of 3M-China and the Chinese travel agency.[17]

The Resolution

To settle the SEC's action, 3M consented to a cease-and-desist order that found that 3M failed to keep accurate documentation reflecting the business justification for and management approval of overseas tourism and failed to devise and maintain a system of internal accounting controls to provide reasonable assurances that transactions were in accordance with management's authorization. The SEC required disgorgement and prejudgment interest of approximately $4.5 million, plus a $2 million civil penalty.[18]

3M was credited with promptly self-reporting the alleged wrongdoing, cooperating with the investigation, and engaging in remedial efforts, including disciplining and terminating culpable employees, terminating its relationship with the complicit travel agencies, and enhancing its internal controls and compliance program.[19]

Takeaways

Both the Corficolombiana and 3M facts involve common and well-documented FCPA risks that enforcement authorities regularly investigate and that compliance personnel should be communicating and keeping top of mind when faced with similar scenarios. Here are a few reminders and takeaways from these actions:

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16. *Id.* ¶¶ 4-6.
17. *Id.* ¶¶ 9, 12-13.
18. *Id.* ¶¶ 15-16, IV.
19. *Id.* 18.

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- **Third parties remain integral in the bribery supply chain.** All 11 cases thus far resolved in 2023 (just like all 10 of the 2022 cases) involved the use of third parties (e.g., consultants, distributors, etc.). Both Grupo Aval/Corficolombiana and 3M failed to address the risk that funds paid to third parties eventually would flow to government officials. In both cases, payments were facilitated by inaccurate bookkeeping at subsidiaries or joint ventures that were consolidated into the parent's financial statements and inadequate internal accounting controls. Board members, officers, and employees—including those at headquarters, subsidiaries, or secondees to joint ventures—should receive tailored training and be empowered to raise red flags. Similarly, those in control functions should be empowered to carefully monitor and inquire about the relationships with and work of third-party intermediaries and report concerns if and when they arise.

Improper payments—particularly in the form of gifts, travel, and entertainment—to doctors and other employees of state-owned health care facilities continue to be a source of significant FCPA risk.

- **Keep a close eye on joint ventures.** Corficolombiana was a minority participant in a joint venture majority-owned by the Brazilian construction company that was later implicated in Brazil's Operation *Lava Jato*. Thorough due diligence of potential joint venture partners is imperative, particularly where red flags emerge. Joint ventures inherently present a sliding scale of risk: greater ownership brings more control, visibility, and liability; less ownership brings lower visibility and clout to positively influence compliance. Negotiating the right to appoint certain executives of the joint venture, such as the CFO to have more control of finance and accounting approvals processes that could detect and prevent improper payments, can help mitigate risk exposure. However, in this instance, Corficolombia had a culpable executive at the top. The SEC's Order specifically called out that Corficolombiana "exercised influence over the financial and accounting operations" of the joint venture, including that

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the former president caused the joint venture to approve payments to vendors for work that lacked supporting documentation.[20] More robust controls and anti-corruption training should be employed to empower others in the venture. Training is essential to improving the ability of board members, executives, and employees throughout a company to identify risks, ask questions, and raise concerns when red flags are identified—and they should be reminded that personal liability could attach to any employees or agents of the joint venture who approve, authorize, or otherwise know of improper payments or consciously ignore red flags if in a supervisory role.

- **Address issues posed by personal messaging applications.** According to the SEC's Order, employees of one of 3M's China-based subsidiaries worked with complicit travel agents to create alternate itineraries to entertain officials at state-owned medical facilities, communicating those only via hand or personal WeChat accounts. The use of ephemeral messaging applications like WeChat demonstrates both the challenges that personal devices and messaging applications pose to company compliance personnel when used for business-related communications and also the importance of such communications to authorities' ability to conduct investigations and build their cases. As has been often emphasized over the last few years, companies' compliance programs should contain effective policies governing the use of personal devices and messaging platforms, as well as clear employee training and enforcement of such policies.[21]
- **Improper entertainment expenses continue to underpin FCPA cases involving life sciences sales.** Improper payments—particularly in the form of gifts, travel, and entertainment—to doctors and other employees of state-owned health care facilities continue to be a source of significant FCPA risk. In fact, we have seen more than 15 cases since 2012 related to gifts, travel, and entertainment given to boost sales of pharmaceutical or medical device products. While the FCPA broadly prohibits giving anything of value to foreign government officials to influence their decisions to gain a business advantage, it does not prohibit legitimate hospitality expenditures that are reasonable, bona fide, and directly related to the promotion, demonstration, or explanation of

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20. Corficolombiana Order ¶ 17.
21. *See, e.g.*, Debevoise In Depth, "DOJ Issues Trio of Updates that Further Heighten Compliance Expectations, Particularly Involving Off-System Communications and Compensation Systems" (Mar. 6, 2023), https://www.debevoise.com/insights/publications/2023/03/doj-issues-trio-of-updates-that-further-heighten.

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a company's products or services. But it is the company's burden to prove that the expenditures meet these requirements. And time after time, companies get caught up overdoing entertainment. The more lavish the hospitality expenditure and more attenuated its relationship to legitimately explaining company services, the more room there is for a prosecutor to argue that the expenditure violates the FCPA.

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Major UK Legal Reforms Near Enactment

After many months of intense scrutiny and a series of significant revisions, the Economic Crime and Corporate Transparency Bill (the "ECCT Bill") has recently passed its final reading in both Houses of the UK Parliament and is on track to receive royal assent by the end of the year.

While one proposed amendment to the ECCT Bill (discussed below) is still under consideration, it is highly likely that the current draft will prove to be its final form. Consequently, the provisions agreed this month are expected to come in force in stages between the end of this year and the middle of 2024.

The ECCT Bill makes wide-ranging and very substantial changes to the UK's corporate crime framework. Once enacted, it will be the most important law tackling economic crime since the Bribery Act 2010. This article outlines the three key developments that have emerged from the latest rounds of parliamentary debate. For many companies, responding to this new landscape is likely to be a major compliance project over the next few years.

Expansion of Corporate Criminal Liability

It has now been confirmed that the ECCT Bill will retain its most groundbreaking proposal – a major extension of corporate liability for offences committed by employees. The logical consequence of this will be to make corporate prosecutions for economic crimes (such as the substantive bribery offences in the Bribery Act 2010) considerably easier than is currently the case.[1]

Under the current "identification doctrine," companies are liable for offences committed by individuals who represent its "directing mind and will." In general, this has been restrictively interpreted by the courts as comprising only the company's most senior officers and executives – those at or close to board level – leading to widespread criticism and significant difficulties for the Serious Fraud Office bringing prosecutions against large companies.

Once the ECCT Bill comes into force, the actions of a "*senior manager … acting within the actual or apparent scope of their authority*" will be attributable to his or her employer for a wide range of offences, including bribery, money laundering, sanctions, fraud, and false accounting. The concept of a "senior manager" encompasses any individual who plays a "significant role" in making decisions about, managing, or organising the activities of the whole company or a substantial part of it.

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1. *See* Karolos Seeger, Aisling Cowell, & Andrew Lee, "UK Government Proposes Major Expansion of Corporate Criminal Liability," FCPA Update,Vol. 14, No. 12 (July 2023), https://www.debevoise.com/insights/publications/2023/07/fcpa-update-july-2023.

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At present, there is very limited guidance regarding how the various elements of this test will be interpreted. However, the UK government has made it clear that the focus will be on the substance of an individual's role rather than their job title. This is intended to provide flexibility for prosecutors and prevent corporations from using complex management structures to shield themselves from liability.

New "Failure to Prevent Fraud" Corporate Offence

As anticipated, the ECCT Bill will introduce an offence for companies failing to prevent fraud by employees, agents, and any others who perform services on their behalf. This will have considerable extraterritorial effect, and the government believes that it will act as a deterrent to would-be fraudsters, precipitating a cultural shift within companies.[2]

Under the new strict liability offence, corporate liability will arise where:

- An "associate" of a "large organisation" commits a specified fraud offence; and
- The associate intends to benefit either the organisation or a third party to which it is providing services; unless
- The organisation had implemented reasonable procedures designed to prevent associates from committing fraud.

However, members of the House of Lords have been strongly arguing that the scope of the offence should be expanded by removing the requirement that relevant organisations be "large"[3] and should instead capture all organisations except "micro-entities." In September, this proposal was rejected by the House of Commons, with the government claiming that it would place an unjustifiable compliance burden on small and medium-sized businesses. This point has still not been fully resolved, but it appears very unlikely that there will be any late change to the current position.

This offence will not come into force until the government has published guidance on what constitutes reasonable fraud prevention procedures, which could take at least six months. Affected companies will need to review fraud risks across their entire operations in response to the broad and amorphous nature of the offence. There will be significant challenges for companies in designing and implementing an effective package of fraud prevention policies and procedures.

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2. *See* Karolos Seeger, Aisling Cowell, & Andrew Lee, "UK Introduces New 'Failure to Prevent Fraud' Corporate Offense," FCPA Update, Vol. 14, No. 10 (May 2023), https://www.debevoise.com/insights/publications/2023/05/fcpa-update-may-2023.
3. A company will be considered "large" if it meets at least two of the following criteria: (i) over 250 employees; (ii) over £36 million turnover; or (iii) over £18 million in total assets.

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"Failure to Prevent Money Laundering" Offence Removed

The final version of the ECCT Bill will omit a corporate offence of "failure to prevent money laundering," which had previously been drafted. This would have taken a similar form to the "failure to prevent fraud" offence discussed above. The money laundering offences in the Proceeds of Crime Act 2002 will therefore still require the involvement of a company's "directing mind and will" for the organisation to be held liable.

The proposed offence was not supported by the government on the grounds that it would be unnecessary and duplicative, and would undermine the operation of the existing Money Laundering Regulations 2017 for regulated entities such as financial institutions, accounting firms, law firms, and real estate agents. Instead, the House of Lords decided to prioritise a wider "failure to prevent fraud" offence extending beyond large companies.

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