

## Financial crime in the United States: overview

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### FRAUD

#### Regulatory provisions and authorities

#### 1. What are the main regulatory provisions and legislation relevant to corporate or business fraud?

A number of statutes and regulations address crimes of fraud and attempted fraud, including:

- Section 32(a) of the Securities Exchange Act of 1934 (Exchange Act).
- Section 24 of the Securities Act of 1933 (Securities Act).
- Sarbanes-Oxley Act of 2002.
- Mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343).
- Misapplication and embezzlement statute (18 U.S.C. § 656).
- Criminal False Claims Act (18 U.S.C. § 287).
- Internal Revenue Code (§§ 7201, 7206(1)).
- Computer Fraud and Abuse Act (18 U.S.C. § 1030(a)(4)).
- False Statements Statute (18 U.S.C. § 1001).
- Major Fraud Act (18 U.S.C. § 1031).

Relevant provisions that impose civil liability for fraud, and which can serve as predicates for criminal violations in certain circumstances, include:

- Civil False Claims Act (31 U.S.C. §§ 3729-3733).
- Sections 11, 12(a), and 17(a) of the Securities Act.
- Sections 9, 10(b), 14, 16(b), and 18 of the Exchange Act.
- Securities and Exchange Commission (SEC) Rules 10b-5 and 14a-9.
- Commodity Futures Trading Commission (CFTC) Rule 180.1.
- Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

#### Offences

#### 2. What are the specific offences that can be used to prosecute corporate or business fraud?

Fraud offences under US law include:

- **Securities fraud.** Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 prohibit the use of a "deceptive device," the making of a false statement, or engaging in an act operating as a fraud or deceit in connection with the purchase or sale of any security. Sections 24 of the Securities Act of 1933 (Securities Act) and 32(a) of the Exchange Act provide for criminal liability for securities fraud and require

that the government prove that the violation was wilful (that is, not merely negligent).

- **Mail or wire fraud.** The mail and wire fraud statutes prohibit devising or participating in a scheme to defraud that involves a material misrepresentation or omission and the use of the US mails or wires to further the scheme.
- **Bank fraud.** The bank fraud statute prohibits knowing attempts to execute or execution of a scheme to defraud a financial institution in order to obtain property controlled by that institution by means of false pretences.
- **Tax evasion.** Tax fraud statutes prohibit wilful evasion or attempt to evade the payment of federal tax.

#### Enforcement

#### 3. Which authorities have the powers of prosecution, investigation and enforcement in cases of corporate or business fraud? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

#### Authorities

US authorities with responsibility for investigating corporate or business fraud include:

- Department of Justice (DOJ), including the US Attorney's Office in each federal district and the Federal Bureau of Investigation (FBI).
- Securities and Exchange Commission (SEC).
- Commodity Futures Trading Commission (CFTC).
- Non-governmental self-regulatory organisations (SROs) such as the Financial Industry Regulatory Authority (FINRA).
- US Department of the Treasury, including the Internal Revenue Service (IRS).
- Federal Trade Commission (FTC).

These authorities often share information and co-ordinate investigations with one another and, increasingly, with their counterparts abroad.

US courts and authorities have extraterritorial jurisdiction over fraud under certain circumstances. For example, if overseas actors engage in a wire fraud scheme involving wire communications between the US and other countries, or between two countries other than the US where the communications had a foreseeable impact in the US, the scheme may be prosecuted in the US.

For more information on the relevant authorities see box: *The authorities.*

#### Prosecution powers

The DOJ prosecutes federal crimes and brings civil enforcement actions. The SEC, CFTC, and other government authorities can file

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civil enforcement actions in federal court or before administrative tribunals. Non-governmental SROs such as FINRA can bring disciplinary actions against member firms before their own hearings officers.

#### **Powers of interview**

See below, *Powers to obtain evidence*.

#### **Powers of search/to compel disclosure**

Federal judges are authorised to issue warrants for the search and seizure of property at the request of a federal law-enforcement officer or US Attorney, based on a showing of probable cause to believe that evidence relevant to the commission of a crime will be found.

#### **Powers to obtain evidence**

US civil and criminal law-enforcement agencies can issue administrative subpoenas for documents or information.

Grand juries can investigate federal crimes in the jurisdiction of the federal district in which they sit. Grand juries can issue subpoenas for testimony or for documents or other evidence.

A federal court can compel testimony or the production of documents or other evidence by subpoena to a US person living abroad.

#### **Power of arrest**

Arrests can be made with or without a warrant. A warrant is issued by a federal judge based on a complaint and affidavit establishing probable cause to believe that the person to be arrested has committed an offence. The FBI and US Marshals Service are authorised to execute arrest warrants, as well as to make arrests without a warrant if they have probable cause to believe that the suspect has committed or is committing a crime.

#### **Court orders or injunctions**

The DOJ can pursue asset forfeiture in a criminal indictment. It can also seek a court order restraining assets that are subject to forfeiture on conviction if the assets will be unavailable for forfeiture otherwise and if the need to preserve the property outweighs any hardship to the owner. Courts can order asset freezes in civil enforcement actions as well.

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#### **4. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?**

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The Department of Justice (DOJ) determines whether to bring a criminal charge, and generally does so by indictment. To obtain an indictment, the DOJ must present the case to a grand jury, which is instructed to vote to indict if, based on the evidence presented by the government, there is probable cause to believe that the defendant has committed a crime.

As an alternative to seeking an indictment, the DOJ may file an information as part of a resolution involving a deferred prosecution agreement (DPA) with a corporate entity that agrees to plead guilty. In the event of a DPA, the entity will agree to the filing of information, which does not require the DOJ to present the case to a grand jury. DPAs often depend on payment of a financial settlement, compliance with a cease-and-desist order, or acceptance of a monitor. A DPA may be more readily available to companies that proactively self-report wrongdoing to the government and co-operate fully with government investigations.

#### **Conviction and sanctions**

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#### **5. What are the sanctions for participating in corporate or business fraud?**

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#### **Civil/administrative proceedings or penalties**

For civil fraud violations, US authorities including the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) can seek disgorgement of ill-gotten gains, injunctions against future violations, and monetary penalties. The SEC can also bar individuals that engaged in securities fraud from serving as officers or directors of publicly traded companies.

Under the Financial Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the Department of Justice (DOJ) may seek civil monetary penalties against entities and individuals for violations of the mail and wire fraud statutes if the government can prove that the violation affected a federally insured financial institution. Other civil fraud statutes provide the DOJ with other potential monetary penalties as well.

In deciding whether to pursue monetary penalties against corporate entities, and the extent of any such penalties, US authorities generally consider a variety of factors, including the harm caused by the violation, remediation undertaken by the entity, and the number and seniority of individuals involved in the misconduct.

#### **Criminal proceedings**

**Right to bail.** After a defendant is charged, a judge can order the defendant to be:

- Released on personal recognisance.
- Released on conditions (which may include bail).
- Detained temporarily.
- Detained until trial.

For defendants charged with corporate crimes who do not have a history of violent crime, the principal issue with respect to bail is whether they pose a risk of flight. Risk of flight is generally assessed on the basis of a defendant's ties to the community, available assets, and the length of any potential sentence.

**Sentencing guidelines.** The Federal Sentencing Guidelines recommend a minimum sentence of zero to six months' imprisonment and US\$500 to US\$5000 in fines for offences involving fraud and deceit. That range can increase based on the amount of money that the fraud involved. The US Sentencing Commission Organizational Guidelines, which apply to corporations convicted of federal felonies, recommend a base fine of the greater of:

- The amount set by the guidelines (that is, a range of US\$8,500 to US\$150 million, depending on the crime).
- The pecuniary gain to the corporation.
- The pecuniary loss caused, if the corporation caused the loss through intentional, knowing, or reckless conduct.

**Penalties.** For fraud convictions, courts may impose fines, disgorgement, asset forfeiture, and imprisonment (for individuals). For felonies, entities and individuals face maximum potential fines of the greater of the following, unless the statute setting out the offence intentionally lowers the maximum:

- US\$500,000 or US\$250,000 per offence, respectively.
- Twice the gain from the offence.
- Twice the loss caused.

## Civil suits

The securities laws provide several civil remedies for private individuals harmed by securities fraud, including class actions. Damages are typically compensatory.

### Safeguards

#### 6. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

### Judicial review

Judicial review of government investigations is limited. A corporate entity subject to a subpoena may move to quash on the grounds that the subpoena is unduly burdensome or seeking irrelevant information. However, an entity seeking to co-operate with the government generally would not make such a motion. Both criminal convictions and civil judgments can be appealed from the district court to the court of appeals, though a party that pleads guilty or consents to a civil settlement may agree to waive the right of appeal with respect to certain issues.

### Privileges

Recipients of subpoenas or other requests for information may decline to provide materials protected by the attorney-client privilege, common-interest (or joint-defence) doctrine, and attorney work-product doctrine. The attorney-client privilege shields confidential communications in which the client seeks or the counsel provides legal advice, as well as communications engaged in for purposes of obtaining or providing legal advice. The privilege protects the communications, but not the underlying facts. The common-interest doctrine extends the attorney-client privilege to communications with third parties and their counsel, to the extent that the communications further a legal interest shared by the client and the third party. The attorney work-product doctrine protects materials prepared by attorneys or their agents in anticipation of litigation.

### Unlawfully obtained evidence

Evidence collected in violation of a defendant's constitutional rights (for example, through an illegal search) is generally inadmissible in US courts, as is any evidence subsequently gathered as a result of the unlawful search.

## BRIBERY AND CORRUPTION

### Regulatory provisions and authorities

#### 7. What are the main regulatory provisions and legislation relevant to bribery and corruption?

The following statutes and regulations are relevant to bribery and corruption:

- Foreign Corrupt Practices Act of 1977 (15 U.S.C. § 78dd-1, et seq).
- Hobbs Act (18 U.S.C. § 1951).
- Travel Act (18 U.S.C. § 1952).
- Bribery of public officials and witnesses (18 U.S.C. § 201).
- Federal Program Bribery Statute (18 U.S.C. § 666).

The Department of Justice and Securities and Exchange Commission's joint 2012 *Resource Guide to the US Foreign Corrupt Practices Act* (FCPA) provides guidance on FCPA compliance and enforcement.

#### 8. What international anti-corruption conventions apply in your jurisdiction?

The principles of the following conventions apply within the US:

- The UN Convention Against Corruption 2003.
- The Inter-American Convention Against Corruption.
- The Organisation for Economic Cooperation and Development (OECD) Anti-Bribery Convention.
- The UN Convention Against Transnational Organized Crime.

### Offences

#### 9. What are the specific bribery and corruption offences in your jurisdiction?

### Foreign public officials

Criminal liability for bribing foreign officials can arise under the FCPA and the Travel Act:

- **Foreign Corrupt Practices Act (FCPA).** The FCPA prohibits payments, or offers or promises of payments, to a foreign official, political party, or candidate for office in order to influence an official decision or to induce the recipient to violate his or her duties, using any means of interstate commerce, including a wire transfer between a foreign country and the US. The FCPA does not apply to facilitating payments (that is, payments made or attempted merely to expedite a foreign government's routine action). The FCPA applies not only to US persons and entities, but also to non-US persons and entities who act in the US. Even those who do not enter the US but have some contact with US territory may face prosecution for violations of the statute.
- **Travel Act.** The Travel Act prohibits the use of interstate or foreign travel or of the mails or any other activity facilitating business transactions if done with the intent to promote or carry on certain unlawful activity, including bribery. Bribery of a foreign official, as prohibited by the FCPA, can therefore give rise to a Travel Act violation.

### Domestic public officials

Statutes that prohibit bribery of domestic officials and public corruption include:

- **Bribery of public officials and witnesses (18 U.S.C. § 201).** This statute prohibits persons from giving or promising anything of value to someone acting on behalf of the US, with specific intent to influence any official act, influence a public official to engage in or allow fraud against the US, or induce a public official to do or omit to do any act in violation of his lawful duty.
- **Bribery of state, local, or Indian tribal government (18 U.S.C. § 666).** This statute prohibits persons from offering or agreeing to give anything valued at US\$5,000 or more to any person, with intent to influence or reward an agent of a state, local, or Indian tribal government.

### Private commercial bribery

Private commercial bribery is regulated under state rather than federal law, but violations of state anti-bribery laws can give rise to federal criminal liability under the Travel Act.

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## Defences

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### 10. What defences, safe harbours or exemptions are available and who can qualify?

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The Foreign Corrupt Practices Act (FCPA) provides two affirmative defences:

- The payment was legal in the foreign official's home country.
- The payment was a reasonable and legitimate expense (that is, travel and lodging expenses) incurred by or on behalf of a foreign official, and was directly related to the promotion of products or services to, or the performance of a contract with, a foreign government.

### 11. Can associated persons (such as spouses) and agents be liable for these offences and in what circumstances?

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An associate or agent of a person who is criminally liable for bribery or corruption can be convicted only if that person's own conduct meets all elements of the offence.

## Enforcement

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### 12. Which authorities have the powers of prosecution, investigation and enforcement in cases of bribery and corruption? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

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#### Authorities

The primary US authorities responsible for investigating and prosecuting bribery and corruption are the Department of Justice (DOJ), including the Federal Bureau of Investigation (FBI) and US Attorneys' Offices, and the Securities and Exchange Commission (SEC). Their investigative powers in the context of bribery and corruption are the same as their powers with respect to other crimes (see Question 3).

For more information on the relevant authorities see box: *The authorities*.

#### Prosecution powers

See Question 3.

#### Powers of interview

See Question 3.

#### Powers of search/to compel disclosure

See Question 3.

#### Powers to obtain evidence

See Question 3.

#### Power of arrest

See Question 3.

#### Court orders or injunctions

See Question 3.

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### 13. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

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Charging decisions in the bribery and corruption context are handled in the same way they are handled with respect to other crimes (see Question 4).

## Conviction and sanction

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### 14. What are the sanctions for participating in bribery and corruption?

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#### Civil/administrative proceedings or penalties

The Department of Justice (DOJ) and Securities and Exchange Commission (SEC), both of which may bring civil enforcement actions under the Foreign Corrupt Practices Act (FCPA), can seek fines of up to US\$16,000 for each act in violation of the statute, as well as injunctions prohibiting continued or future misconduct under the statute.

#### Criminal proceedings

**Right to bail.** The approach to bail for persons charged with violations of the FCPA is the same as the approach with respect to other crimes (see Question 5).

**Penalties.** An entity convicted under the FCPA's anti-bribery provisions may be subject to disgorgement, asset forfeiture, and fines of up to US\$2 million per offence. Individuals may face up to US\$250,000 per offence and five years' imprisonment. Criminal fines imposed on an individual cannot be paid by the company on whose behalf the defendant acted.

A conviction for bribery under sections 666 or 201 can result in fines and imprisonment of up to ten or 15 years, respectively. Individuals convicted of violating section 201 may be barred from holding US public office.

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### 15. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

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These measures are the same as those available with respect to other crimes (see Question 6).

## Tax treatment

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### 16. Are there any circumstances under which payments such as bribes, ransoms or other payments arising from blackmail or extortion are tax-deductible as a business expense?

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Bribes and illegal payments are not tax deductible in the US, but ransom payments can be deducted if the loss can be proven.

## INSIDER DEALING AND MARKET ABUSE

### Regulatory provisions and authorities

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### 17. What are the main regulatory provisions and legislation relevant to insider dealing and market abuse?

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US statutes and regulations relevant to insider dealing and market abuse include:



- Sections 10(b), 14(e), 16(b), and 32(a) of the Securities Exchange Act of 1934.
- Sections 17(a) and 24 of the Securities Act of 1933.
- Securities and Exchange Commission (SEC) Rules 10b-5 and 14e-3.
- Section 807 of the Sarbanes-Oxley Act.
- Regulation Fair Disclosure (FD).
- Insider Trading Sanctions Act of 1984.
- Securities Fraud Enforcement Act of 1988.

### Offences

#### 18. What are the specific offences that can be used to prosecute insider dealing and market abuse?

##### Insider dealing

Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 prohibit the use of a "deceptive device", the making of a false statement, or engaging in an act operating as a fraud or deceit in connection with the purchase or sale of any security. Section 17(a) of the Securities Act of 1933 (Securities Act) prohibits similar conduct in connection with the offer or sale of any security.

##### Insider dealing with respect to tender offers

Section 14(e) of the Exchange Act and Rule 14e-3 require any person possessing material non-public information relating to a tender offer to either disclose the information publicly or abstain from trading in the securities involved.

##### Market abuse

Sections 10(b) of the Exchange Act and 17(a) of the Securities Act are used to prosecute market-abuse offences such as pump-and-dump schemes, options backdating, and wash trading. Market abuse can also be prosecuted under other sections of the Exchange Act, including Section 9, which prohibits transactions undertaken for purposes of creating a false or misleading appearance of active trading.

Sections 24 of the Securities Act and 32(a) of the Exchange Act provide for criminal liability for wilful violations of the US securities laws.

### Defences

#### 19. What defences, safe harbours or exemptions are available and who can qualify?

Potential defences to a charge of insider dealing include:

- **Materiality.** A defendant may dispute the government's proof that the information at issue was material.
- **Duty.** The defendant may dispute that he or his source of information owed a fiduciary duty to the issuer, or contend that any such duty was not breached.
- **Non-public information.** The defendant may argue that the information he traded on was publicly available.

### Enforcement

#### 20. Which authorities have the powers of prosecution, investigation and enforcement in cases of insider dealing and market abuse? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

##### Authorities

The primary US authorities responsible for investigating insider dealing and market abuse are:

- Department of Justice (DOJ), including the Federal Bureau of Investigation (FBI) and US Attorneys' Offices.
- Securities and Exchange Commission (SEC).
- Commodity Futures Trading Commission (CFTC).
- Non-governmental self-regulatory organisations (SROs) such as the Financial Industry Regulatory Authority (FINRA).

Their investigative powers in the context of insider dealing and market abuse are the same as their powers with respect to other crimes (see *Question 3*).

For more information on the relevant authorities see box: *The authorities*.

##### Prosecution powers

See *Question 3*.

##### Powers of interview

See *Question 3*.

##### Powers of search/to compel disclosure

See *Question 3*.

##### Powers to obtain evidence

See *Question 3*.

##### Power of arrest

See *Question 3*.

##### Court orders or injunctions

See *Question 3*.

#### 21. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

Charging decisions in the context of insider dealing and market abuse are handled in the same way they are handled with respect to other crimes (see *Question 4*).

### Conviction and sanctions

#### 22. What are the sanctions for participating in insider dealing and market abuse?

##### Civil/administrative proceedings or penalties

In cases of insider dealing and market abuse, as in other cases of securities fraud, the Securities and Exchange Commission (SEC) can impose a penalty of up to three times the profit gained or loss avoided, in addition to disgorgement.

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## Criminal proceedings

**Right to bail.** The approach to bail for persons charged with insider dealing or market abuse is the same as the approach with respect to other crimes (see *Question 5*).

**Penalties.** Wilful violations of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) can give rise to fines of up to US\$5 million and 20 years' imprisonment for individuals, and fines of up to US\$25 million for corporate entities.

## Civil suits

Injured private parties may bring civil suits, including class actions, for securities fraud.

## Safeguards

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### 23. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

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These measures are the same as those available with respect to other crimes (see *Question 6*).

## MONEY LAUNDERING, TERRORIST FINANCING AND FINANCIAL/TRADE SANCTIONS

### Regulatory provisions and authorities

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### 24. What is the main legislation and regulatory provisions relevant to money laundering, terrorist financing and/or breach of financial/trade sanctions?

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Statutes and regulatory provisions relevant to money laundering, terrorist financing, and breach of sanctions include:

- Money laundering:
  - Money Laundering Control Act of 1986 (18 U.S.C. §§ 1956-1957);
  - Bank Secrecy Act (31 U.S.C. §§ 5311-5331);
  - Bulk cash smuggling into or out of the US (31 U.S.C. § 5332).
- Terrorist financing:
  - Providing material support to foreign terrorists (18 U.S.C. § 2339A);
  - Providing material support to foreign terrorist organisations (18 U.S.C. § 2339B).
- Financial/trade sanctions:
  - International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1707);
  - Trading with the Enemy Act of 1917 (50 U.S.C. App. §§ 1-44);
  - International Security and Development Cooperation Act (22 U.S.C. § 2349aa-9);
  - Reporting and recordkeeping requirements for financial/trade sanctions (31 C.F.R. § 501).

## Offences

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### 25. What are the specific offences that can be used to prosecute money laundering, terrorist financing and breach of financial/trade sanctions?

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## Money laundering

Offences under the money laundering statutes include:

- **Domestic money laundering (18 U.S.C. § 1956(a)(1)).** The government must prove that the defendant conducted a financial transaction involving proceeds of specified unlawful activity (as defined by statute), that he knew that the proceeds resulted from activity constituting a federal, state, or foreign felony, and that he either intended to promote specified unlawful activity or evade taxes, or knew that the transaction was designed to disguise proceeds or avoid a federal or state reporting requirement.
- **International money laundering (18 U.S.C. § 1956(a)(2)).** The statute prohibits transportation of financial instruments or funds across the US border with intent to promote specified unlawful activity or with knowledge that the funds resulted from unlawful activity and that the transportation was designed to conceal the origin of the funds or avoid reporting requirements.
- **Transacting in proceeds of specified unlawful activity (18 U.S.C. § 1957(a)).** The government must prove that the defendant engaged in a monetary transaction knowing that the transaction involved more than US\$10,000 in proceeds of specified unlawful activity.
- **Bank Secrecy Act violation (31 U.S.C. §§ 5321-5322).** Liability arises where a person wilfully fails to file a necessary report or otherwise violates the requirements of the Bank Secrecy Act or related regulations.
- **Bulk cash smuggling (31 U.S.C. § 5332).** The government must establish that the defendant intended to evade a currency reporting requirement and knowingly concealed and transported, or attempted to transport, more than US\$10,000 in currency across the US border.

## Terrorist financing

Offences under the terrorist financing statutes include:

- **Material support of foreign terrorists (18 U.S.C. § 2339A).** Liability arises where a defendant provides material support (that is, money or services), or conceals or disguises the nature, location, source, or ownership of material support, knowing or intending that such support will be used in, or help conceal, the preparation for or carrying out of a federal crime of terrorism.
- **Material support of foreign terrorist organisations (18 U.S.C. § 2339B).** The government must establish that the defendant knowingly provided or attempted to provide material support to a foreign terrorist organisation and knew that the organisation had been designated a foreign terrorist organisation by the Secretary of State or that the organisation has engaged in terrorist activity.

## Financial/trade sanctions

**Breach of financial or trade sanctions.** The government must prove that a US person wilfully breached a sanction regulation. Sanctions are authorised by statute and implemented by executive orders and regulations. Although activity constituting a breach depends on the specific sanction, transacting with prohibited parties or states will generally qualify as a breach.

## Defences

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### 26. What defences, safe harbours or exemptions are available and who can qualify?

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## Money laundering

**Domestic and international money laundering.** Lack of the requisite intent or knowledge is a defence to a charge of domestic or international money laundering, as the crimes require both:

- Knowledge that the funds involved in the transaction represent the proceeds of some state, federal, or foreign felony, or that the transaction was designed at least in part to conceal the

nature of the unlawful proceeds or to avoid a reporting requirement.

- Intent to engage in tax evasion or to promote the underlying unlawful activity.

**Transacting in proceeds of specified unlawful activity.** As the government must prove that the defendant knew that the funds involved in the transaction at issue were derived from specified unlawful activity, a defendant may argue lack of knowledge.

**Bulk cash smuggling.** A defendant can avoid a conviction of currency smuggling if the government is unable to prove that the defendant intended to evade a currency reporting requirement.

### Terrorist financing

**Material support of terrorism.** Lack of knowledge is a defence to a charge of material support of terrorism, as a defendant cannot be convicted if the government cannot prove that the defendant knew that the material support would contribute to terrorism. Similarly, a defendant that provided material support to a terrorist organisation may argue that he or she did not know that the organisation was a designated terrorist organisation or engaged in terrorism.

### Financial/trade sanctions

In defence to a charge of breach of sanctions, a defendant may argue lack of knowledge, as the government must prove that the defendant knew of the relevant sanctions programme, knew it covered the alleged conduct, and engaged in the transaction despite that knowledge (or consciously avoided developing affirmative knowledge).

### Enforcement

#### 27. Which authorities have the powers of prosecution, investigation and enforcement in cases of money laundering? What are these powers and what are the consequences of non-compliance? Please identify any differences between criminal and regulatory investigations.

### Authorities

The primary US authorities responsible for investigating and prosecuting money laundering, terrorist financing, and breach of sanctions are the Department of Justice (DOJ), including the Federal Bureau of Investigation (FBI) and US Attorneys' Offices, and the Treasury Department's Office of Foreign Assets Control (OFAC).

OFAC is responsible for administering and issuing regulations related to the sanctions regime. OFAC has the power to issue administrative subpoenas, freeze funds while conducting an investigation, and levy civil monetary penalties.

Financial and trade sanctions generally prohibit persons within the US from transacting with sanctioned parties, regardless of citizenship status, and can therefore extend to non-US persons.

The government's investigative powers in the context of money laundering, terrorist financing, and violations of sanctions are the same as its powers with respect to other crimes (see *Question 3*).

For more information on the relevant authorities see box: *The authorities*.

### Prosecution powers

See *Question 3*.

### Powers of interview

See *Question 3*.

### Powers of search/to compel disclosure

See *Question 3*.

### Powers to obtain evidence

See *Question 3*.

### Power of arrest

See *Question 3*.

### Court orders or injunctions

See *Question 3*.

#### 28. Which authority makes the decision to charge and on what basis is that decision made? Are there any alternative methods of disposal and what are the conditions of such disposal?

Charging decisions in the context of money laundering, terrorist financing, and violation of financial or trade sanctions are handled in the same way they are handled with respect to other crimes (see *Question 4*).

### Conviction and sanctions

#### 29. What are the sanctions for participating in money laundering, terrorist financing offences and/or for breaches of financial/trade sanctions?

### Money laundering

**Right to bail.** The approach to bail for persons charged with money laundering is the same as the approach with respect to other crimes (see *Question 5*).

**Penalties.** A defendant convicted of money laundering is subject to civil penalties up to the value of the property or funds involved in the transactions or US\$10,000, whichever is greater. Funds that were commingled with illicit proceeds to facilitate money laundering are subject to forfeiture. Funds involved in bulk cash smuggling are also subject to forfeiture.

Under 18 U.S.C. § 1956 (Laundering of monetary instruments), individuals convicted of money laundering may face up to 20 years' imprisonment and fines of up to the greater of US\$500,000 or twice the value of the funds involved. Under 18 U.S.C. § 1957 (Engaging in monetary transactions in property derived from specified unlawful activity) and 31 U.S.C. § 5332 (Bulk cash smuggling into or out of the US), individuals are subject to up to ten years' imprisonment and fines of up to US\$250,000 or twice the value of the illicit funds involved. Entities convicted under the latter two statutes may face up to US\$500,000 in fines or twice the illicit funds involved.

### Terrorist financing

**Right to bail.** The approach to bail for persons charged with providing material support to terrorism is the same as the approach with respect to other crimes (see *Question 5*).

**Penalties.** A conviction under the material support statutes can give rise to criminal fines of up to US\$250,000 and 15 years' imprisonment under 18 U.S.C. § 2339A (Providing material support to terrorists), and 20 years' imprisonment under 18 U.S.C. § 2339B (Providing material support or resources to designated foreign terrorist organizations). Under either provision, if any person dies as a result of the terrorist activity supported by the defendant, the maximum sentence increases to life imprisonment. If a financial institution knowingly fails to retain possession of funds it knows a foreign terrorist organisation has an interest in, or fails to report such funds, the institution can be subject to civil penalties of the greater of US\$50,000 or twice the amount of funds at issue.

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## Financial/trade sanctions

**Right to bail.** The approach to bail for persons charged with violating financial or trade sanctions is the same as the approach with respect to other crimes (see *Question 5*).

**Penalties.** Penalties vary depending on the sanctions regime, but substantial civil penalties are common. Criminal fines of twice the gross loss to the victim or twice the gross gain to the defendant, and up to 30 years' imprisonment, are permissible.

### Safeguards

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#### 30. Are there any measures in place to safeguard the conduct of investigations? Is there a process of appeal? Is there a process of judicial review?

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These measures are the same as those available with respect to other crimes (see *Question 6*).

### Financial record keeping

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#### 31. What are the general requirements for financial record keeping and disclosure?

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Absent a duty to preserve documents, destruction of records under a valid document retention policy is generally an appropriate business practice. Duties to preserve records arise under various statutes and regulations, including:

- **Securities Exchange Act of 1934 (Exchange Act).** The Securities and Exchange Commission (SEC) requires companies to retain most documents filed with the SEC under the Exchange Act for five years.
- **Foreign Corrupt Practices Act (FCPA).** The FCPA requires corporate issuers to maintain financial records that accurately reflect, in reasonable detail, all corporate transactions. The statute also requires companies to maintain accounting procedures that reasonably assure that, among other things:
  - transactions are recorded as necessary to permit preparation of financial statements and to maintain accountability for assets;
  - assets as recorded are compared with existing assets at reasonable intervals; and
  - any discrepancies are addressed.

Under SEC Rules 13b2-1 and 13b2-2, it is unlawful for any corporate officer or director to falsify records that must be accurately maintained under the FCPA, or to supply false information to auditors.

- **Sarbanes-Oxley Act (SOX).** The destruction, alteration, or falsification of any record with the intent to obstruct or influence a federal investigation or bankruptcy proceeding is a criminal offence under SOX. The statute also criminalises failure to comply with its provisions regarding audit records, which require any accountant who conducts an audit to maintain all audit paperwork for at least five years from the end of the fiscal period in which the audit was concluded. SEC Rule 2-06 requires any accountant who audits a publicly traded company's financials to maintain audit records for seven years.

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#### 32. What are the penalties for failure to keep or disclose accurate financial records?

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Failure to comply with the document-preservation requirements of the Sarbanes-Oxley Act (SOX) carries a penalty of up to US\$500,000 for corporations and up to US\$250,000 and 20

years' imprisonment for individuals. Failure to comply with the audit-records provision of SOX carries a penalty of up to US\$500,000 for corporations or US\$250,000 and ten years' imprisonment for individuals.

Wilful violations of the Foreign Corrupt Practices Act (FCPA) accounting provisions carry penalties of up to US\$2.5 million for corporations or US\$1 million and ten years' imprisonment for individuals.

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#### 33. Are the financial record keeping rules used to prosecute white-collar crimes?

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Violations of the recordkeeping provisions of Sarbanes-Oxley Act may give rise to criminal prosecution for obstruction of justice. The Securities and Exchange Commission (SEC) has brought civil enforcement actions under the Foreign Corrupt Practices Act (FCPA) accounting provisions. Criminal enforcement by the Department of Justice (DOJ) is less common.

## DUE DILIGENCE

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#### 34. What are the general due diligence requirements and procedures in relation to corruption, fraud or money laundering when contracting with external parties?

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The Bank Secrecy Act (BSA) requires financial institutions to implement effective compliance programmes to detect and prevent money laundering and report suspicious transactions. Some self-regulatory organisations (SROs), such as the Financial Industry Regulatory Authority (FINRA), review and provide guidance to their member firms with respect to BSA compliance programmes.

Companies may face exposure under the Foreign Corrupt Practices Act (FCPA) due to corrupt activity of entities that they acquire or in which they invest. In determining whether to take action against a buyer or investor, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) will take into account the level of pre- and post-acquisition due diligence conducted by the company. In view of this risk, due diligence and ongoing monitoring are vitally important, particularly when acquiring or investing in entities located in corruption-prone countries.

## CORPORATE LIABILITY

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#### 35. Under what circumstances can a corporate body itself be subject to criminal liability?

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Federal criminal statutes apply to entities and individuals alike. Criminal liability may be imputed to a corporation when an officer or employee's illegal conduct occurs within the scope of his employment and for the benefit of the corporation. In deciding whether to prosecute a corporation, the Department of Justice (DOJ) can consider:

- The entity's proactive self-reporting of misconduct.
- The entity's willingness to co-operate.
- The seriousness of the offence.
- The number and seniority of individuals involved, including members of management.
- The entity's history, if any, of relevant misconduct.
- The effectiveness of the company's compliance programme.
- Remedial steps taken by the entity.



## CARTELS

### 36. Are cartels prohibited in your jurisdiction? How are cartel offences defined? Under what circumstances can a corporate body be subject to criminal liability for cartel offences?

Cartel behaviour is prohibited by US antitrust law, which is codified by statute and through extensive case law. The principal governing statutes include:

The Sherman Act (15 U.S.C. §§ 1-2).

The Clayton Act (15 U.S.C. § 12).

The Federal Trade Commission Act (15 U.S.C. § 45).

The Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) share responsibility for enforcing the antitrust laws, but only the DOJ can bring criminal enforcement actions.

The Sherman Act prohibits entering into agreements that unlawfully restrain trade. Typical cartel behaviour (that is, agreement between companies to set prices) is clearly prohibited. Sherman Act violations can result in penalties of up to US\$100 million for companies or US\$1 million and ten years' imprisonment for individuals.

See *Cartel Leniency Q&A: United States*.

## IMMUNITY AND LENIENCY

### 37. In what circumstances is it possible to obtain immunity/leniency for co-operation with the authorities?

Generally, entities and individuals that proactively self-report potential misconduct to US authorities and co-operate fully with any government investigations may secure reduced penalties and more favourable resolutions. Both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) take into account an entity's prompt and full disclosure of misconduct and willingness to co-operate, along with other factors such as the effectiveness of the company's compliance programme and remedial steps taken. The DOJ also offers two specific leniency programmes for entities and individuals that voluntarily self-disclose and fully co-operate with the government with respect to Foreign Corrupt Practices Act (FCPA) and antitrust violations under certain conditions.

## CROSS-BORDER CO-OPERATION

### 38. What international agreements and legal instruments are available for local authorities?

#### Obtaining evidence

US authorities can obtain information from foreign governments through mutual legal assistance treaties (MLAT). The US has ratified over 40 bilateral and numerous other multilateral treaties.

The US is one of 59 countries that are party to the Hague Evidence Convention, which provides procedures for obtaining evidence across jurisdictions. The US is also party to the Inter-American Convention Against Corruption (IACAC), which provides for the sharing of evidence between 33 American countries.

#### Seizing assets

MLATs also provide means for seizing assets located in other jurisdictions. Multilateral treaties that provide such mechanisms include the IACAC, the UN Corruption Convention, the UN

Convention Against Transnational Organized Crime, and the OECD Anti-Bribery Convention.

#### Sharing information

Recent developments in financial crime enforcement reflect a trend of increasing co-operation between US authorities and their counterparts abroad. For example, the LIBOR and foreign exchange manipulation matters were investigated across jurisdictions, and joint resolutions were obtained.

### 39. In what circumstance will domestic criminal courts assert extra-territorial jurisdiction?

Due process requires that crimes involving extraterritorial conduct have some US nexus if they are to be prosecuted by US authorities. That is, the activity somehow must touch or be directed toward the US, or the defendant must be a US entity or person. Federal legislation is presumed not to apply extraterritorially (unless there is a clear intent of Congress to that effect). Whether a statute grants extraterritorial jurisdiction therefore depends on the text of the statute and legislative intent.

### 40. Does your jurisdiction have any statutes aimed at blocking the assertion of foreign jurisdictions within your territory? Are there statutes aimed at blocking the assertion of foreign jurisdictions within their territory?

The US has not implemented blocking statutes. By statute, US district courts can order entities and individuals to give testimony or produce documents to foreign and international tribunals.

## WHISTLEBLOWING

### 41. Are whistleblowers given statutory protection?

The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 provide significant protections for whistleblowers employed by public companies. The anti-retaliation provisions of these statutes subject corporations to liability for discriminating or retaliating against whistleblowers who provide information to supervisors or government officials.

## REFORM, TRENDS AND DEVELOPMENTS

### 42. Are there any impending developments or proposals for reform?

A key issue in current enforcement of financial crime is US authorities' increased focus on prosecuting individuals engaged in corporate misconduct, in addition to the entities for whom they work. In September 2015, the Department of Justice (DOJ) directed, via a memorandum by Deputy Attorney General Sally Yates, that, among other things:

- Any investigation of a corporate entity should focus from inception on individuals.
- Co-operation credit should not be granted to an entity unless it shares all relevant facts relating to the individuals responsible for the misconduct at issue,
- Culpable individuals should not be released from liability as part of resolutions with corporations.

Although it remains to be seen whether the Yates Memo will result in a substantial increase in prosecutions of individuals over time,

the new requirements have set a higher bar for corporate co-operation credit.

## MARKET PRACTICE

### 43. What are the main steps foreign and local companies are taking to manage their exposure to corruption/corporate crime?

Companies generally devote significant resources to compliance programmes that help limit the risk that their employees will commit crimes. Corporate compliance programmes involve, among other things, written policies, training programmes, and processes for monitoring and testing compliance with those policies. A robust corporate compliance programme is one factor that the

Department of Justice (DOJ) considers when assessing potential criminal penalties.

US authorities offer co-operation credit to entities and individuals who promptly self-report potential offences and fully co-operate with related government investigations. If a company learns of activity giving rise to potential violations, proactive self-reporting and co-operation may reduce the severity of any penalties or other consequences.

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## THE REGULATORY AUTHORITIES

### Department of Justice (DOJ)

W [www.justice.gov](http://www.justice.gov)

Status. Governmental organisation.

Principal responsibilities. The DOJ, which includes the US Attorneys' Offices, the Federal Bureau of Investigation (FBI), and over 50 other agencies, is responsible for enforcing federal law and defending the legal interests of the US.

### Securities and Exchange Commission (SEC)

W [www.sec.gov](http://www.sec.gov)

Status. Governmental agency.

Principal responsibilities. The SEC's mission is to protect investors, maintain fair, orderly, and efficient securities markets, and facilitate capital formation.

### Commodity Futures Trading Commission (CFTC)

W [www.cftc.gov](http://www.cftc.gov)

Status. Governmental agency.

Principal responsibilities. The CFTC regulates the commodity futures, options, and derivatives markets. It polices market abuse, fraud, and manipulation and aims to reduce systemic market risk.

### Federal Trade Commission (FTC)

W [www.ftc.gov](http://www.ftc.gov)

Status. Government agency.

Principal responsibilities. The FTC is responsible for preventing and policing anticompetitive, deceptive, and unfair business practices.

### Internal Revenue Service (IRS)

W [www.irs.gov](http://www.irs.gov)

Status. Government agency.

Principal responsibilities. The IRS, a bureau of the Department of the Treasury, is responsible for collecting taxes and enforcing the Internal Revenue Code.

### Office of Foreign Assets Control (OFAC)

W [www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx](http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx)

Status. Government agency.

Principal responsibilities. OFAC, an office within the Department of the Treasury, is responsible for administering financial and trade sanctions in support of US foreign policy and national security goals.

### Financial Industry Regulatory Authority (FINRA)

W [www.finra.org](http://www.finra.org)

Status. Nongovernmental self-regulatory organisation.

Principal responsibilities. FINRA is responsible for writing and enforcing rules governing the activities of broker-dealers and other member firms and fostering market transparency.

## ONLINE RESOURCES

**A Resource Guide to the US Foreign Corrupt Practices Act**

W [www.justice.gov/criminal-fraud/fcpa-guidance](http://www.justice.gov/criminal-fraud/fcpa-guidance)

W [www.sec.gov/spotlight/fcpa.shtml](http://www.sec.gov/spotlight/fcpa.shtml)

**Description.** This joint DOJ and SEC resource guide provides guidance on FCPA requirements and compliance, as well as insight into DOJ and SEC enforcement practices. It was published on 14 November 2012.

**US Attorneys' Manual**

W [www.justice.gov/usam](http://www.justice.gov/usam)

**Description.** The US Attorneys' Manual, which is designed as an internal reference for DOJ attorneys, contains policies and procedures relevant to DOJ's enforcement activity. Title 9 of the manual, which pertains to criminal enforcement, provides insight into the investigation and prosecution of fraud, bribery, money laundering, and other financial crimes. The manual is revised periodically.

**The Laws That Govern the Securities Industry**

W [www.sec.gov/about/laws.shtml](http://www.sec.gov/about/laws.shtml)

**Description.** This SEC webpage contains summaries and links to the full text of the Securities Act, Exchange Act, Sarbanes-Oxley Act, and other statutes that govern the US securities industry.

**Federal Digital System**

W [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys)

**Description.** The US Government Publishing Office provides public access to the US Code and other federal publications and information.

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