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# CORPORATE FRAUD & CORRUPTION

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

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A senior director in Navigant Consulting's Global Investigations & Compliance Practice, Anne Marie Minogue is a veteran in financial investigations and compliance.

Expert in indications of fraud, corruption and money laundering, she conducts investigations, assesses anti-fraud, bribery and corruption (ABC) and anti-money laundering (AML) risk management capabilities and reviews regulatory compliance activities. Holding various positions of leadership with the Internal Revenue Service Criminal Investigation prior to joining the consulting industry, Ms Minogue led noteworthy publicised investigations, including corporate fraud and corruption investigations, and directed special agents in the execution of financial search warrants, including pre-dawn raids.

## United States ■

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

**MINOGUE:** One proxy for measuring corporate fraud and corruption in the US is the dollar amount of fines imposed by federal authorities in recent years. Although monetary fines are increasingly common in the prosecution of fraud and corruption, statistics show a 20-year downward trend in the volume of federal white-collar crime cases prosecuted by the Department of Justice (DOJ). Moreover, the DOJ is annually prosecuting less than half the amount of corporate fraud cases that it prosecuted a decade ago. Despite decreasing prosecutions for federal white-collar crime and corporate fraud, in our opinion the decreases are not reflective of a downward turn in actual crime but rather a manifestation of competing enforcement priorities and diminished resources. Nonetheless, Foreign Corrupt Practices Act (FCPA) prosecution yielded more than \$2.2bn in penalties imposed across more than 40 total civil and criminal enforcement actions in 2018 by the Securities and Exchange Commission (SEC) and the DOJ, respectively. Statistics suggest an increasing focus on FCPA and False Claims Act (FCA) actions and

a decreasing focus on criminal corporate fraud prosecutions. The information indicates that the DOJ focuses on the most severe cases of fraud and may opt out of prosecuting less egregious fraudulent behaviour.

■ **Q. Have there been any legal and regulatory changes implemented in the US designed to combat fraud and corruption? What penalties do companies face for failure to comply?**

**MINOGUE:** The most noteworthy regulatory change in the US is the DOJ's implementation of the FCPA Corporate Enforcement Policy (CEP). Essentially, the CEP is an extension of the previous FCPA Pilot Program's incentives for voluntary self-disclosure of FCPA violations. The CEP creates a presumption of no prosecution where companies self-disclose violations, fully cooperate with government authorities and appropriately remediate. Although not all are required to obtain the presumption, there is one conditional element of the CEP that must be met to secure a 'CEP declination' – the corporation must disgorge its ill-gotten proceeds either in agreement with the DOJ or with the SEC. There are already several landmark instances of the CEP in action, showing the various avenues to obtaining the presumption of non-prosecution. For instance, the DOJ declined to prosecute Dun & Bradstreet because of its full cooperation with the DOJ, even though Dun & Bradstreet did not self-disclose the underlying FCPA violations. Nonetheless, all corporations that receive CEP-specific declinations from the DOJ are still subject to disgorgement of all ill-gotten profits as a condition of the 'declination'.

■ **Q. In your opinion, do regulators in the US have sufficient resources to enforce the law in this area? Are they making inroads?**

**MINOGUE:** The US has a robust framework of regulatory, administrative and enforcement agencies responsible for combating fraud and corruption. The SEC holds the power to investigate violations of securities laws, including fraud. If an investigation warrants it, the SEC's Enforcement Division can recommend pursuit of a civil action in federal court or an administrative action. The Internal Revenue Service (IRS) Criminal Investigation Division (CID) investigates corporate fraud and will refer qualified cases for criminal prosecution to the DOJ. The DOJ's Fraud Division and its investigative agency, the Federal Bureau of Investigation (FBI), investigate and prosecute corporate corruption and fraud in the US. While FBI resources have remained fairly constant, IRS CID resources have declined over the past several years. With the exception of the District Attorney of New York, local and state law enforcement investigations of these cases are few and far between. Nonetheless, it appears that several agencies are addressing reductions in resources for white-collar prosecutions by increasing their collaboration with both domestic and foreign law enforcement and implementing new technologies to detect and prevent corruption and fraud.



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**Q. If a company finds itself subject to a government investigation or dawn raid, how should it respond?**

**MINOGUE:** A company that finds itself the subject of a government investigation or dawn raid should seek the advice of outside counsel. Attorneys experienced in defending fraud and corruption violations are familiar with the unique methods employed in these types of investigations and are well-equipped to navigate the bureaucracy of investigating agencies, the DOJ, US attorney's office and federal judicial system. Proper legal representation can protect the entity's legal rights and help to ensure that representatives of the company do not provide false information or submit statements that could hurt the company. The attorney may also engage the services of a forensic accountant or financial investigator or consultant who is experienced in fraud investigations or bribery and corruption investigations, as appropriate. The forensic accountant, financial investigator or consultant can conduct a parallel investigation that mirrors the government investigation and gather financial documents and information to predict the findings of the special agents or criminal investigators. He or she can uncover defences and gather the necessary evidence to support them. This can be invaluable in interactions with the government and in the overall defence strategy.

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**■ Q. What role are whistleblowers playing in the fight against corporate fraud and corruption? How important is it to train staff to identify and report potentially fraudulent activity?**

**MINOGUE:** In light of declining white-collar crime prosecutions, recent years have seen a huge increase in the number of successful litigation claims, whistleblowing tips and whistleblower rewards. Furthermore, in 2018, the SEC rewarded a whistleblower in its first-ever retaliation case and dispensed the largest-ever award to three whistleblowers. These instances, and the implementation of the DOJ's CEP, demonstrate the growing role of whistleblowers in the fight against corporate fraud. It is extremely important for companies to train their staff to identify and report potentially fraudulent activity. According to the Association of Certified Fraud Examiners (ACFE), 40 percent of fraud schemes are identified through tips. The existence of a whistleblower programme is also considered a mitigating factor by regulators in determining corporate prosecution, fines and penalties.

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

**MINOGUE:** When conducting an internal investigation, a company should carefully plan the investigation before jumping in to examine the allegations. Proper planning can enable companies to protect confidentiality, guard against loss of evidence and prepare for potential problems. There are a number of important things a company should consider in investigative planning. First, to determine who should conduct an investigation, a company should consider independence, privilege and expertise. Second, at the outset of the investigation, the investigative team should define and document the allegations and the



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scope of the investigation. Third, planning for potential problems that may arise can enable the company to better manage its outcomes. Finally, once an investigation is concluded, the company should determine the root cause of the violations, including identifying weakness in controls that allowed the activity to occur.

**■ Q. What general steps can companies take to proactively prevent corruption and fraud within their organisation?**

**MINOGUE:** To prevent fraud and corruption, companies can focus on building a strong culture of compliance and robust anti-fraud and anti-bribery and corruption programmes. The

Institute of Internal Auditors, the American Institute of Certified Public Accountants, and the ACFE recommend five principles to proactively establish an environment to effectively manage an organisation’s fraud risk: governance, risk assessment, preventive controls, detection techniques and reporting mechanisms. These same principles are embedded in the elements of an effective compliance and ethics programme and are applicable to managing the risk of bribery and corruption. ■



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