



■ ANNUAL REVIEW Reprint May 2020

---

# Corporate fraud & corruption

---

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

---





**SCOTT HULSEY**  
**Kobre & Kim LLP**

Lawyer

+1 (202) 664 1904

[scott.hulsey@kobrekim.com](mailto:scott.hulsey@kobrekim.com)

Scott Hulsey is a former high-ranking Department of Justice official and corporate chief compliance officer who serves as counsel in white-collar criminal and regulatory enforcement matters. He represents individuals and institutions in complex international government investigations and trials, particularly those involving Asia and the EMEA regions. As a former federal prosecutor at the US Attorney's Office for the Northern District of Georgia, he was responsible for investigating and prosecuting complex criminal, money laundering, and civil asset forfeiture matters against large-scale, international criminal organisations. He has successfully tried more than 60 federal and state cases over the course of his career.

## United States ■

■ **Q. To what extent are boards and senior executives in the US taking proactive steps to reduce incidences of fraud and corruption from surfacing within their company?**

**HULSEY:** To reduce the incidence of fraud and corruption, corporations rely on compliance programming, ranging from training and controls to internal reporting and investigations. In 2019, US corporations continued to spend significant sums of money in support of compliance – third only behind the UK and Germany. This fact suggests that boards and senior executives continue to understand the implications of failing to quickly and effectively address potential fraud violations. Still, there are signs that US corporations may be letting down their guard, including reports indicating US financial institutions reduced their legal compliance spending in 2019. Recent upward trends in both FCPA enforcement actions and resolutions also reveal a mixed picture about corporate commitment to compliance, suggesting that boards and executives should stay focused now more than ever on detecting and addressing fraud at its earliest stages.

■ **Q. Have there been any significant legal and regulatory developments relevant to corporate fraud and corruption in the US over the past 12-18 months?**

**HULSEY:** Over the past year, the US Department of Justice (DOJ) continued to emphasise corporate self-policing, especially in Foreign Corrupt Practices Act (FCPA) matters. In April 2019, the DOJ Criminal Division updated its 2017 ‘Evaluation of Corporate Compliance Programs’, providing comprehensive guidance to prosecutors examining compliance programmes in making charging and sentencing decisions, and further signalling the central role of compliance in corporate criminal resolutions – particularly in matters involving fraud and corruption. The DOJ also updated its 2017 FCPA Corporate Enforcement Policy to enhance its self-disclosure provisions, including extending credit to companies providing all relevant facts known at the time of disclosure, even if incomplete, to encourage companies to come forward early. The Commodity Futures Trading Commission (CFTC) similarly enhanced its focus on corporate self-policing, extending the benefits of compliance and self-reporting to non-registered companies. A development from the past year that is likely to have an outsized impact in the face of the COVID-19 pandemic and economic fallout is the DOJ’s October 2019 ‘Evaluating a Business Organization’s Inability to Pay a Criminal Fine or Criminal Monetary Penalty’ memorandum. The burden will rest with the corporations relying on the fallout from the current economic downturn – ‘collateral consequences’ including furloughs, lay-offs, and reduced pensions and 401(k) plans – to make their case they cannot afford substantial

finances, and would be well-served to have at-the-ready detailed records and analyses to support their arguments. Also notable is Section 4018 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, establishing the Office of the Special Inspector General for Pandemic Response (SIGPR). Housed within the US Department of Treasury, this unit will monitor and investigate fraud in connection with the more than \$2 trillion aid infusion into the US economy.

■ **Q. When suspicions of fraud or corruption arise within a firm, what steps should be taken to evaluate and resolve the potential problem?**

**HULSEY:** In responding to suspicions of fraud and corruption, it is critical that corporations have infrastructure in place for handling allegations of misconduct, including trained investigators and pre-established, detailed procedures for handling. The procedures should ensure that allegations creating possible legal exposure initially are funnelled to company employees that have been identified and trained to handle them. These investigations should be overseen by the legal department and, in appropriate cases, referred to outside counsel, for example when criminal exposure potentially extends to the company itself. Employees must be trained to spot potential allegations and report them. The company should also make available multiple channels for reporting, ranging from management and ombudsmen to anonymous hotlines. To function well, employees must have confidence in the system, which is instilled through quick, fair and consistent handling of investigations, including the appropriate remediation of misconduct.



■ **Q. Do you believe companies are paying enough attention to employee awareness, such as training staff to identify and report potential fraud and misconduct?**

**HULSEY:** A company ultimately will be successful in preventing or mitigating fraud and misconduct to the extent its employees have been educated to identify and avoid behaviours creating exposure, and to report the same when committed by others. The DOJ's compliance guidance emphasises the importance of employee training to an effective compliance programme in evaluating its design. We live in a time with unprecedented opportunities to train employees. Many more employees can be reached directly because of technology. Further, technology provides opportunities to develop and deliver personalised content, based on employee profiles. Differentiated training would be useful to 'at risk' employees, for example those who engage with third parties or operate regularly in high-risk markets. Technology can be used to create interactive experiences, and to more effectively keep track of who has been trained.

■ **Q. How has the renewed focus on encouraging and protecting whistleblowers changed the way companies manage and respond to reports of potential wrongdoing?**

**HULSEY:** 2019 continued the trend of substantial reporting by whistleblowers, with the SEC issuing significant awards. Moreover, Congress and regulators took steps to further encourage and protect whistleblowers. As employees increasingly are incentivised to report potential fraud and FCPA violations directly to

the government, it is more important than ever for companies to make internal whistleblowing easier, including by protecting those reporting potential violations. When reported internally, companies can quickly address problems before they grow. For problems that warrant self-disclosure to the government, companies at least will have the opportunity to internally investigate, begin developing a remediation plan, and ultimately minimise reputational and financial damage. Companies also must consider their role in upholding the integrity of such investigations to maintain the confidence of their employees that reported violations will be handled quickly, fairly and confidentially, and to avoid collateral damage of internal inquiries such as corporate prosecution for obstruction of justice.

■ **Q. Could you outline the main fraud and corruption risks that can emerge from third-party relationships? In your opinion, do firms pay sufficient attention to due diligence at the outset of a new business relationship?**

**HULSEY:** Third-party relationships create significant risk for corporations. Third parties operate largely outside of a corporation's direct purview and control, yet their conduct can create exposure for corporations that are not careful. Indeed, in 2018, 16 bribery schemes involved third-party intermediaries and in 2019, there were 15 prosecutions involving third parties. Consequently, it is critical that corporations conduct thorough due diligence at the outset of a third-party relationship to understand with whom they are doing business. This initial due diligence may be scaled up or down depending on risk factors associated with the entity – including any history of misconduct, remission of payments to



*“ Internal controls allow for the early identification of potential fraud and misconduct. Whether manual or automated, these controls alert when violations occur – even if advertent. ”*

.....

the entity, the sensitivity of the activity and where it is occurring. These third parties should be made aware of and sign an agreement to comply with the corporation’s compliance rules, as well as any governing anti-corruption laws.

■ **Q. What advice can you offer to companies on implementing and maintaining a robust fraud and corruption risk management process, with appropriate internal controls?**

**HULSEY:** Internal controls allow for the early identification of potential fraud and misconduct. Whether manual or automated, these controls alert when violations occur – even if advertent.

The earlier that potential violations can be identified, the quicker they can be addressed and prevented from metastasising into larger issues. To ensure their effectiveness, controls must be regularly monitored. Predictive analytics is a new frontier in internal controls that holds great promise. Advancing technology provides opportunities to collect and analyse data from multiple sources, helping to identify risks in ways not previously possible, revealing, for example, whether an employee has travelled frequently to a high-risk country and engaged in high-value expenses, thus suggesting the need for further inquiry. ■

[www.kobrekim.com](http://www.kobrekim.com)

## KOBRE & KIM

Kobre & Kim is a conflict free, global law firm focused exclusively on disputes and investigations. With locations across the Americas, Asia, Europe, the Middle East and the Caribbean, it is the premier firm for providing clients with integrated, aggressive, multijurisdictional advocacy. It is aggressive and trial-ready and focused on the heart of any dispute. The team includes several former US Department of Justice prosecutors that regularly represent international clients in cross-border government enforcement actions, regulatory investigations, insolvency disputes and international asset tracing and recovery matters.

**SCOTT HULSEY**  
Lawyer  
+1 (202) 664 1904  
[scott.hulsey@kobrekim.com](mailto:scott.hulsey@kobrekim.com)