

# 5 Things To Watch For In FCPA Enforcement This Year

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Recognizing that prognostication is a fool's errand and mindful of our own unique limitations (having collectively gone four for 29 in our firm's football picking pool), here are five things we think lawyers and compliance professionals interested in the enforcement of the Foreign Corrupt Practices Act should look for in 2018.

(Note: Certain information set forth in this article contains “forward-looking information.” Except for statements of historical fact, information contained herein constitutes forward-looking statements. Forward-looking statements are provided to allow readers the opportunity to understand the authors' beliefs and opinions in respect of the future so that they may use such beliefs and opinions as one factor in evaluating future conduct. These statements are not guarantees of future outcomes and undue reliance should not be placed on them. Such forward-looking statements necessarily involve known and unknown risks and uncertainties, which may cause actual events in future periods to differ materially from any projections expressed or implied by such forward-looking statements. The reader is cautioned not to place undue reliance on forward-looking statements. In other words, we could well be completely wrong.)

## 1. There Will Be No “Trump Effect”

After much post-election hand-wringing in 2017 about whether FCPA enforcement would diminish radically under President Donald Trump, it's now safe to say that the basic paradigm — in place since at least the George W. Bush administration — has survived. Indeed, all signs point toward continued and vigorous enforcement of the FCPA by both the [U.S. Department of Justice](#) and the [U.S. Securities and Exchange Commission](#).

Even before the DOJ announced a new “FCPA Corporate Enforcement Policy” at the end of November, the pace and scope of enforcement actions by both the DOJ and SEC suggested that a “Trump effect” would not be forthcoming.

In 2017, the DOJ and SEC brought 27 corporate FCPA enforcement actions.<sup>1</sup> Although in 2016 the agencies brought twice that number (55 enforcement actions),<sup>2</sup> comparing annual enforcement activity isn't particularly meaningful, especially when considering the time required to investigate complex corporate

misconduct and bring such matters to a close. Corporate investigations of historical misconduct — especially where witnesses and documents are located abroad — can be lengthy endeavors. The majority of corporate FCPA investigations closed by the DOJ and SEC between 2006 and 2017 lasted more than two years, and about a quarter of investigations closed during the same period lasted five years or more.<sup>3</sup>

Moreover, it isn't unusual for enforcement activity to dip following a change in administration as final decisions in consequential cases are sometimes left for the new regime. Indeed, there is reason to believe that a number of long-simmering investigations are likely to resolve in 2018. Among them is the well-publicized investigation of [Wal-Mart Stores Inc.](#), which first disclosed its investigation of possible FCPA violations in 2011.<sup>4</sup>

Similarly, personnel is policy, and fears of a “Trump effect” are undercut by the fact that the government’s FCPA enforcement programs continue to be run by experienced career attorneys. The DOJ’s FCPA Unit is led by Dan Kahn, who has been a prosecutor in the unit since 2010. The new chief of the SEC’s FCPA Unit, Charles Cain, has been a supervisor in the unit since its formation in 2010 and has been with the SEC for more than 18 years.<sup>5</sup> Other supervisors in both units are all career attorneys, whose experience crosses multiple administrations. The experienced and capable leadership of both enforcement units are unlikely to dramatically shift — let alone abandon — the enforcement regime they’ve developed over the last several years.

## 2. It Is a Small World After All

The last several years have seen increased activity by foreign anti-corruption authorities, often in coordination with their counterparts in the United States. This trend is likely to continue, and may even accelerate. In April 2017, then-Acting Principal Deputy Assistant Attorney General Trevor N. McFadden lauded the DOJ’s work with foreign anti-corruption authorities, noting that “cooperation with our foreign partners has become a hallmark of our work.”<sup>6</sup>

Following the resolutions involving [Odebrecht SA](#) and [Braskem SA](#) at the end of 2016 — which involved coordinated actions by the United States, Brazil and Switzerland — 2017 saw continued global anti-corruption enforcement:

- U.K.-based [Rolls-Royce PLC](#) resolved cases with authorities in Brazil, the United Kingdom and the United States in January 2017, paying more than \$800 million to resolve corruption-related charges involving Brazil, Thailand, Kazakhstan, Angola, Azerbaijan and Iraq.<sup>7</sup> Announcing the resolution, the DOJ touted the “strong relationship” with the [U.K. Serious Fraud Office](#) and Brazil’s Ministério Público Federal, noting that the “global nature” of the violations required a “global response.”<sup>8</sup>
- Swedish telecommunications company Telia Co. AB resolved cases with authorities in the United States, Netherlands and Sweden in September, agreeing to pay nearly \$1 billion for its role in a

massive, multiyear bribery scheme involving high-level officials in Uzbekistan.<sup>9</sup>

- In November, Dutch oil services company [SBM Offshore NV](#) paid \$238 million and entered into a deferred prosecution for bribing government officials in Brazil, Angola, Equatorial Guinea and Iraq.<sup>10</sup> This followed a \$342 million settlement with Brazilian authorities in 2016, and an earlier \$240 million resolution with Dutch authorities in 2014.<sup>11</sup>

U.S. authorities don't have the market cornered on anti-corruption enforcement and these coordinated multi-jurisdictional enforcement actions have helped train and educate anti-corruption enforcers outside the United States. We are already seeing independent action by other regulators. For example, the U.K.'s Serious Fraud Office charged two executives of Monaco-based oil and gas company Unaoil in November 2017, marking the first charges since allegations first came to light about the company's role in widespread corruption.<sup>12</sup> The investigation is likely to continue into 2018, as public reports indicate that authorities in Australia and the U.S. are also investigating.

Likewise, in November 2016, the Indian Central Bureau of Investigation filed corruption charges against [Embraer SA](#) — which had resolved charges with the U.S. and Brazil in October 2016.<sup>3</sup> As the Indian investigation continues, reports indicate Indian authorities may be receiving cooperation from their counterparts, having received documents from the U.S. and other information from Switzerland and Singapore.<sup>14</sup>

Multijurisdictional investigations are complex, and recent enforcement actions show that authorities across the globe are ramping up their own enforcement efforts.

### **3. More Disclosed Misconduct — But More Declinations?**

At the end of November, Deputy Attorney General Rod Rosenstein announced a revised “FCPA Corporate Enforcement Policy” that formalized aspects of the 2016 FCPA pilot program into the United States Attorneys’ Manual, with some potentially significant tweaks.<sup>15</sup> Specifically, the policy creates a presumption that the DOJ will decline to bring an FCPA case when a corporation voluntarily self-discloses misconduct, fully cooperates with the DOJ investigation, timely and adequately remediates misconduct, and disgorges any ill-gotten profits.<sup>16</sup> The policy contains an important qualification, taking declinations off the table when “aggravating circumstances” exist. However, if such circumstances are present where a company has otherwise disclosed, cooperated and remediated, prosecutors will be required to recommend a 50 percent reduction off the low end of the sentencing guidelines fine range.

In announcing the new policy, Rosenstein explained that the DOJ was seeking to “provide incentives for companies to engage in ethical corporate behavior” and that the DOJ expected the new policy “to reassure

corporations that want to do the right thing.”<sup>17</sup> According to DOJ figures, during the 18 months of the pilot program, the DOJ received 30 voluntary disclosures — a two-thirds increase as compared with the prior 18 months.

It remains to be seen how exactly the DOJ will resolve cases under the new policy, especially in light of the considerable discretion still afforded to prosecutors in evaluating whether a company has met the requirements of “voluntary disclosure,” “cooperation” and “remediation.” And because of the requirement to disgorge ill-gotten profits, even companies who receive declinations will have to pay a penalty — which for public companies will mean having to contend with the SEC.

Nevertheless, the new policy offers greater certainty than the DOJ’s enforcement program previously offered, which may result in a changed calculus for companies considering whether to disclose — potentially leading to even more self-reports.

## **4. Effective Anti-Bribery Compliance Programs Will Become Even More Important**

In announcing the FCPA Corporate Enforcement Policy, Rosenstein placed corruption and financial crimes within the broader law enforcement context, explaining that robust compliance programs may actually free up law enforcement resources to focus on “different threats to the American people” by preventing corruption, and therefore the need for corruption enforcement.<sup>18</sup> This statement of purpose tied together the DOJ’s efforts since 2016 to emphasize the importance of corporate compliance. Going forward, compliance programs will grow in importance — and companies making significant efforts in this area are likely to keep seeing their efforts rewarded.

The DOJ’s February 2017 “Evaluation of Corporate Compliance Program” questions provided a more sophisticated, challenging take on the fundamental tenets of corporate compliance that the DOJ had long been applying. The questions were welcomed by the compliance community as a more nuanced approach to evaluating compliance programs within the context of a specific company.

Compliance programs will also continue to be important for companies caught in FCPA enforcement actions, as an effective program may be the only way to avoid a monitor. In November, the DOJ’s Dan Kahn stated that prosecutors would continue to impose corporate monitors on companies that do not have strong compliance programs.<sup>19</sup>

The continued sophistication of the DOJ in overseeing monitorships is apparent, where monitors will not simply come in and review a program arbitrarily. Instead, the DOJ is likely to continue to push monitors to be data driven by examining metrics to demonstrate the effectiveness of and improvements to a corporate wrongdoer’s compliance processes.

As we enter 2018, it's clear there won't be DOJ declinations without effective compliance programs, and the DOJ policy's expectations for effective compliance programs will influence best practices in this space.

## **5. DOJ Will Focus on Individual Liability — Executives Remain in the Crosshairs**

Our final prediction for 2018 has been on everyone's radar since at least the 2015 Yates memo: The DOJ will continue to focus on individual FCPA prosecutions. While commentators have noted that the results don't always match the rhetoric,<sup>20</sup> there have been significant individual prosecutions in recent years and the DOJ has indicated that this will remain a priority. Indeed, implicit in the leniency offered to corporations in the DOJ's FCPA Corporate Enforcement Policy is the notion that the DOJ will focus on its core mission of prosecuting "bad guys."

There were 19 convictions or guilty pleas involving FCPA violations in 2017 alone,<sup>21</sup> apart from the 16 other individuals criminally charged with violating the FCPA or related crimes.<sup>22</sup> These have included senior executives — such as the former CEO of SBM Offshore, whose guilty plea was also significant because he admitted to being willfully blind to bribes paid by his company.<sup>23</sup>

But it's not just Fortune 500 executives who will be held accountable for violating the law; the DOJ continues to prosecute violators who pay bribes even at smaller and privately held companies. 2017 saw further arrests and guilty pleas in connection with schemes to bribe officials in various countries for a variety of business benefits: businessmen in Texas who paid more than \$2 million to bribe Mexican officials in exchange for aviation maintenance contracts;<sup>24</sup> a total of 10 individuals who bribed officials at the Venezuelan state-owned oil company for contracts in a scheme that lasted from 2008 to 2012;<sup>25</sup> and the arrest of two former top officials from Hong Kong and Senegal on corruption charges related to bribery allegations involving Chad and Uganda on behalf of a Chinese energy company.<sup>26</sup> In addition, as demonstrated by the recent charges against retired [U.S. Army](#) colonel Joseph Baptiste for his alleged role in a conspiracy to bribe Haitian officials, the DOJ is employing more traditional law enforcement tools, including the use of undercover agents and wiretaps, to go after individuals engaged in corruption.<sup>27</sup>

The DOJ has also shown a willingness to take FCPA cases to trial — winning convictions at three jury trials in 2017, involving bribes paid to officials in Guinea<sup>28</sup>, South Korea<sup>29</sup>, and at the [United Nations](#).<sup>30</sup>

## **Conclusion**

These are our best predictions for FCPA enforcement in 2018. We hope that if they are revisited 12 months from now, we'll at least have gotten some of it correct. If not, we hope we'll be given the same slack

pollsters and political prognosticators were given after the 2016 presidential election.

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