

Anti-Corruption Developments: A Look Back on 2017, and Ahead to 2018

January 9, 2018

This past year, which marked the 40th anniversary of the Foreign Corrupt Practices Act (“FCPA”), saw significant anti-corruption developments in the United States and abroad, capped by the announcement of a new FCPA corporate enforcement policy by the U.S. Department of Justice (“DOJ”). As the year began with a new administration, however, there was initially some uncertainty as to how much the new administration would prioritize FCPA enforcement.¹ Perhaps wanting to put this concern to rest, President Trump’s appointees quickly emphasized that FCPA enforcement was “as alive as ever”² with Attorney General Jeff Sessions promising that the DOJ would “continue to strongly enforce the FCPA and other anti-corruption laws.”³ While there were fewer total FCPA corporate resolutions in 2017 than in 2016, the DOJ concluded two of the largest global settlements in FCPA history this year. The DOJ also demonstrated a continued and expanded focus on anti-corruption compliance, aided by its issuance in February of new guidance on how the DOJ would evaluate the effectiveness of compliance programs.

This memo examines some of these key FCPA developments in greater detail and provides our analysis of what their impact may be in 2018.

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¹ President Trump once condemned the FCPA as a “horrible law.” *Trump: Dimon’s Woes & Zuckerberg’s Prenuptial*, at 15:27 (CNBC television broadcast May 15, 2012, 7:30 AM), <https://www.cnbc.com/video/2012/05/15/trump-dimons-woes-zuckerbergs-prenuptial.html>.

² Trevor N. McFadden, Acting Principal Deputy Assistant Attorney Gen., DOJ, Criminal Div., Address at American Conference Institute’s 19th Annual Conference on Foreign Corrupt Practices Act (Apr. 20, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-justice-department-s>.

³ Attorney General Jeff Sessions, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>.



2017 FCPA Enforcement Actions and Settlements

In 2017 the DOJ and U.S. Securities and Exchange Commission (“SEC”) resolved a total of thirteen corporate FCPA investigations – including two declinations.⁴ Six of those were resolved in January 2017, before President Trump took office.⁵ Although the number of total settlements was less than in 2016, which was a record-setting year, 2017 still saw some of the largest FCPA settlements in history.

First, in mid-January, Rolls-Royce agreed to pay approximately \$170 million in criminal penalties to the DOJ and approximately \$800 million in global fines for its role in a bribery scheme spanning decades, involving payments to officials at state-owned oil companies in various countries for purposes of securing lucrative contracts.⁶ Second, Stockholm-based Telia Company AB (“Telia”) and its Uzbek subsidiary agreed to pay more than \$965 million to U.S., Swedish, and Dutch authorities in September 2017.⁷ The company admitted to paying more than \$331 million in bribes intended for high-level Uzbek officials over the course of several years.⁸ Notably, Telia was not required to engage a compliance monitor, nor was it required to report on its remediation of the underlying violations, based on its

implementation of an anti-corruption compliance program that satisfied U.S. authorities. Finally, December 2017 brought another large settlement, with Singapore-based Keppel Offshore & Marine Ltd. (“KOM”) and its U.S. subsidiary agreeing to pay \$422 million to resolve charges by authorities in the U.S., Brazil, and Singapore that KOM and its subsidiary paid millions of dollars in bribes to Brazilian officials.⁹

Each of these multi-jurisdictional resolutions continued the DOJ’s recent effort to coordinate global resolutions among interested authorities in other countries. Notably, this includes calculating a global penalty using the U.S. Sentencing Guidelines as a starting point, and then providing credit (at least to some extent) for payments made to other authorities. By way of example, although KOM agreed in its deferred prosecution agreement that a \$422 million fine under the Sentencing Guidelines was the appropriate total penalty, the DOJ agreed that KOM could receive “credit” for payments to authorities in Brazil and Singapore; the result was that the DOJ received only 25% of the total penalty, or approximately \$105.5 million.¹⁰

There are significant benefits for both the DOJ and the settling company in this approach. For a company, the possibility of a coordinated resolution,

⁴ The DOJ entered into resolutions with Keppel Offshore & Marine Ltd., SBM Offshore N.V. (and its U.S.-based subsidiary), Telia Company AB, CDM Smith, Inc. (declination), Linde North America Inc. (and Linde Gas North America LLC) (declination), Las Vegas Sands Corp., Rolls-Royce PLC, Sociedad Química y Minera de Chile, and JERDS Luxembourg Holdings S.A.R.L. (Zimmer Biomet Holdings Inc.). The SEC settled with Telia Company AB, Alere Inc., Halliburton, Orthofix International, Sociedad Química y Minera de Chile, Zimmer Biomet Holdings Inc., and Cadbury Limited/Mondelez international. See DOJ, *Chronological List, 2017*, Related Enforcement Actions, <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2017> (last visited Jan. 9, 2018); SEC, *2017*, SEC Enforcement Actions: FCPA Cases, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Jan. 9, 2018).

⁵ See *id.*

⁶ For Cleary Gottlieb’s alert memorandum on the Rolls-Royce settlement, see

<https://www.clearygottlieb.com/~media/organize-archive/cgsh/files/publication-pdfs/alert-memos/2017/alert-memo-201712.pdf>.

⁷ Press Release, DOJ, *Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More than \$965 Million for Corrupt Payments in Uzbekistan* (Sept. 21, 2017), <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965>.

⁸ *Id.*

⁹ Press Release, DOJ, *Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case* (Dec. 22, 2017), <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>.

¹⁰ *Id.*

along with a single total penalty based on the U.S. Sentencing Guidelines (which is ultimately divided among multiple authorities), serves as a potentially significant incentive to pursue a settlement, essentially providing the opportunity to pursue “global peace” and certainty at a single, lower overall cost. Such a global settlement also limits the number of times that a settlement will be reported in the media. For the DOJ, as well as authorities in other countries, a global approach to settlement puts pressure on the target of an investigation because of the increased cross-border interest to accept a settlement offer, and it can potentially accelerate settlements of long-running investigations that may be delayed by authorities working at different speeds, given their likely interest in sharing in the substantial payouts from any resolution. For authorities outside the U.S. in particular, this approach recognizes the interest those authorities have in investigating wrongdoing in their own countries. This global approach to settlements seems likely to continue the trend toward cross-border anti-corruption enforcement, signaling that coordination between U.S. authorities and their foreign

counterparts in corruption investigations will continue, if not increase, in 2018.

In addition to corporate settlements, the government charged twenty-two individual managers, executives, and intermediaries for FCPA violations: the DOJ charged nineteen individuals,¹¹ and the SEC charged three.¹² This continued focus on individual FCPA prosecutions by the DOJ is no surprise in light of the 2015 Yates Memo, which placed a greater emphasis on the prosecution of individual wrongdoers in corporate investigations.¹³

The New FCPA Corporate Enforcement Policy

In an effort to encourage self-reporting and increase transparency, in November 2017 the DOJ formalized and expanded the FCPA Pilot Program¹⁴ (which it extended after its one-year period expired) through the new Corporate Enforcement Policy (the “Enforcement Policy”).¹⁵ In announcing the new Enforcement Policy, Deputy Attorney General Rod Rosenstein characterized the Pilot Program as a successful step forward and explained that the

¹¹ Defendants included: Juan Jose Hernandez Comerma, Charles Quintard Beech III, Fernando Ardila-Rueda, Joo Hyun Bahn, Ban ki Sang, Malcolm Harris, Sang Woo, Aloysius Johannes Jozef Zuurhout, Keith Barnett, James Finley, Petros Contoguris, Andreas Kohler, Joseph Baptiste, Robert Zubiate, Anthony Mace, Chi Ping Patrick Ho, Cheikh Gadio, Colin Steven, and Jeffrey Chow. See DOJ, *Chronological List, 2017, Related Enforcement Actions*, <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2017> (last visited Jan. 9, 2018); see also Press Release, United States Attorney’s Office for the Southern District of New York, *Four Individuals Charged in Foreign Bribery and Fraud Scheme Involving Potential \$800 Million International Real Estate Deal for South Korean Company* (Jan. 10, 2017) <https://www.justice.gov/usao-sdny/pr/four-individuals-charged-foreign-bribery-and-fraud-scheme-involving-potential-800>.

¹² The SEC charged Michael L. Cohen, Vanja Baros, and Jeannot Lorenz. Press Release, SEC, *SEC Charges Two Former Och-Ziff Executives with FCPA Violations* (Jan. 26, 2017), <https://www.sec.gov/news/pressrelease/2017-34.html>; Press Release, SEC, *Halliburton Paying \$292.2 Million to Settle FCPA Violations* (July 27, 2017), <https://www.sec.gov/news/press-release/2017-133>.

¹³ Notably, Trevor McFadden has also warned that “while [the DOJ] often charge[s] foreign bribery under the FCPA, when [it] cannot, there are several other legal theories [it] can use to prosecute both the briber and the bribe recipient,” such as money laundering, conspiracy, or mail and wire fraud, among others. Trevor N. McFadden, Acting Principal Deputy Assistant Attorney Gen., DOJ, Criminal Div., Address at American Conference Institute’s 7th Brazil Summit on Anti-Corruption (May 24, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

¹⁴ For Cleary Gottlieb’s alert memorandum regarding the Pilot Program, see <https://www.clearygottlieb.com/~media/organize-archive/cgsh/files/publication-pdfs/alert-memos/alert-memo-pdf-version-201643.pdf>.

¹⁵ For Cleary Gottlieb’s alert memorandum regarding the Enforcement Policy, see <https://www.clearygottlieb.com/~media/organize-archive/cgsh/files/2017/publications/alert-memos/doj-releases-fcpa-corporate-enforcement-policy-12-1-17.pdf>.

Enforcement Policy was designed to provide greater clarity for companies attempting to determine the appropriate course when faced with a potential FCPA issue, regarding the benefits of self-reporting (and the downsides of not doing so).¹⁶

Reflecting its more permanent character, the Enforcement Policy differs in a few significant ways from its predecessor. Most importantly, the Enforcement Policy provides a presumption that companies meeting the requirements of voluntary self-disclosure, full cooperation, and timely and appropriate remediation will receive a declination (unlike the Pilot Program, which only provided that such companies would be eligible for a declination).¹⁷ This presumption is only overcome when there are aggravating circumstances related to the nature of the offense (such as the involvement of senior management, or the extent and pervasiveness of the misconduct), or if the company is a recidivist.¹⁸ Even if aggravating circumstances exist, however, a company that meets the other requirements will be entitled to a recommendation of a 50% reduction from the low end of the fine recommended by the Sentencing Guidelines.¹⁹ Moreover, provided the company has implemented an effective compliance program and conducted full remediation, no corporate monitor will be required.²⁰ Finally, the Enforcement Policy provides that even companies that did not voluntarily disclose misconduct will be entitled to a 25% reduction from the low end of the fine recommended by the Sentencing Guidelines, if they cooperate with the DOJ and undertake appropriate remedial measures.²¹

At the same conference at which he announced the Enforcement Policy, Rosenstein reported that there had been thirty voluntary

disclosures by companies in the eighteen month period since the Pilot Program's enactment, compared with eighteen voluntary disclosures in the eighteen months prior to its enactment.²² This suggests that the DOJ's continued push for voluntarily disclosure is having an impact, and the Enforcement Policy seems designed to further this goal.

Guidance on DOJ's Evaluation of Compliance Programs

One other aspect of the Enforcement Policy warrants further discussion—to receive full mitigation credit, the DOJ requires companies to have implemented an effective compliance program. The Enforcement Policy explains that the DOJ will consider a company's "culture of compliance," as measured by the resources the company has dedicated to compliance, the stature and experience of relevant compliance personnel, the independence and oversight of the compliance function, and the effectiveness of its risk assessment, reporting mechanisms and policies, procedures and training, among other factors. Notably, the Enforcement Policy additionally contemplates that companies will perform a "root cause" analysis to determine, and then remediate, the cause of the underlying misconduct.

This continued emphasis on compliance programs in the Enforcement Policy (and before that, in the Pilot Program and even the FCPA Resource Guide) is not surprising. In February 2017, DOJ's Fraud Section published further helpful information on this issue, in the form of a memorandum entitled "Evaluation of Corporate Compliance Programs" (the "Guidance") identifying some of the key questions that it may ask in reviewing the effectiveness of a company's compliance efforts.²³ While meant as a complement to other sources such as the U.S.

¹⁶ Deputy Attorney General Rod J. Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

¹⁷ USAM § 9-47.120(1).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See* USAM § 9-41.120(1).

²¹ *Id.* § 9-41.120(2).

²² *See supra* note 16.

²³ DOJ, *Evaluation of Corporate Compliance Programs*, <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

Attorney's Manual and the Sentencing Guidelines, the Guidance demonstrates an increased emphasis on process and evidence, focusing on the steps companies take to identify and meet compliance objectives, as well as the data they collect to evaluate the effectiveness of their compliance programs. The Guidance ultimately takes the form of 119 questions, covering the following 11 topics: (1) analysis of the cause, and remediation of, underlying misconduct (i.e., the root cause analysis described above); (2) senior and middle management conduct, commitment, and oversight; (3) autonomy and resources of the compliance function; (4) policies and procedures (including regarding design and accessibility, as well as operational integration); (5) risk assessment processes; (6) compliance training and communications about the underlying misconduct; (7) reporting mechanisms and internal investigations; (8) incentives and disciplinary measures; (9) continuous improvement, periodic testing and review; (10) third party management; and (11) processes with respect to mergers and acquisitions.

While the Guidance is not specific to the FCPA, companies would be wise, as part of any ongoing analysis of an anti-corruption program's effectiveness, to use the questions as a benchmark. A company with a compliance program that rates well when evaluated under the Guidance is more likely to avoid the appointment of a corporate monitor—a costly and potentially burdensome obligation—if the company ever seeks to resolve an FCPA investigation with the DOJ. More generally, of course, an effective compliance program allows companies to detect and prevent misconduct, and respond more effectively to misconduct that is detected, which puts the company in a better position to self-report—something that may be particularly helpful under the new Enforcement Policy.

International Developments

In addition to the continued growth of cross-border investigations and multi-jurisdictional settlements that we describe above, 2017 also saw a number of other countries implement, or enhance, anti-

corruption legislation. For multinational companies, this obviously means greater risk and possibly greater exposure in the event of misconduct. Among the significant legal developments in 2017 were the following:

- China amended its Anti-Unfair Competition Law to expand the scope of liability for commercial bribery, create vicarious liability for employers, increase penalties, and increase the supervisory and investigatory powers of China's State Administration for Industry and Commerce.
- Australia's Attorney General proposed amendments to Australia's existing foreign bribery laws, which would significantly expand the scope of laws already on the books, and create a new, distinct offense to be applied to corporations that fail to prevent foreign bribery.
- In August 2017, Brazil's Chamber of Federal Prosecutors released new guidelines for Brazilian federal prosecutors in negotiating and ratifying leniency agreements, which are a relatively recent mechanism for resolving corruption investigations in Brazil. These guidelines standardize the measures that companies must agree to as part of the negotiation of any leniency agreement, and set forth the information that must be provided in the leniency agreement, as well as the process by which such agreements are ratified and published.
- A number of other Latin American countries enacted new anti-corruption legislation: (1) Peru passed the Corporate Corruption Act, which went into effect on January 1, 2018; (2) Mexico enacted the General Law for Administrative Responsibility, which went into effect in July 2017; and (3) Argentina passed the Law on Corporate Criminal Liability and Compliance Programs, which went into effect in November 2017. These statutes share certain common characteristics, such as allowing local authorities to impose significant penalties on corporations for

bribing public officials, and include leniency-type programs to encourage self-reporting and provide credit for maintaining an effective anti-corruption compliance program (including as an absolute defense to liability in some instances).

More generally, because anti-corruption laws are on the books in countries around the world, companies with worldwide operations should aim to enact global compliance standards both to prevent misconduct and to best position themselves in dealing with foreign authorities should an issue arise. Relatedly, one way that companies have sought to standardize and globalize their anti-corruption compliance programs is through the use of ISO 37001, which was published by the International Organization for Standardization in late 2016. While there is no indication that the DOJ or SEC will accept an ISO 37001 certification as proof that a compliance program is effective, major companies with worldwide operations such as Walmart and Microsoft have publicly announced that they are seeking certification.²⁴ It is worth watching whether the standard continues to gain traction.

Looking Ahead: Key Questions for 2018

Looking ahead to 2018, the developments of 2017, both in the U.S. and abroad, raise a number of questions about potential issues to keep an eye on in the coming year.

First, will the DOJ and the SEC continue to prioritize FCPA investigations? Many of the 2017 FCPA settlements were announced by the DOJ and the SEC before the new administration took office, and even the settlements that were announced after January 2017 were likely in process under the Obama-

administration Justice Department. A larger data set of cases (some of which will have been initiated or substantially advanced under the new administration) will help answer that question. Again, all signs—from the new Enforcement Policy, to the continued staffing levels in the Fraud Section, to statements by senior DOJ and SEC officials—point to the continued prioritization of these cases.

Second, how will the new Enforcement Policy be applied in practice? The presumption of a declination is an important adjustment to the Pilot Program, but as discussed, the presumption may not apply where there are aggravating circumstances, and there is significant room for interpretation about what qualifies as an aggravating circumstance. Further decisions under the new Enforcement Policy, either in the form of declinations or enforcement actions, should help shed light on how the DOJ will apply these factors.

Third, how much of an impact will the Supreme Court's decision in *Kokesh v. SEC*,²⁵ which imposed a five-year statute of limitations on the availability of disgorgement, have on the SEC's ability to impose significant penalties for FCPA violations? Steven R. Peikin, the Co-Director of the SEC's Enforcement Division, has said that "one of the principal challenges" the SEC's FCPA Unit faces is "the interplay between the length of time it takes to conduct an FCPA investigation and the statute of limitations," particularly after *Kokesh*.²⁶ While *Kokesh* may lead the SEC to accelerate its investigative process, for companies, the SEC will likely be able to address timing concerns by seeking tolling agreements to stop the running of the statute of limitations. In practice, therefore, *Kokesh* may have a greater impact on enforcement actions against individuals.

²⁴ Kristy Grant-Hart & Diana Trevley, *Microsoft and Wal-Mart Seek ISO 37001 Anti-Bribery Certification* (May 11, 2017, 8:28 AM), <http://www.fcpablog.com/blog/2017/5/11/microsoft-and-wal-mart-seek-iso-37001-anti-bribery-certifica.html>.

²⁵ *Kokesh v. SEC*, 581 U.S. __ (2017); for Cleary Gottlieb's alert memorandum on *Kokesh v. SEC*, see <https://www.clearygottlieb.com/~media/organize->

<archive/cgsh/files/2017/publications/alert-memos/supreme-court-applies-fiveyear-statute-of-limitations-to-sec-6-6-17.pdf>.

²⁶ Steven R. Peikin, Co-Director, Enforcement Division SEC, Address at New York University School of Law (Nov. 9, 2017) <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

Finally, how will the rapid pace of developments outside of the United States continue to impact cross-border anti-corruption investigations?

Ultimately, regardless of how much we learn about the answer to these questions in 2018, companies should continue to maintain effective compliance programs. Such programs will serve as a defense to enforcement in some countries, will be key to securing a more favorable resolution in the United States, and, perhaps most importantly, will enable companies to develop and maintain a reputation for ethical behavior.²⁷

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²⁷ This Alert Memorandum was prepared with the assistance of Nicholas J. Karasimas and Kylie M. Huff.