United States Anti-Corruption Enforcement:

Highlights and Trends at the End of the Obama Administration and Potential Changes under the Trump Administration

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Introduction

In the closing weeks of the Obama administration, enforcement officials punctuated efforts to crack down on violations of the Foreign Corrupt Practices Act (FCPA) by concluding approximately a dozen high-profile settlements involving more than $1 billion in monetary penalties. That came on the heels of a blockbuster year for the US Government, which neared record levels of anti-corruption enforcement, in terms of both the number of cases settled and the total value of penalties assessed.

The flurry of activity came after a relative lull in anti-corruption enforcement in 2015, suggesting that a number of ongoing investigations from prior years were brought to a conclusion in 2016. The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) concluded 56 FCPA enforcement actions in total last year,[1] including 4 of the 10 largest settlements in FCPA history.[2] The enforcement boom was the product of both greater international collaboration between and among enforcement authorities and dedication of additional resources by the US Government.[3]

While the trend of robust enforcement is likely to continue in the near term as investigations initiated under the Obama administration are concluded during the early stages of the new Trump administration, the change in administration also may signal change for US anti-corruption efforts. In particular, the Trump administration may shift or reduce anti-corruption enforcement resources. For example, the administration has already implemented a hiring freeze for all federal employees other than defence and safety personnel, likely to chill further plans for relevant government agencies to continue adding personnel.[4] Discussing the FCPA in a 2012 interview, Donald Trump stated, "It's a horrible law, and it should be changed", as it puts US companies at a disadvantage in the global market.[5] It is not clear whether, and to what extent, President Trump's views may change now, and analysis of the new administration's initial stated objectives might indicate a continuation of strong anti-corruption enforcement.

This article highlights key enforcement actions from the final year of the Obama administration and discusses trends in international co-operation, voluntary self-disclosure and individual prosecution. It also draws on past commentary by members of the incoming administration to identify potential shifts in the US Government's approach. If the last year provides any indication as to future enforcement efforts, companies must be diligent in assessing their anti-corruption compliance policies and practices.

Key enforcement actions

Prosecuting companies and individuals for violations of the FCPA continued to be a priority under the Obama administration in 2016 and early 2017. Including international resolutions, the past year featured more anti-corruption enforcement than ever before, with corporate sanctions for corruption and bribery exceeding $6 billion.[6] The DOJ and SEC collected more than $2.6 billion in penalties and disgorgement, the most since 2008.[7] The DOJ and the SEC reached some of the largest anti-corruption resolutions ever, as the Obama administration sought to finalise cases in industries such

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[1] See Kristen Savelle, "The FCPA in 2016: Analyzing the Numbers" (23 January 2017), *Wall Street Journal*, *http://blogs.wsj.com/riskandcompliance/2017/01/23/the-fcpa-in-2016-analyzing-the-numbers/* [Accessed 17 March 2017].

[2] See subsections "Odebrecht and Braskem", "Teva Pharmaceutical Industries", "VimpelCom" and "Och-Ziff Capital management" below.

[3] US Dep't of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (5 April 2016), *https://www.justice.gov/opa/file/838386/download* [Accessed 17 March 2017]. In guidance announcing the addition of 10 new prosecutors to the Fraud Section's FCPA Unit, the DOJ advised, "The Department's demonstrated commitment to devoting additional resources to FCPA investigations and prosecutions should send a message to wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light".

[4] White House, "Presidential Memorandum Regarding the Hiring Freeze" (23 January 2017), *https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-hiring-freeze* [Accessed 17 March 2017].

[5] CNBC, "Trump: Dimon's Woes & Zuckerberg's Prenuptial (15 May 2012), *http://video.cnbc.com/gallery/?video=3000089630* [Accessed 17 March 2017].

[6] See Shearman & Sterling LLP, *FCPA Digest* (January 2017), *http://www.shearman.com/~/media/Files/NewsInsights/Publications/2017/01/January-2017--FCPA-Digest-011117.pdf* [Accessed 17 March 2017].

[7] See Savelle, "The FCPA in 2016" (23 January 2017), *Wall Street Journal*, *http://blogs.wsj.com/riskandcompliance/2017/01/23/the-fcpa-in-2016-analyzing-the-numbers/* [Accessed 17 March 2017].

as finance, communications, pharmaceuticals, oil and gas, and even sports. Similar to past years, the overwhelming majority of enforcement actions involved improper payment made through agents, distributors, brokers and other third-party intermediaries, highlighting the threats involved in using such partners in countries and industries that pose a significant corruption risk.

Odebrecht and Braskem

Since initiating Operation Car Wash to examine corruption involving the state-controlled oil company Petrobras in 2014, the Brazilian Government has investigated dozens of companies and individuals and the scandal has touched the highest levels of the Brazilian Government.[8] The investigation uncovered, among many other instances of alleged misconduct, corruption on the part of construction conglomerate Odebrecht SA and its petrochemical subsidiary, Braskem SA. In December, the Brazilian Ministério Público Federal (MPF) teamed with US enforcement agencies and the Swiss Office of the Attorney General to secure guilty pleas from Odebrecht and Braskem that will result in the companies paying at least $3.5 billion to be split among the three governments.[9]

According to the charging documents, Odebrecht allegedly paid $788 million through shell companies and off-book accounts to government officials in several countries in order to win contracts. The company developed a standalone department—the "Division of Structured Operations"—to implement the scheme off the books and employees at the highest levels of the company allegedly participated. For its part, Braskem allegedly paid $250 million into the Division's payment system in exchange for various benefits from the Brazilian Government and Petrobras. The payoffs enabled the companies to bring in over $3.8 billion in profits.

At the heart of the case is a multi-jurisdictional effort targeting Odebrecht's alleged international bribery scheme. With the company allegedly making substantial payments in connection with more than 100 projects in 12 countries, collaboration among US, Swiss and Brazilian authorities enabled a comprehensive investigation around the world. Odebrecht did not voluntarily disclose the violations and, in fact, company officials were alleged to have destroyed evidence after learning of the Brazilian investigation. Nonetheless, subsequent co-operation with the US Government and the provision of significant information pursuant to Brazil's years-long investigation of Petrobras enabled Odebrecht to resolve the case in less than a year. In addition, both companies received co-operation credit, with Odebrecht receiving 25 per cent off the bottom of the range suggested by the Sentencing Guidelines for full co-operation and Braskem receiving 15 per cent off for partial co-operation.

The final fines are yet to be determined, as sentencing is scheduled for April 2017. Odebrecht agreed that $4.5 billion would be an appropriate criminal fine, but its initial analysis indicated that it had the capacity to pay only $2.6 billion. Braskem, meanwhile, has agreed to pay over $950 million in penalties and disgorgement to Brazilian, US and Swiss authorities. In the end, Brazil will collect 80 per cent of Odebrecht's penalties and 70 per cent of Braskem's payments, with US and Swiss agencies sharing the remainder. When announcing the enforcement actions, the DOJ emphasised the "significant cooperation" provided by government officials in Brazil and Switzerland.[10]

Teva Pharmaceutical Industries

Another of the largest FCPA settlements ever came just a day after Odebrecht and Braskem resolved their case in December, when the DOJ and the SEC settled with Teva Pharmaceutical Industries Ltd.[11] The Israeli company, the world's largest manufacturer of generic medication, was alleged to have paid significant bribes to government officials in Russia, Ukraine and Mexico—primarily through unaffiliated third-party distributors in those countries—enabling it to take in over $200 million in improper profits.

The US Government investigation centred on illicit payments to government officials, including government-employed doctors, in each of the three countries. In Russia, a Teva subsidiary was alleged to have paid high-ranking government officials to increase sales of a Teva multiple sclerosis drug through government auctions held by the Russian Ministry of Health. Teva also partnered with a repackaging and distribution company owned by a Russian official, resulting in more than $200 million in profits for Teva and another $65 million in profits for the Russian official's company.

Teva was also alleged to have made improper payments in Ukraine and Mexico. In the former instance, the company employed a senior Ukrainian Ministry of Health official as a "registration consultant", paying him more than $200,000 over 10 years to influence the registration

[8] See, e.g., Tom Schoenberg et al., "Brazil 'Carwash' Probe Yields Largest-Ever Corruption Penalty" (21 December 2016), *Bloomberg*, *https://www.bloomberg.com/news/articles/2016-12-21/odebrecht-braskem-agree-to-carwash-penalty-of-3-5-billion* [Accessed 17 March 2017].

[9] See US Dep't of Justice, "Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History" (21 December 2016), *https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve*; US Sec. & Exch. Comm'n, "Petrochemical Manufacturer Braskem S.A. to Pay $957 Million to Settle FCPA Charges" (21 December 2016), *https://www.sec.gov/news/pressrelease/2016-271.html* [Both accessed 17 March 2017].

[10] See US Dep't of Justice, "Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History" (21 December 2016), *https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve*; US Sec. & Exch. Comm'n, "Petrochemical Manufacturer Braskem S.A. to Pay $957 Million to Settle FCPA Charges" (21 December 2016), *https://www.sec.gov/news/pressrelease/2016-271.html* [Both accessed 17 March 2017].

[11] See US Dep't of Justice, "Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges" (22 December 2016), *https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt*; US Sec. & Exch. Comm'n, "Teva Pharmaceutical Paying $519 Million to Settle FCPA Charges" (22 December 2016), *https://www.sec.gov/news/pressrelease/2016-277.html* [Both accessed 17 March 2017].

of Teva products in Ukraine. Employees of Teva's Mexican subsidiary also admitted to paying bribes to government doctors to increase drug purchases there, which resulted in more than $16 million in business for Teva.

The US Government concluded the case by fining Teva and its subsidiaries more than $283 million as part of a deferred prosecution agreement and also collecting $236 million in disgorgement. The DOJ and the SEC found that Teva executives were aware of the improper payment schemes and failed to implement responsive anti-corruption policies prior to the Government's investigation. The company did not voluntarily self-disclose the violations, but it nevertheless received a reduced criminal fine in light of partial co-operation credit from the US Government (as the company's co-operation came only after what the Government described as "vastly overbroad" assertions of attorney-client privilege). Teva also agreed to implement new controls but will have an independent compliance monitor for three years.

Zimmer Biomet

The anti-corruption authorities continued their string of enforcement actions in early January 2017, when the Indiana-based medical device manufacturer Zimmer Biomet Holdings Inc agreed to pay more than $30 million to resolve FCPA investigations with the SEC and the DOJ for bribes paid to Mexican and Brazilian government officials through third-party distributors, customs brokers and sub-agents.[12] The company's second FCPA settlement, this resolution included a deferred prosecution agreement (DPA) with the DOJ along with civil penalties and disgorgement from the SEC.

In 2012, Biomet—which was acquired by Zimmer Holdings Inc in 2015—reached a DPA focusing on FCPA violations in Argentina, Brazil and China. The next year, the company discovered further violations in Brazil and Mexico and reported the misconduct to the independent monitor. The current investigation found that even after the initial DPA, Zimmer Biomet had continued to do business with a Brazilian distributor known to have paid bribes to government officials on the company's behalf in the past. In Mexico, the company failed to prevent its subsidiary from bribing customs officials through brokers and sub-agents to import contraband dental implants in violation of Mexican law.

The independent compliance monitor did not certify compliance at the end of the term imposed by the 2012 agreement and the new DPA will impose a monitor for three additional years. The company did notify the authorities of the violations and co-operated with the investigation and it ultimately agreed to pay $17.4 million in penalties to the DOJ along with $5.5 million in fines and another $5.5 million in disgorgement to the SEC.

Rolls-Royce

On 17 January 2017, the DOJ and anti-corruption authorities from the UK and Brazil announced an $800 million global settlement with the UK-based power system manufacturer Rolls-Royce Plc.[13] Another large-scale international investigation, the case emerged from co-operation between the DOJ, the UK's Serious Fraud Office (SFO) and Brazil's MPF, with assistance from authorities in Austria, Germany, the Netherlands, Singapore and Turkey.

The investigation focused on a series of FCPA violations that Rolls-Royce allegedly committed between 2000 and 2013. The DOJ cited $35 million in bribes through third parties to foreign officials in multiple countries. In several cases, Rolls-Royce funnelled millions in bribes through intermediaries in exchange for lucrative contracts in the oil and gas industry. In Azerbaijan, for example, Rolls-Royce admitted to having paid over $7.8 million to government officials, allowing it to win several contracts that brought in over $50 million in profits.

The largest portion of the resolution was with the SFO, which initiated the investigation and cited international corruption from 1989 to 2013. As part of that settlement, the company entered into a DPA and agreed to pay a total fine of more than $600 million. The MPF fined the company more than $25 million for bribes to Brazilian officials, which was credited against the DOJ's penalty of over $195 million.

In entering into a DPA with Rolls-Royce, the DOJ indicated that the company had not reported the violations until the media had begun reporting on the conduct and the SFO had initiated its investigation. Rolls-Royce did, however, co-operate with the investigation and eventually took significant remedial measures, improved its compliance policies and implemented new controls to address corruption risks.

VimpelCom

Earlier in 2016, US and Dutch regulators reached a global settlement with VimpelCom Ltd, requiring the telecommunications giant to pay more than $795 million in total penalties and disgorgement.[14] The case focused on the company's violations of both the FCPA and Dutch anti-corruption laws, as the authorities alleged that VimpelCom used sham contracts and acquisitions to

[12] See US Dep't of Justice, "Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges" (12 January 2017), *https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act*; US Sec. & Exch. Comm'n, "Biomet Charged with Repeating FCPA Violations" (12 January 2017), *https://www.sec.gov/news/pressrelease/2017-8.html* [Both accessed 17 March 2017].

[13] See US Dep't of Justice, "Rolls-Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case" (17 January 2017), *https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act* [Accessed 17 March 2017].

[14] See US Dep't of Justice, "VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme" (18 February 2016), *https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million*; US Sec. & Exch. Comm'n, "VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations" (18 February 2016), *https://www.sec.gov/news/pressrelease/2016-34.html* [Both accessed 17 March 2017].

provide over $114 million to a shell company owned by a government official in Uzbekistan, all with the knowledge of the company's senior management.

In reaching the settlement, finalised in February, the DOJ emphasised the role of foreign anti-corruption regulators from around the world, with "significant cooperation and assistance" from officials in the Netherlands, Sweden, Switzerland and Latvia, in addition to further support from more than a dozen other jurisdictions. The settlement required VimpelCom to pay nearly equal penalties to American and Dutch regulators, with $397.5 million going to the Dutch Prosecution Authority, $230.1 million to the DOJ and $167.5 million to the SEC.

As part of the DOJ's criminal prosecution, which focused on anti-bribery, books and records, and internal controls violations of the FCPA, the company agreed to implement stronger controls, retain a compliance monitor and co-operate with the DOJ's ongoing investigation. The DOJ reported crediting VimpelCom for promptly acknowledging wrongdoing and co-operating with the case, resulting in a 45 per cent discount off the bottom of the penalty range suggested by the Sentencing Guidelines as part of the DPA.

Och-Ziff Capital Management

Last year also marked the first time the Government charged a hedge fund with FCPA violations. In September, the DOJ and the SEC brought enforcement actions against Och-Ziff Capital Management Group LLC, two of its executives and a subsidiary for bribing government officials in several countries for special access to investment opportunities.[15] Och-Ziff was required to pay a criminal penalty of more than $213 million and disgorge nearly $200 million. As part of the settlement, the SEC also reached individual resolutions with two company executives, including requiring CEO Daniel Och to pay nearly $2.2 million in disgorgement of profits for his role in the bribery scheme. On 26 January 2017, the SEC filed a complaint against two additional former Och-Ziff executives alleging that they violated the FCPA in their individual capacity by causing bribes to be paid to African government officials.[16]

The Government alleged that Och-Ziff, a New York-based investment and hedge fund manager and a subsidiary paid bribes to officials in Libya, the Democratic Republic of the Congo (DRC), Chad and Niger. In Libya, the Government alleged that Och-Ziff paid a third party to aid in securing an investment from the Libyan Investment Authority, the nation's sovereign wealth fund. The company secured a $300 million investment from the fund and, in exchange, it paid the agent a $3.75 million fee that it knew would be passed along to government officials. In the DRC, Och-Ziff was alleged to have engaged with a businessman that it knew had special access to the nation's diamond and mining sectors because of bribes to government officials. Pursuant to the scheme, the businessman paid millions to DRC officials in exchange for investments resulting in $90 million in profits for the company. The Government also asserted internal control failures leading to improper payments in all four countries.

Och-Ziff entered into a DPA with the DOJ and its subsidiary pleaded guilty to FCPA violations. For its anti-bribery, books and records, and internal controls violations, the company agreed to retain a compliance monitor for three years. It did not voluntarily self-disclose the violations but did co-operate sufficiently to earn a 20 per cent criminal penalty reduction off the bottom of the penalty range suggested by the Sentencing Guidelines.

FIFA

The US Government also engaged in significant anti-corruption enforcement activity outside the scope of the FCPA, particularly by continuing to issue indictments and secure guilty pleas as part of a broad investigation initiated in May 2015 focusing on racketeering, fraud and money laundering on the part of high-ranking international soccer officials of the Fédération Internationale de Football Association (FIFA).[17] The Government does not appear to be pursuing violations pursuant to the FCPA and instead is prosecuting defendants under the Racketeer Influenced and Corrupt Organizations Act (RICO) by classifying FIFA as a criminal syndicate. The Government has asserted jurisdiction because the soccer officials allegedly held meetings in the US and used the US financial system in furtherance of their bribery scheme.

After 41 defendants were indicted in 2015 for dozens of criminal charges involving bribery for media and marketing rights, 2016 saw the prosecution of several more prominent officials. In March, the DOJ announced that the former president of the Honduran soccer federation had pleaded guilty to racketeering and corruption for accepting bribes in exchange for media rights to FIFA World Cup qualifying matches.[18] His

[15] See US Dep't of Justice, "Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine" (29 September 2016), *https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213*; US Sec. & Exch. Comm'n, "Och-Ziff Hedge Fund Settles FCPA Charges" (29 September 2016), *https://www.sec.gov/news/pressrelease/2016-203.html* [Both accessed 17 March 2017].

[16] See *SEC v Cohen and Baros*, Case 1:17-cv-00430-PKC-LB, Complaint (26 January 2017).

[17] See US Dep't of Justice, "Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption" (27 May 2015), *https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and*; Leon Siciliano and Sophie Jamieson, "Fifa: A timeline of corruption — in 90 seconds" (22 March 2016), *The Telegraph*, *http://www.telegraph.co.uk/football/2016/03/22/fifa-a-timeline-of-corruption---in-90-seconds/*[Both accessed 17 March 2017].

[18] See US Dep't of Justice, "Former President of Honduran Soccer Federation Pleads Guilty to Racketeering and Corruption Charges" (28 March 2016), *https://www.justice.gov/usao-edny/pr/former-president-honduran-soccer-federation-pleads-guilty-racketeering-and-corruption* [Accessed 17 March 2017].

counterparts in Guatemala, Costa Rica and Nicaragua followed suit for similar charges.[19] In October, a US sports marketing executive pleaded guilty to racketeering and corruption for bribes to high-ranking officials at FIFA and other soccer federations in exchange for media contracts, and an Argentine sports marketing company agreed to pay over $112 million for racketeering in December.[20]

Trends in anti-corruption enforcement

Beyond the sheer quantity of expansive enforcement actions, the US Government provided significant guidance regarding its enforcement practices throughout the final year of Barack Obama's presidency. The aforementioned enforcement actions demonstrate perhaps the most significant trend in anti-corruption enforcement over the last year: increasing co-operation among international enforcement agencies and greater enforcement of anti-corruption laws by foreign authorities. In addition, the US agencies have continued their emphasis on voluntary self-disclosure of violations and the DOJ announced its FCPA pilot programme, laying out guidelines for voluntary self-disclosure, in April. Finally, the Government has maintained the focus on individual prosecutions that it began to emphasise in 2015.

Growing international enforcement

The rising tide of collaboration among international corruption enforcement agencies reached a new apex in the Odebrecht and Braskem resolution, but the trend had been apparent for some time. In public remarks, high-level enforcement officials in the US have repeatedly emphasised an increase in engagement between US government agencies and their foreign counterparts in the prosecution of corruption.

In a March 2016 speech, Assistant Attorney-General Leslie R. Caldwell said: "To address crime on a global scale, we are forging deep coalitions with our international enforcement and regulatory partners."[21] The SEC Enforcement Division director, Andrew Ceresney, added in November:

> "Collaboration with international regulators and law enforcement is critical to our success in the FCPA space. As global markets become more interconnected and complex, no one country or agency can effectively fight bribery and corruption alone."[22]

Kara Brockmeyer, chief of the SEC Enforcement Division's FCPA Unit, remarked in November that the US Government had worked with two dozen foreign anti-corruption offices during 2016, a new high.[23] As international enforcement collaboration becomes the new normal, companies face new considerations in assessing risk. First, government officials have advised companies of the practice of sharing information with foreign counterparts: if a company discloses information to US enforcement agencies, foreign enforcement authorities are now likely to have access to the same information.[24] In addition, officials have advised against "forum shopping" by attempting to resolve cases in friendly jurisdictions.[25] While the DOJ has indicated that it will credit companies for settlements in other countries, it will do so only to the extent that a resolution addresses the concerns of jurisdictions with the most interest, as occurred in the Odebrecht/Braskem case.[26]

Some questions remain regarding international enforcement practices. While some anti-corruption offices are beginning to keep pace with the US enforcement agencies, other countries have not yet adopted effective anti-corruption mechanisms. Furthermore, while multilateral settlements can allow a company to resolve charges in several countries at once, companies attempting to secure a full resolution have little guarantee against piling on by other countries. Legal and logistical obstacles to discovery in foreign offices may also present practical challenges to enforcement agencies engaging in international investigations.

Voluntary self-disclosure of violations

While the US Government consistently has encouraged voluntary self-disclosure of violations, the practice came to the fore in April 2016 when the DOJ announced a

[19] See US Dep't of Justice, "Former President of Guatemalan Soccer Federation Pleads Guilty to Racketeering and Corruption Charges" (29 July 2016), *https://www.justice.gov/usao-edny/pr/former-president-guatemalan-soccer-federation-pleads-guilty-racketeering-and-corruption*; US Dep't of Justice, "Former President of Costa Rican Soccer Federation and Member-Elect of the FIFA Executive Committee Pleads Guilty to Racketeering and Corruption Charges" (7 October 2016), *https://www.justice.gov/usao-edny/pr/former-president-costa-rican-soccer-federation-and-member-elect-fifa-executive*; US Dep't of Justice, "Former President of the Nicaraguan Soccer Federation and FIFA Development Officer Pleads Guilty to Racketeering and Corruption Charges" (7 December 2016), *https://www.justice.gov/usao-edny/pr/former-president-nicaraguan-soccer-federation-and-fifa-development-officer-pleads* [All accessed 17 March 2017].

[20] See US Dep't of Justice, "American Sports Marketing Executive Pleads Guilty to Racketeering and Corruption Charges" (20 October 2016), *https://www.justice.gov/usao-edny/pr/american-sports-marketing-executive-pleads-guilty-racketeering-and-corruption-charges*; US Dep't of Justice, "Argentine Sports Marketing Company Admits to Role in International Soccer Bribery Conspiracy and Agrees to $112 Million in Forfeiture and Criminal Penalties" (13 December 2016), *https://www.justice.gov/usao-edny/pr/argentine-sports-marketing-company-admits-role-international-soccer-bribery-conspiracy* [Both accessed 17 March 2017].

[21] Leslie R. Caldwell, Assistant Att'y Gen., US Dep't of Justice, Speech at American Bar Association's 30th Annual National Institute on White Collar Crime (4 March 2016), *https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-bar-association-s-30th* [Accessed 17 March 2017].

[22] Andrew Ceresney, director, Div. of Enf't, US Sec. & Exch. Comm'n, Keynote Speech at ACI's 33rd International Conference on the FCPA (30 November 2016), *https://www.sec.gov/news/speech/speech-ceresney-113016.html* [Accessed 17 March 2017].

[23] Kara Brockmeyer, Foreign Corrupt Practices Act Unit chief, US Sec. & Exch. Comm'n, Panel Remarks at ACI's 33rd International Conference on the FCPA (30 November 2016).

[24] Andrew Weissmann, chief, Fraud Section, Criminal Div., US Dep't of Justice, Panel Remarks at ACI's 33rd International Conference on the FCPA (1 December 2016).

[25] Weissmann, Panel Remarks at ACI's 33rd International Conference on the FCPA (1 December 2016).

[26] Weissmann, Panel Remarks at ACI's 33rd International Conference on the FCPA (1 December 2016).

one-year FCPA "pilot program".[27] Enforcement officials long have underscored the value of voluntary self-disclosure, but the new pilot programme formalises several benefits to companies that proactively disclose potential FCPA violations. By the end of the one-year period (in April 2017), the DOJ will determine whether to extend the programme and whether it should be modified based on the prior year's experience—as of the date of this article, no decisions had been made yet.

The pilot programme grants a discount of up to 50 per cent off the bottom of the penalty range suggested by the Sentencing Guidelines for companies that timely and voluntarily self-disclose FCPA violations, fully co-operate with enforcement authorities and carry out remedial efforts in a timely and appropriate manner. In order to benefit under the programme, companies must discipline employees responsible for FCPA violations, as well as implement a compliance programme that will reduce the risk of future violations. DOJ officials have also emphasised their goal of resolving pilot programme investigations within a year, though the initial memorandum announcing the programme did not specify such a timeline.

In the eight months since the DOJ launched the pilot programme, the DOJ has publicised five declinations in cases involving voluntary self-disclosure (and other companies have reported declinations by the DOJ and SEC, but the US Government did not publicly confirm such actions).[28] The first public declinations occurred in June, as the DOJ issued letters to Akamai Technologies Inc, Nortek Inc and Johnson Controls Inc, indicating that it would not proceed with prosecutions of apparent bribery.[29] In each case, the DOJ highlighted the companies' self-disclosure and subsequent co-operation and full remediation. Two months later, the DOJ issued declinations to HMT LLC and NCH Corp that required each to disgorge profits emerging from apparent corruption on the part of their employees.[30] The cases exhibited mostly the same characteristics as the previous declinations, but all three companies receiving declinations in June had previously agreed to disgorge profits to the SEC.

While the pilot programme applies only to FCPA investigations by the DOJ Fraud Section, officials have similarly highlighted the value of voluntary self-disclosure to the SEC. After a former SAP SE executive made bribery payments in exchange for lucrative contracts, the company voluntarily disclosed the apparent violations to the SEC.[31] In February, the SEC issued an order requiring SAP to pay disgorgement but did not include a penalty, which SEC officials said was partially because of the company's self-disclosure. The SEC also reported crediting Nordion Inc and AstraZeneca Plc for similar disclosures of apparent FCPA violations.[32]

For further evidence of the benefits of self-disclosure, co-operation and remediation, SEC enforcement officials have also pointed to the agency's investigation of Anheuser-Busch InBev SA/NV (AB InBev).[33] In an order issued in September, the SEC required AB InBev to disgorge more than $2.7 million in profits stemming from a subsidiary's scheme to improperly influence government officials through third-party sales promoters and the company's imposition of restrictions on whistleblowing.[34] In addition to disgorgement, though, the order required AB InBev to pay more than $3 million in penalties because the company did not disclose the misconduct until after the SEC's investigation began and did not engage in comprehensive remedial action for years after the misconduct was discovered. The AB InBev case also demonstrates the Government's interest in encouraging whistleblowers to come forward: in fiscal year 2016, the SEC received nearly 240 whistleblower tips pertaining to the FCPA.[35] The SEC issued $57 million in whistleblower awards in fiscal year 2016[36]—more than all previous years combined—and while the agency keeps whistleblower information confidential, reports indicated that it paid the first FCPA-related award of $3.5 million in May 2016.[37]

[27] US Dep't of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (5 April 2016), *https://www.justice.gov/criminal-fraud/file/838416/download* [Accessed 17 March 2017].

[28] See US Dep't of Justice, "Declinations", *https://www.justice.gov/criminal-fraud/pilot-program/declinations* [Accessed 17 March 2017].

[29] Letter from Daniel Kahn, deputy chief, Fraud Section, Criminal Division, US Dep't of Justice, to Luke Cadigan, K&L Gates (3 June 2016), *https://www.justice.gov/criminal-fraud/file/865406/download*; Letter from Daniel Kahn, deputy chief, Fraud Section, Criminal Division, US Dep't of Justice, to Josh Levy and Ryan Rohlfsen, Ropes & Gray LLP (6 June 2016), *https://www.justice.gov/criminal-fraud/file/865411/download*; Letter from Daniel Kahn, deputy chief, Fraud Section, Criminal Division, US Dep't of Justice, to Jay Holtmeier and Erin G.H. Sloane, WilmerHale (21 June 2016), *https://www.justice.gov/criminal-fraud/file/874566/download* [All accessed 17 March 2017].

[30] Letter from Lorinda Laryea, trial attorney, Fraud Section, Criminal Division, US Dep't of Justice, to Steven A. Tyrrell, Weil, Gotshal & Manges LLP (29 September 2016), *https://www.justice.gov/criminal-fraud/file/899116/download*; Letter from Laura N. Perkins, assistant chief, Fraud Section, Criminal Division, US Dep't of Justice, to Paul E. Coggins and Kiprian Mendrygal, Locke Lord LLP (29 September 2016), *https://www.justice.gov/criminal-fraud/file/899121/download* [Both accessed 317 March 2017].

[31] See US Sec. & Exch. Comm'n, "SEC Charges Software Company with FCPA Violations" (1 February 2016), *https://www.sec.gov/news/pressrelease/2016-17.html* [Accessed 17 March 2017].

[32] See Ceresney, Keynote Speech at ACI's 33rd International Conference on the FCPA (30 November 2016), *https://www.sec.gov/news/speech/speech-ceresney-113016.html* [Accessed 17 March 2017].

[33] See Brockmeyer, Panel Remarks at ACI's 33rd International Conference on the FCPA (30 November 2016).

[34] See US Sec. & Exch. Comm'n, "SEC Charges Anheuser-Busch InBev with Violating FCPA and Whistleblower Protection Laws" (28 September 2016), *https://www.sec.gov/news/pressrelease/2016-196.html* [Accessed 17 March 2017].

[35] US Sec. & Exch. Comm'n, "2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program" (2016), p.24, *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf* [Accessed 17 March 2017].

[36] US Sec. & Exch. Comm'n, "2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program" (2016), p.1, *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf* [Accessed 17 March 2017].

[37] FCPA Today, "Report: SEC paid Aussie whistleblower $3.75 million for BHP Billiton bribery tip" (29 August 2016), *http://fcpatoday.com/2016/08/report-sec-paid-aussie-whistleblower-3-75-million-for-bhp-billiton-bribery-tip/* [Accessed 17 March 2017].

Ongoing emphasis on individual prosecutions

In September 2015, Deputy Attorney-General Sally Yates circulated a memorandum targeting "Individual Accountability for Corporate Wrongdoing".[38] Now in its second year, the so-called "Yates Memo" continues to guide DOJ investigations of foreign corruption and both the DOJ and the SEC have continued to target individual offenders pursuant to the stated goal of the Yates Memo to hold individual executives accountable for violations of the FCPA. As Deputy Attorney-General Yates emphasised in a speech in November, "the best way to deter individual conduct is the threat of going to jail".[39]

The Yates Memo emphasises the requirement for companies to provide information about individual wrongdoers in order to qualify for co-operation credit. In addition, DOJ attorneys are tasked with focusing on individual violators from the start of the investigation. The Yates Memo has thus created incentives for both individuals and corporations, with the former discouraged from committing violations and the latter encouraged to provide information regarding such offenders.

Reflecting the focus on individual accountability, the DOJ and SEC brought FCPA-related charges against 27 individuals during 2016, including a number of top executives and foreign officials.[40] For example, in March, the DOJ elicited a guilty plea from an executive charged with committing bribery and fraud to secure contracts with Venezuela's state-owned energy company, Petroleos de Venezuela (PDVSA).[41] According to his plea admissions, Abraham Jose Shiera Bastidas and a partner bribed PDVSA purchasing analysts to gain access to energy contracts. The DOJ secured guilty pleas from Shiera and one of his employees, along with three PDVSA personnel who pleaded guilty to money laundering charges.

The most significant effect of the Yates Memo is to require companies to provide information regarding individuals' wrongdoing as part of the investigative process. Co-operation credit requires companies to supply such information, so companies must make specific assessments as to the risks and benefits of disclosing individual misdeeds.

What's to come

Officials from the new administration have offered little indication as to how they intend to approach anti-corruption enforcement. In a 2012 CNBC discussion, President Trump said of the FCPA, "It's a horrible law, and it should be changed."[42] Trump specifically said that the FCPA puts American businesses at a disadvantage in the global market, particularly in countries such as China and Mexico where activities prohibited under the FCPA are perceived as the only way to conduct business. This criticism notwithstanding, though, there is mixed indication of the Trump administration's likely approach.

President Trump's 2012 comment is the clearest statement he has made regarding the FCPA and anti-corruption enforcement. In addition, pro-business organisations such as the US Chamber of Commerce may gain more traction in their efforts to promote so-called FCPA reform.

In early January, President Trump announced that he would nominate the corporate attorney Jay Clayton as SEC chair. In 2011, Clayton led a New York City Bar Association committee that drafted a White Paper entitled "The FCPA and Its Impact on International Business Transactions—Should Anything be Done to Minimize the Consequences of the US's Unique Position on Combatting Offshore Corruption?".[43] The committee argued that the US should "dial back the scope of FCPA enforcement with respect to companies and focus more on individuals engaged in foreign corruption",[44] and asserted that the FCPA harms businesses subject to US law.[45] If those opinions accompany Clayton to the SEC, the agency could see a reduction in the emphasis that the former chair, Mary Jo White, placed on FCPA enforcement during her tenure.

Meanwhile, the Attorney-General Jeff Sessions will guide the DOJ under the new administration. Attorney-General Sessions first weighed in directly on the FCPA in response to questions from members of the Senate Judiciary Committee in January. Asked about President Trump's assessment of the law, Attorney-General Sessions stated:

[38] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., US Dep't of Justice, to All U.S. Att'ys et al., "Individual Accountability for Corporate Wrongdoing" (9 September 2015), *http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/annual_meeting/2016/yates_memo_individual_accountability_for_corporate_wrongdoing_dag_memo2.authcheckdam.pdf* [Accessed 28 March 2017].

[39] Sally Quillian Yates, Deputy Att'y Gen., US Dep't of Justice, Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act (30 November 2016), *https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international* [Accessed 17 March 2017].

[40] See Shearman & Sterling LLP, *FCPA Digest* (January 2017), p.ii, *http://www.shearman.com/~/media/Files/NewsInsights/Publications/2017/01/January-2017--FCPA-Digest-011117.pdf* [Accessed 17 March 2017].

[41] See US Dep't of Justice, "Miami Businessman Pleads Guilty to Foreign Bribery and Fraud Charges in Connection with Venezuela Bribery Scheme" (23 March 2016), *https://www.justice.gov/opa/pr/miami-businessman-pleads-guilty-foreign-bribery-and-fraud-charges-connection-venezuela* [Accessed 17 March 2017].

[42] CNBC, "Trump: Dimon's Woes & Zuckerberg's Prenuptial" (15 May 2012), *http://video.cnbc.com/gallery/?video=3000089630* [Accessed 17 March 2017].

[43] New York City Bar Committee on International Business Transactions, "The FCPA and its Impact on International Business Transactions—Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?" (December 2011), *http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf* [Accessed 17 March 2017].

[44] New York City Bar Committee on International Business Transactions, "The FCPA and its Impact on International Business Transactions" (December 2011), p.24, *http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf* [Accessed 17 March 2017].

[45] New York City Bar Committee on International Business Transactions, "The FCPA and its Impact on International Business Transactions" (December 2011), p.2, *http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf* [Accessed 17 March 2017] (stating the "asymmetry in regulation has had significant direct and indirect effects on companies subject to the FCPA as well as knock-on effects on the U.S. markets more generally").

> "[I]f confirmed as attorney general, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case."[46]

Attorney-General Sessions also suggested during his confirmation hearing that he would continue the focus on individual prosecutions highlighted by the Yates Memorandum, stating that, with respect to violations of law committed by corporations:

> "Sometimes, it seems to me ... that the corporate officers who caused the problem should be subjected to more severe punishment than the stockholders of the company who didn't know anything about it."[47]

President Trump also has criticised the trend of imposing large financial penalties against corporations as such resolutions harm innocent shareholders, in his view.

Attorney-General Sessions indicated some support for anti-corruption investigations while serving in the U.S. Senate, including co-sponsoring legislation expanding federal prohibitions against bribery and other forms of corruption.[48] Attorney-General Sessions has expressed some scepticism, however, with respect to the utilisation of non-prosecution and deferred prosecution agreements. In a 2010 Senate Judiciary Committee hearing, Attorney-General Sessions remarked on DOJ prosecution alternatives, "I was taught if they violated the law, you charge them. If they didn't violate the law, you don't charge them."[49] His stated aversion to NPAs and DPAs may affect the manner in which the Trump administration handles FCPA cases, as several of the most prominent enforcement actions of the past year were resolved through these mechanisms.

In the coming weeks and months the public should learn much more about the incoming administration's appetite for enforcement of the FCPA, with a potentially significant impact on companies and individuals in the enforcement pipeline as well as those not yet under the microscope. In any event, especially in light of growing enforcement activity overseas, it would appear prudent for companies conducting international business to continue to take steps to ensure that they comply with applicable anti-bribery laws and are prepared to defend themselves if and when necessary.

[46] Nomination of Jeff Sessions to be Attorney General of the United States, Questions for the Record, Submitted January 17, 2017: Questions from Senator Whitehouse, 115th Cong. 6 (2017), *https://www.judiciary.senate.gov/imo/media/doc/Sessions%20Responses%20to%20Whitehouse%20QFRs.pdf* [Accessed 17 March 2017].
[47] US Senate Confirmation Hearing of Attorney General Nominee Jeff Sessions Before the Senate Judiciary Comm., 115th Cong. 125 (2017).
[48] See, e.g., S. 1946, 110th Congress (2007) (Public Corruption Prosecution Improvements Act).
[49] Nomination of James Michael Cole, Nominee to Be Deputy Attorney General, US Department of Justice, Hearing before the S. Comm. on the Judiciary, 111th Congress 99 (2010), *https://www.judiciary.senate.gov/imo/media/doc/CHRG-111shrg64377.pdf* [Accessed 17 March 2017].