The ANTI-CORRUPTION REPORT
Formerly the FCPA Report
An Acuris Company

www.anti-corruption.com Vol 7, No. 12 June 13, 2018

Anti-Corruption Enforcement Continues Apace Under New Administration

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The first year-and-a-half of the Trump Administration has brought with it questions about whether the Obama Administration's active enforcement of the FCPA would continue. For now, FCPA enforcement seems to be here to stay.

Certain anti-corruption enforcement trends identified in the latter years of Barack Obama's presidency have continued to develop, though others may be overstated. The DOJ and SEC continue to partner with foreign anti-corruption agencies to bring enforcement actions here and abroad, and recent DOJ policy changes have increased the incentives for companies to make voluntary self-disclosures of apparent FCPA violations. At the same time, it is not clear whether the U.S. government's stated emphasis on targeting individual wrongdoers is leading (or will lead any time soon) to more individual prosecutions.

See "SEC and DOJ Officials Predict That Current FCPA Enforcement Trends Will Continue, Defense Attorneys Agree" (May 2, 2018).

Multi-Jurisdictional Enforcement

U.S. government officials now routinely cite and praise their foreign counterparts during discussions of FCPA enforcement trends. International cooperation contributed to several significant anti-corruption resolutions under the Trump Administration, as detailed in the table below. As the figurative and literal apportioning of credit and settlement proceeds makes clear, U.S. enforcement authorities no longer are going it alone.

Company	Date	Alleged Bribery	Realized or Expected Profit	Total Settlement	U.S. Portion	Non-U.S. Portions
Société Générale S.A.	6/4/2018	$90,000,000	$523,000,000	$585,552,888	$292,776,444	France - $292,776,444
Legg Mason	6/4/2018	*relates to the conduct in the Société Générale case	$31,617,891	$64,200,000	$64,242,891	N/A
Panasonic Corporation	4/30/2018	$875,000	$249,581,975	$280,000,000	$280,000,000	N/A
Keppel Offshore & Marine Ltd.	12/22/2017	$55,000,000	$351,847,483	$422,216,980	$105,554,245	Brazil - $211,108,490 Singapore - $105,554,245
SBM Offshore N.V.	11/29/2017	$180,000,000	$2,819,500,000	$820,000,000	$238,000,000	Brazil - $342,000,000 Netherlands - $240,000,000
Telia Company AB	9/21/2017	$331,000,000	$457,169,977	$965,773,949	$483,273,949	Netherlands - $274,000,000 Sweden - $208,500,00
Rolls-Royce	1/17/2017	$35,000,000	$314,814,000	$800,305,272	$169,917,710	U.K. - $604,808,392 Brazil - $25,579,170

Panasonic Corporation

In April 2018, Japan-based Panasonic Corporation (Panasonic) and its U.S. subsidiary, Panasonic Avionics Corporation (PAC), together (the companies) agreed to pay a combined $280 million to U.S. authorities. PAC also entered into a deferred prosecution agreement (DPA) with the DOJ in response to FCPA and accounting fraud violations. Panasonic's $143 million payment to the SEC and PAC's $137-million payment to the DOJ arise from a scheme to pay officials at state-owned airlines through third-party vendors for "low-show" consulting jobs to gain improper advantage in gaining contracts from the airlines. The companies reportedly earned almost $250 million from transactions arising from the misconduct. PAC further admitted to having concealed its use of sales agents that had been misclassified in order to avoid internal diligence requirements, a violation of the FCPA's books and records provisions.

The Panasonic case exhibits American law enforcement's continued ability to work with foreign enforcement authorities to pursue not only U.S. subsidiaries that commit wrongdoing, but also foreign companies that are involved in related misconduct. While no other countries have announced penalties against Panasonic, the U.S. investigation involved collaboration with Swiss, Canadian, UAE, Japanese, Singaporean, Australian and Pakistani officials.

See "Big Deals? Panasonic and Subsidiary Settle FCPA and Exchange Act Charges for $280 million" (May 16, 2018).

Keppel Offshore and Marine Ltd.

The Brazilian Government's investigation of state-controlled oil company Petróleo Brasileiro S.A. – Petrobras (Petrobras), initiated in 2014, continued to give rise to major anti-corruption enforcement actions in 2017. In December, the DOJ announced a multi-jurisdictional settlement of $422 million with Keppel Offshore and Marine Ltd. (KOM) for its years-long practice of bribing Brazilian officials. Both the Singapore-based KOM (which repairs, converts and builds ships, among other businesses) and its U.S. subsidiary, Keppel Offshore & Marine USA Inc. ("KOM USA"), were involved in the bribery scheme. KOM USA, along with a former senior KOM legal

official, pleaded guilty to charges arising from the payment of approximately $55 million in bribes to both Brazilian party officials and Petrobras executives, which the DOJ said led to over $350 million in company profits.

The KOM settlement is notable as an example of cooperation across jurisdictions. U.S. officials collaborated on an investigation for the first time with Singaporean authorities and worked yet again with Brazilian law enforcement, as the two countries have taken a joint approach to several anti-corruption enforcement actions in recent years. That jurisdiction over the bribery scheme at KOM spanned three continents underscores the ongoing importance of multi-jurisdictional cooperation in FCPA investigations. Of the final penalty, the Brazilian government received half (over $211 million), while the U.S. and Singaporean governments took in $105 million each.

See "Local Experts Weigh In on Keppel's $422 Million Trilateral Anti-Corruption Settlement" (Jan. 10, 2018).

SBM Offshore N.V.

In November 2017, SBM Offshore N.V. (SBM) and U.S. subsidiary SBM Offshore USA Inc. (SBM USA) reached a settlement with the DOJ for $238 million in relation to bribes paid to government officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq. Regarding the extensive nature of the bribery scheme, then-Acting Assistant Attorney General John P. Cronan said, "This corrupt scheme involved some of the highest level executives within the company, spanned five countries, and lasted more than a decade." While SBM entered into a deferred prosecution agreement, SBM USA and two SBM executives pleaded guilty to FCPA violations after the investigation discovered at least 16 years' worth of payments to intermediaries that SBM knew would be used to bribe officials at state-owned oil companies.

The SBM settlement reflects the U.S. government's efforts to reach domestic resolutions with companies already cited by foreign anti-corruption agencies, as SBM had previously resolved bribery charges with the Dutch authorities. In finalizing the FCPA settlement, the DOJ credited Brazilian, Dutch and Swiss agencies for their contributions to the case.

See "SBM Offshore Reaches FCPA Settlement After a Reopened DOJ Investigation" (Dec. 13, 2017).

Telia Company AB

In September 2017, Swedish telecommunications firm Telia Company AB (Telia) reached the largest FCPA settlement on record, paying a total of $965 million in response to bribery allegations by the SEC and DOJ, as well as Dutch and Swedish law enforcement agencies. The DPA's statement of facts stated that Telia, a telecom provider in parts of Europe, entered the Uzbek market by paying at least $330 million in bribes to a shell company under false pretenses. Investigations around the world resulted in the SEC's order that Telia pay $457 million in disgorgement and a DOJ fine of over $508 million, though these figures may be offset by settlements with international enforcement agencies.

The Telia investigation represents a broad international investigative effort. The DOJ cited help from law enforcement authorities and other regulators in the Netherlands, Norway, Sweden, Switzerland, Latvia, France, Spain, Hong Kong, the British Virgin Islands, the Cayman Islands, Bermuda, Cyprus and Ireland. This type of worldwide cooperation equips governments around the world to better detect corruption and strengthen cases against wrongdoers.

See "Massive Telia Settlement Indicates International Cooperation Will Continue Under New Administration" (Oct. 4, 2017).

Rolls-Royce plc

In January 2017, Rolls-Royce plc settled with U.S. authorities for approximately $170 million as part of a worldwide $800-million settlement relating to the company's bribery of foreign officials in exchange for government contracts. Various government investigations uncovered bribes paid to foreign officials through third parties in six countries. Following Rolls-Royce's settlement with U.S., U.K. and Brazilian authorities, the DOJ charged five individuals in November 2017 with FCPA violations and money laundering, including two executives. Once again, the investigations leading to the company's settlement, and the individuals' charges, were conducted across several jurisdictions, with contributions coming from the U.K., Brazil, Austria, Germany, the Netherlands, Singapore and Turkey.

See "SFO Arrives in the Anti-Corruption Premier League With Rolls-Royce Settlement" (Mar. 1, 2017); "Rolls Settlement Illuminates SFO Expectations for Cooperation and Compliance" (Mar. 15, 2017).

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Emphasis on Individual Prosecutions

U.S. government officials frequently cite a second enforcement trend – the government's focus on individual prosecutions – though the data underlying FCPA enforcement may not support this characterization.

In September 2015, the Yates Memo directed DOJ components to place greater emphasis on targeting individual wrongdoers rather than companies involved in misconduct. Since then, the DOJ has reached several significant resolutions against individual culprits – among them, individuals implicated in three of the resolutions described above (KOM, SBM and Rolls-Royce).

Still, neither the DOJ nor the SEC seems to have pursued a significantly greater number of individual prosecutions in anti-corruption enforcement actions. In 2017, the SEC brought FCPA charges against only three individuals, and it has yet to bring charges against any individual in 2018. The DOJ, meanwhile, brought such charges against 18 individuals in 2017, up from eight each in 2015 and 2016 – but the same total as in 2009.

While the enforcement statistics do not show increasing individual prosecutions for either the SEC or the DOJ, recent policy developments may yet contribute to a rise in those figures. As discussed in greater detail below, the DOJ's new Corporate Enforcement Policy encourages and incentivizes greater cooperation on the part of companies seeking to avoid penalties for corruption, which could shift additional focus toward individual wrongdoers. In addition, new DOJ guidance encouraging Department components to coordinate with other agencies (including foreign authorities) in calculating corporate penalties may further shift the agency's focus from companies to individual wrongdoers.

See "An Enforcement Trend? The DOJ Pursues Individuals in Diverse Industries" (Feb. 21, 2018).

DOJ Corporate Enforcement Policy

The DOJ has also refined its corporate enforcement policy to encourage voluntary self-disclosure in FCPA cases and reduce duplicative penalties that are levied by multiple enforcement authorities. These changes to DOJ policies will likely mitigate the impact of enforcement on corporations while helping law enforcement increase its focus on individual enforcement, as discussed earlier.

Voluntary Disclosure

The United States continues to refine its treatment of foreign corruption disclosure. In November 2017, the DOJ announced a revised FCPA Corporate Enforcement Policy (CEP), which further incentivizes voluntary self-disclosure on the part of companies that uncover apparent corruption.

The policy builds on the FCPA Pilot Program initiated in April 2016 and renewed in March 2017, and it clarifies and enhances incentives for corporations to disclose potential FCPA violations. Significantly, the policy converts the FCPA Pilot Program's informal incentives for voluntary disclosure into a "presumption" that the DOJ will decline to prosecute and not impose a monitor for corporations that disclose, cooperate and remediate. The revised enforcement approach is intended to encourage more corporate disclosures and, in turn, enable the DOJ to bring more prosecutions of individual wrongdoers.

The CEP seeks to incentivize voluntary disclosure by offering credit to companies that (1) voluntarily disclose violations, (2) fully cooperate with government authorities, and (3) timely and appropriately remediate violations. The CEP specifies that when a company satisfies these elements "there will be a presumption that the company will receive a declination," which will include disgorgement of profits. The presence of aggravating circumstances can overcome this presumption. The CEP defines "aggravating circumstances" to include (1) involvement by executive management in FCPA violations, (2) significant profits stemming from misconduct, (3) pervasiveness of misconduct, and (4) repeat offenses. Where a company discloses, cooperates and remediates but aggravating circumstances are present, the DOJ will recommend a 50-percent reduction off the minimum sanction under the U.S. Sentencing Guidelines and will not impose a monitor (assuming implementation of an effective compliance program).

Declinations

Thus far, the DOJ has issued one declination under the CEP. On April 23, 2018, the DOJ announced that it would not prosecute The Dun & Bradstreet Corporation, despite what it called the "bribery committed by employees of the [c]ompany's subsidiaries in China." The DOJ declined to prosecute because the company identified the misconduct; made prompt and voluntary disclosure; conducted a thorough internal investigation; enhanced its compliance program and internal accounting controls; fully remediated by terminating and disciplining wrongdoers; and agreed to full disgorgement. Before the CEP, there had been seven declinations under the Pilot Program, which outlined similar reasons for declining

to bring charges. Despite the DOJ's new CEP, the company agreed to pay $9 million as part of an agreement with the SEC. Because the same general considerations are outlined in all eight Pilot Program and CEP declinations, it is likely that these actions are necessary to receive similar treatment in the future.

Unresolved Issues

Notwithstanding the revised policy, some issues remain to be resolved. For example, concerns remain about U.S. government de-confliction requests during investigations and whether a company must hold off on interviewing key individuals to allow the government to interview such personnel first. The CEP clarifies that such requests are necessary for cooperation credit but assures companies that requests "will be made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose." However, it remains to be seen how this may impact the conduct of internal investigations and how an individual employee who exercises his Fifth Amendment right by declining a Government-requested interview will factor into the calculation of cooperation credit for the company.

While the full impact of the CEP may not be readily apparent in the near term, it is clear the DOJ intends the policy to result in an increased flow of disclosures that will enable the Department to prosecute more individual wrongdoers. As individuals facing the prospect of significant jail time often have less incentive than corporations do to settle enforcement matters, an indirect long-term consequence of the revised policy – as these cases go to trial – may be an uptick in judicial review of the Department's approach to assertions of jurisdiction and criminal liability under the FCPA. This may prove especially interesting with respect to non-U.S. citizens located and acting outside the United States.

See The Anti-Corruption Report's three-part series on the DOJ's FCPA Corporate Enforcement Policy: "What's New and What's Not" (Jan. 10, 2018); "How Important Is the Presumption of Declination?" (Jan. 24, 2018); and "Cooperation and Compliance Expectations" (Feb. 7, 2018).

New Coordination Policy

On May 9, 2018, Deputy Attorney General Rod Rosenstein announced a new DOJ policy designed to encourage coordination among law enforcement agencies in determining corporate enforcement penalties. This policy will not be limited to FCPA actions, but will be operative throughout the DOJ. The policy, which has been integrated into the U.S. Attorneys' Manual, instructs DOJ attorneys to consider the fines, penalties and forfeiture applied by other law enforcement agencies (including foreign authorities) in finalizing their own sanctions. Coming on the heels of the new CEP, the penalty policy continues a DOJ shift toward reduced corporate penalties. Deputy Attorney General Rosenstein provided several examples of offices within the DOJ that already coordinate with other agencies. He pointed to the FCPA Unit as one that has done so in recent months.

The new penalty policy has four main principles, three of which impact FCPA enforcement penalties. First, the policy states that threats of criminal prosecution should not be used solely to persuade companies to agree to larger settlements in civil cases. Rather, the federal government should use its enforcement authority only for the investigation and prosecution of potential crimes. Second, the DOJ will attempt to coordinate with other federal, state, local and foreign enforcement authorities regarding the amount of penalties being levied for the same conduct. And third, DOJ officials will consider, among others, the following factors to determine whether levying multiple penalties "allows the interests of justice to be fully vindicated": the egregiousness of the misconduct; statutory mandates regarding penalties; the risk of delay in achieving a resolution; and the level of cooperation that a company provides to the DOJ, regardless of its cooperation with other enforcement authorities.

It is still unclear whether the SEC will implement a program to further coordinate with other agencies, given the DOJ's clear policy of doing so. While enforcement authorities already give credit to companies for penalties paid to foreign authorities, this policy will likely increase coordination and may lead to lower penalties for corporations.

See "How Significant is the DOJ's New Directive on Coordination?" (May 16, 2018).

Conclusion

The trend toward multi-jurisdictional enforcement is continuing, as national governments and international authorities collaborate on increasing numbers of enforcement actions. As anti-corruption law continues to mature in countries around the world, this trend will continue, increasing the ease and efficiency with which officials enforce their laws, leading to a likely rise in enforcement actions. Of course, jurisdictional and other challenges will arise as well.

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Here at home, enforcement officials continue to encourage disclosure and cooperation, making permanent even stronger incentives for individuals and entities to self-report violations. While entities still face reputational risks and compliance disgorgement costs, many entities may decide that self-reporting is the safest and clearest path when facing anti-corruption issues.

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