

*Litigation Department*

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## **FCPA Enforcement: A Record Year and an Uncertain Future**

2016 was a busy year for anti-bribery enforcement under the Foreign Corrupt Practices Act (“FCPA”). The U.S. Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) continued to aggressively enforce the FCPA, resulting in settlements and fines in excess of \$2 billion—a record amount. Additionally, the DOJ instituted an FCPA Pilot Program to encourage parties to self-report violations and fully cooperate with investigations in exchange for cooperation credit and reduced penalties. There was also an increased focus on holding individuals responsible for violations. While FCPA enforcement has increased over the last several years, the recent change in administration in Washington creates uncertainty for 2017 and beyond. It is nevertheless important for individuals and companies covered by the Act that are doing business abroad to stay the course with compliance measures and internal controls while monitoring future enforcement trends.

### **Overview of the FCPA**

As outlined in our [\*October 2015 advisory\*](#), the FCPA has two primary types of provisions: anti-bribery and accounting. The anti-bribery provisions apply to U.S. and foreign issuers of U.S.-regulated securities and other U.S. business entities (and their employees, officers, and directors), U.S. citizens and residents, and certain foreign nationals or entities engaging in prohibited acts in the U.S. The provisions prohibit the offering or providing, directly or through a third party, anything of value to a foreign government official with corrupt intent to influence an award (or continuation) of business or to gain an unfair advantage. The accounting provisions essentially make it illegal for a company that reports to the SEC to have false or inaccurate books or records, or to fail to maintain a system of internal accounting controls.

Enforcement actions in 2016 have continued to demonstrate that prohibited “bribes” can take many forms, including payments of cash, travel and entertainment expenses, and the giving of extravagant gifts or a series of smaller gifts; pay-to-play schemes and activities; and even the hiring of relatives of foreign officials. In order for there to be a violation, however, there must be proof of “corrupt intent”—an intent to wrongfully influence the recipient. For individual criminal liability, the actor must act “willfully”—with knowledge that the conduct is unlawful. For corporate criminal liability or civil liability, proof of willfulness is not required provided there is proof of corrupt intent. An FCPA violation is committed by merely making the offer; an actual payment of a bribe is not required. Sanctions may include disgorgement of ill-gotten gains, civil penalties, additional reporting obligations, required oversight by an independent monitor, or even

imprisonment. Both the SEC and the DOJ have continued to work with (and receive cooperation from) foreign authorities on FCPA enforcement matters.

### **The Yates Memo and FCPA Pilot Program**

The DOJ and the SEC have taken the position in public guidance that they should be informed when an internal investigation indicates there is a problem, expect prompt investigations and remedial actions, and will not settle actions without a full vetting of individual culpability. These principles were set forth in the September 9, 2015 memo from the U.S. Deputy Attorney General, Sally Yates (widely referred to as the “Yates Memo”), which also reinforces that corporations will not obtain any credit for cooperating with the DOJ unless they provide “all relevant facts about the individuals involved in corporate misconduct.”

In April 2016, the Fraud Section of the DOJ announced the expansion of its FCPA unit by 50% by adding 10 prosecutors; its continued coordination and cooperation with foreign governments; and commencement of a one-year FCPA Pilot Program intended to promote accountability by motivating companies to voluntarily report FCPA-related misconduct, cooperate with investigations, and remediate offending business practices in their internal controls and compliance programs. The Pilot Program (which runs until April 5, 2017, unless extended) is intended to encourage disclosure and cooperation by making clear that such actions are necessary to be eligible for declination of criminal prosecution or for “mitigation credit” when the DOJ determines fines, penalties and other sanctions. Companies that self-disclose are eligible for up to a 50% reduction off the bottom of the range of possible criminal sentences, while companies that do not self-disclose can obtain no more than a 25% reduction. The SEC’s Enforcement Cooperation Program similarly provides cooperating credit in connection with SEC investigations and enforcement actions.

### **2016 Enforcement Actions and Settlements**

In 2016, the SEC and DOJ secured a record amount in penalties and fines in connection with FCPA settlements and enforcement actions—totaling over \$2 billion. The SEC publicized 26 enforcement actions and settlements while the DOJ announced 21 (in some cases parallel actions).<sup>1</sup> 2016 saw at least five separate enforcement actions that required corporations, in each case, to pay over \$200 million in fines and penalties to U.S. authorities. Geographically, China and Latin America were hot regions for FCPA violations. Several investigations in 2016 involved close coordination between U.S. authorities and those of other countries, and resulted in penalties in the U.S. and in related foreign proceedings. In addition, there was increased focus on individuals, with many settling or pleading guilty to FCPA-related charges.

Notwithstanding aggressive enforcement in 2016, the DOJ appears to have followed through on the policies articulated by the Yates Memo and the Pilot Program—with several declinations of prosecution being attributed to self-disclosure and cooperation (in some cases, the declinations were accompanied by required

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<sup>1</sup> <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>; <https://www.justice.gov/criminal-fraud/related-enforcement-actions>.

disgorgements). The DOJ has publicly announced five such declination letters on its website, and SEC and DOJ press releases relating to declinations or other settlements have detailed the level of cooperation and self-disclosure and the mitigation credit received.

Attached is an Appendix with examples of some notable 2016 FCPA-related actions and settlements.

### **The New Administration and Possible Changes in Policy**

President Trump has in the past described the FCPA as “a horrible law” that places U.S. companies at a “huge disadvantage” in trying to compete for business in places like Mexico and China. These comments, however, were made four years ago in the context of his business interests. President Trump, unabashedly pro-business, has vowed to implement policies that he believes will encourage job creation and the growth and expansion of U.S. companies and to scale back regulations that he believes have restricted such economic growth. The President’s nominee for Attorney General, Jeff Sessions, is similarly regarded as extremely pro-business. And President Trump’s nominee to replace the outgoing SEC Chair, Mary Jo White, is highly regarded Wall Street corporate lawyer Jay Clayton, whose practice, according to his law firm’s website, has primarily involved advising on M&A deals and capital market transactions and advising and defending companies in regulatory investigations and proceedings (including FCPA matters). Mr. Clayton also helped draft a 2011 New York City Bar Association Committee paper highlighting how zealous FCPA enforcement was disadvantaging U.S.-regulated companies. Accordingly, as we move forward under the Trump administration, there is uncertainty about the future of FCPA enforcement.

While the President’s pro-business views and key nominations suggest that the SEC and the DOJ may cut back on enforcement and regulation, there are also reasons to suggest that the Trump administration may not scale back FCPA enforcement. For example, the current policy encouraging self-reporting and internal investigations is inherently efficient for the government in that it saves the government from bearing significant investigative costs, and the billions of dollars in FCPA-related fines paid by companies to the U.S. government has provided an obvious financial benefit. Further, enforcement agencies have recently added assets dedicated to FCPA enforcement, and President Trump may not want to be seen as soft on corruption. Moreover, some people (such as former Secretary of State John Kerry) believe there is a clear link between corruption and terrorism, on which Trump espouses an aggressive approach. In addition, the President strongly favors policies that eliminate competitive disadvantages for U.S. companies in the global market, and the FCPA has been effectively used to reign in bribery by foreign entities, and has encouraged anti-corruption enforcement by foreign governments. As we move forward under the new President, there is significant uncertainty about the future of FCPA enforcement by U.S. authorities.

### **Conclusion: Looking Ahead**

Over the past several years, U.S. companies doing business outside the U.S. have had to expend resources to understand the scope of conduct prohibited by the FCPA and the potential sanctions that can be imposed, and have taken steps to reduce the risk of violations and minimize sanctions and exposure (by changing business

practices, instituting formal written FCPA compliance policies, and implementing robust compliance programs). In our [October 2015 advisory](#), we outlined several best practices for companies to mitigate FCPA-related civil and criminal exposure.

Implementing effective compliance programs and focusing on improving corporate ethics and practices makes good business sense, and we caution against any relaxation of FCPA-related compliance programs and best practices. Even if the enforcement environment in the U.S. cools, enforcement agencies are likely to continue to require cooperation and remediation in order to obtain reduced penalties. And other countries may continue to vigorously and aggressively investigate and prosecute bribery and corruption. Companies will need to stay tuned as to the future direction of FCPA enforcement in the U.S., while also monitoring global anti-bribery enforcement developments.

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## APPENDIX

The following are examples of some notable 2016 FCPA-related actions and settlements:

- In December 2016, *Teva Pharmaceutical* agreed to pay \$519 million to settle parallel civil and criminal charges that it paid bribes to foreign government officials in Russia, Ukraine, and Mexico to increase pharmaceutical sales and obtain regulatory and other approvals. Teva will pay approximately \$236 million in disgorgement to the SEC and \$283 million to the DOJ, and must retain an independent compliance monitor for at least three years.
- In December 2016, *Odebrecht S.A.*, a global construction conglomerate based in Brazil, and its subsidiary Braskem S.A., a Brazilian petrochemical manufacturer whose stock is listed on the NYSE, pleaded guilty to violating the FCPA and agreed to pay over \$3 billion in a global settlement with U.S., Brazilian, and Swiss authorities for concealing millions of dollars in bribes paid to government officials in Brazil and several Latin American countries to secure business. Braskem agreed to pay about \$957 million—\$65 million to the SEC, \$260 million to Brazilian authorities, and \$632 million in criminal penalties and fines to the DOJ, Brazil, and Switzerland. Odebrecht is expected to pay about \$260 million to each of the DOJ and Switzerland, and over \$2 billion to Brazil. Notwithstanding these staggering amounts, Odebrecht received a 25% penalty reduction off the bottom of the fine range for full cooperation with the DOJ, and Braskem received a 15% reduction for its partial cooperation.
- In November 2016, *J.P. Morgan Chase & Co.* agreed to pay more than \$264 million in sanctions to settle FCPA and bribery-related allegations that the bank hired friends and relatives of Chinese and other Asian government officials for jobs and internships in order to obtain business for the bank. The bank will pay about \$130 million to the SEC, about \$72 million to the DOJ, and about \$62 million to the Federal Reserve Board of Governors. Regulators noted that the bank did not voluntarily and timely disclose the issue, but the bank was credited (with a non-prosecution agreement and 25% reduction off the bottom of the fine range) for its cooperation in conducting an internal investigation, turning over information, and taking remedial actions.
- In October 2016, Brazil-based aircraft manufacturer *Embraer S.A.* agreed to pay \$205 million to settle SEC and DOJ charges for alleged FCPA violations involving its U.S. subsidiary and the use of agents to bribe government officials in the Dominican Republic, Saudi Arabia, Mozambique, and India. Embraer must pay a \$107 million penalty to the DOJ as part of a deferred prosecution agreement and \$98 million in disgorgement to the SEC, and must retain an independent compliance monitor for at least three years. According to the DOJ, Embraer did not voluntarily disclose and did not fully remediate (because it did not discipline a senior executive), but was otherwise credited with full cooperation and thus the criminal penalty was 20% below the bottom of the fine range.
- In September 2016, hedge fund *Och-Ziff Capital Management Group* and two executives agreed to settle civil and criminal charges for alleged FCPA violations relating to the use of intermediaries, agents, and business partners to pay bribes to high-level government officials in Africa to induce investments from sovereign wealth funds and secure mining rights. Och-Ziff will pay the DOJ and the SEC \$412 million, the CEO will pay \$2.2 million, and Och-Ziff must retain a compliance monitor for three years. The CFO also settled, with penalties to be assessed at a later date. Och Ziff did not self-disclose but otherwise cooperated and thus received a 20% reduction off the bottom of the fine range. According to the DOJ, this was the first time a hedge fund has been held accountable for FCPA violations.
- In July 2016, *Johnson Controls, Inc.*, a Wisconsin-based global provider of HVAC systems, agreed to pay more than \$14 million to the SEC to settle charges that its Chinese subsidiary used sham vendors to make improper payments to employees of Chinese government-owned shipyards and other officials to win

business. The DOJ closed its investigation without a penalty and declined to prosecute because the company voluntarily self-reported, conducted its own investigation, fully cooperated, and fully remediated by terminating the subsidiary's employees and executives involved in the misconduct.

- In March 2016, *Novartis AG*, the Swiss-based pharmaceutical company, agreed to pay \$25 million to the SEC to settle charges that it violated the FCPA when its China-based subsidiaries bribed officials to increase sales of pharmaceuticals to China's state health institutions (in what are known as pay-to-prescribe schemes).
- In February 2016, *VimpelCom Ltd.*, a Dutch-based telecommunications provider with securities publicly traded in the U.S., agreed to a \$795 million global settlement to resolve FCPA-related charges that it paid bribes (disguised as sham contracts and charitable contributions) in order to obtain regulatory licenses and win business in Uzbekistan. The company must pay \$167.5 million to the SEC, \$230.1 million to the DOJ, and \$397.5 million to Dutch regulators, and must retain an independent compliance monitor for at least three years. Although the company did not self-disclose, it received significant credit (45% off the bottom of the fine range) for promptly acknowledging the wrongdoing and fully cooperating with the investigation. As an example of the global nature of FCPA investigations, the SEC credited assistance and cooperation from agencies in the Netherlands, Norway, Sweden, Switzerland, Latvia, the British Virgin Islands, Cayman Islands, Bermuda, Ireland, Estonia, Spain, and the UAE.

For further information regarding these matters and other enforcement actions and settlements in 2016 and previous years, see <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>; <https://www.justice.gov/criminal-fraud/related-enforcement-actions>.