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FCPA 2017 Year in Review

Under the Trump Administration, the number of DOJ and SEC corporate enforcement actions declined, with only five corporate FCPA resolutions in the last 49 weeks of the year. The number of 2017 Trump Administration corporate FCPA enforcement actions was a steep drop from the 25 corporate resolutions in 2016 and even lower than the number of corporate resolutions in the last three weeks of the Obama Administration.

However, the slowdown in corporate enforcement actions has not led to a slowdown in corruption investigations. The DOJ, FBI, and SEC continue to devote significant resources to FCPA investigations and prosecutions, and the enhanced collaboration between U.S. enforcement authorities and their foreign counterparts has increasingly led to heightened anticorruption enforcement activity in jurisdictions around the world.

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KEY HIGHLIGHTS

There were six key highlights from 2017 Foreign Corrupt Practices Act ("FCPA") enforcement.

1. The number of corporate FCPA enforcement actions in the first year of the Trump Administration—or 49 weeks, to be precise—was lower than any full year in the last 10 years and even lagged behind the first three weeks of January, which marked the end of the Obama Administration. There was a corresponding increase in publicly reported corporate FCPA declinations. Overall FCPA enforcement against individuals increased in 2017, however, consistent with recent Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") initiatives to focus on individual accountability.
2. The Deputy Attorney General announced a new FCPA enforcement policy that replaces the FCPA Pilot Program and creates a presumption that absent "aggravating circumstances," companies will not face criminal prosecution or other DOJ enforcement actions based on self-disclosed FCPA violations, full cooperation, and timely and appropriate remediation.
3. Significant delays in replacing the Assistant Attorney General for the Criminal Division of the DOJ and several senior anticorruption enforcement positions have created some uncertainty about whether the full impact of the Trump Administration on FCPA enforcement has been realized.
4. The DOJ did not require monitors in any of its three Trump Administration corporate FCPA resolutions. This is a marked change from 2016, when seven DOJ corporate FCPA resolutions required the company to hire an independent monitor for a three-year term. In 2017, the SEC required three compliance monitors, each in a so-called "repeat offender" action.
5. The U.S. Supreme Court significantly limited the SEC's ability to collect disgorgement by subjecting disgorgement to a five-year statute of limitations.
6. The DOJ coordinated with foreign authorities in the Netherlands, Switzerland, the United Kingdom, Singapore, and Brazil in the investigation and resolution of four major global anticorruption cases, showcasing the continuing development of anticorruption enforcement in jurisdictions outside the United States and the importance of coordinating investigations and resolutions with multiple sovereigns.

SLOWDOWN IN CORPORATE FCPA ENFORCEMENT UNDER THE TRUMP ADMINISTRATION

The Trump Administration's DOJ and SEC Resolved Five Corporate FCPA Cases and Collected $868.3 Million in Fines and Penalties in 2017

The first 49 weeks of the Trump Administration saw a significant decline in the number of corporate FCPA enforcement actions, when compared with full years dating back to 2008. Between January 21 and December 31, 2017, the DOJ and SEC resolved a total of five corporate FCPA cases for a total of $868.3 million in fines, penalties, disgorgement, and interest.

The number of corporate FCPA enforcement actions was lower than in any single year between 2008 and 2016. In fact, the total number of corporate FCPA resolutions in the first 49 weeks of the Trump Administration was less than the number brought in the first three weeks of January 2017, which represented the tail end of the Obama Administration. During those three weeks, the DOJ and SEC resolved six corporate FCPA cases for a total of $256.9 million.

In addition, as shown in Chart 1 below, there was an increase in the number of companies that publicly reported corporate FCPA declinations in 2017, when compared with 2016.

Chart 1: DOJ and SEC Corporate FCPA Resolutions and Declinations, 2016–2017

	Obama Administration (2016)		Obama Administration (Jan. 1 – Jan. 20, 2017)		Trump Administration (Jan. 21 – Dec. 31, 2017)	
	Number	$	Number	$	Number	$
DOJ Corporate FCPA Enforcement Actions	11	$1.33B	6	$202.9M	3	$617.6M
SEC Corporate FCPA Enforcement Actions	24	$1.1B	5	$54M	3	$250.7M
Fines/Penalties/Disgorgement[1]	**25**	**$2.43B**	**6**	**$256.9M**	**5**	**$868.3M**
Publicly Reported Corporate FCPA Declinations	**12**		**1**		**18**	

Chart 2: Number of DOJ and SEC FCPA Corporate Resolutions, 2008–2017

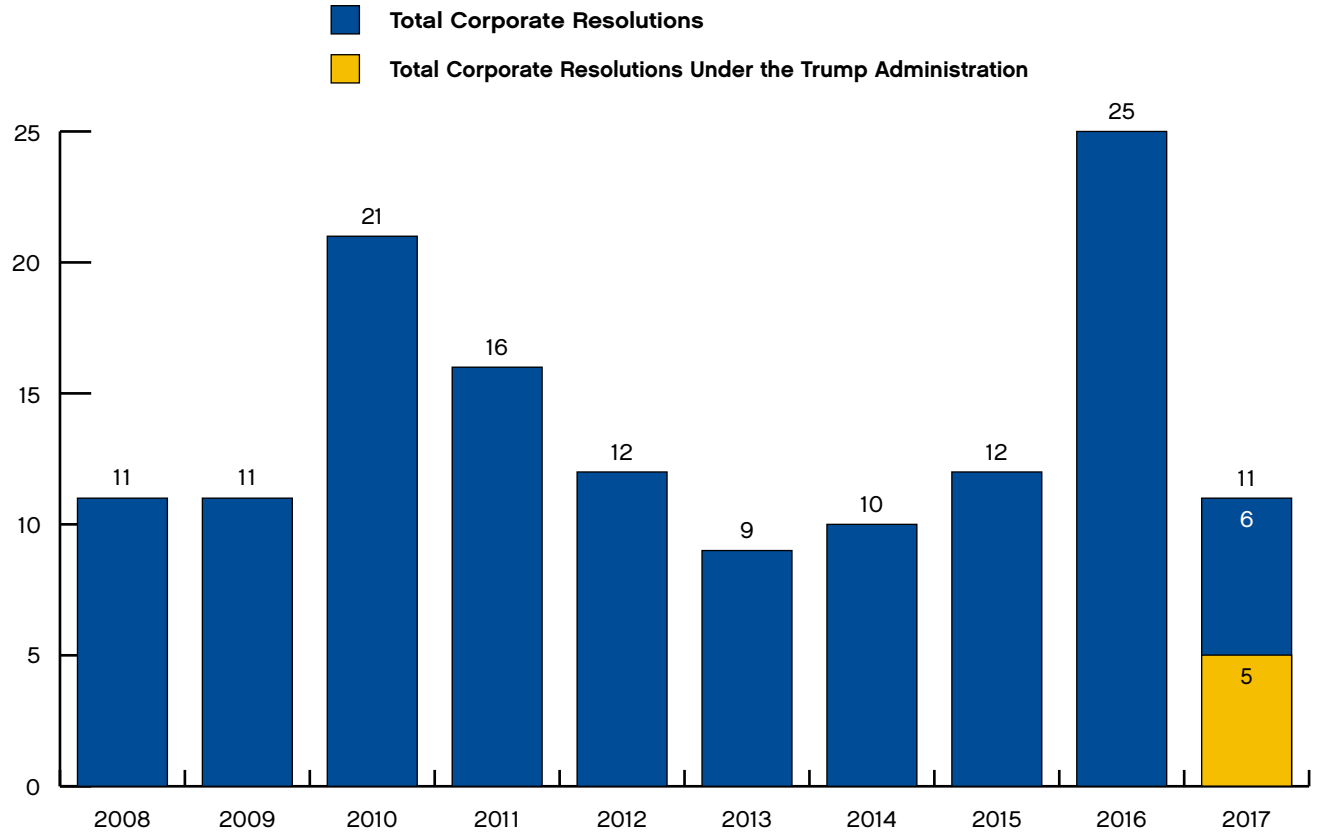
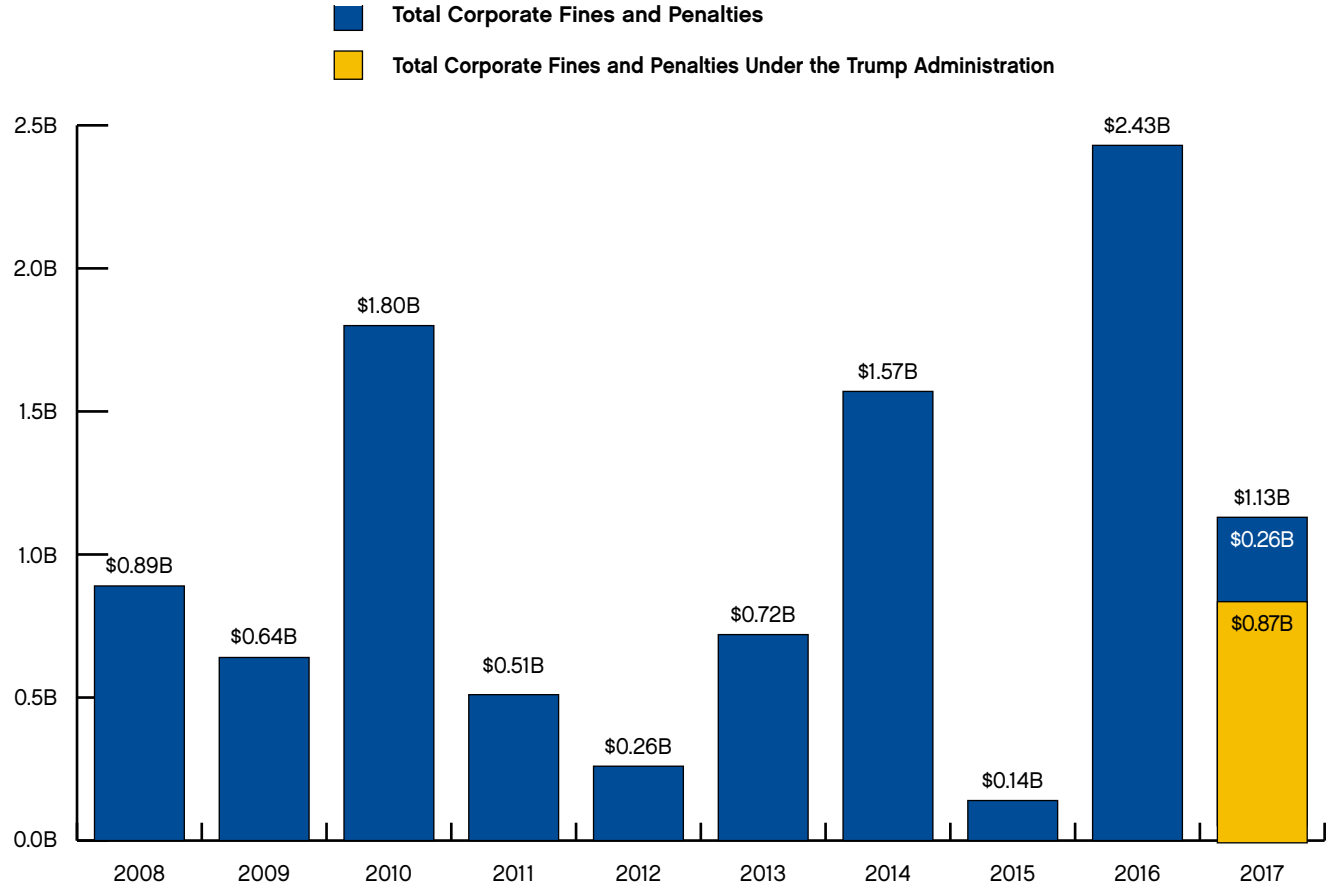


Chart 3: DOJ and SEC FCPA Corporate Fines and Penalties, 2008–2017



Several Trends that May Explain the Apparent Downturn

While there is no clear explanation for the downturn in corporate FCPA enforcement in the Trump Administration, there are several factors that may partially account for the trend.

New FCPA Enforcement Policy. As discussed below, the DOJ adopted a new FCPA enforcement policy that creates a presumption that, under certain circumstances, companies will not face criminal prosecution or other DOJ enforcement actions based on self-disclosed FCPA violations.[2] While this policy was not officially announced until November 2017, the greater number of publicly reported corporate FCPA declinations in 2017 shows that the practice of declining enforcement actions against companies increased during the full year.

Push to Resolve FCPA Cases Before the End of the Obama Administration. There were public reports that the DOJ and SEC pushed to resolve certain corporate white-collar enforcement actions, including FCPA actions, before the end of the Obama Administration and the departure of Obama Administration personnel. While these reports have not been confirmed, the 2017 enforcement numbers described above are consistent with the reports and may reflect a desire on the part of the government authorities and companies involved to avoid the uncertainty associated with a new administration.

Change in FCPA Enforcement Leadership. As discussed below, key FCPA enforcement positions within the DOJ and SEC either remain unfilled, with staffers serving in an acting capacity, or were not filled until later in 2017. The unsettled nature of enforcement leadership may have affected 2017 FCPA enforcement.

Chart 4: DOJ and SEC Corporate FCPA Resolutions, 2017

	Company	Date	DOJ	SEC	Total
Obama Administration (Jan. 1 – Jan. 20, 2017)					
1	Mondelez Int'l (Food & Beverage: U.S.)	January 6		$13M	$13M
2	Zimmer Biomet (Medical Devices: U.S.)	January 12	$17.4M	$13M	$30.4M
3	Sociedad Quimica y Minera de Chile (Chemicals: Chile)	January 13	$15.5M	$15M	$30.5M
4	Rolls-Royce plc (Aviation: UK)	January 17	$170M		$170M
5	Orthofix Int'l (Medical Supplies: U.S.)	January 18		$6M	$6M
6	Las Vegas Sands Corp. (Gaming: U.S.)	January 19		$7M	$7M
Trump Administration (Jan. 21 – Dec. 31, 2017)					
7	Halliburton Co. (Oil and Gas: U.S.)	July 27		$29.2M	$29.2M
8	Telia Company AB (Telecommunications: Sweden)	September 21	$274.6M	$208.5M	$519.1M
9	Alere Inc. (Healthcare: U.S.)	October 24		$13M	$13M
10	SBM Offshore N.V. (Oil and Gas: Netherlands)	November 29	$238M		$238M
11	Keppel Offshore & Marine Ltd. (Oil and Gas: Singapore)	December 22	$105M		$105M

DOJ Corporate Enforcement Dropped; Individual Enforcement Actions Increased

DOJ corporate FCPA enforcement activity slowed in 2017. In total, the DOJ resolved nine corporate FCPA cases and collected $820.5 million, but two-thirds of the corporate resolutions occurred at the end of the Obama Administration in the first three weeks of January, when the DOJ entered into six resolutions and collected $202.9 million. For the rest of 2017, the DOJ, under the Trump Administration, resolved only three corporate FCPA cases for a total of $617.6 million. Overall, 2017 activity was down from the 11 corporate resolutions and $1.33 billion collected in 2016.

By contrast, 2017 saw an uptick in DOJ enforcement actions against individuals, with the filing of four indictments against individuals and the resolution of nine cases against individuals—figures higher than the two indictments and six resolutions announced in 2016. Six of the nine 2017 FCPA resolutions against individuals involved jail sentences, with an average sentence of more than two years.

Chart 5: DOJ and SEC Individual FCPA Charges and Resolutions, 2016–2017

	Obama Admin. (2016)	Obama Admin. (Jan. 1–Jan. 20, 2017)	Trump Admin. (Jan. 21–Dec. 31, 2017)
DOJ – Indictments	2	0	4
DOJ – Pleas	6	2	9
DOJ – Total	8	2	13
SEC	8	6	1
Total	16	8	14

SEC Corporate and Individual FCPA Enforcement Declined

SEC corporate FCPA enforcement activity slowed significantly in 2017. In total, the SEC resolved eight corporate FCPA cases, but five of those occurred at the tail end of the Obama Administration, during the first three weeks of January. In contrast, in the remaining 49 weeks of 2017, the Trump Administration's SEC resolved only three corporate FCPA cases. The total number of SEC corporate FCPA enforcement actions, and in particular those brought under the Trump Administration, is down significantly from the 25 corporate resolutions in 2016.

The total dollar value of SEC corporate FCPA resolutions also dropped, from $1.1 billion in 2016 to $304.7 million in 2017. Of the $304.7 million collected in corporate FCPA actions in 2017, $54 million was collected during the first three weeks of the year under the Obama Administration, and $250.7 million was collected in the remaining 49 weeks under the Trump Administration.

The SEC continued its trend of resolving corporate FCPA investigations through administrative proceedings instead of civil court actions. In 2017, all three of the Trump Administration's SEC's corporate resolutions were administrative actions, which is an increase from 2016, when 71 percent of corporate FCPA resolutions were administrative actions. Reliance on administrative proceedings provides the SEC with greater autonomy by allowing it to avoid judicial scrutiny of its settlements.[3]

The SEC resolved seven FCPA cases against individuals in 2017, but six of those seven were resolved in the last three weeks of the Obama Administration. Between January 21 and December 31, under the Trump Administration, the SEC resolved only one FCPA case against an individual.

NEW DOJ CORPORATE FCPA POLICY CREATES PRESUMPTION OF A DECLINATION IF A COMPANY SELF-DISCLOSES, FULLY COOPERATES, REMEDIATES, AND DISGORGES

Overview

On November 29, 2017, the DOJ announced a new corporate FCPA enforcement policy creating a presumption that, absent "aggravating circumstances," the DOJ will decline to take enforcement action against a company that self-discloses alleged misconduct, fully cooperates with the DOJ's investigation, remediates, and disgorges any ill-gotten profits.[4] This policy supersedes the FCPA Pilot Program—a temporary policy that had been in effect since April 2016 and offered companies that self-reported FCPA violations a possible declination or fine reduction of up to 50 percent if they cooperated with the DOJ's investigation and fully remediated the violation.[5] The new enforcement policy is set out in section 9-47.120 of the U.S. Attorneys' Manual. Similar to the Pilot Program, companies that do not voluntarily disclose misconduct, but otherwise fully

cooperate with the DOJ's investigation and engage in timely and appropriate remediation, qualify for up to a 25 percent reduction off the low end of the U.S. Sentencing Guidelines ("U.S.S.G.") range.[6]

Satisfying Presumption that the DOJ Will Decline to Take Any Enforcement Action

The new corporate enforcement policy creates a presumption that the DOJ will decline to take any enforcement action against companies that: (i) voluntarily self-disclose suspected FCPA violations; (ii) fully cooperate with the DOJ investigation; (iii) take timely and appropriate remediation steps; and (iv) pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.[7]

The presumption of a declination can be rebutted by "aggravating circumstances," which include:

- Involvement by executive management in the misconduct;
- A significant profit to the company from the misconduct;
- Pervasiveness of the misconduct within the company; and
- Criminal recidivism.[8]

If the DOJ determines that the presumption of a declination is rebutted but that the company involved has fully cooperated with the DOJ and fully remediated as of the time of the resolution, the DOJ nevertheless will recommend a 50 percent reduction off the low end of the U.S.S.G. fine range (except in the case of a criminal recidivist) and generally not require appointment of a monitor.[9]

Chart 6: The Revised DOJ Policy vs. the Pilot Program

	Policies Prior to Pilot Program	FCPA Pilot Program	New FCPA Corporate Enforcement Policy
Self-Report, Full Cooperation, and Remediation	Opaque prosecutorial discretion	Consideration of declination Up to 50% off the low end of the U.S.S.G. fine range, if fine sought Generally will not require a corporate monitor	Presumption of declination 50% off the low end of the U.S.S.G. fine range in the event presumption of declination is overcome Generally will not require a corporate monitor
No Self-Report but Full Cooperation and Remediation	Opaque prosecutorial discretion	Up to 25% off the low end of the U.S.S.G. fine range	Up to 25% off the low end of the U.S.S.G. fine range

Voluntary Self-Disclosure and Cooperation

Consistent with past practice, to receive credit for voluntary self-disclosure of suspected wrongdoing, corporate disclosure to the DOJ must occur prior to an imminent threat of disclosure or government investigation and within a reasonably prompt time after the company becomes aware of the offense.[10] In addition, the company must timely disclose all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law, proactively cooperate with the DOJ's investigation, and take other steps to assist the DOJ with its investigation.[11]

Remediation

The new policy also describes requirements for a company to receive credit for timely and appropriate remediation. Among other things, similar to existing practice, the DOJ expects companies to:

- Demonstrate a thorough analysis of causes for the underlying conduct and, where appropriate, remediate to address the root causes;
- Implement an effective compliance and ethics program;
- Appropriately discipline employees;
- Appropriately retain and prohibit improper destruction or deletion of business records; and
- Take additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and implementation of measures to reduce the risk of repetition.[12]

The policy's expectations relating to remediation incorporates elements from the Ten Hallmarks of an Effective Compliance Program contained in the DOJ's and the SEC's 2012 FCPA Resource Guide, and the policy appears to incorporate new

language and concepts from a variety of other sources, including the Pilot Program and the DOJ's Evaluation of Corporate Compliance Programs guidance document released by the Fraud Section in February 2017.[13]

Uncertainty Remains

In announcing the new policy, the Deputy Attorney General explained that the DOJ was seeking to "provide incentives for companies to engage in ethical corporate behavior" and that it expected the new policy "to reassure corporations that want to do the right thing."[14] Indeed, the new enforcement policy provides a significant disclosure incentive for companies to consider when deciding whether to self-disclose conduct that may violate the FCPA, particularly when the conduct was not pervasive, did not involve executive management, and did not result in significant profit to the company. While the policy also incentivizes self-disclosure in cases involving more serious conduct, companies still face much of the same uncertainty that they did prior to the adoption of the new policy when deciding whether or not to self-disclose FCPA violations to the DOJ, including, but not limited to, potential subsequent investigations by the SEC or foreign regulators and other collateral consequences, such as civil litigation, administrative sanctions, and reputational harm.

DELAYS IN REPLACING SEVERAL SENIOR ENFORCEMENT POSITIONS HAVE CREATED SOME UNCERTAINTY IN FCPA ENFORCEMENT

Under the new administration, there have been several changes to DOJ enforcement leadership and many key positions remain unfilled, with seasoned attorneys serving on an interim basis. This combination of new leaders and unfilled positions has affected key policy and personnel decisions and has also created some uncertainty about whether we have seen the full impact of the Trump Administration on FCPA enforcement.

Changes to and Openings in DOJ Enforcement Leadership

Last year, there were several changes in DOJ enforcement leadership under new Attorney General Jeff Sessions. On June 5, 2017, Brian Benczkowski was nominated to lead the DOJ's Criminal Division, but his confirmation was still pending at the end of 2017.[15] In the interim, Acting Assistant Attorney General Ken Blanco, a career DOJ prosecutor, led the Criminal Division in an acting capacity through November 2017.[16] At that point, John Cronan, a former Southern District of New York prosecutor, began leading the Criminal Division as its Acting Assistant Attorney General.[17]

The Fraud Section, which houses the DOJ's FCPA Unit, is also under temporary new leadership. In June 2017, Fraud Section Chief Andrew Weissmann departed to assume a management role on the DOJ Special Counsel team headed by Robert Mueller.[18] Sandra Moser, a member of the Fraud Section since 2012, was named to lead the Fraud Section in an acting capacity.[19]

Dan Kahn, who joined the Unit in 2010 and was named the acting Chief of the FCPA Unit in March 2016 and permanent Chief of the FCPA Unit in June 2016, continues to lead the DOJ's 30-attorney FCPA Unit.[20] During 2017, several prosecutors in the FCPA Unit have left for private practice, with replacements coming in from private practice or from within the DOJ.

Also, in June 2017, Hui Chen, the Fraud Section's first compliance consultant, departed.[21] As of the end of 2017, the DOJ's search for a replacement was continuing.

New Enforcement Leadership at the SEC

There were also changes in FCPA enforcement leadership at the SEC under the new chair, Jay Clayton. In June 2017, Stephanie Avakian and Steven Peikin were named as the new co-heads of Enforcement.[22] Avakian was the acting director from December 2016 to June 2017.[23] In November 2017, Charles Cain was appointed as the new head of the SEC's 40-attorney FCPA Unit after serving in an acting role since April 2017.[24] Cain has been a supervisor in the Unit since 2010.[25] On December 6, 2017, Tracy Price was appointed the deputy chief of the FCPA Unit.[26] She had previously served as the assistant director of the FCPA Unit.[27]

Enforcement Trends May Further Evolve in 2018 with New Trump Administration Enforcement Leadership

With a full slate of new permanent enforcement leadership on the horizon, the total impact of the Trump Administration on FCPA enforcement has yet to be realized. This is particularly significant given the backlog of DOJ and SEC FCPA investigations that exists.

FEWER MONITORSHIPS IMPOSED

The Trump Administration's DOJ Required No Monitors

Under the Trump Administration, the DOJ did not require monitorships in any of its three 2017 corporate resolutions. In each of these resolutions, the DOJ stated that no monitor was necessary "based on the Company's remediation and the state of its compliance program."[28] In two of the three actions, the resolving company agreed to self-report its additional remediation efforts to the DOJ for a three-year period.[29] In response to this trend, the head of the DOJ's FCPA Unit said in November 2017 that monitors would not be imposed in cases where the company's compliance program was "sufficiently effective that [the DOJ] did not think there was a risk of recurrence," but that that the DOJ would impose monitors on companies "where [the DOJ thinks] it is appropriate … to reduce the risk of misconduct recurring."[30]

As discussed above, under its new FCPA enforcement policy, the DOJ has pronounced that it will generally not require a corporate monitor if a company: (i) voluntarily self-discloses criminal conduct to the DOJ; (ii) fully cooperates with the DOJ's investigation; and (iii) takes timely and appropriate remediation steps. In each corporate FCPA resolution under the Trump Administration's DOJ, however, each company did not self-disclose its conduct, although it did fully cooperate and implement extensive remedial measures.

This is a marked change from the Obama Administration, when seven of the 11 DOJ corporate FCPA resolutions in 2016 and two of the six resolutions during the first three weeks of 2017 required the resolving company to hire an independent monitor generally for a three-year term. If this trend away from the imposition of an independent monitor continues under the Trump Administration's DOJ, it will be an even more significant development, as it may further signal a new DOJ willingness to allow companies to self-monitor their own conduct after FCPA enforcement actions, even in cases where the company does not self-disclose its conduct.

The Trump Administration's DOJ Announced Review of Monitor Policy

Changes to the current monitor program are on the horizon. As noted above, in October 2017, the Deputy Attorney General announced that he would be establishing a working group to review, among other policies to deter corporate fraud, the DOJ's monitor program.[31] While the DOJ has not commented on how it might change its current monitor program, some have speculated that it may include changes to the monitor selection process and clarification as to why some companies require a monitor while others do not.[32]

The SEC Required Independent Compliance Monitors in Three "Repeat Offender" Actions

In 2017, the SEC required monitors in all three so-called "repeat offender" actions, including one under the Trump Administration. Each of these resolving companies had previously entered into an FCPA resolution with the DOJ and SEC.[33] This trend is significant because, even under the Trump Administration, it indicates the SEC and likely the DOJ will take recidivism seriously when it comes to insisting on the imposition of monitors. Indeed, as noted above, under the DOJ's new corporate FCPA Enforcement Policy, criminal recidivism will be considered an "aggravating circumstance," which may weigh against a declination even if a company voluntarily discloses the conduct.[34]

THE U.S. SUPREME COURT CURBED THE SEC'S ABILITY TO COLLECT DISGORGEMENT

SEC Disgorgement Subject to Five-Year Statute of Limitation

In June 2017, the U.S. Supreme Court significantly limited the scope of the SEC's ability to collect disgorgement, the SEC's primary enforcement remedy. In *Kokesh v. SEC*,[35] the Court unanimously held that disgorgement, like other financial sanctions employed by the SEC, is a "penalty" and is therefore subject to the five-year statute of limitations set forth in 28 U.SC. §2462.[36] The Court noted that disgorgement "bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate."[37] The Court rejected the SEC's position that disgorgement was "remedial" rather than punitive, citing prior cases where the SEC imposed a disgorgement amount that exceeded the defendant's ill-gotten gains.[38]

The Court declined to state its opinion on the legitimacy of the SEC's use of disgorgement as an enforcement remedy, cautioning in a footnote that "[n]othing in this opinion should be

interpreted as an opinion on whether courts possess the authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context."[39] The Court's unwillingness to address whether the SEC's use of disgorgement is appropriate has invited further challenges to the SEC's disgorgement authority.

The full impact of *Kokesh* on SEC enforcement remains to be seen. However, because the SEC can no longer seek disgorgement for conduct outside of the five-year statute of limitations, it may begin seeking higher penalties to compensate for lost disgorgement. The SEC might also seek to expedite enforcement actions by issuing Wells notices more quickly and expediting requests that investigation targets execute tolling agreements to suspend or waive the statute of limitations. It may also increasingly claim that individual wrongful acts were part of an ongoing scheme so as to make disgorgement permissible as to the entirety of the conduct, including acts outside the five-year limitations period. Finally, the Court's determination that disgorgement is a penalty may revive arguments that in parallel civil and criminal cases, double jeopardy bars the imposition of both SEC disgorgement and a DOJ criminal fine.[40] This would have important consequences for FCPA resolutions, particularly given the number of FCPA investigations that are resolved by parallel negotiated settlements with the SEC and the DOJ.

2017 Tax Reform Bill Will Impact the Characterization of SEC Disgorgement in Federal District Court Actions

Companies should be aware that amendments contained in the tax reform bill signed into law in December 2017 will mean new rules for deducting fines, penalties, and other amounts, including disgorgement, paid to the SEC.[41] The tax reform bill amends section 162(f) of the Internal Revenue Code, which prohibited businesses from deducting "any fine or similar penalty paid to a government for the violation of any law."[42] Under the amendment, which broadens the scope of section 162(f), taxpayers cannot deduct amounts paid to the government in a settlement or as a result of court order.[43] The amendment is effective only as of the date of its enactment and does not apply retroactively to existing binding orders or settlement agreements that have already been entered into and approved by a court.[44]

The amendment provides exceptions for: (i) payments made in restitution (including remediation of property); and (ii) payments made to come into compliance with law.[45] To fall within these exceptions, such payments must, among other things, be identified in the relevant court order or settlement agreement as serving one of the two enumerated purposes.[46] Thus, the amendment gives the government significant influence over the tax treatment of any settlement payment, in essence allowing the SEC (or court) to influence the deductibility of settlement payments.

Indeed, following *Kokesh*, the SEC may have an incentive to characterize disgorgement as restitution in federal district court actions. Before *Kokesh*, the SEC consistently argued that disgorgement was not a penalty but an equitable remedy.[47] Adopting that reasoning, district courts have consistently used their equitable powers to order disgorgement in SEC actions. Federal courts, however, do not generally have explicit statutory authority to impose disgorgement. Thus, if disgorgement constitutes a penalty rather than an equitable remedy after *Kokesh*, what is the SEC's source of authority to impose disgorgement in district court actions? To preserve its ability to collect disgorgement in federal court actions, the SEC may resort to characterizing these payments as restitution in settlement agreements and in court submissions. *Kokesh* will not affect the SEC's ability to collect disgorgement in administrative proceedings since the SEC has clear authority to seek disgorgement in an administrative action.

FOUR LARGE MULTIJURISDICTIONAL CORPORATE SETTLEMENTS HIGHLIGHT INCREASING INTERNATIONAL COOPERATION AND COORDINATION

As 2017 demonstrated, cooperation among U.S. and foreign anticorruption enforcement authorities continues to increase. The DOJ entered into four major global anticorruption resolutions that were coordinated with foreign authorities in the Netherlands, Switzerland, the United Kingdom, Singapore, and Brazil, showcasing the continuing development of anticorruption enforcement in jurisdictions outside the United States and the increasing incidence of coordination among multiple sovereigns conducting investigations into the same conduct.

While the United States still leads the world in anticorruption enforcement, foreign regulators are increasingly investigating and punishing companies that participate in bribery. As such, it is important that companies stay apprised of developments in international anticorruption enforcement so they are

equipped to deal with multiple enforcement agencies in the event misconduct occurs.

Sweden's Telia Paid $274.6 Million to the DOJ and $208.5 Million to the SEC, Part of a More than $965 Million Global Resolution with U.S., Dutch, and Swedish Authorities

In September 2017, Sweden-based telecommunications company Telia Company AB and its Uzbekistan subsidiary, Coscom LLC, agreed to pay more than $965 million to the DOJ, the SEC, the Public Prosecution Service of the Netherlands, and the Swedish Prosecution Authority to resolve foreign bribery charges related to improper payments to foreign officials in Uzbekistan.[48] According to the charging documents, Telia and Coscom conspired to pay more than $330 million to an Uzbek government official between 2007 and 2010 to enter into and ultimately expand their share of the Uzbekistan telecommunications market.[49] The Telia settlement marked the third-largest global resolution of foreign bribery charges and the DOJ's first major FCPA settlement under the Trump Administration.

The global resolution consisted of $274.6 million in criminal penalties paid to the DOJ and $274 million paid to the Dutch Public Prosecutor's Office (Openbaar Ministerie), resulting in a total criminal penalty of $548.6 million. Telia also agreed to pay $457 million in disgorgement of profits and prejudgment interest, satisfied through an immediate $208.5 million payment to the SEC, a $40 million forfeiture payment to the DOJ subsumed within the criminal penalty total, and the remainder through forfeiture payments made in related proceedings with Swedish and Dutch authorities.[50] Telia entered into a Deferred Prosecution Agreement ("DPA") with the DOJ and a cease-and-desist order with the SEC.[51] The DOJ determined that an independent compliance monitor was unnecessary "based on the Company's remediation and the state of its compliance program."[52]

One day after the DOJ announced its settlement with Telia, Swedish prosecutors charged three former Telia executives with "serious bribery offenses," including the company's former CEO, Lars Nyberg, and the former head of the Eurasian business, Tero Kivisaari.[53]

UK's Rolls-Royce Settled $800 Million Global Resolution, Including $170 Million Penalty Payment to the DOJ

In January 2017, prior to the Trump Administration, Rolls-Royce plc, a manufacturer and distributor of power systems based in the United Kingdom, agreed to pay $800 million in connection with the global resolution of a parallel anticorruption investigation conducted by the DOJ, the UK Serious Fraud Office ("SFO"), and the Brazilian Ministério Público Federal ("MPF").[54] According to the charging documents, Rolls-Royce made more than $35 million in commission payments to third parties, which were used to bribe foreign officials in exchange for confidential information and awarded contracts.[55] The charging documents state that bribes were paid over the course of 13 years in at least six different countries, including Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq, and that at least one high-level Rolls-Royce executive knew about the bribe payments.[56]

The $800 million resolution included nearly $170 million in criminal penalties paid to the DOJ, a £497 million ($604.8 million) fine paid to the SFO, and a $25.5 million fine paid to the MPF.[57] At the announcement, the DOJ praised its "strong relationship" with the SFO and MPF. Rolls-Royce entered into DPAs with the DOJ and the SFO and a leniency agreement with the MPF.[58] As with the Telia matter, the DOJ determined that the imposition of an independent compliance monitor was unnecessary in light of Rolls-Royce's "remediation and the state of its compliance program."[59]

Several months after announcing the corporate resolution, the DOJ unsealed charges against five individuals, including two former executives of Rolls-Royce and its subsidiaries, another former Rolls-Royce employee, and a former Rolls-Royce intermediary, for their alleged participation in the bribery scheme.[60] One individual pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA, three others pleaded guilty to one count of conspiracy to violate the FCPA, and the fifth individual was indicted but is believed to reside outside of the United States.[61]

Netherlands' SBM Offshore Paid $238 Million to Settle with the DOJ, Resulting in an Overall $820 Million Global Resolution

In November 2017, the DOJ announced the resolution of its investigation into SBM Offshore, a Dutch manufacturer of offshore drilling equipment, and its wholly owned U.S. subsidiary ("SBM USA"), concluding another case in which U.S. authorities worked closely with their foreign partners to investigate instances of bribery abroad.[62] According to court documents, SBM's conduct that formed the basis for the settlement

occurred between 1996 and 2012, when the company paid more than $180 million in commissions to intermediaries, knowing that a portion of those payments would be used to bribe foreign officials working at state-controlled oil companies in Brazil, Angola, and Equatorial Guinea.[63] As part of the resolution, SBM entered into a DPA with the DOJ and agreed to pay a $238 million criminal penalty.[64]

In 2014, SBM settled with the Openbaar Ministerie in connection with related conduct and paid the Dutch agency $200 million in disgorgement and a $40 million fine, and in 2016, SBM and Brazil's MPF agreed to settle MPF's investigation for $342 million, although the nonfinancial terms are being negotiated.[65] The DOJ initially declined to prosecute SBM in 2014 but reopened its investigation in 2016 after learning of additional information not uncovered during SBM's investigation, including that a U.S.-based executive managed a significant portion of the scheme.[66] Combined with the criminal penalties SBM paid to the DOJ in 2017, SBM's worldwide settlement payments totaled $820 million.[67] As with Telia and Rolls-Royce, the DOJ agreed to settle the matter without requiring a corporate monitor, although SBM did complete three years of monitoring under the supervision of Dutch authorities and agreed to self-report to the DOJ for a three-year period regarding its remediation and implementation of compliance reforms.[68]

SBM's resolution with the DOJ was announced shortly after two of its former executives, including the former SBM Offshore CEO, pleaded guilty in the United States to charges tied to the bribery scheme.[69] The former SBM Offshore CEO pleaded guilty to one count of conspiracy to violate the FCPA based on his willful blindness to the scheme, which predated his role as CEO.[70] On November 9, 2017, he admitted that after he became SBM Offshore's CEO, he furthered the company's preexisting scheme to bribe officials at the state-controlled oil companies of Brazil, Angola, and Guinea for assistance securing contracts by authorizing payments that he "deliberately avoided" learning were bribes.[71]

Singapore's Keppel Offshore & Marine Paid $106 Million in Penalties to the DOJ, Part of a More than $422 Million Global Resolution with U.S., Brazil, and Singapore Authorities

In December 2017, Singapore-based shipping company Keppel Offshore & Marine Ltd. and its U.S. subsidiary, Keppel Offshore & Marine USA Inc., agreed to pay more than $422 million to the DOJ, the MPF in Brazil, and the Attorney General's Chambers in Singapore arising out of a nearly 14-year scheme to pay millions of dollars in bribes to Brazilian officials.[72] The Keppel settlement is the latest in a recent string of major global anticorruption resolutions with Brazilian authorities.

According to the charging documents, Keppel made more than $350 million in profits from 13 contracts after paying more than $50 million in bribes to Brazilian officials at the Brazilian state-owned oil company Petrobras, and to the then-ruling political party, between 2001 and 2014.[73] Keppel used a series of shell companies to conceal the payments.[74] The DOJ determined that a monitor was unnecessary "based on the Company's remediation and the state of its compliance program" and agreement to report to the DOJ regarding its remediation and implementation of additional compliance reforms.[75]

In connection with the resolution, the DOJ unsealed charges against a former senior member of Keppel's legal department who pleaded guilty to one count of conspiracy to violate the FCPA.[76]

Continued Close Cooperation Between U.S. Authorities and Foreign Regulators

As these resolutions demonstrate, the DOJ and SEC appear to have intensified their cooperation with regulators around the world when conducting anticorruption investigations and resolving related enforcement actions. Indeed, five corporate FCPA resolutions with international cooperation and coordination entered in the last two years rank among the highest total global settlements ever recorded, as shown on Chart 7.

Chart 7: Top Six Global Anticorruption Corporate Resolutions Involving DOJ and/or SEC

	Company	Resolution Year(s)	Global Total	Regulators
1	Odebrecht/Braskem (Construction: Brazil)	2016	$3.6B	U.S. Brazil Switzerland
2	Siemens (Manufacturing: Germany)	2008	$1.6B	U.S. Germany
3	Telia Company AB (Telecommunications: Sweden)	2017	$965M	U.S. Sweden Netherlands
4	SBM Offshore N.V. (Oil and Gas: Netherlands)	2014–2017	$820M	U.S. (2017) Brazil (2016) Netherlands (2014)
5	Rolls-Royce plc (Aviation: UK)	2017	$800M	U.S. UK
6	Vimpelcom (Oil and Gas: Netherlands)	2016	$795M	U.S. Netherlands

The frequent cooperation between U.S. regulators and their foreign counterparts is expected to continue. In December 2016, the DOJ announced that, for the first time, it planned to second a prosecutor from the Fraud Section to the UK's SFO and Financial Conduct Authority ("FCA").[77] In May 2017, the Trump Administration announced further aspects of its plans for this two-year secondment to the UK authorities, explaining that it launched the secondment program because the "cross-border nature of many financial frauds has increased the need for international cooperation and coordination among regulators and prosecutors."[78]

Against this backdrop, companies facing corruption investigations now, more than ever, must be prepared to deal with multiple enforcement agencies in multiple countries, whether or not those agencies are acting in coordination with one another. Dealing concurrently with these multijurisdictional regulators can complicate the process of investigating and resolving corruption cases. For example, historically, not all countries have considered penalties imposed by other jurisdictions when resolving their own cases. This can lead to a company believing it is entering a global settlement but nevertheless facing the risk of subsequent actions by other regulators relating to the same underlying conduct.[79] Because of this risk, when a company considers disclosing potential corruption issues in one country as part of a settlement with another country, it must consider whether that disclosure will lead to other countries claiming jurisdiction over, and seeking to prosecute the company for, the disclosed conduct.

On the other hand, recent developments show that certain regulators are making efforts to mitigate issues raised by prosecutions in multiple jurisdictions. In July 2017, the DOJ announced it would attempt to cooperate with foreign countries to avoid levying duplicative fines.[80] Following that announcement, the DOJ credited SBM Offshore for payments to Dutch and Brazilian authorities in calculating the company's fine to resolve its case in November 2017 and used similar offsets in the Telia resolution in September 2017.[81] Moving forward, it is possible that multijurisdictional cooperation will result in companies facing lower overall sanctions than they would otherwise incur if they faced duplicative fines and penalties.[82]

CONCLUSION

2017 was a noteworthy year for FCPA enforcement. With the Trump Administration still finding its footing, the DOJ's and SEC's corporate enforcement statistics declined, with only five corporate FCPA resolutions and a total of $868.3 million in fines and penalties in the last 49 weeks of the year. Meanwhile, 2017 saw the adoption of a revised DOJ FCPA enforcement policy that creates a presumption of a declination for non-recidivist companies that self-report, fully cooperate, and fully remediate, as well as a U.S. Supreme Court ruling that significantly curbs the SEC's ability to collect disgorgement. With several members of the new leadership yet to be confirmed by the U.S. Senate or appointed, the full impact of the Trump Administration on FCPA enforcement may not be realized until well into 2018.

However, given the increased global anticorruption activity and stepped-up cooperation between U.S. enforcement authorities and their foreign counterparts, multinational companies should still expect to be subject to increased anticorruption enforcement activity in jurisdictions throughout the world.

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ENDNOTES

1 A concurrent DOJ and SEC corporate FCPA resolution is counted as one total corporate FCPA enforcement action.

2 U.S. Attorneys' Manual ("USAM") § 9-47.120 (4).

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6 USAM § 9-47.120 (2).

7 *Id.*

8 *Id.*

9 *Id.*

10 USAM § 9-47.120 (3)(a).

11 *Id.* Full cooperation also requires: (i) Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance; (ii) Where requested, de-confliction of steps the DOJ intends to take as part of its investigation, including witness interviews, with steps the company intends to take as part of its internal investigation; and (iii) Where requested, making company officers and employees who possess relevant information available for DOJ interviews. *Id.*

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34 USAM § 9-47.120 (2).

35 No. 16-529, 137 S. Ct. 1635 (2017).

36 *Id.* at 1639.

37 *Id.* at 1644.

38 *Id.* at 1644-45.

39 *Id.* at 1642 n.3.

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44 *Id.*

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