Professional Perspective

FCPA Enforcement Continues Apace Under Trump Administration

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Foreign Corrupt Practices Act investigations and settlements appear to be continuing apace under the current administration despite its business-friendly stance and the President's comments as a candidate regarding the statute. Indeed, 2018 and 2019 have borne witness to numerous cases involving substantial penalties for FCPA violations, most recently in the instance of telecom equipment maker Ericsson, which in December agreed to pay more than $1 billion in combined penalties to the Department of Justice and Securities and Exchange Commission. Entities engaged in rapid, foreign expansion efforts continue to be the prime, but by no means the only, suspects and targets.

Significant trends that developed in 2019 included:

- While 2019 saw some notable, headline-grabbing settlements and trial convictions, companies' continued efforts to avail themselves of the Department of Justice's FCPA Corporate Enforcement Policy have had a significant impact on FCPA trends. That policy—a formal version of a pilot program first implemented under the prior administration—allows companies to receive substantial reductions in penalties or even a declination of prosecution in exchange for self-reporting and cooperation with the government investigation.

- An increasing focus on individual liability in conjunction with companies' ability to avoid criminal penalties is possible, but whether it will occur is as yet unclear. Although there have been some prosecutions of individuals in past years, it is too soon to say whether this is a trend; the DOJ's slow retreat from the Yates Memo's focus on individual accountability may suggest otherwise.

- Individual prosecutions have led to additional FCPA trials, which are generally few and far between. As is always the case, individuals have greater incentives than corporations to test the government's charges and legal theories. There has been speculation that these trials will result in a better-developed body of law interpreting the FCPA, which should provide greater clarity as to the reach of this broad statute. In some instances, that theory has borne fruit. Whether that will be the case in general remains to be seen.

Looking forward to 2020 and beyond, we should expect to see continued self-disclosure and cooperation by companies seeking to be among the increasing number of FCPA violators who receive declinations from the DOJ, and perhaps an increased focus on prosecutions of individuals.

FCPA Enforcement Policy

President Donald Trump's statements as a candidate denigrating the FCPA led some to believe that, when he was elected, enforcement efforts under his administration would be substantially muted. It has now become clear, however, that FCPA enforcement efforts by both the DOJ and the Securities and Exchange Commission have not appreciably changed in frequency as compared to pre-Trump levels. Indeed, the consensus among observers now seems to be that any lull early in this administration was instead attributable to typical factors that can suppress enforcement efforts during any presidential transition, coupled with an especially active final year of the Obama administration.

The more significant development has been a continuation and expansion of policies first implemented under Obama. These policies make it easier and more appealing for corporations to cooperate with the DOJ, thereby possibly avoiding prosecution altogether. Specifically, the DOJ has formalized its self-disclosure policy, announced a "no piling on" policy, and relaxed the standards for a corporation to receive cooperation credit.

In Nov. 2017, the DOJ Criminal Division formally implemented the FCPA Corporate Enforcement Policy. This policy had previously been instituted on a pilot basis during the Obama administration. Under the formalized version, there is a "presumption" that the company "will receive a declination [of prosecution] absent aggravating circumstances" so long as it satisfies three criteria: it "has voluntarily self-disclosed in an FCPA matter", "fully cooperated", and "timely and appropriately remediated."

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Then in May 2018, then-Deputy Attorney General Rod Rosenstein announced the DOJ's "no piling on" policy. In short, this policy requires federal prosecutors to consider potential penalties imposed by other federal agencies (principally the SEC), state authorities, and foreign governments. In the context of the kind of behavior proscribed by the FCPA, which can readily attract the attention of numerous government agencies both at home and abroad, this could have significant consequences in reducing enforcement efforts by the DOJ and, more particularly, punishments imposed on FCPA violators.

Finally, in Nov. 2018, the DOJ modified the so-called Yates Memo to make it easier for corporations to receive cooperation credit in all cases, not specifically the FCPA arena. Rather than the original 2015 requirement that to "receive any consideration for cooperation" credit, "the company [was required to] completely disclose to the Department all relevant facts about individual misconduct," the Nov. 2018 modification lowered the threshold for corporations to receive credit. Now they must only disclose "all individuals substantially involved in or responsible for the misconduct at issue."

Taken together, these changes are having a serious impact on FCPA enforcement. Indeed, while it is still early to arrive at firm conclusions, observers generally expect the number of formal declinations issued under the Enforcement Policy to continue to increase, as they did from 2018 to 2019.

Corporate Enforcement

Although it is now easier for companies to avoid criminal prosecution altogether, the DOJ remains focused on enforcement. Particularly at risk are companies engaged in rapid international expansion in emerging markets; the desire for growth, coupled with business norms in certain foreign locales, may set the stage for FCPA violations. And robust compliance programs in the U.S. are of limited value if not adhered to by foreign operations and/or subsidiaries that can often operate with some degree of autonomy. Further, U.S.-based parent companies are less likely to notice—and therefore investigate and self-report—such potential violations when focused on the tasks necessary for rapid, international expansion.

Perhaps no current public investigation exemplifies this trend more than an ongoing matter involving Uber. In April 2019 filings related to its initial public offering, Uber disclosed publicly for the first time that it was under investigation by both the SEC and DOJ for violations of the FCPA. Initially focused on conduct in Indonesia, the investigation had since expanded to include Uber's operations in Malaysia, China, and India.

This development should come as no surprise: Uber has operations in at least 65 countries and a long-running string of controversies emblematic of the company's aggressive approach to expansion, consistent with its origins in the start-up culture of Silicon Valley. This rapid growth, particularly if coupled with insufficient oversight or compliance programs, primed the company for potential violations of the FCPA. Only time will tell whether Uber can position itself to enjoy the full benefits of the FCPA Corporate Enforcement Policy and avoid criminal prosecution.

Nor is it "easy" to fully comply with the FCPA Corporate Enforcement Policy's requirements. The recently settled enforcement actions against Walmart and Fresenius illustrate the challenges companies face in satisfying the self-disclosure and cooperation requirements. On June 20, 2019, Walmart entered into a three-year non-prosecution agreement with the DOJ related to the department's investigation of its Mexico, India, and China subsidiaries. Its Brazil subsidiary pleaded guilty in the District Court for the Eastern District of Virginia for violations of the FCPA. Walmart also consented to entry of a cease-and-desist order with the SEC for alleged reporting violations.

Pursuant to the agreements with the DOJ and SEC, Walmart agreed to pay a total of $282 million in penalties and disgorgement ($137.96 million penalty to the DOJ and $144.69 million in disgorgement plus interest to the SEC). The penalties imposed by the DOJ represented a 25% discount from the bottom of the otherwise applicable sentencing guidelines for conduct in India, China, and Brazil, and a 20% discount for the conduct in Mexico.

The misconduct related to Walmart's foreign subsidiaries, which used intermediaries to make payments to foreign government officials to facilitate the construction and opening of retail stores. For years, Walmart consistently turned a blind eye to the misconduct. As a result, the company did not receive disclosure credit under the FCPA Corporate Enforcement Policy. The company did, however, receive "full credit" for cooperation in assisting the government with respect to the misconduct in Brazil, China, and India. In particular, Walmart voluntarily expanded its investigation and disclosed findings related to Brazil, China, and India. In this respect, Walmart offers a lesson in how to salvage a less-than-ideal situation.

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Fresenius, on the other hand, did voluntarily disclose all of its misconduct but nonetheless failed to receive a declination of prosecution because, according to the government, it did not fully cooperate with the ensuing investigation.

Fresenius is a German corporation that provides products and services for people with chronic kidney failure. Fresenius entered into a non-prosecution agreement with the DOJ and agreed to pay a total criminal penalty of $84,715,273, which represented an aggregate discount of 40% off the bottom of the U.S. Sentencing Guidelines fine range. The company further agreed to an independent compliance monitor for a term of two years, followed by self-monitoring for the final year of the NPA. Finally, Fresenius entered into a consent decree with the SEC, which provided for disgorgement of $147 million.

The misconduct related to various schemes to pay bribes to publicly employed health and/or government officials to obtain or retain business for and on behalf of FMC in, among other places, Angola, Saudi Arabia, Morocco, Spain, Turkey, and West Africa. The company received voluntary disclosure credit because it voluntarily and timely disclosed to the government in April 2012. However, it only received partial credit for its cooperation. In particular, although it conducted a thorough internal investigation, the company apparently did not timely respond to requests by the DOJ and did not always provide fulsome responses to requests for information.

In contrast to the examples of Walmart and Fresenius stands the investigation of Insurance Corporate of Barbados Limited, which was the first corporation to receive a declination with disgorgement under the FCPA Corporate Enforcement Policy in Aug. 2018. ICBL, through its agents and employees, paid approximately $36,000 to a member of the Parliament of Barbados. In return, the company received insurance contracts resulting in approximately $686,827.50 in total premiums and net profits of $93,940.19.

Notwithstanding the "high-level involvement of corporate officers in the misconduct," the company received a declination due to its "timely, voluntary self-disclosure," "thorough and comprehensive investigation," and cooperation, including its commitment to continue assisting in the Department's related ongoing investigations and prosecutions.

In sum, ICBL stands as the template for companies such as Uber to follow as it attempts to mitigate fallout from FCPA violations. Proactive, voluntary disclosure, coupled with good faith cooperation and remediation efforts, provide a path to receiving a declination. But even should a company stumble under one of the criteria, as the examples of Walmart and Fresenius demonstrate, there still exists the possibility of substantial reduction in penalties for only partially satisfying the criteria under the FCPA Corporate Enforcement Policy.

Notable FCPA Resolutions	**Date**	**Resolution**	**FCPA Corporate Enforcement Policy Factors**
Uber Technologies, Inc.	April 2019 (disclosure in SEC filing)	TBD	TBD
Telefonaktiebolaget LM Ericsson	Dec. 2019	DOJ Deferred Prosecution Agreement; subsidiary pleaded guilty • Penalty – $520 million SEC Consent Decree • Disgorgement – $540 million	No voluntary disclosure Partial credit for cooperation and remediation
Microsoft Corporation	July 2019	DOJ NPA with Hungary Subsidiary • Penalty – $8 .75 million SEC Consent Decree • Disgorgement – $16.55 million	

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Notable FCPA Resolutions	Date	Resolution	FCPA Corporate Enforcement Policy Factors
Walmart / WMT Brasilia S.a.r.l.	June 2019	DOJ Non-Prosecution Agreement • Penalty – $137.96 million SEC Consent Decree • Disgorgement – $144.69 million	No voluntary disclosure Cooperation and Remediation (full credit as to Brazil, China, and India; partial as to Mexico)
Fresenius Medical Care AG & Co. KGaA	March 2019	DOJ Non-Prosecution Agreement • Penalty – $84.7 million SEC Consent Decree • Disgorgement – $147 million	Voluntary disclosure Cooperation and remediation not full (partial credit)
Petroleo Brasileiro S.A.	Sept. 2018	DOJ Non-Prosecution Agreement • Penalty – $853.2 million SEC Consent Decree • Disgorgement – $933.47 million	No voluntary disclosure Full cooperation and remediation

Prosecution of Individuals

While there have been several prosecutions of individuals for FCPA violations in recent years, it is difficult to say how the trends will unfold in the coming years. Should prosecutions of individuals increase, we should expect more cases to go to trial. Settlements between corporations and the government effectively leave the meaning of the law to the parties; trials, however, require judges to address the meaning of the operative provisions, from the earliest stages, such as pre-trial motions, to jury instructions. If more trials occur, we can hope for the development of a more fulsome body of law interpreting the relevant provisions of the FCPA and in particular defining the outer limits of its reach.

The impact is not theoretical. Indeed, two decisions recently had a significant impact on the interpretation of the FCPA, as courts have been forced to grapple with previously novel questions.

In *United States v. Hoskins*, mid-prosecution the government appealed an order dismissing the first count of the indictment. The primary issue was whether the FCPA could be applied to Hoskins, a foreign national who had not worked for an American company or visited the U.S. during the course of the alleged criminal conduct. *United States v. Hoskins*, 902 F.3d 69, 71–72 (2d Cir. 2018).

The Court of Appeals concluded that an individual cannot be found to have violated the FCPA, under either a conspiracy or aiding-and-abetting theory, if he could not have violated the statute as a principal. However, the Second Circuit reversed the portion of the district court's opinion holding that Hoskins could also not be charged under an agency theory of liability. That is, if Hoskins was an agent of the American company, Alstom Power, he was properly subject to the FCPA. The jury ultimately convicted Hoskins under this theory.

In Aug. 2019 the Second Circuit issued another important decision in *United States v. Seng*, 934 F.3d 110 (2d Cir. 2019). There, the question was a jury instruction regarding what kinds of services provided in exchange for allegedly illicit payments fall within the scope of the FCPA.

The defendant Ng Lap Seng paid two United Nations ambassadors more than $1 million to secure a commitment to use Seng's Macau real estate development as the site for an annual U.N. conference. Seng appealed on a number of different grounds, one of which was that the jury instructions as to the FCPA violations were deficient in light of the Supreme Court's

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ruling in *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016), which required an “official act” to constitute bribery of a public official.

The FCPA, the Second Circuit explained, “makes it a crime corruptly to give a foreign official anything of value (again, the *quid*) for purposes of (1) ’influencing any act or decision of such foreign official in his official capacity’; (2) ’inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official’; (3) ’securing any improper advantage’; or (4) ’inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality’ (the *quos*).”

The Court of Appeals rejected the idea that the heightened standard for bribery cases set in *McDonnell* applies to the FCPA. In affirming the defendant's conviction, the court held that the government does not need to satisfy the more stringent “official acts” element established by *McDonnell* in order to prove an FCPA violation. In essence, therefore, federal law proscribes a greater range of conduct in the FCPA than in the domestic context.

Conclusion

Looking ahead, we expect a continued robust enforcement environment for FCPA violations, with an ever-increasing emphasis on companies trying to take advantage of the leniency afforded by the FCPA Corporate Enforcement Policy. Additional trials may shed light on new—and at times esoteric—areas of FCPA enforcement. At the same time, the corporate incentives to disclose and disgorge have never been higher, so we may continue to see eye-popping settlements announced.

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