How to Qualify for Benefits Under the New FCPA Corporate Enforcement Policy

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DOJ Solidifies and Sharpens FCPA Enforcement Guidance

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On Nov. 29, 2017, the U.S. Department of Justice (DOJ) released a new enforcement policy for cases brought under the U.S. Foreign Corrupt Practices Act (FCPA), the primary U.S. law governing bribery of foreign government officials. The new FCPA Corporate Enforcement Policy is largely a continuation of the FCPA pilot program, which was launched in April 2016 and provided incentives for companies to self-disclose FCPA violations.
violations, cooperate with government investigations and remediate misconduct. However, the new policy goes further than the pilot program in several respects in its efforts to encourage companies to self-disclose FCPA misconduct.

There are a few key takeaways from the new policy. First, the new policy removes the temporariness of the pilot program and codifies it. Second, the new policy takes the pilot program further in important respects, including the fact that self-disclosing companies now have a presumption in favor of a declination of prosecution, although there are important qualifications on that presumption, such that it may not be operative in some cases, particularly larger ones or at companies that have a prior FCPA resolution. Third, regardless of the criminal resolution, companies are still required to disgorge profits tied to the misconduct. Traditionally, the government has taken a broader view of what constituted profits than disclosing parties have. Fourth, the new policy reflects the DOJ’s continuing commitment to pursuing individual wrongdoers. Finally, despite the discussion in the new policy of the DOJ’s flexibility in awarding cooperation credit, the DOJ still expects extensive cooperation from companies, which can be quite onerous.

2016 Pilot Program—Construct and Results

Launched on April 5, 2016, the FCPA enforcement pilot program was a one-year program incentivizing companies to self-disclose FCPA violations to U.S. authorities. Under the program, the DOJ would “consider a declination of prosecution” against self-disclosing companies, and those companies could also avoid the imposition of a monitor. The pilot program also stressed that self-disclosure itself was not enough—to reap the program’s benefits, companies would also need to (1) cooperate fully with the DOJ’s investigation and (2) remediate misconduct in a timely and appropriate manner.

However, if the DOJ decided that a criminal penalty was warranted and the company was not awarded a declination, a self-disclosing company was eligible for a 50 percent reduction off the bottom end of the applicable fine range under the U.S. Sentencing Guidelines. Even in the absence of self-disclosure, a company could obtain up to a 25 percent discount off the bottom end of the applicable fine range if it fully cooperated and remediated the misconduct.

On March 10, 2017, the DOJ announced that the pilot program would continue past its one-year anniversary and that the DOJ was evaluating the efficacy of the program.

In announcing the new policy on Nov. 29, 2017, Deputy Attorney General Rod Rosenstein stated that the government viewed the pilot program as a success. Rosenstein pointed out that, in the 18 months of the pilot program, the DOJ received 30 voluntary disclosures, compared to 18 during the previous 18-month period, an increase of 67 percent.

Takeaways From the New Policy

While the new policy is largely a continuation of the pilot program, there are several key takeaways.

Codification. Most fundamentally, the new policy is codified in the U.S. Attorneys’ Manual, which removes any uncertainty over the continuity of the pilot program and sharpens the calculus for companies that are evaluating their options in the face of potential FCPA violations.
Same Core Principles. The new policy rests on the same three core principles as the pilot program: (1) timely and complete self-disclosures to the government; (2) extensive and fulsome cooperation with the DOJ’s investigation; and (3) timely remediation, including a detailed analysis of root cause, implementation of an effective compliance program, and employee discipline. The need for a root-cause analysis—which was implicit in the pilot program’s guidance—is now expressly referenced in the new policy.

Additional Provisions, Including a Rebuttable Presumption of Declination. The new enforcement policy goes further than its predecessor in a couple of respects. First, while the pilot program allowed the DOJ to “consider a declination of prosecution” where a party meets the requirements of self-disclosure, full cooperation and timely remediation, the new policy creates a presumption, albeit a rebuttable one, that the self-disclosing party will receive a declination. Additionally, in the event a criminal fine is imposed, the new policy states that the DOJ “will” recommend a 50 percent reduction off the bottom end of the sentencing guidelines for self-disclosing parties. The pilot program was less definitive, stating that the DOJ “may” recommend a 50 percent discount for self-disclosing companies.

Significant Limitations on the Presumption of Declination. Even if a party self-discloses, cooperates and remediates (and thereby earns a presumption of declination), the declination is far from automatic. As under the pilot program, there are several factors that could warrant the imposition of a criminal fine. According to the policy, “[a]ggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism [i.e., the company is a repeat offender].”

These exceptions still afford prosecutors substantial discretion, as there is no specific guidance on how, for example, the DOJ defines “pervasive [] misconduct” and “significant profit[s].” On the issue of the significance of profits, the cases the DOJ declined under the pilot program involved disgorgement amounts averaging $4.5 million. It is unclear if the DOJ would decline a case—and forgo the imposition of a fine—where the profits approached the tens of millions or more.

Disgorgement. As with the pilot program, companies are still required to disgorge—without a discount—any profits arising out of the misconduct. Disgorgement is owed regardless of a declination or a criminal prosecution—in the case of a criminal fine, the disgorgement is an additional payment. Critically, the exercise of calculating tainted profits is subjective and is the focus of considerable negotiation with the DOJ (and the SEC), often involving experts. Unsurprisingly, the government’s calculation of “profits” often exceeds that of the disclosing party, and the government has substantial leverage to impose its conclusion.

Focus on Individuals. The policy offers benefits to companies only, not individuals. The text and structure of the new policy suggest that it is designed to enable the DOJ to sharpen its focus on individual wrongdoers. Deputy Attorney General Rod Rosenstein underscored this point when announcing the policy, stating that it “will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals.” In essence, by incentivizing companies to self-disclose and potentially earn
a declination, the DOJ is freeing resources to pursue individuals. This in turn puts pressure on self-disclosing and cooperating companies to identify culpable individuals and provide fulsome disclosures regarding their conduct.

*Full Cooperation as Defined by the Government.* While the new policy largely reiterates the pilot program's requirements for cooperation, it is worth reviewing how extensive those requirements are. They include, for example: timely, proactive and complete disclosure of relevant facts, including those relating to individuals and third parties; disclosure of documents located overseas; facilitating the provision of documents from third parties; and identifying external evidence the government can pursue. These requirements also include “de-confliction,” a process of deferring to the DOJ to allow the DOJ to take investigative steps before the company where parallel steps by the company and the DOJ may conflict. While the DOJ attempted to be more reasonable in its formulation of de-confliction in the new policy, it remains an expectation for cooperating companies.

As with the pilot program, a party that cooperates (but does not self-disclose) is eligible for a 25 percent reduction off the bottom end of the applicable fine range, which is still a significant benefit. The new policy provides some further nuance on cooperation, asserting that the DOJ will be more flexible and consider a company’s financial resources when assessing the extent and quality of cooperation. The DOJ also stated that it would credit partial cooperation, rather than treating cooperation credit as all-or-nothing.

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DOJ Announces New FCPA Corporate Enforcement Policy

Advisory
By Marcus A. Asner, Andrew Bauer, James W. Cooper, Jonathan E. Green, Drew A. Harker, John N. Nassikas, Soo-Mi Rhee, Michael A. Rogoff, Daniel Bernstein, Lindsey D. Carson

On November 29, 2017, Deputy Attorney General Rod Rosenstein unveiled a revised Corporate Enforcement Policy for the US Foreign Corrupt Practices Act (FCPA). This policy, which incorporates key portions of the Obama Administration’s FCPA Pilot Program into the US Attorneys’ Manual, is "aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct."2

The New Policy: Presumption of Non-Prosecution for Companies That Self-Disclose, Cooperate, and Remediate

The FCPA Corporate Enforcement Policy provides that "[w]hen a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated ..., there will be a presumption that the company will receive a declination." In other words, under these circumstances there now will be a presumption that the company will not be prosecuted for FCPA violations. Where aggravating circumstances—such as high-level executive involvement in the misconduct, significant profit from the misconduct, or pervasiveness of the misconduct in the company—warrant a criminal resolution, companies still may receive a 50 percent reduction off the low end of the US Sentencing Guidelines fine range (except in the case of a criminal recidivist). Companies may also avoid the appointment of a compliance monitor if, at the time of the resolution, they have in place an effective compliance program. Notably, to qualify for favorable treatment under the Policy, a company must pay all disgorgement, forfeiture, and/or restitution from the misconduct at issue, even if the DOJ declines to bring charges.3

The FCPA Corporate Enforcement Policy also provides limited credit for full cooperation and timely and appropriate remediation in FCPA matters without voluntary self-disclosure. Consistent with the FCPA Pilot Program that was announced last April, companies that satisfy the DOJ’s standards for cooperation and remediation are eligible for a reduction of up to 25 percent off the low end of the Sentencing Guidelines fine range.4

The Policy, moreover, defines what the DOJ considers "voluntary self-disclosure", "full cooperation," and "timely and appropriate remediation.". To receive credit for self-disclosure, a company must report the issue before "an imminent threat of disclosure or government investigation," and must report all relevant facts known to the company at that time. Meanwhile, "full cooperation" requires that a company not only disclose the findings of any independent or internal investigations and any relevant documents and information, but also, if requested, "deconflict" by deferring the interviews of employee witnesses or other investigative steps until after the government has had an opportunity to do so itself. Full credit for "timely and appropriate remediation" will be awarded only to companies that have analyzed and redressed the root causes of the misconduct, implemented an effective compliance program, appropriately disciplined any employees that participated in the misconduct, and taken steps that "demonstrate recognition of the company’s misconduct," including acceptance of responsibility.5
Significance: Emphasis on Compliance and Individual Misconduct

The DOJ's FCPA Corporate Enforcement Policy makes permanent many of the core elements of the Pilot Program, which has guided the DOJ's FCPA enforcement decisions over the past year and a half. What is new is the presumption in favor of non-prosecution when companies self-report, cooperate, and remediate. This presumption is intended to encourage more self-reporting of violations.

The decision to self-report, however, may not be an easy one, particularly if a company is unsure whether an FCPA violation has in fact occurred. The FCPA Corporate Enforcement Policy does not guarantee a declination or assure that a resolution will be kept confidential. Nor does it provide the equivalent of a "Get Out of Jail Free" card for companies that violated the FCPA. Even if a company receives a declination, the DOJ will not allow it to keep the profits from its misconduct. Companies therefore will need to weigh both the benefits and risks of self-reporting under DOJ policy.

In his remarks on the FCPA Corporate Enforcement Policy, Deputy Attorney General Rosenstein emphasized that the DOJ remains committed to holding individuals accountable for FCPA violations, as well as other crimes. His remarks echoed those of Attorney General Jeff Sessions, who earlier in the year stressed the importance of holding individuals accountable for corporate misconduct. So while the FCPA Corporate Enforcement Policy may lead to lower penalties for companies that self-report, the DOJ's focus on individuals may intensify. Companies seeking the benefits of the FCPA Corporate Enforcement Policy will need to demonstrate their willingness to cooperate with the DOJ's investigation of individuals and their commitment to develop robust compliance programs that are designed to prevent and detect misconduct.

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2 US Attorneys' Manual (USAM) § 9-47.120.

3 USAM § 9-47.120.

4 See id.

5 See id.


7 See Rosenstein Remarks.

FCPA investigators routinely face obstacles to gathering data from non-company email and messaging apps. In particular, such communications are often not stored on company devices, and where files exist, they may be encrypted or otherwise difficult to open.

Outside messaging apps, such as Snapchat and Wickr may automatically delete messages after a few seconds or days precisely so that users can keep their communications confidential.

Outside email accounts are also difficult to access and present obvious data privacy issues. These circumstances have long posed challenges for FCPA investigators, but now, the use of outside email and messaging apps also threatens to disqualify companies from receiving substantial benefits under the DOJ’s new FCPA Corporate Enforcement Policy.

Specifically, under the new DOJ policy, for a company to receive full credit -- e.g., the presumption of a declination -- for timely and appropriate remediation in the context of cooperating with a government investigation, the company must meet the following criteria (among others):

- Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications [emphasis added].

This language is unprecedented in prior DOJ guidance on FCPA enforcement, and shows a significant evolution in the DOJ’s expectations for data controls.

In particular, the new Policy signals that the DOJ now expects companies to clearly instruct employees not to communicate about business matters using any type of email or messaging software that doesn’t properly store the relevant data. If a company fails to do so, it may not qualify for a declination or certain other benefits under the new DOJ Policy -- even if the company has an otherwise state-of-the-art compliance program and satisfies all other requirements for cooperation under the DOJ Policy.

From a practical perspective, the new Policy suggests that the DOJ expects companies to:

- Maintain appropriate written standards for data controls, which clearly define the types of communication software that are permissible to use for business matters. The new Policy suggests that acceptable software should include only programs that create and store business-related emails and messages in a form that is reasonably accessible to the company (e.g., to preserve and collect in an investigation), and consistent with the company’s document retention rules.
Effectively implement data controls through means such as training, automated checks (e.g., potentially blocking installation of unauthorized apps), obtaining employee consents (to facilitate data processing), routinely testing compliance (e.g., through audits), and enforcement through discipline where appropriate.

Many companies have already made substantial efforts to implement effective data controls, recognizing their importance to safeguard against a broad range of corporate risks. In light of the DOJ’s new Policy, corporate attention to this area will likely intensify.

For compliance professionals, it is important to first understand the perspectives and work habits of business personnel. For example, if company email servers are slow, employees may use personal Gmail accounts to get through more quickly. If the company doesn't offer an internal messaging app, employees may use Skype to chat with a workmate down the hall rather than individually sending, opening, and deleting hundreds of short emails.

Employees may find it more reliable to reach customers and business partners through Viber if the business partners find it more economical, user-friendly, or compatible with their personal smartphones. Employees may prefer the functionality of WhatsApp in sending photos, accessing contacts, or chatting with project teams.

With a solid understanding of such factors, one can more effectively develop practical data controls that help companies address risk and position themselves to qualify for substantial benefits under the DOJ’s new enforcement Policy, with minimal disruption to legitimate business processes.

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Considerations Before Self-Reporting Under New FCPA Policy

By Olga Greenberg, Scott Sorrels, Yvonne Williams-Wass and Jeffrey Bialos

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On Nov. 29, 2017, the U.S. Department of Justice kicked off the holiday season with a Christmas offering of sorts to companies subject to the U.S. Foreign Corrupt Practices Act with its announcement of a revised corporate enforcement policy.[1] The policy revision makes permanent the core elements of an Obama-era FCPA pilot program and also adds a key benefit to firms considering voluntary disclosures of FCPA violations — namely, that a presumption of no prosecution will apply to those companies that self-report such misconduct in a manner consistent with the DOJ’s standards.

Viewed in context, the new enforcement policy is noteworthy in several respects. First, it addresses lingering questions about whether the Trump administration would continue the robust enforcement of the FCPA that has evolved over the last several administrations. The president’s past comments on the law prior to taking office, suggesting it created an uneven playing field for U.S. firms, as well as comments by Attorney General Jeff Sessions raised some questions in this regard. While Sessions committed to FCPA enforcement during his nomination hearings, this new policy, announced by Deputy Attorney General Rod Rosenstein last week, puts these issues to rest and confirms that all parties subject to the FCPA should continue to be vigilant and to expect strong U.S. enforcement.

Second, the new corporate enforcement policy, with its confirmed beneficial treatment for corporate liability, continues the DOJ’s recent emphasis on holding individuals, who do not receive benefits under the policy, fully accountable for criminal activity.[2] As Rosenstein noted in highlighting the distinction, “[i]t makes sense to treat corporations differently than individuals, because corporate liability is vicarious; it is only derivative of individual liability.”[3] Thus, all individuals working as corporate directors, executives, employees and agents should recognize that this new policy does not offer leniency for their past or future misconduct.

Finally, companies considering voluntary disclosure need to carefully consider the benefits, costs and risks of self-reporting under the now permanent corporate enforcement policy. On the one hand, the new presumption of nonprosecution is a tangible benefit of disclosure. It extends the pilot program’s effort to afford more certainty about the benefits of disclosure to firms as they make the disclosure choice.
The policy also continues the 50 percent off discount for those disclosures that still warrant criminal resolution. Indeed, in announcing the revised enforcement policy, Rosenstein acknowledged the uncertainty that companies deal with when “struggling with the question of whether to make voluntary disclosures of wrongdoing.” The policy revision, he explained, is designed to “reassure corporations that want to do the right thing.” Rosenstein said he expects the changes “will increase the volume of voluntary disclosures.”

On the other hand, the standards for a disclosure to qualify for these and other benefits under the new corporate enforcement policy continue to be high. The disclosure must truly be voluntary, the firm must be fully cooperative, the firm’s compliance program must meet robust criteria, and the firm must “pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.” Moreover, some benefits, including a 25 percent discount, are offered to firms that take appropriate remedial steps but do not make voluntary disclosures.

In short, disclosure of violations is still voluntary under the FCPA, and the new policy does not end the need for firms to make considered choices. The policy reinforces the importance that DOJ places on the potential benefits of disclosure and cooperation. While the new presumption of nonprosecution is a tangible benefit of disclosure, that holiday gift may be taken away by the facts and circumstances of a particular matter. Nevertheless, firms now can make this choice with a better understanding of the potential benefits as well as a full understanding of the relevant standards, which are discussed in detail below. There is no “one size fits all” approach here, and companies need to undertake a structured analysis on how to proceed.

The Policy Context: The FCPA Pilot Program

The FCPA pilot program, announced on April 5, 2016, was originally set to run for one year and set out to test whether formalizing the DOJ’s practice of rewarding voluntary disclosures, cooperation and remediation with penalty reductions would result in companies, their boards and management coming forward with the hopes of receiving a lessened penalty. The formal revision of the FCPA corporate enforcement policy indicates the DOJ’s view that the Obama-era pilot program was having the desired impact. During his remarks, Rosenstein noted that “in the year and a half that the Pilot Program was in effect the FCPA Unit received 30 voluntary disclosures, compared to 18 during the previous 18-month period.”

While the DOJ is touting that the revisions provide greater transparency on what is expected from companies that wish to receive credit under the policy, enough subjectivity remains to still make the decision to self-report one that directors and officers will continue to debate.

The Newly Created Presumption

The most significant aspect of the revised FCPA corporate enforcement policy is the adoption of a presumption that the DOJ will decline to take any enforcement action against companies that: (1) voluntarily self-disclose misconduct in an FCPA matter; (2) fully cooperate; and (3) timely and appropriately remediate. This presumption will be overcome if there are “aggravating circumstances involving the seriousness of the offense or the nature of the offender.” If such aggravating circumstances exist, and the DOJ determines criminal prosecution is therefore warranted, companies that otherwise meet the criteria for a declination will potentially receive a 50 percent reduction off the low end of the applicable sentencing guidelines fine range, and generally will not be required to appoint an independent monitor if the company has implemented an effective compliance program.
The policy lays out examples of aggravating circumstances that may warrant criminal resolution, but notes this is a nonexhaustive list: (1) involvement of the company’s executive management in the misconduct; (2) a significant profit to the company from the misconduct; (3) pervasiveness of the misconduct within the company; and (4) criminal recidivism. Thus, companies and their counsel need to consider the full range of circumstances in making the disclosure decision. They need to wrestle with questions like what constitutes “executive management” and how high up in the chain of command must knowledge of or participation in the misconduct go for “aggravating circumstances” to be found.

The continued emphasis on disgorgement as part of the appropriate remediation necessary to receive full credit is apparent from both the policy and Rosenstein’s remarks, in which he clarified that declinations with the payment of disgorgement is clearly “not immunity.” The policy makes clear that restitution “may be satisfied by parallel resolution with a relevant regulator,” such as the U.S. Securities and Exchange Commission. However, in the absence of a parallel regulatory action by the SEC, companies will likely have to demonstrate to the government that they have appropriately remediated by making satisfactory disgorgement, forfeiture and/or restitution for the violations.

**Key Considerations in Evaluating Self-Reporting**

Significantly, the new policy confirms and reiterates the standards for voluntary self-disclosure, full cooperation, and timely and appropriate remediation. Thus, directors and officers should pay close attention to these definitions when evaluating what is expected to qualify for credit under the policy.

1. **Self-Disclosure**

The new policy retains the pilot program’s definitions and requirements of what qualifies as voluntary self-disclosure in FCPA matters. To qualify for credit, self-disclosure must occur “prior to an imminent threat of disclosure or government investigation” and “within a reasonably prompt time after becoming aware of the offense.” Significantly, the burden is on the company seeking credit to demonstrate timeliness. Many times the decision to self-report is being informed by internal investigations or reviews, which may take weeks or months to complete. Often companies face the decision of whether to self-report before a full investigation has occurred, meaning that a company may or may not know whether there are “aggravating circumstances” that would disqualify it from receiving a declination at the point when it must decide to self-report. One can easily then imagine a tension arising between the director or officer who wants a full understanding of the issue before reaching a decision to self-report, and the government, which expects to learn of the issue not long after the fact.

Credit for self-disclosure is also predicated on the company disclosing “all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.” This requirement may also give pause to directors and officers considering self-reporting. What is expected by “all relevant facts”? Who determines what is “relevant”? And is the company willing to name names?

2. **Full Cooperation in FCPA Matters**

The new policy includes a detailed description of what the government will consider “full cooperation,” which is substantially similar to the description contained in the pilot program. While not an exhaustive list, companies are expected to at least:

(i) cooperate proactively and disclose all relevant facts and evidence to the government on a timely
basis, even when not specifically asked to do so by the government;

(ii) provide all relevant facts gathered during a company’s independent investigation;

(iii) attribute facts to specific sources;

(iv) preserve, collect and disclose relevant documents to the government, including documents located overseas;

(v) refrain from interviewing witnesses, including a company’s own employees, if requested to do so by the government;

(vi) make employees and officers available to the government to interview; and

(vii) facilitate the production of third-party witnesses and documents.

An addition in the new policy is a footnote providing that “[i]f a company claims that it is impossible to meet one of these requirements ... the Fraud section should closely evaluate the validity of that claim and should take the impediment into consideration in assessing whether the company has fully cooperated.” This footnote appears to suggest that a company may be able to successfully obtain credit even if not able to fully satisfy the policy’s requirements. However, the policy notes that the company has the burden of establishing why it cannot meet the requirements.

Inviting the government in and providing this level of access to people and information is enough to give pause in many a boardroom.

Needless to say, this can be a very expensive undertaking and an investigative challenge, especially in cases involving multinational firms with offices in multiple countries.

3. Timely and Appropriate Remediation

Companies can’t just spot the problem — they have to fix it in order to benefit from the new policy. As with self-disclosure and full cooperation, the government sets a relatively high standard for what is expected by remediation. Among other things, the government expects that a company will engage in a root-cause analysis of the underlying criminal conduct and take steps to address such causes, implement an effective compliance and ethics program, discipline employees who participated in the conduct or who failed in their oversight and supervision, retain business records in an appropriate way, and take additional steps commensurate with the conduct identified.

The Continued Importance of an Effective Compliance Program

The policy discusses in depth the importance of having an effective compliance program. In particular, for a company to receive full credit for timely and appropriate remediation in FCPA matters, it must have in place an “effective compliance and ethics program.” Similarly, if criminal resolution is warranted, a company that has an effective compliance program, and has otherwise fully cooperated, self-reported and remediated, will not likely require the appointment of a monitor.

The policy again provides the following, nonexhaustive but robust list of what may be considered in evaluating effective compliance programs:
The company’s culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;

The resources the company has dedicated to compliance;

The quality and experience of the personnel involved in compliance, so that they can understand and identify the transactions and activities that pose a potential risk;

The authority and independence of the compliance function and the availability of compliance expertise to the board;

The effectiveness of the company’s risk assessment and the manner in which the company’s compliance program has been tailored based on that risk assessment;

The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance and other appropriate factors;

The auditing of the compliance program to assure its effectiveness; and

The reporting structure of any compliance personnel employed or contracted by the company.

Two additions in the new policy are worth noting: First, the compliance function is now expected to have “authority” as well as independence; second, companies are required to have engaged in the “appropriate retention of business records,” including “prohibiting the destruction or deletion of business records.” These additions appear to reflect lessons learned by the government from the issues that arose in matters under the pilot program.

For firms that did not have an effective system in place to begin with (which in part may have given rise to the violation in question), the challenge is to improve these systems quickly and in a way that its rigor can be measured to qualify for benefits under the policy. For example, evaluating the “effectiveness of the company’s risk assessment” is something that typically is done after a period of time when it has experience rather than simply on relying on new policies and procedures on paper.

In all events, the policy clearly highlights the continued importance of an effective compliance program and the need for companies, and their directors and officers, to put one in place to deter violations as well as to facilitate more lenient treatment if a subsequent violation occurs. Boards of directors of companies with material FCPA exposure due to the nature of their business (whether in risky countries, business sectors or the like) should exercise appropriate oversight over this issue and review the effectiveness of these programs from time to time. Setting the right “tone at the top” and building a truly strong culture of compliance and an effective program requires not only a significant dedication of time and effort at the outset, but also should remain at the forefront of corporate priorities. FCPA violations — and particularly those involving aggravating circumstances — are simply less likely to occur in companies that prioritize effective compliance functions.
Conclusion

Although the prospect of a declination is encouraging for companies considering self-reporting, the decision to disclose remains voluntary. Firms have to carefully assess the potential benefits of such disclosures along with potential costs and risks, including whether they qualify under the rigorous standards for voluntary disclosure in the DOJ’s FCPA enforcement policy. Questions about what constitutes a “voluntary” disclosure, cooperation, an effective compliance program, and whether aggravating circumstances are involved are subjective determinations. These questions, along with the amount of disgorgement, are difficult to answer and require a “facts and circumstances” analysis. Ultimately, these are subjective judgments that the company in the first place, and the Justice Department, if a voluntary disclosure is made, will make in deciding on a course of action.

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November 30, 2017

DOJ Issues New FCPA Corporate Enforcement Policy

Introduction

On Wednesday, November 29, 2017, United States Deputy Attorney General Rod J. Rosenstein announced a new Justice Department FCPA Corporate Enforcement Policy. The policy is intended to improve upon and make permanent the FCPA Pilot Program (the “Pilot Program”), that was announced on April 5, 2016, to enable DOJ to efficiently identify and punish criminal conduct, and to provide greater certainty for companies considering whether to disclose voluntarily a potential FCPA violation to DOJ. Unlike prior guidance announced through memoranda from the assistant attorney general, the FCPA Corporate Enforcement Policy will be incorporated into the United States Attorneys’ Manual.

Under the new FCPA Corporate Enforcement Policy – which applies only to DOJ criminal prosecutions and neither affects declinations in cases in which there is no criminal liability nor SEC investigations – when a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that the company will receive a declination unless there are aggravating circumstances. Even if a company does not make a voluntary disclosure, if it otherwise meets all of the requirements of the new policy, the company will still be eligible for cooperation credit of a 25 percent reduction off the bottom of the U.S. Sentencing Guidelines range. This new policy appears to represent an effort by DOJ to incentivize companies further to disclose voluntarily and fully cooperate with respect to potential FCPA violations, as well as a redoubled effort to bring criminal prosecutions against individual offenders.


3 USAM 9-47.120 – FCPA Corporate Enforcement Policy.
Background

On April 5, 2016, DOJ announced the FCPA Pilot Program. Under that program, companies seeking full mitigation credit were required to (1) voluntarily self-disclose; (2) fully cooperate with DOJ investigation; (3) remediate internal controls and compliance programs as appropriate; and (4) disgorge ill-gotten gains. If these requirements were satisfied, a company could receive a 50 percent reduction off the bottom end of the U.S. Sentencing Guidelines range or even potentially a declination. The terms of the new FCPA Corporate Enforcement Policy appear intended to signal a greater likelihood that a company that satisfies the same requirements as under the Pilot Program will now receive a declination. Whether this promise is realized in practice will depend in large measure on how DOJ interprets several of the key concepts set forth in the new policy related to eligibility and aggravating circumstances.

Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation

Absent aggravating circumstances, the new policy provides for a presumption that a company will receive a declination if it voluntarily self-discloses, fully cooperates, and timely and appropriately remediates. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct, a significant profit to the company from the misconduct, pervasiveness of the misconduct within the company, and criminal recidivism. Even if a criminal resolution is warranted, however, if a company has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section will provide a 50 percent reduction off of the low end of the U.S. Sentencing Guidelines fine range unless the company is a repeat offender; and generally the Fraud Section will not require the appointment of a monitor if a company has implemented an effective compliance program at the time of the resolution.

To qualify for the benefits of the FCPA Corporate Enforcement Policy, a company must also pay all disgorgement, forfeiture, and restitution resulting from the misconduct. This requirement may be satisfied by payments made under a parallel resolution with another regulator or enforcement agency, such as the SEC.

In addition, all declinations awarded pursuant to the FCPA Corporate Enforcement Policy (i.e., cases that would have been prosecuted or criminally resolved but for the Policy) will be made public.

The FCPA Corporate Enforcement Policy also provides benefits for companies that do not self-disclose but subsequently fully cooperate and timely and appropriately remediate in accordance with the standards of the Policy. A company meeting these requirements may receive up to a 25 percent reduction off of the low end of the U.S. Sentencing Guidelines fine range.
Meaning of Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation

In an effort to provide greater transparency, the FCPA Corporate Enforcement Policy provides fairly detailed definitions of “voluntary self-disclosure,” “full cooperation,” and “timely and appropriate remediation.”

Voluntary Self-Disclosure

In evaluating self-disclosure, DOJ will carefully assess the circumstances in which it is made. To receive credit for self-disclosure, a company must disclose prior to an imminent threat of disclosure or government investigation; it must disclose promptly after becoming aware of the offense; and, it must disclose all relevant facts known to the company, including all relevant facts about individuals involved in the violations.

Full Cooperation

In addition to existing provisions of the U.S. Attorneys’ Manual relating to disclosure of facts relevant to an investigation, the FCPA Corporate Enforcement Policy sets forth five specific requirements for companies to receive credit for full cooperation: (1) disclosure on a timely basis of all facts relevant to the wrongdoing, including facts uncovered during a company’s independent investigation, attributed to specific sources, where attribution does not violate the attorney-client privilege; (2) cooperating proactively rather than reactively, including disclosing facts relevant to the investigation even when not specifically asked to do so; (3) timely preservation, collection, and disclosure of relevant documents, including the facilitation of the production of third-party documents and translations of documents in foreign languages where appropriate and requested; (4) where requested, resolving conflicts relating to witness interviews and other investigative steps that the company intends to take in its investigation with those that DOJ intends to take in its investigation; and (5) making employees and other individuals, including those located overseas, available for DOJ interviews.

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5 If a company claims that the disclosure of overseas documents is prohibited due to local data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the prohibition and is required to work diligently to identify all available legal bases to provide such documents.
6 With respect to witness interviews, the Policy also states that “[DOJ’s] requests to defer investigative steps, such as the interview of company employees or third parties, will be made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department’s investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.”
The FCPA Corporate Enforcement Policy makes clear that cooperation credit is not predicated on a waiver of attorney-client privilege. It also recognizes that a company may be prevented from fully cooperating due to its financial condition, but requires a company claiming financial hardship to provide factual support so DOJ can evaluate the assertion when considering the extent of the company’s cooperation.

Timely and Appropriate Remediation

To receive full credit for timely and appropriate remediation under the FCPA Corporate Enforcement Policy, a company must demonstrate a thorough analysis of the root causes underlying the misconduct and, where appropriate, that it has remediated the root causes; implement an effective compliance and ethics program; appropriately discipline employees, including those involved in the misconduct and those with supervisory authority over the area in which the misconduct occurred; retain and prevent the destruction of business records; and take any additional steps to demonstrate the seriousness of the misconduct, acceptance of responsibility, and the implementation of measures to reduce the risk of repetition of the misconduct.

The criteria DOJ will use in evaluating the effectiveness of the company’s compliance and ethics program may vary based on the size and resources of the organization, but may include the company’s culture of compliance, resources the company has dedicated to compliance, the quality and experience of the compliance personnel, the authority and independence of the compliance function, the effectiveness of the company’s risk assessment and how the company tailors its compliance program based on the risks identified, compensation and promotion of compliance personnel, auditing of the compliance program to ensure its effectiveness, and the reporting structure of compliance personnel. The FCPA Corporate Enforcement Policy makes clear that these criteria will be periodically updated.

Analysis

DOJ, like the SEC, has consistently sought to incentivize companies to disclose FCPA violations and provide robust cooperation in subsequent investigations. The Pilot Program was an effort to provide incentives to self-report and greater guidance to companies regarding how they would be treated. In announcing the new FCPA Corporate Enforcement Policy, Deputy Attorney General Rosenstein stated that DOJ analyzed the Pilot Program and concluded that it was a “step forward in fighting corporate crime.” Rosenstein implied that the new FCPA Corporate Enforcement Policy was an “improvement” on that program. While the new policy appears on its face to represent a step forward from the Pilot Program in dangling the carrot of a declination, there are substantial questions regarding how it will be implemented in practice, including whether the public nature of any declination and the requirement of disgorgement will be sufficiently enticing. At a minimum, however, it may further motivate companies with an FCPA issue to endeavor to meet the eligibility criteria under the Policy even when they choose not to voluntarily disclose in order to maintain eligibility for the 25 percent reduction.
In announcing the new Policy, Deputy Attorney General Rosenstein provided statistics demonstrating that the number of self-reported FCPA matters increased over the 18 months that the Pilot Program was in effect, when compared to the prior 18 months. Given the increased incentives for self-reporting, it is certainly possible that the uptick in self-disclosure will continue, at least in certain types of cases. The effectiveness of the new Policy in achieving this objective may turn, at least in part, on how DOJ interprets the eligibility criteria for consideration under the Policy, as well as the aggravating factors that can prevent a company from receiving the full benefit of the Policy. These factors, especially the definitions of “timely and appropriate remediation,” “significant profit to the company,” and “pervasiveness of the misconduct within the company,” are open to interpretation and could be used by DOJ to justify the continued prosecution of major cases, despite the Policy.

Finally, in announcing the new Policy, Deputy Attorney General Rosenstein reiterated DOJ’s commitment to holding individuals accountable, stating that “[e]ffective deterrence of corporate corruption requires prosecuting culpable individuals.” He argued that the new policy will increase the number of voluntary self-disclosures, which would in turn enhance DOJ’s ability to identify and punish individuals. In explaining why DOJ was continuing to emphasize the prosecution of individuals over corporations, Deputy Attorney General Rosenstein explained his view that “[i]t makes sense to treat corporations differently because corporate liability is vicarious; it is only derivative of individual liability.” Companies should expect that full cooperation under the new FCPA Corporate Enforcement Policy will need to reflect this focus on individual liability and that they will be expected to continue to cooperate in investigations of individuals.

*       *       *
This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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FCPA ENFORCEMENT AND ANTI-CORRUPTION DEVELOPMENTS: 2017 YEAR IN REVIEW

Despite significant FCPA enforcement activity in 2017, the Trump administration’s approach to enforcement remains elusive and not readily characterized.

Looking at 2017 as a whole, the number of corporate enforcement actions resolved by the DOJ and the SEC was within the range of fluctuations in such numbers in recent years, though down from 2016’s record-breaking total. Looking at the year more closely, we find that eight of the fourteen corporate resolutions by the DOJ and the SEC in 2017 were announced in January during the final weeks of the Obama administration, followed by a six-month quiet period during the beginning of the Trump administration, and culminating in six corporate resolutions in the closing months of the year. The majority of corporate resolutions announced during the Trump administration involved foreign companies, but whether the Trump administration is pursuing an “America First” policy in enforcing the FCPA remains an open question. The new administration does appear to have been more aggressive in pursuing prosecutions against individuals, with 17 of the 20 prosecutions of individuals in 2017 brought by the Trump administration. However, given the duration of FCPA investigations, most, if not all, of the corporate and individual enforcement actions announced during the Trump administration almost certainly originated from investigations that pre-dated the administration, suggesting it is too early to draw definitive conclusions.

While it may be too soon to evaluate trends, the administration has made efforts to signal its priorities to companies clearly. The DOJ announced, and incorporated into the United States Attorney’s Manual, a new corporate enforcement policy that reinforces the policy objectives that drove the FCPA Pilot Program announced during the Obama administration, continuing the emphasis on corporate self-reporting of wrongdoing. The new policy is noteworthy in seeking to incentivize cooperation further by dangling the prospect of a declination for companies that self-report and meet the rigorous criteria.

Crossing borders, cooperation between the U.S. and foreign enforcement authorities remained a key feature of FCPA enforcement in 2017.

Our reflections on the year’s most significant developments in anti-corruption and FCPA enforcement and policy are below.
A Decline in Corporate Resolutions from the Highs in 2016

In 2017, the DOJ and the SEC resolved a combined 14 enforcement actions against business entities resulting in $1.1 billion in fines, penalties, disgorgement and pre-judgment interest, of which $832 million was assessed by the DOJ and $298 million by the SEC. Though significant, the $1.1 billion assessed in 2017 is considerably less than the record-breaking amount of more than $2 billion assessed last year. Foreign authorities assessed another $1.4 billion in penalties in connection with U.S. enforcement actions, collectively assessing more than the DOJ and the SEC combined for the second year in a row. Four of the settlements in 2017 (Telia, SBM Offshore N.V. (“SBM”), Rolls-Royce and Keppel Offshore & Marine Ltd. (“KOM”)) resulted in global resolutions with total penalties topping the $400 million mark. Telia’s $965 million global settlement was one of the largest FCPA settlements ever.

<table>
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<th>SEC</th>
<th>Foreign</th>
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<td>$1.34M</td>
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</tr>
</tbody>
</table>

CORPORATE FCPA ENFORCEMENT ACTION PENALTIES 2013-2017

1 Penalty amounts account for offsets between the DOJ and the SEC, and between U.S. and foreign authorities.
2 See Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2016 Year In Review (Jan. 20, 2017), https://www.paulweiss.com/media/3897243/19jan17_fcpa_year_end.pdf. The 2016 penalty amounts have been revised from those reported last year, including to take into account additional information released regarding the penalties assessed in the Odebrecht case.
The DOJ and the SEC each resolved seven corporate enforcement actions in 2017. Although these totals were significantly lower than last year’s, they are comparable with the number of resolutions in earlier years.

Enforcement actions were counted based on the year they were announced. See [https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml](https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml); [https://www.justice.gov/criminal-fraud/related-enforcement-actions](https://www.justice.gov/criminal-fraud/related-enforcement-actions). Resolutions announced on the same day by the same enforcement agency against corporate affiliates were counted as one resolution (e.g., SBM Offshore N.V. and SBM Offshore USA Inc.), a change in methodology from last year.
**Enforcement Across Industries and Regions**

The DOJ and the SEC entered into corporate resolutions in 2017 with companies across a variety of industries and throughout the world. U.S. authorities were most active in the healthcare and energy industries, resolving actions against Zimmer Biomet/JERDS, Orthofix and Alere in the healthcare industry and Halliburton, KOM and SBM in the energy industry.4

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**2017 FCPA CORPORATE RESOLUTIONS BY INDUSTRY**

The map below demonstrates the global span of FCPA cases by showing the locations of the corporate headquarters of all companies that resolved FCPA actions in 2017 and the countries in which improper conduct allegedly occurred.

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4 Industries were defined according to the industry group classifications set by S&P Global Market Intelligence, pursuant to the Global Industry Classification Standard. See [http://www.snl.com](http://www.snl.com).
Over the past five years, the number of foreign authorities cooperating with U.S. authorities’ FCPA corporate enforcement efforts appears to have increased, with 2015 an apparent outlier. We caution, though, that limited conclusions can be drawn from this data, as it is difficult to assess the depth of the substantive cooperation provided by a foreign authority.

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5 The number of cooperating countries and territories was counted based on the countries and territories thanked in DOJ and SEC press releases announcing corporate resolutions.
DOJ Corporate Resolutions

Four of the seven corporate resolutions announced by the DOJ in 2017 (Zimmer Biomet/JERDS, Sociedad Química y Minera Chile (“SQM”), Rolls-Royce and Las Vegas Sands) were announced during the final weeks of the Obama administration. Following an eight-month period during which the DOJ did not announce any corporate resolutions, in the last few months of 2017, the DOJ announced three such resolutions (Telia/Coscom, SBM and KOM). All three resolutions involved foreign companies and their U.S. subsidiaries.

Pursuant to the FCPA Pilot Program, the DOJ also issued two public declination letters in 2017. Both declinations were issued in June to privately-held companies (Linde Group and CDM Smith) and required the companies to disgorge all ill-gotten gains. Since the start of the FCPA Pilot Program, the DOJ has issued seven public declination letters, each of which required the company to disgorge ill-gotten gains to the DOJ or credited the company’s disgorge ment of ill-gotten gains to the SEC as part of parallel settlements.

In addition to the two public declinations under the Pilot Program, in 2017, the DOJ also apparently declined to prosecute at least eleven companies that had been under investigation for potential corruption offenses (Cobalt, Core Laboratories, Halliburton, IBM, Innodata, MTS, Net 1 UEPS Technologies, Newmont, Platform, Vantage Drilling and Varian), based on their public announcements. Whether such announcements indicate something more than that the DOJ lacked any basis—jurisdictional or otherwise—to prosecute such companies, remains to be seen.

FCPA Corporate Enforcement Policy

On November 29, 2017, Deputy Attorney General Rod J. Rosenstein announced the FCPA Corporate Enforcement Policy. The policy, which has been incorporated into the U.S. Attorneys’ Manual, is intended to improve upon and make permanent aspects of the FCPA Pilot Program, to enable the DOJ to identify and punish criminal conduct efficiently and to provide greater certainty for companies considering whether to disclose a potential FCPA violation to the DOJ voluntarily. The new Corporate Enforcement Policy applies only to DOJ criminal prosecutions and affects neither declinations in cases in which there is no basis for prosecution nor SEC investigations. Under the policy, when a company voluntarily self-discloses misconduct, fully cooperates and timely and appropriately remediates, there will be a presumption that the company will receive a declination unless there are aggravating circumstances. To qualify for benefits under the policy, a company must also pay all disgorgement, forfeiture and restitution resulting from the misconduct. In an effort to provide greater transparency, the policy addresses in detail these eligibility

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criteria, as well as the aggravating factors that can prevent a company from receiving the full benefit of the policy.

Even if the DOJ determines that a criminal resolution is warranted because of the presence of an aggravating factor, a company nonetheless may be eligible for a 50-percent reduction off of the low end of the U.S. Sentencing Guidelines fine range unless the company is a repeat offender. A company that does not voluntarily self-disclose, but otherwise meets all of the requirements of the new policy, may receive up to a 25-percent reduction off of the low end of the Guidelines fine range.

The DOJ, like the SEC, has consistently sought to incentivize companies to disclose FCPA violations and provide robust cooperation in subsequent investigations. The Corporate Enforcement Policy appears on its face to represent a step forward from the Pilot Program in encouraging voluntary self-disclosure by dangling the carrot of a declination, or possibly a penalty reduction, but there are substantial questions regarding how the policy will be implemented, including how the DOJ will interpret the eligibility criteria for consideration under the policy, as well as the aggravating factors. In addition, even if a company does not self-report, the policy may motivate it to endeavor to meet the other eligibility criteria in order to maintain eligibility for the 25-percent reduction.

In announcing the Corporate Enforcement Policy, DAG Rosenstein stated that the number of self-reported FCPA matters increased to 30 over the 18 months that the Pilot Program was in effect, compared to 18 reports during the prior 18 months. Given the increased incentives for self-reporting, it is possible that this uptick in self-disclosure will continue, at least in certain types of cases. However, to further incentivize self-reporting, the DOJ could be more transparent about how it treats companies that self-report, by making public—without identifying the companies by name—whether it has declined to prosecute these companies or is continuing to investigate and/or prosecute them. Because the DOJ has issued only seven public declinations under the Pilot Program, the outcomes for the other companies that self-reported are not clear.

The Corporate Enforcement Policy also emphasizes corporate cooperation in holding individuals accountable. The policy builds on the Yates Memo, which requires that companies provide the DOJ with all relevant facts about individuals involved in corporate misconduct to receive cooperation credit. The Corporate Enforcement Policy goes further, requiring that, to receive full cooperation credit, companies must disclose all facts relating to involvement in the criminal activity by the company’s officers, employees or agents, as well as facts relating to potential criminal conduct by third parties and their officers, employees and agents. In announcing the policy, DAG Rosenstein stated that “[e]ffective deterrence of corporate corruption requires prosecuting individuals.” He argued that the new policy will increase corporate voluntary self-disclosure, which will in turn enhance the DOJ’s ability to identify and punish individuals. Consistent with the stated emphasis on prosecuting individuals, the DOJ has prosecuted fourteen individuals for FCPA offenses since President Trump’s inauguration. In explaining why the DOJ was continuing to emphasize the prosecution of individuals over corporations, Rosenstein explained his view that “[i]t makes sense to treat corporations differently because corporate liability is vicarious; it is only derivative of individual liability.” Companies should expect that, to earn the full benefits of cooperation
under the Corporate Enforcement Policy, their actions will need to reflect this focus on individual liability through cooperation in investigations of individuals.

**SEC Corporate Resolutions**

In 2017, the SEC resolved seven corporate enforcement actions and assessed $298 million in penalties and related remedies, which was 16 fewer resolutions and almost $800 million less than in 2016. Setting aside 2016’s record-breaking numbers, the number of corporate enforcement actions and penalties assessed in 2017 was consistent with recent prior years. Only three of the seven corporate resolutions (Halliburton, Telia and Alere) were announced during the Trump administration.

**SEC Whistleblower Program**

In 2017, with respect to FCPA-related tips, the SEC’s whistleblower program also saw declines from highs in 2016. The SEC issued awards totaling more than $42 million to 13 whistleblowers, which was considerably less than the $80 million total awarded to 15 whistleblowers in 2016.\(^8\) Although the SEC received more whistleblower tips in 2017 than in any previous year, the number of FCPA-related tips declined to 210 in 2017, from 238 in 2016, ending a long trend of increased reporting of potential FCPA violations.\(^9\)

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\(^8\) One of the whistleblower awards did not specify the amount, which will be a percentage of monetary sanctions collected or to be collected.

The maps below show the geographic distribution of whistleblower tips in 2017, both within the United States and internationally. Domestically, the greatest number of tips were in California, New York and Texas.

The SEC received tips from 73 countries, with the largest number of tips coming from the United States, the United Kingdom and Canada. The large number of countries from which tips emanated continues to suggest, as it did last year, that norms discouraging whistleblowing may be receding in many foreign jurisdictions.
The SEC also continued to warn companies in 2017 against impeding potential whistleblowers. The SEC brought enforcement actions against three companies (BlackRock, HomeStreet and Lux Financial Services/LWLVACC) for violations of Exchange Act Rule 21F-17, which prohibits impeding any individual from communicating with the Commission about potential securities law violations. Only one of these actions was brought during the Trump administration.

**Review of Trump Administration Corporate Resolutions**

After not announcing any corporate resolutions during the first six months of the Trump administration, beginning in late July, the DOJ and the SEC announced a total of six corporate resolutions against five companies (Halliburton, Telia/Coscom, Alere, SBM and KOM). These resolutions are summarized below.

**Halliburton**

million—a $14 million penalty, $14 million in disgorgement and $1.2 million in prejudgment interest—and to retain an independent compliance consultant for eighteen months. Halliburton’s former vice president, Jeannot Lorenz, also agreed to pay the SEC a $75,000 civil penalty for his alleged role in causing the company’s FCPA violations.

According to the SEC, officials at Angola’s state oil company, Sonangol, advised Halliburton that it was required to partner with more local Angolan-owned businesses to satisfy local content regulations for foreign firms operating in Angola. Halliburton then retained a local Angolan company owned by a former Halliburton employee with connections to an influential Sonangol official who ultimately approved the award of lucrative subcontracts to Halliburton. The local Angolan company did not perform the work described in the pretextual contracts. The SEC further alleged that Lorenz negotiated and entered into these contracts while knowingly circumventing Halliburton’s internal accounting controls and that he falsified books and records by knowingly providing inaccurate scopes of work and other information.

In July, Halliburton disclosed that the DOJ advised that it has closed its investigation into the alleged misconduct. 12

Although not referenced in the SEC’s order, in 2009, Halliburton reached a settlement with the SEC to resolve charges that it and its former subsidiary, KBR Inc., violated the FCPA by participating in a decade-long scheme to bribe Nigerian government officials. 13 Halliburton and KBR jointly agreed to pay $177 million in disgorgement. In addition, KBR has disclosed that the DOJ, SEC and the U.K.’s Serious Fraud Office (“SFO”) are conducting investigations into KBR’s interactions with energy company Unaoil—which the SFO is investigating for suspected bribery and corruption—in relation to international projects involving several global companies. 14

**Telia and Coscom**

On September 21, 2017, the DOJ and the SEC, together with the Public Prosecution Service of the Netherlands (“OM”), entered into a $965 million global settlement—one of the largest combined FCPA settlements ever—with Telia Company AB, a Sweden-based international telecommunications company, and Coscom LLC, Telia’s Uzbek subsidiary. 15 This was the second corporate resolution resulting from an

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ongoing investigation into alleged corruption in the Uzbek telecommunications market. In February 2016, Amsterdam-based telecommunications provider VimpelCom Limited and its Uzbek subsidiary, Unitel LLC, entered into a $795 million global settlement, also with the DOJ, the SEC and the OM, to resolve allegations that they funneled over $114 million in bribery payments to an Uzbek government official.\(^\text{16}\)

According to resolution documents, Telia and Coscom admitted that, from 2007 until at least 2010, they paid over $330 million in bribes to a shell company, under the guise of payments for lobbying and consulting services that were never performed, in order to enter the Uzbek telecommunications market. The shell company was controlled by the Uzbek government official implicated in the VimpelCom scheme, who was a family member of the president of Uzbekistan with influence over the Uzbek governmental body that regulated the telecom industry. In connection with the bribery scheme, millions of dollars were laundered through the U.S. financial system.

Telia entered into a deferred prosecution agreement with the DOJ to resolve charges of conspiracy to violate the FCPA’s anti-bribery provisions and consented to a cease-and-desist order with the SEC to settle charges that it violated the FCPA’s anti-bribery and internal accounting controls provisions, and Coscom pleaded guilty to conspiracy to violate the FCPA’s anti-bribery provisions. Telia agreed to pay a $274.6 million criminal penalty (including a $500,000 criminal fine and $40 million criminal forfeiture on Coscom’s behalf) to the DOJ, $457 million in disgorgement and prejudgment interest to the SEC and a $274 million criminal penalty to the OM. The SEC has agreed to credit any disgorged profits that Telia pays to Swedish or Dutch authorities, who are also investigating, up to half of the total $457 million owed. With respect to the criminal penalty, Telia received a 25-percent reduction off of the bottom of the U.S. Sentencing Guidelines fine range but did not receive more significant mitigation credit because it did not voluntarily self-disclose the misconduct to the DOJ.

In announcing the resolution, then-Acting U.S. Attorney Joon H. Kim of the Southern District of New York stated that it was “one of the largest criminal corporate bribery and corruption resolutions ever.”

**Alere**

On September 28, 2017, Alere Inc., a Massachusetts-based medical manufacturer, consented to a cease-and-desist order with the SEC to resolve charges that Alere’s foreign subsidiaries committed accounting fraud, used third parties to make improper payments to government officials, failed to maintain adequate internal controls and inaccurately recorded the improper payments.\(^\text{17}\) Alere agreed to pay more than $13 million, including a $9.2 million civil penalty, $3.3 million in disgorgement and almost $500,000 in prejudgment interest.

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According to the SEC’s order, from 2011 to 2016, Alere misstated its reported revenue due to its South Korean unit’s intentionally recording sales prematurely and to various foreign subsidiaries’ engaging in other improper revenue recognition practices. The SEC also alleged that, between 2011 and 2013, Alere’s Colombian subsidiary made improper payments to a management-level employee at a private health insurance entity that served as an instrumentality of the Colombian government, such that its employees were Colombian government officials. The Colombian subsidiary allegedly made the payments, disguised as payments for purported consulting services, to obtain and retain business from the health insurance entity. The SEC further alleged that, in 2012, Alere’s Indian distributor paid local government officials a commission so they would increase orders under the distributor’s contract for malaria testing kits. In addition, the SEC alleged that Alere failed to maintain adequate internal accounting controls to prevent the improper payments and inaccurately recorded the payments in its books and records.

SBM

On November 29, 2017, SBM, a Netherlands-based oil services company, and its U.S. subsidiary, SBM USA, agreed to pay the DOJ $238 million to resolve charges that they conspired to bribe foreign officials to secure business advantages. According to settlement documents and the companies’ admissions, over a more than fifteen-year period, SBM paid more than $180 million in commissions to intermediaries, knowing that a portion of the commissions would be used to bribe government officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq. SBM made these payments to secure improper business advantages with state-owned oil companies in those countries and gained at least $2.8 billion from projects obtained from the oil companies.

SBM entered into a deferred prosecution agreement with the DOJ, pursuant to which the company agreed to pay the DOJ a criminal penalty of $238 million, including a $500,000 criminal fine and $13.2 million in criminal forfeiture that SBM agreed to pay on behalf of SBM USA. The DOJ considered a number of factors in reaching this resolution, including that SBM self-reported the misconduct but did not provide a complete disclosure for approximately one year, and found that SBM was entitled to a 25-percent reduction off of the bottom of the U.S. Sentencing Guidelines range. In calculating its fine, the DOJ also credited SBM’s payment of penalties to the OM and penalties likely to be paid to the Brazilian Ministério Público Federal. As part of the settlement, SBM USA pleaded guilty to conspiring to violate the FCPA’s anti-bribery provision.

SBM has paid a combined worldwide total in criminal penalties in excess of $478 million to resolve charges over related conduct. In addition, in November, two former SBM executives pleaded guilty in the Southern District of Texas to conspiracy to violate the FCPA.

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On December 22, 2017, KOM, a Singapore-based company that operates shipyards and repairs ships, and its wholly-owned U.S. subsidiary, KOM USA, agreed to pay a combined total penalty of more than $422 million to resolve charges brought by authorities in the U.S., Brazil and Singapore that the companies conspired to pay millions of dollars in bribes to officials in Brazil. According to settlement documents and the companies’ admissions, for more than a decade, KOM—and, for part of that time, KOM USA—paid approximately $55 million in bribes to officials at Petróleo Brasileiro SA (“Petrobras”), Brazil’s state-run oil company, and to the then-governing political party in Brazil, to secure contracts with Petrobras and another Brazilian entity. KOM paid the bribes, under the guise of legitimate consulting agreements, through commissions to an intermediary, who then made payments for the benefit of the officials at Petrobras and the Brazilian political party.

KOM entered into a deferred prosecution agreement with the DOJ to resolve charges that it violated the FCPA’s anti-bribery provisions. Pursuant to the agreement, KOM will pay a $105.6 million criminal penalty to the U.S., including a $4.7 million criminal fine paid by KOM USA. KOM also will pay $211 million to Brazil and $105.6 million to Singapore; the DOJ will credit these payments. KOM USA pleaded guilty in the Eastern District of New York to conspiracy to violate the FCPA’s anti-bribery provisions. In addition, a former senior member of KOM’s legal department pleaded guilty to conspiring to violate the FCPA based upon related conduct.

Singapore’s Corrupt Practice Investigation Bureau is continuing to investigate certain employees of KOM.

Significant Legal Developments Affected Enforcement Tools

In 2017, significant legal developments affected the SEC’s and the DOJ’s tools for enforcing the FCPA and resolving cases. First, in Kokesh v. SEC, a decision with potentially far reaching consequences for FCPA enforcement, the Supreme Court held that disgorgement is a penalty subject to a five-year statute of limitations. Second, the Supreme Court has agreed to hear an appeal of a decision holding that SEC administrative law judges (“ALJs”) are not constitutional officers who must be appointed under the Appointments Clause, thereby leaving open questions about SEC enforcement actions brought as administrative proceedings. These legal developments and their potential implications are discussed below.

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**Limits on U.S. Authorities’ Abilities to Seek Disgorgement**

In *Kokesh* v. *SEC*, the Supreme Court unanimously held that disgorgement sought in SEC enforcement actions, although not expressly enumerated as a “civil fine, penalty, or forfeiture” under 28 U.S.C. § 2462, constitutes a penalty under that provision and therefore is subject to its five-year statute of limitations.\(^{21}\) In a footnote, the Court noted that its decision did not address whether courts possess authority to order disgorgement in SEC enforcement proceedings, which was an issue not squarely raised by the parties.\(^{22}\)

The consequences of *Kokesh* for FCPA enforcement are potentially far-reaching, particularly given the long time it often takes to discover and investigate foreign corruption. Under *Kokesh*, SEC disgorgement claims are barred five years from the date on which the defendant’s allegedly wrongful conduct occurred. Consequently, parties previously ordered to pay disgorgement outside the five-year window may seek to have those rulings—and even settlements—set aside. Indeed, at least one party in a non-FCPA case has already sought to do so.\(^{22}\) Also, going forward, the SEC may endeavor to prosecute cases more quickly, although, more realistically, it likely will make more requests for companies to enter into tolling agreements in which they agree to extend the five-year statute of limitations. In addressing whether, in light of *Kokesh*, the SEC will seek tolling agreements as a matter of routine, Charles Cain, Chief of the SEC’s FCPA Unit, stated that the SEC will not automatically ask for such agreements, but will ask for them as deemed appropriate.\(^{23}\)

*Kokesh* also raises questions about the DOJ’s authority to seek disgorgement in cases where it declines prosecution. The DOJ has statutory authority, pursuant to the alternative fines provision of 18 U.S.C. § 3571, to seek disgorgement against convicted defendants, but neither that nor any other federal statute indicates that this alternative fines provision may be applied against a company that the DOJ declines to prosecute.\(^{24}\) Notably, the FCPA Corporate Enforcement Policy explicitly restricts declinations to cases that would have been prosecuted criminally but for the company’s voluntary disclosure, full cooperation, remediation and payment of disgorgement, forfeiture and/or restitution. By requiring disgorgement as a condition for a company to receive a declination and avoid a criminal enforcement action, the FCPA Corporate Enforcement Policy may be carefully worded to avoid characterizing this sort of disgorgement as a penalty in an effort to protect declinations with disgorgement against potential *Kokesh* challenges.

It is also worth noting that the Internal Revenue Service issued guidance that section 162(a) of the Internal Revenue Code prohibits deductions for disgorgement paid in connection with a breach of federal securities

\(^{21}\) 137 S. Ct. 1635 (2017).


law, referencing Kokesh’s holding that disgorgement is a penalty.25 Prior to Kokesh, the IRS had issued guidance that the Code prohibits a deduction for disgorgement paid for violating the FCPA.26 The new tax law signed by President Trump on December 22, 2017 precludes, with limited exceptions, deductions for amounts paid at the government’s direction in connection with the violation of any law or the investigation into the potential violation of any law.27

**Constitutional Challenges to SEC Administrative Proceedings**

On June 26, 2017, the D.C. Circuit, sitting *en banc*, denied a petition for review of its decision holding that SEC ALJs are not constitutional officers who must be appointed under the Appointments Clause (i.e., by the president, a court or a department head), thus affirming that their appointments are constitutional.28 The Tenth Circuit, in contrast, had previously held that SEC ALJs are constitutional officers subject to the requirements of the Appointments Clause and thus that the appointments of these ALJs were unconstitutional because they were not appointed by the President, a court or the head of a department.29 In light of this decision, the SEC stayed certain administrative proceedings in the Tenth Circuit involving ALJs.30

On November 30, 2017, to resolve potential claims that administrative proceedings before SEC ALJs violate the Appointments Clause, the SEC—in its capacity as a "department head" thereby authorized to make appointments under the Appointments Clause—ratified the prior appointments of all of the SEC ALJs.31 The SEC also directed ALJs to review their actions in all open administrative proceedings to determine whether to ratify those actions. In addition, the SEC lifted its stay on administrative proceedings in the Tenth Circuit.

On January 12, 2018, the Supreme Court granted a writ of certiorari in the D.C. Circuit case, agreeing to hear an appeal of the D.C. Circuit’s decision. The DOJ had urged the Supreme Court to hear the appeal, taking the position that SEC ALJs are constitutional officers subject to the requirements of the Appointments Clause.32 How the Supreme Court decides this case could have far-reaching consequences for SEC enforcement actions brought as administrative proceedings, as well as challenges to such actions.

29 See Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016), rel’g denied, 855 F.3d 1128 (10th Cir. 2017), petition for cert. pending, No. 17-475 (U.S. 2017).
Corporate Compliance

The Trump administration has emphasized the importance of robust corporate compliance programs. It is not yet clear, however, how the administration will use compliance monitors and consultants in corporate resolutions.

In 2017, corporate resolutions required that companies retain a total of two corporate monitors (Zimmer Biomet and SQM) and three independent compliance consultants (Orthofix, Las Vegas Sands and Halliburton). Since the start of the Trump administration, neither the DOJ nor the SEC has required a monitor as a condition of a corporate resolution, and only one resolution (Halliburton) required retention of an independent compliance consultant. The new FCPA Corporate Enforcement Policy provides that when a criminal resolution is warranted, the Fraud Section generally will not require the appointment of a monitor if a company has implemented an effective compliance program at the time of the resolution.

On February 8, 2017, the DOJ issued the “Evaluation of Corporate Compliance Programs,” a guidance document that sets forth a list of common questions that the Fraud Section may ask in evaluating corporate

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33 Where multiple monitors or consultants were imposed in the same resolution, such as when both the parent company and its subsidiary received monitors, those monitors and consultants are counted separately.

34 United States Attorneys’ Manual 9-47.120.
compliance programs during a criminal investigation.\textsuperscript{35} The questions emphasize the importance of maintaining a risk-based compliance program that focuses appropriate resources on areas where misconduct is most likely to occur. Although these questions provide helpful insights into the Fraud Section’s views about effective compliance programs, it is worth noting that the guidance was promulgated at the direction of Andrew Weissmann, former Chief of the Fraud Section, and may be subject to revision. It is also worth noting that Hui Chen, former DOJ Compliance Counsel, left that position in June 2017.\textsuperscript{36} A replacement has not yet been named, though the position is being filled temporarily by Andrew Gentin of the FCPA unit.\textsuperscript{37}

The FCPA Corporate Enforcement Policy also highlights the DOJ’s focus on corporate compliance by requiring that, where appropriate, a company must implement an effective compliance and ethics program to receive full credit for timely and appropriate remediation.\textsuperscript{38} Under the Corporate Enforcement Policy, the DOJ’s criteria for evaluating the effectiveness of the company’s compliance and ethics program may vary based on the size and resources of the organization, but may include considerations such as the company’s culture of compliance, resources the company has dedicated to compliance and auditing of the compliance program to ensure its effectiveness. For a company to receive full credit for timely and appropriate remediation, the policy also requires the appropriate retention of business records, including prohibiting employees from using software that does not appropriately retain records or communications, as well as the implementation of measures to reduce the risk of repetition of misconduct, including measures to identify future risks. The criteria outlined in the policy mirror the principles of the “Evaluation of Corporate Compliance Programs” guidance and expand upon considerations in other DOJ guidance documents.\textsuperscript{39}

**FCPA Actions Against Individuals Were Consistent with Past Years**

Based on publicly filed charging instruments, in 2017, the DOJ brought FCPA charges against seventeen individuals and the SEC brought charges against three individuals.\textsuperscript{40} The number of prosecutions brought


\textsuperscript{38} See United States Attorneys’ Manual 9-47.120.


\textsuperscript{40} Included in these totals are individual prosecutions and enforcement actions for FCPA charges, but not for other charges, such as money laundering or racketeering. Actions are listed in the year of the initial filing of FCPA charges, even if unsealed in a later year.
by the DOJ in 2017 was the highest in recent years, but overall both the DOJ and the SEC numbers are in line with fluctuations in individual prosecutions over the past five years.

As in most recent years, in 2017, the DOJ was more active than the SEC in bringing FCPA cases against individuals. As noted in last year’s report, compared with the DOJ, the SEC seemingly has not made FCPA actions against individuals a focus, perhaps because of its other regulatory role with respect to issuers. In 2017, the DOJ affirmed its commitment to prioritizing prosecutions of individuals and announced the FCPA Corporate Enforcement Policy. The SEC has not announced an equivalent policy focusing on enforcement against individuals.

Of the seventeen prosecutions brought by the DOJ against individuals in 2017, fourteen were brought during the Trump administration. Two of the three individuals charged during the final weeks of the Obama administration and eight of the individuals charged during the Trump administration have pleaded guilty. All three of the actions brought by the SEC were brought during the Trump administration, of which only one has been resolved.

Most of these individual enforcement actions were ancillary to corporate resolutions. This is not surprising given the evidentiary requirements and the demands imposed on companies to cooperate with DOJ and SEC investigations, as reflected in both the Yates Memo and the FCPA Corporate Enforcement Policy.
Also in 2017, for the first time since 2011, a jury convicted an individual on FCPA charges. On July 27, following a four-week trial, a jury in the Southern District of New York convicted Ng Lap Seng of, among other charges, conspiracy to violate the FCPA and violating the FCPA, in connection with a multi-year scheme to pay more than $1.3 million in bribes to ambassadors of the United Nations.\footnote{See Press Release, Dep’t of Justice, Chairman of Macau-Based Real Estate Development Company Convicted at Trial on All Counts in Connection with United Nations Bribery Scheme (July 27, 2017), https://www.justice.gov/usao-sdny/pr/chairman-macau-based-real-estate-development-company-convicted-trial-all-counts.} Ng, chairman of the Sun Kian Ip Group, a Macau real estate development company, conspired with and paid bribes to UN officials—including John Ashe, former president of the UN General Assembly—with the principal objective of obtaining the UN’s formal support for a facility that Ng hoped to build in Macau that would serve as a location for various events associated with the UN.

The significant number of DOJ actions brought against individuals in 2017 is consistent with the Trump administration’s statements that it will prioritize individual enforcement. Given the length of FCPA investigations, though, most of these actions likely originated from investigations that pre-dated the administration.

**Multi-Jurisdictional Coordination**

U.S. authorities continued in 2017 to achieve significant successes in the fight against global corruption by coordinating with and leveraging the resources of their foreign counterparts, as demonstrated by the global resolutions with Rolls-Royce, Telia and SBM. These successes continue to reflect both the U.S. government’s commitment to international cooperation and the more aggressive stances foreign governments are taking through legislation and enforcement to address international corruption.

Senior DOJ and SEC officials in the Trump administration have publicly confirmed the agencies’ commitments to coordinating with foreign authorities and signaled that such coordination is increasing. For example, DAG Rosenstein stated in November that, by “[w]orking together with international partners,” the DOJ was “making headway in combatting corruption,” and that he could not “emphasize enough [the DOJ’s] commitment to international cooperation.”\footnote{Rod J. Rosenstein, Deputy Attorney General, Dep’t of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.} Steven R. Peikin, co-director of the SEC’s Division of Enforcement, in November similarly highlighted the need for multi-jurisdictional cooperation, stating: “[I]n an increasingly international enforcement environment, the U.S. authorities cannot—and should not—go it alone in fighting corruption. As global markets become more interconnected and complex, no one country or agency can effectively fight bribery and corruption by itself.”\footnote{Steven R. Peikin, Co-Director, SEC Enforcement Division, Reflections on the Past, Present, and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act, Speech at New York University School of Law (Nov. 9, 2017), https://www.sec.gov/news/speech/speech-peikin-2017-11-09.}

Several of the corporate enforcement actions resolved during the Trump administration are consistent with statements by administration officials signaling the importance of multi-jurisdictional cooperation. These
include the Telia/Coscom, SBM and KOM resolutions described above. U.S. authorities' investigation of international soccer corruption also demonstrates the extent of the international cooperation undertaken by the DOJ.

International Soccer Corruption

U.S. authorities have continued to cooperate with international authorities, particularly Swiss law enforcement, to root out corruption in international soccer. Since May 2015, U.S. authorities have charged 44 individuals and entities with racketeering, wire fraud, money laundering and other offenses—though no FCPA charges—in connection with what in some instances were decades-long schemes to enrich themselves by awarding lucrative marketing contracts in exchange for bribes.44 In 2017, two additional individuals were charged and pleaded guilty, two individuals who had been charged in a previous year pleaded guilty and were sentenced to terms of imprisonment and, as described below, two individuals were convicted following a jury trial.45

In December, a jury in the Eastern District of New York convicted two former South American soccer officials of racketeering and other charges.46 José Maria Marin, the former president of Brazil's soccer federation, and Juan Ángel Napout, the former president of Paraguay's soccer federation and of the South American soccer confederation, were each convicted of racketeering conspiracy and wire fraud conspiracy, and Marin was also convicted on money laundering conspiracy charges. Marin and Napout have not yet been sentenced. A third defendant, Manuel Burga, the former president of the Peruvian soccer federation, was acquitted of racketeering conspiracy, the sole charge he faced. The superseding indictment against Burga also charged him with wire fraud and money laundering conspiracies, but, pursuant to the rule of specialty, he was not tried on those charges because he was extradited to the United States from Peru only on the racketeering conspiracy charge. Following his acquittal, the DOJ advised the court that it does not intend to dismiss the open wire fraud and money laundering conspiracy charges.

44 Because no FCPA charges were brought in these actions, they are not included in the individual prosecution and enforcement action totals provided above.


Foreign Jurisdictions Investigating and Prosecuting Corruption

In addition to U.S.-led enforcement, other jurisdictions have taken strides to investigate and prosecute corrupt actors. In the past year, authorities in Brazil, Saudi Arabia, South Korea and the United Kingdom took significant steps to enforce their anti-corruption laws.

Brazil

In 2017, Brazilian authorities continued Operation Lava Jato (“Carwash”), the sweeping investigation of money laundering and corruption associated with Petrobras, which has implicated officials at the highest levels of government, including two former presidents, and major Brazilian companies and their executives.\(^{47}\) The Brazilian authorities’ investigation has now expanded to several other industries, uncovering evidence of corruption in the construction, meatpacking and banking industries. The scope of the investigation appears to reflect a new era in the Brazilian government’s efforts to fight corruption.

In the construction industry, billions of dollars of bribes have been revealed.\(^ {48}\) In the meatpacking industry, J&F Investimentos, parent company of Brazil’s meatpacking giant JBS SA, admitted in 2017 to paying approximately $150 million in improper payments to hundreds of Brazilian politicians and agreed to pay $3.2 billion to the Brazilian Federal Prosecutor’s Office over a 25-year period.\(^ {49}\) In the banking industry, in May 2017, Brazil’s federal police launched an investigation into the National Bank for Economic Social Development (“BNDES”)—the largest source of long-term corporate credit in Brazil and one of the world’s largest development banks—based on allegations that the bank loaned over $37 billion to various companies entangled in the Lava Jato probe.\(^ {50}\)

In connection with the various investigations, more than 200 individuals have been charged with criminal offenses, resulting in sentences totaling more than 1,300 years of jail time.\(^ {51}\) Among those convicted in 2017 were former president Luiz Inacio Lula da Silva and former House speaker Eduardo Cunha, who were convicted of money laundering and corruption and sentenced, respectively, to 9.5 and 15 years in prison.\(^ {52}\) Brazil’s current president, Michel Temer, has also been implicated in the corruption scandal. Brazilian


authorities charged him in June with bribery, then in September with effectively operating the Brazilian government like a criminal organization and with obstruction of justice. The legislative votes needed to suspend him so he could face trial fell short both times. President Temer has denied wrongdoing.

Although impossible to quantify precisely, the corruption scandal has had a devastating impact on Brazil’s economy. Brazil’s GDP for 2015 and 2016 shrunk approximately 3.8 percent and 3.6 percent, respectively, and it is estimated that the Lava Jato probe accounted for a significant portion of the decline each year. The slump in Brazil’s GDP was caused, at least in part, by freezing various planned infrastructure projects, which was a direct byproduct of the investigation. Further demonstrating the impact of the corruption allegations, millions of employees in the affected industries have lost their jobs or been displaced.

The expanding nature of the Lava Jato investigation and Brazilian authorities’ aggressive prosecution of corruption are important developments for U.S. companies. American companies contemplating conducting business in Brazil should exercise caution in partnering with local companies and should conduct enhanced due diligence on potential business partners. U.S. companies that are already conducting business in Brazil should consider reviewing their business partnerships and the anti-corruption controls of their local operations. And U.S. companies that are caught up in the widespread investigation may want to consider seeking incentives for cooperating with Brazilian authorities. Brazil’s Clean Company Act, which establishes civil and administrative penalties for companies engaging in corrupt conduct, permits companies that cooperate with authorities in an investigation to receive up to a two-thirds reduction in any penalties that are assessed.

**Saudi Arabia**

The Supreme Anti-Corruption Committee, formed in November by Saudi Arabian Crown Prince Mohammed bin Salman, has been conducting a widespread investigation into alleged corruption that has roiled the Kingdom’s elite. The Committee was vested with powers to take any measures deemed necessary to seize companies, funds and other assets, and, within hours of its formation, reports emerged concerning the detention of hundreds of senior officials, princes and businessmen. Reportedly, 320 individuals have

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been subpoenaed and 2,000 bank accounts frozen.\(^57\) The far-reaching investigation is said to be consistent with the crown prince’s “Saudi Vision 2030” reform program, which seeks to modernize Saudi Arabia’s economy and make it more attractive to foreign investors.\(^58\)

In December, Attorney General Sheikh Saud Al-Mujib announced that most of the detainees facing corruption allegations had accepted settlements to avoid prosecution.\(^59\) Although the size of the settlements and the identity of the individuals detained are largely confidential, according to news reports, Senior Prince Miteb bin Abdullah, a member of the House of Saud who previously served as the Kingdom’s Minister of the National Guard, agreed to pay over $1 billion for his release.\(^60\) News reports also indicate that Saudi authorities are demanding $6 billion to release Prince Al-Waleed bin Talal, an influential international businessman and one of the world’s wealthiest individuals, who reportedly has been detained since November. The Public Prosecutor’s Office estimates that between $50 and $100 billion ultimately will be recovered.\(^61\)

Based upon news reports, the corruption investigation does not appear to be focused on foreign companies doing business in Saudi Arabia. Rather, consistent with the Saudi Vision 2030 program, the investigation seems focused on eradicating corruption inside Saudi Arabia in order to increase foreign investment. Nevertheless, U.S. companies doing business in the Kingdom, or considering doing so, should monitor developments carefully, given the suddenness with which the Supreme Anti-Corruption Committee acted.

### South Korea

In 2017, the South Korean news was dominated by the legal travails of former President Park Geun-hye, who has been accused of conspiring with her close confidante, Choi Soon-sil, to pressure numerous business groups—including Samsung, Lotte, POSCO, SK, CJ, Hyundai, LG, Hanwha, Hanjin and GS—to donate approximately $70 million to two non-profit organizations controlled by Choi, in exchange for various favors.\(^62\) Based on investigation findings by Korean prosecutors, in December 2016, the Korean National
Assembly impeached then-President Park and, on March 10, 2017, the Constitutional Court upheld the impeachment decision, ending her presidency. Park was subsequently arrested and indicted, and has been on trial since May. If convicted of bribery involving more than KRW100 million (approximately $94,000), Park faces a prison term of more than ten years, and up to life imprisonment.63

In February 2017, in connection with the allegations against former President Park, Korean prosecutors also indicted five Samsung executives—including Samsung’s de facto head, Jay Y. Lee—based on allegations that, between 2015 and 2016, they made improper payments to Choi in exchange for business-related benefits.64 Lee was charged, tried and convicted for allegedly authorizing a payment to Choi in order to obtain government support of a merger between Samsung affiliates. Lee was sentenced to five years in prison, and has appealed.65 The four other charged executives were also convicted on related corruption charges, with two sentenced to four years in prison and two receiving suspended prison terms. In addition, in December, the Chairman of Lotte was convicted on related corruption charges, and received a suspended prison sentence.66

The effects of these prosecutions on South Korea’s economy may be far reaching. The country’s economic growth slowed in 2016 in conjunction with a drop in consumer confidence following announcements of Park’s impeachment. In November 2016, amid political unrest and large protests, Korea’s consumer sentiment index fell to its lowest level in seven years.67 Since Lee’s detention, however, Samsung’s stock price has risen, which may be a positive sign for future economic growth, as the company generates almost one-fifth of the country’s GDP.68

Neither the DOJ nor the SEC has brought enforcement actions against the companies implicated in the corruption scandal, but it remains to be seen whether such cases will be brought.

In addition, as reported last year, South Korea’s anti-corruption legislation, commonly referred to as the “Kim Young-ran Act,” took effect in September 2016, significantly expanding the set of conduct and individuals that could be subject to bribery offenses.69 In December 2017, the Anti-Corruption and Civil...
Rights Commission agreed to a proposed amendment to the Act, modifying the monetary limits on specific types of benefits that public officials may receive. Under the proposed amendment, the current KRW30,000 (approximately $28) maximum for meals and drinks would remain the same. The KRW50,000 (approximately $47) maximum for presents would be doubled, to KRW100,000, provided that the gifts are agricultural products or processed goods with more than 50% agricultural content. The KRW100,000 limit for congratulatory and condolence payments would be reduced to KRW50,000, but would not change for wreaths and condolence flowers. The proposed amendment resulted in part from campaigning by the agricultural industry, which has seen significant decreases in sales since the Act was passed. Critics of the proposed amendment have expressed concern that permitting an exception for agricultural gifts could set a precedent for further changes to the Act, undermining it. The proposed amendment requires final endorsement by the Cabinet.

**United Kingdom**

2017 was a significant year for anti-corruption enforcement in the United Kingdom. In January, Rolls-Royce entered into a deferred prosecution agreement with the SFO, pursuant to which Rolls-Royce admitted to paying bribes in seven countries and agreed to pay the largest penalty ever assessed in the United Kingdom, totaling £497.25 million. In September, the SFO announced the conviction of F.H. Bertling, a U.K.-based subsidiary of the German-headquartered Bertling Group, for conspiring to make corrupt payments to an agent of the Angolan state oil company, Sonangol. In addition, four employees pleaded guilty to the same charges in March, three of whom were subsequently given suspended prison sentences and fined. One employee was acquitted in September. Two others had pleaded guilty in 2016.

In connection with the international investigations into SBM and arising out of an ongoing criminal investigation into suspected bribery, corruption and money laundering at Unaoil, in November 2017, the SFO announced charges against two SBM executives and two Unaoil employees for conspiracy to make corrupt payments. The individuals allegedly made corrupt payments to secure contracts in Iraq for SBM, Unaoil’s client, between June 2005 and August 2011. Another Unaoil employee is subject to an extradition request to Monaco on related charges.

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Also in 2017, the SFO commenced bribery and corruption investigations into several other prominent companies, including Rio Tinto, AMEC Foster Wheeler, British American Tobacco p.l.c., and ABB Ltd.\(^7^4\)

In 2017, the United States and the United Kingdom took steps to institutionalize their relationship, further strengthening their high level of cooperation in addressing cross-border bribery and corruption. For example, in May, the DOJ announced that it plans to send an anti-corruption prosecutor to work in the United Kingdom as part of the DOJ’s efforts to collaborate with international partners in the fight against corruption and financial fraud.\(^7^5\) This will be the first time that a DOJ prosecutor has worked in a foreign regulatory agency on white collar crime issues. In light of the cooperation between the United States and the United Kingdom, U.S. companies conducting business in the United Kingdom should be cognizant that these authorities likely will work together to enforce the anti-corruption laws in both jurisdictions.

Notably, there has been concern that the Brexit vote might undermine the United Kingdom’s efforts to combat corruption and bribery, including with respect to its international cooperation.\(^7^6\) In response to such concerns, David Green, the outgoing head of the SFO, stated in December that he “think[s] everyone recognises on both sides that cooperation in relation to criminal investigation and prosecution and the return of suspected offenders is in everybody’s interest,” while acknowledging that the SFO might need to find alternative mechanisms to carry out such international cooperation.\(^7^7\)

### Foreign Jurisdictions Enhancing Their Anti-Corruption Laws

#### Canada

In 2017, Canada implemented legislation making facilitation payments—payments made to foreign government officials to facilitate routine transactions, such as permits—unlawful.\(^7^8\) An exception for facilitation payments in the Corruption of Foreign Public Officials Act, which excluded facilitation payments

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from the Act’s bribery offense, was repealed in 2013 as part of the Canadian government’s efforts to combat corruption and bribery. Implementation of the repeal was delayed to provide businesses with adequate time to amend their practices and procedures. On October 30, 2017, the Canadian government announced that the repeal of the exception for facilitation payments would become effective the next day.\(^79\)

**China**

In November, the Standing Committee of the National People’s Congress adopted amendments to China’s Anti-Unfair-Competition Law, a civil and administrative statute that regulates, among other things, domestic commercial bribery.\(^80\) The amendments modify the scope of prohibited bribery, by specifying the range of prohibited recipients of bribes and expanding the definition of prohibited bribery to include bribery for the purpose of obtaining transaction opportunities or competitive advantages. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees. In addition, the law provides for increased penalties. These amendments, which came into effect on January 1, 2018, represent the most significant changes to the law since its adoption in 1993. It is an open question how the Chinese government will interpret these statutory changes and whether and to what extent the government will modify its enforcement approach under the amended law.

Also in 2017, the Communist Party continued its broad criminal anti-corruption campaign under General Secretary Xi Jinping, detaining and imprisoning several prominent Chinese business leaders and government officials.\(^81\) In his address to the National Congress in October, General Secretary Xi described corruption as the “greatest threat” facing the party and promised to work toward the adoption of a national anti-corruption law and the creation of a “corruption reporting platform.”\(^82\) Xi subsequently proposed the creation of a National Supervision Commission, a new anti-corruption agency with broad powers over China’s public sector.\(^83\) We expect significant developments in this area in 2018.

In addition, an official with the Communist Party’s Central Commission for Discipline Inspection, which is tasked with fighting corruption, stated in December that China wants to work with the international community to “establish new orders in [the] global anti-corruption fight.”\(^84\) The agency also stated that it

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\(^80\) See Emily Feng, China SOEs Move to Set Up First Institutional Compliance Systems, FINANCIAL TIMES (Jan. 1, 2018), https://www.ft.com/content/0833413a-db2f-11e7-a039-c64b1c09b482.


\(^83\) See China Aims to Set Up State Anti-Corruption Unit Next Year, REUTERS (Oct. 29, 2017), https://af.reuters.com/article/worldNews/idAFKBNtCY0DK.

will “punish both those who take bribes and those who offer them.” The Communist Party has not, however, actively prosecuted bribery by Chinese companies overseas.

**Mexico**

Effective July 2017, under Mexico’s General Law of Administrative Responsibilities (“GLAR”), individuals and corporations that have bribed government officials, rigged procurement processes or misused public resources are subject to penalties and may be required to establish enhanced compliance programs. GLAR was one of a series of laws passed to implement a 2015 amendment to the Federal Constitution to create a National Anti-Corruption System. This system is tasked with coordinating the anti-corruption activity of all government and state agencies responsible for the prevention, detection and prosecution of corruption.

In June, the Secretary of Public Administration published its “Model Program for Corporation Integrity,” which provides interpretations of certain provisions of the GLAR. The Model Program provides detailed requirements for companies’ “integrity programs,” including the creation and maintenance of an organizational manual describing the company’s leadership structure and reporting chains, employee code of conduct, compliance and audit systems, self-reporting systems, disciplinary procedures and training-in-integrity measures.

Another significant anti-corruption development in Mexico was the December arrest of Alejandro Gutiérrez, a former high-ranking official of President Enrique Peña Nieto’s Institutional Revolutionary Party (“PRI”). Gutiérrez was arrested on allegations that he orchestrated a financing scheme to illegally funnel public money to support PRI’s political campaigns. Several other former officials have been arrested on political corruption charges as part of a widening inquiry into seemingly large-scale corruption in Mexican politics. Corruption is expected to be a key issue in Mexico’s 2018 presidential election.

Mexico’s increasing anti-corruption efforts may impact future FCPA enforcement. In recent years, several companies (such as Teva, Key Energy and Zimmer Biomet) have paid significant settlement amounts to the DOJ and the SEC to settle charges involving alleged wrongdoing in Mexico, but have not paid related penalties to Mexican authorities. This trend may change, as multinational and U.S.-based companies

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operating in Mexico must comply with the GLAR, which potentially exposes them to broader enforcement risk. In addition, Mexico’s enforcement of anti-corruption laws may lead to increased cooperation and collaboration with U.S. authorities.

The January 19, 2017 extradition of narcotics kingpin Joaquín Guzmán Loera (“El Chapo”) from Mexico to the United States may reflect such cooperation. His trial, scheduled for September 2018 in the Eastern District of New York, threatens to reveal further salacious details regarding corruption in Mexico, given the reach of his alleged criminal enterprise.  

**Multilateral Development Bank Debarments**

In 2017, as in prior years, the World Bank Group debarred considerably more individuals and entities than did the other multilateral development banks (“MDBs”). The World Bank Group imposed 288 debarments, whereas the Inter-American Development Bank imposed 27, the Asian Development Bank and the European Bank for Reconstruction and Development each imposed six and the African Development Bank imposed five. More than half of the World Bank Group debarments (180 debarments) and almost half of the African Development Bank debarments (2 debarments) were based, at least in part, on corrupt practices. The other MDBs do not appear to have imposed any debarments based on corrupt practices.

The longest debarments based at least in part on corrupt practices were the World Bank’s debarments of Consia Consultants ApS and Dutchmed B.V., each of which was debarred for fourteen years. The World Bank debarred Consia, a Denmark-based consultancy company, for allegedly making improper payments to officials in connection with various projects in Indonesia and Vietnam, while Dutchmed, a Dutch medical products firm, was debarred for allegedly paying improper commissions to an official for the Romanian health ministry. In debarring these entities, the World Bank Sanctions Board emphasized each entity’s lack of cooperation with the World Bank’s investigation and inadequate compliance measures.

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Unfortunately, limited conclusions about MDB corruption enforcement can be drawn from this data. Debarments of affiliates of the same company generally are reported as separate debarments, such that the debarment statistics do not reflect the number of standalone entities that have been debarred.

**Anti-Money Laundering and the Kleptocracy Initiative**

The DOJ continued to seek the forfeiture and recovery of assets through significant actions brought under its Kleptocracy Asset Recovery Initiative, which is led by the International Unit of the DOJ Criminal Division’s Money Laundering and Asset Recovery Section.

As reported last year, the DOJ announced in 2016 that it was seeking the forfeiture of more than $1 billion of assets in connection with investigations of corruption at 1Malaysia Development Berhad (“1MDB”), a Malaysian sovereign wealth fund. On June 15, 2017, the DOJ announced that it was seeking the forfeiture and recovery of an additional $540 million in assets. The 1MDB case is the largest asset forfeiture action under the Kleptocracy Initiative. Assets now subject to forfeiture total nearly $1.7 billion.

On July 14, 2017, the DOJ announced that it was seeking the forfeiture and recovery of approximately $144 million in assets alleged to be the laundered proceeds of foreign corruption in connection with the Nigerian oil industry. Two Nigerian businessmen allegedly paid bribes to Nigeria’s former minister for petroleum resources in return for access to lucrative oil contracts, with the proceeds laundered in and through the United States. Related assets subject to seizure and forfeiture include a $50 million condominium in Manhattan and an $80 million yacht.

**Looking Forward Into 2018**

Statements by senior Trump administration officials, policies implemented by the DOJ and recent corporate and individual enforcement trends suggest that, as Attorney General Jeff Sessions has promised, U.S. authorities will continue to “strongly enforce the FCPA and other anti-corruption laws.”

It appears that, going forward, U.S. authorities will continue to focus on themes that were prevalent during the later years of the Obama administration, including individual accountability, providing companies with incentives for self-disclosure and cooperation, transparency, international cooperation and corporate

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94 See Press Release, Dep’t of Just., Department of Justice Seeks to Recover Over $100 Million Obtained From Corruption in the Nigerian Oil Industry (July 14, 2017), [https://www.justice.gov/opa/pr/department-justice-seeks-recover-over-100-million-obtained-corruption-nigerian-oil-industry](https://www.justice.gov/opa/pr/department-justice-seeks-recover-over-100-million-obtained-corruption-nigerian-oil-industry).

compliance. Attorney General Sessions highlighted these themes in an April speech, declaring that “[c]ompanies should succeed because they provide superior products and services, not because they have paid off the right people.” 96 He also stated that the DOJ “will continue to emphasize the importance of holding individuals accountable for corporate misconduct” and that the DOJ “will work closely with our law enforcement partners, both here and abroad, to bring these persons to justice.” Sessions further stated that, when the DOJ makes charging decisions, it “will continue to take into account whether companies have good compliance programs; whether they cooperate and self-disclose their wrongdoing; and whether they take suitable steps to remediate problems.” SEC Division of Enforcement Co-Director Peikin emphasized similar themes, stating in November that the “FCPA has been and remains an increasingly important tool in the ongoing fight against corruption worldwide,” and noting the SEC’s continued focus on FCPA enforcement.97

That said, it is still too early to draw conclusions about how the Trump administration will enforce the FCPA, primarily because FCPA investigations and prosecutions generally take longer than one year to resolve. While the high number of individual prosecutions is consistent with the administration’s stated intent to focus on individual misconduct, it remains to be seen whether this trend continues in 2018.

A test of the administration’s approach to FCPA enforcement likely will occur in the coming year, when settlements of significant investigations—including at least one involving a U.S. company—are expected. The manner in which these investigations are resolved may help illuminate the administration’s approach to corporate enforcement, including whether it will be more lenient toward U.S. companies than U.S. authorities were under the Obama administration.

Notably, the most significant corporate enforcement actions resolved during the Trump administration involved coordination with foreign authorities and large penalties paid to those authorities. Moreover, a large percentage of the penalties obtained in these actions were shared with foreign authorities as part of joint resolutions. Such resolutions portend that in 2018, as in 2017, U.S. authorities will continue to cooperate with their international counterparts and that foreign jurisdictions will continue to implement and enforce anti-corruption laws. Should U.S. authorities’ enforcement of the FCPA wane in 2018, foreign jurisdictions may continue to investigate and prosecute on their own.

We will watch these developments with interest and look forward to providing you with further updates in 2018.

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96 Id.
97 Peikin, supra note 43.
This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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In late November, the Department of Justice (DOJ) premiered a new policy regarding Foreign Corrupt Practices Act (FCPA) enforcement. Deputy Attorney General Rod Rosenstein, in a speech, called it the FCPA Corporate Enforcement Policy and stated that it is now “incorporated into the United States Attorneys’ Manual.” The new Policy has four sections: 9-47.100 Introduction; 9-47.110 Policy Concerning Criminal Investigations and Prosecutions of the Foreign Corrupt Practices Act; 9-47.120 FCPA Corporate Enforcement Policy and 9-47.130 Civil Injunctive Actions.

I. Introduction

The thing that struck me in Rosenstein’s was the DOJ’s commitment to moving forward not just the concept of compliance but compliance programs and the compliance profession. Rosenstein recognized “The United States plays a central role in the worldwide fight against corruption, and we serve as a role model. Following our lead, many other countries have joined America by implementing their own anti-corruption laws. Those laws do not just encourage good business. They promote good government.”

Yet FCPA enforcement is more than simply about good government. Just as the Saudi Arabian government explained the economic costs of bribery and corruption to its country, Rosenstein spoke about the costs to business from those who try to game the system, obtaining an unfair advantage through payment of bribes and engaging in corruption. He cited back to the April speech by Attorney General Sessions who spoke about other negative aspects of corruption including “increased prices, substandard products and services, and reduced investment.” Finally, Rosenstein spoke to the basic need for businesses to operate honestly and ethically. This is both true for US companies and the greater international business community.

Internationally, he noted “the Organization for Economic Co-operation and Development adopted an Anti-Bribery Convention in 1997. That convention fuels the growing international rejection of
corruption. Forty-three nations participate in the OECD Anti-Bribery Convention. The agreement establishes legally binding standards. Member countries are required to adopt laws that criminalize bribery of foreign public officials in international business transactions.” He also spoke about the continuing cooperation among international authorities in both investigation of bribery and corruption and of enforcement against wrong-doers.

Obviously, the prime job of the DOJ is to enforce our laws. They do so in the FCPA world with vigor, honor and upholding the highest values of the rule of law. The DOJ has embraced the role of encouraging companies to not only follow the law through rigorous enforcement but with incentives to operate best practices compliance program. Corporate America should and does see the DOJ as a valued partner in supporting “the rule of law, which establishes and safeguards a vibrant economic marketplace for your products and services.”

Over the past several years, the DOJ has consistently provided “incentives for companies to engage in ethical corporate behavior.” In the context of an enforcement action, “That means fully cooperating with government investigations, and doing what is necessary to remediate misconduct – including implementing a robust compliance program. Good corporate behavior also means notifying law enforcement about wrongdoing.” This was one of the goals in creating the FCPA Corporate Enforcement Policy. But more than simply having such a policy, Rosenstein desired transparency and predictability. He stated, “I want the Department to issue concise policy statements. Historical background and commentary should go in a cover memo or a press release. In most instances, the substance of a policy should be in the United States Attorneys’ Manual, and it should be readily understood and easily applied by busy prosecutors.”

The compliance professional reviewing the new FCPA Corporate Enforcement Policy will certainly be heartened with the language around best practices compliance program, including the specific incorporation of the 2012 FCPA Guidance, with the Ten Hallmarks of an Effective Compliance program directly into the section on remediating compliance programs. This section has taken some of the most robust portions of the FCPA Pilot Program and incorporated them directly into the new FCPA Corporate Enforcement Policy. This will drive a corporate compliance function more to the front and center of an organization going forward.

The section on remediation, coupled with Rosenstein’s remarks, demonstrates how significant the compliance profession and compliance practitioner is now and will be going forward. This new FCPA Corporate Enforcement Policy puts more pressure on companies to get compliance right in a best practices, effective compliance program. It has become far more than a “you can pay now or later and only if you get caught mentality” which is still articulated by some today. The DOJ has made clear that it views part of its role in anti-corruption enforcement to more than encourage compliance but to move to partnering with compliance practitioners to design, create and implement best practices compliance programs.
Yet is more than written proscriptions with policies and procedures. Rosenstein ended with comments that spoke directly to doing business ethically. He concluded, “Companies can protect themselves by exercising caution in choosing their business associates and by ensuring appropriate oversight of their activities. There is an ancient proverb that counsels, “If you want to know a person’s character, consider his friends.” My advice is to make sure that you can stand proudly with the company you keep.”

The new FCPA Corporate Enforcement Policy will be focused on primarily for enforcement concepts and issues. Yet I see it as one more step by the DOJ to raise up the important, prestige and esteem of compliance programs. When the Deputy Attorney General talks about corporations partnering with the DOJ to fight the global scourge of bribery and corruption, it drives home the importance of doing compliance through the operationalization of a compliance program into the very DNA of an organization.

II. Root Cause Analysis

Next, I want to consider what this new policy means for a best practices compliance program. There are several different points to note about compliance programs under the new Corporate Enforcement Policy. The first is the incorporation of the 10 Hallmarks of an Effective Compliance Program through reference to the 2012 FCPA Resource Guide. Second is the language that makes clear that credit for a best practices compliance program is available for programs which are beyond simply the bare minimum under the US Sentencing Guidelines. Finally, is that language and concepts in this new Policy come from a variety of sources, including the DOJ’s 2016 FCPA Pilot Program and the 2017 Evaluation of Corporate Compliance Programs (Evaluation). This builds upon the 10 Hallmarks of an Effective Compliance Program incorporated through reference into the new Enforcement Policy.

In the new Enforcement Policy, it states “Demonstration of thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and, where appropriate, remediation to address the root causes”. The language around root cause analysis was first articulated in the Evaluation. Bill Steinman, writing in the FCPA Blog, said, “Of all the changes in the new policy, this is perhaps my favorite. As any ethics professional worth her or his salt will tell you, perhaps the most fundamental part of recovering from a lapse in appropriate conduct is figuring out how it happened in the first place. You can’t really move forward toward fixing a problem unless you’ve asked and until you’ve clearly answered questions like “why did this happen here?” or “what about our company made our people think this was ok?”

Mike Volkov, writing in his blog, said, “The “root cause” analysis has taken on greater significance through the years, and is an important inquiry needed to understand why financial and compliance controls were not able to detect and prevent the illegal conduct. It is a more intensive
review and analysis than a risk and compliance program assessment, and is targeted to the specific facts underlying the violations.” In another blog post, he stated, “A root cause can implicate not only employee misconduct or failure to exercise proper oversight, but can extend to such issues as a company’s culture, tone-at-the-top and other issues with significant implications for the company’s operations.”

I agree with both assessments. A root cause analysis is a method to learn more about your business process and what occurred so that the controls, systems and process can be remediated. A root cause analysis allows you to determine the true cause of an incident, not one that simply hypothesizes a bad actor within a company going rogue. If you just fire someone, without changing the process, you are going to keep getting similar or the same results. Assessing blame does not help, as you want to get deeper into those root causes. The reason the entire process is named ‘root cause analysis’, is to emphasize the need to drill down below the superficial pieces of the framework to fix, and into the things that are driving the outcomes and the behaviors.

When root cause analysis is done correctly and utilized as a part of your remediation strategy going forward, it is principally there in order to develop preventive actions. A preventive action is something to prevent recurrence of the problem. You can correct with a corrective action, but the ultimate goal is to engineer out or fix the system and process so you do not have the opportunity for that flaw to occur again.

A root cause analysis can be used to strengthen the prevention prong of your best practices compliance program. Thinking of the proper manner to use a root cause analysis, to find facts and not assess blame will take your compliance program to an entirely higher level of proficiency. If the DOJ ever comes knocking you can demonstrate your adherence to new FCPA Corporate Enforcement Policy in a documented manner.

Once again for the compliance professional, the new FCPA Corporate Enforcement Policy makes the importance of a best practices compliance program even more critical. By having the first point speak to root cause analysis, it emphasizes not only the importance of the specific exercise but also the data driven approach to a best practices compliance program. It is more than simply learning from your mistakes, it is taking the information from your root cause analysis and incorporating it back into your compliance program. A compliance program is dynamic and not static. This final fact is what separates the type of analysis the DOJ puts forward from those who want a paper program to constitute a full and complete compliance defense.

III. Compliance Expertise

What does DOJ says specifically about a compliance programs in the new Policy? The first thing is the incorporation of the 10 Hallmarks of an Effective Compliance Program through reference to the 2012 FCPA Resource Guide. Second is the language that makes clear that credit for a best
practices compliance program is available for programs which are beyond simply the bare minimum under the US Sentencing Guidelines. Finally, is that language and concepts in this new Policy come from a variety of sources, including the DOJ’s 2016 FCPA Pilot Program and the 2017 Evaluation of Corporate Compliance Programs. This builds upon the 10 Hallmarks of an Effective Compliance Program.

Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, may include:

- The company’s culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
- The resources the company has dedicated to compliance;
- The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
- The authority and independence of the compliance function and the availability of compliance expertise to the board;
- The effectiveness of the company’s risk assessment and the manner in which the company’s compliance program has been tailored based on that risk assessment;
- The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
- The auditing of the compliance program to assure its effectiveness; and
- The reporting structure of any compliance personnel employed or contracted by the company.

I would reorganize these into three general categories: (1) Quality and resources dedicated to the compliance function; (2) ongoing evaluation of a compliance program; and (3) company culture.

**Quality and Resources Dedicated to Compliance**

Here the DOJ has laid out the following:

1. The resources the company has dedicated to compliance;
2. The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
3. The authority and independence of the compliance function and the availability of compliance expertise to the board;

4. The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors; and

5. The reporting structure of any compliance personnel employed or contracted by the company.

One and the first half of 3 come from the 10 Hallmarks of an Effective Compliance Program. Points 2, the second half of 3, 4 and 5 come from the DOJ’s FCPA Pilot Program, Part 3 entitled, “Timely and Appropriate Remediation in FCPA Matters”. Clearly the DOJ is articulating that it expects true compliance professionals, who understand the way compliance interacts with and supports the business. The days of a law school trained, Chief Compliance Officer who cannot read a spreadsheet are consigned to the dustbin of non-compliance. But more than simply compliance professionalism, companies must compensate and promote compliance professionals within their organization. Simply burying someone in the compliance function of a law department because they cannot cut it will no longer suffice.

While part of the first clause of 3 derives from the Hallmark Three of the 10 Hallmarks, which required authority and autonomy for the compliance function; there is a new requirement for compliance professional “independence”. The DOJ has not taken a position on whether a General Counsel can also be the CCO. However, this new language would seem to signal the death knell for the dual GC/CCO role. It may also signal the larger issue that the CCO should have a separate reporting line to the Board, apart from through the GC.

There is however one new part which I am particularly gratified to see, which is “the availability of compliance expertise to the board.” I believe this is more than simply a reporting requirement, or that the CCO has a direct line to the Board. I believe this is a separate requirement for compliance expertise on the Board. I have long argued that there should be a compliance professional on a Board of Directors. You name any of the most recent corporate scandals; Wells Fargo, Uber Technologies, Volkswagen, Equifax and there was no compliance expertise on the Board. Clearly the better practice is for companies to have a seasoned compliance professional on the Board. I would also add the DOJ may soon expect there be a Compliance Committee separate and apart from the Audit Committee.

Once again for the compliance professional, the new FCPA Corporate Enforcement Policy makes the importance of a best practices compliance program even more critical. Clearly the DOJ is focusing more on the role, expertise and how the compliance function is treated within an organization. Pay your CCO considerably less than your GC? You may now better be able to justify that discrepancy. Legal department budget of three million dollars and compliance department is
$500,000; you may be starting behind the 8-ball. Finally, this document may well portend structural changes required at the Board of Directors level, including appointment of a compliance professional and creation of a Compliance Committee.

IV. Clarification and Consolidation

James Koukios, a partner at Morrison & Foerster LLP and a former DOJ prosecutor in the FCPA unit of the Fraud Section characterized the new Policy as one of “clarification and consolidation.” I found this new Policy to be the culmination of different concepts we have seen in FCPA enforcement actions, the 2016 FCPA Pilot Program, the 2017 Evaluation of Corporate Compliance Programs and DOJ pronouncements at speeches over the past few years. It also incorporated concepts articulated in the Yates Memo from September 2015.

I was most particularly interested in the presumption laid out in the new Policy. The language reads:

Due to the unique issues presented in FCPA matters, including their inherently international character and other factors, the FCPA Corporate Enforcement Policy is aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct. When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, **there will be a presumption that the company will receive a declination** absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism. [emphasis supplied]

This was the first time I could recall the DOJ saying that even with a violation of federal law, a company could start out with a **presumption** of receiving a declination. Koukios said that due to the unique circumstances present in FCPA cases the DOJ aimed to bring additional benefits to companies based on their corporate behavior. Further, “the presumption can be overcome if there are certain aggravating factors and those are things that you would probably recognize from other parts of the U.S. attorney’s manual like high level management involvement, corporate recidivism and other factors like that.” Koukios characterized this presumption as “a real improvement over the over the pilot program.”

I was also interested in the process the DOJ used to develop the new Policy. Step back and consider the innovation of the Pilot Program and how it helped to formalize the process that former FCPA unit head Patrick F. Stokes had described at the 2015 ACI National FCPA Conference; where he laid out criteria for fine and penalty reductions. Stokes explained the
discounts that both Parker Drilling and Hewlett-Packard (HP) received from their extensive cooperation and remediation. Obviously, there is language from the FCPA Pilot Program which was announced in April 2016. The Pilot Program put discounts in place of up to 50% for meeting the requirements and now that discount can range up to 100%.

Koukios pointed to the new category of declination with disgorgement as a solid achievement and the biggest outcome from the Pilot Program. He felt like it really benefited corporations, so they would not have to go through either a more formal Deferred Prosecution Agreement (DPA) or Non-Prosecution Agreement (NPA) process. Further, companies would have less information about their violations put out into the public record.

From the Yates Memo, there were two areas where the new Policy pointed towards companies self-disclosing quickly, efficiently and with solid information about culpable individuals. In the introductory policy section, it states, “Any information relating to a possible violation of the FCPA should be brought immediately to the attention of the Fraud Section of the Criminal Division. Even when such information is developed during the course of an apparently unrelated investigation, the Fraud Section should be notified immediately.” In the section defining “Voluntary Disclosures” it states, “The company discloses all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.” [emphasis supplied]

Last April, at the one year anniversary of the Pilot Program, the DOJ announced it was reviewing and evaluating the Pilot Program. The new Policy came out of that process. I found this process to be an excellent example where the DOJ reviewed how it prosecuted FCPA cases, inputted data and came up with something better and stronger in the form of the new Policy. There is also language from the 2017 Evaluation of Corporate Compliance Programs, most particularly impacting the compliance practitioner and compliance profession.

V. New FCPA Enforcement Policy Ends the Compliance Defense Debate

Another effect of the new Policy is that is sounded of the death-knell, once and for all time, of the need for a compliance defense. The protocol set up by the DOJ is certainly creative and perhaps even unique in federal criminal law enforcement. The enforcement aspects, coupled with the incentives provided to corporations and the detailing of a best practices are much more comprehensive to advance compliance than any argument for a compliance defense.

In considering the new Policy, most practitioners have started with the presumption that if a company meets the requirements under the new Policy, they will receive a declination. There are a variety of factors present in FCPA enforcement actions which would lead the DOJ to make this blanket offer. As stated in the new Policy “The investigation and prosecution of particular allegations of violations of the FCPA will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction.”
Those who advocate a compliance defense argue it will somehow drive more compliance. Of course, there has never been any evidence to back up this claim. The structural problem with the compliance defense is it is simply a paper program to give companies cover as they look the other way while their employees engage in bribery and corruption. It is designed to be a *wink-wink, nod-nod, we told you not to do it* defense to companies, which would then claim any FCPA violation is only those “rogue” employees out there and a company certainly cannot be expected to control its own workforce. The compliance defense is designed neither to encourage the *doing* of compliance nor operationalizing compliance in a company. It is simply designed to give companies a way to argue to the DOJ *it is not our responsibility* while not moving forward in the fight against international bribery and corruption one iota.

Yet perhaps the most basic misunderstanding that those advocating the compliance defense make is that there is simply a binary choice to be made: us vs. them; guilty vs. not guilty, conviction at trial vs. no conviction at trial. They fail to understand that the underpinnings of FCPA enforcement have always held a much broader view. It was true at the time of the FCPA’s enactment in 1977 and it is even more true today. The new Policy recognizes this unusual nature in the international fight against bribery and corruption. George J. Terwilliger III, writing in the FCPA Blog, said, “The new policy is grounded in the notion that companies and the government have a shared interest in securing the rule of law, which in this context includes global commercial markets freed from the influence and corrosive effects of corruption.”

This is the brilliance of the new Policy, as not only does it encourage doing compliance by mandating an operationalized compliance program. The new Policy also requires a company to do much more than simply operationalize compliance. Each component of the new Policy moves this notion forward. First there is a presumption created, not a guarantee, that a company will receive a declination. This is important for not only the aggravating factors that the Policy listed, “involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.” The carrot of a declination requires other steps and continuation of those steps throughout the investigation and enforcement process.

A company must voluntarily self-disclose with three requirements. It has to be (1) “prior to an imminent threat of disclosure or government investigation”. (2) The self-disclosure must be “within a reasonably prompt time after becoming aware of the offense,” which the company must demonstrate. (3) Finally, the company must disclose, “all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.” This means the company cannot wait until it is on the front page of the New York Times (NYT) or Wall Street Journal (WSJ) to then come in and report. The company cannot sit on the discovery as multiple US companies have done around their disclosures of data breaches. Finally, the new Policy continues
the Yates Memo mandate that companies will have to continue to produce “Yates Binders” of information about the illegal conduct, including evidence of culpable individuals.

A company must proactively cooperate fully with the DOJ during the pendency of the investigation. This cooperation mandates presentation of the facts, in a manner not designed to violate attorney/client privilege, together with timely updates. There must be timely document security and if a company claims it is limited on information it can get out of another country into the US, the burden is on the company to demonstrate this legal restriction and not simply hide behind a foreign law. The new Policy also requires the company to find a way to get the evidence to the US stating, “Moreover, a company should work diligently to identify all available legal bases to provide such documents.” The Policy addresses two key issues not previously addressed formally by the DOJ. The first is requiring de-confliction with the DOJs investigation or other ongoing investigations. The second is to recognize that employees have Fifth Amendment rights in internal company investigations. Finally, and perhaps most timely in light of the latest Uber revelation, requires companies to prohibit “employees from using software that generates but does not appropriately retain business records or communications”.

The new Policy formalizes the declination with disgorgement, created under the FCPA Pilot Program. This formalization also works to further the goals of anti-corruption enforcement by recognizing companies should not retain their ill-gotten gains, which is also antithetical to the concept of the compliance defense which allows retention of such gains. This is an appropriate sanction.

The new Policy furthers the goals of global anti-corruption enforcement but does it a way in which all the stakeholders involved are a part of that effort. It gives companies a very bright line to work towards, with the presumption of a full declination to follow at the end. This is a much more well-rounded approach for incentivizing not only the increased importance of compliance but also other goals of cooperation, investigations and returning monies not obtained in legitimate commerce. As Telwellige noted, the Policy is “a welcome step in a more positive relationship between government enforcers and the vast majority of U.S. businesses that are committed to legal compliance and strong business ethics.” It is this commitment to legal compliance and strong business ethics which will drive compliance programs and the compliance profession forward, not a paper compliance defense.

**VI. Final Thoughts**

The first observation is the process the DOJ went through to come up with this new Policy. The impetus would seem to have been the expiration of the one year FCPA Pilot Program in April 2017. At the conclusion of this one year experiment, the DOJ announced it would assess the Pilot Program. It not only assessed the Pilot Program but made changes which I think make the new
Policy even more effective than the Pilot Program. In addition to the enforcement aspects of increasing the discount available to companies which met the requirements of the Pilot Program down to a 100% discount, from a Pilot Program high of a 50% discount; the DOJ made the presumption companies would receive a full declination as the default response to meeting the prescripts of the new Policy. Nowhere else under federal law is there such a presumption when there is a violation of federal criminal law.

Yet beyond the presumption of a full declination, there are additional benefits to companies which fail to disclose or have aggravating factors. Mike Volkov noted these additional benefits consisted of “a guarantee of a 50 percent discount and the probable avoidance of a corporate monitor.” Further, “In the event that a company does not qualify for a voluntary disclosure but cooperates and remediates its compliance program, the company can still earn up to a 25 percent discount from the bottom of the Sentencing Guidelines range.”

As a part of its review of the Pilot Program, the DOJ brought forward language on the expectation of a best practices compliance program, which I previously examined in some depth. There was language brought forward from both the Pilot Program and the 2017 Evaluation of Corporate Compliance Programs. Each of these additions builds upon the 10 Hallmarks of an Effective Compliance Program incorporated through reference into the new Enforcement Policy.

These new additions to a best practices compliance program elevate both the corporate compliance function and the position of the Chief Compliance Officer in an organization. Perhaps most importantly, the DOJ made clear there must be compliance expertise on the Board, which signals that companies should now have a compliance program subject matter expert (SME) on their Board of Directors. Hopefully companies like Wells Fargo and Uber will take notice of this new DOJ expectation. Compliance department budgets will also need to be commensurately increased. There is also now the requirement for not only a root cause analysis but the looping the information obtained during the root cause analysis back into the remediation phase of any corporate compliance program. While myself and others have argued these were DOJ requirements based on the Pilot Program and Evaluation, it is now a part of the US Attorney’s Manual, they will be given the full credence they deserve.

Another way to consider these changes are of preservation and enhancement. The DOJ preserved the foundational compliance elements found in the 10 Hallmarks of an Effective Compliance Program and enhanced compliance programs through the incorporation of those items from the Pilot Program and Evaluation. Whichever formulation you might prefer, clearly the compliance discipline was moved forward by the DOJ with the new Policy.

All of these new statements, consolidations of prior DOJ publicly released documents and items from other sources are now consolidated in one Policy. Certainly, this is a positive move forward for all parties involved in the process; prosecutors, companies and their counsel. Looking back at
the DOJ statements from this year, it is clear how important the compliance function and compliance profession is in FCPA enforcement. In April, Attorney General Sessions said, at the Ethics & Compliance Initiative (ECI) Annual Conference, the following about compliance practitioners, “your work seeks to prevent, by building strong cultures of compliance within your companies to deter illegal and unethical conduct. We applaud those efforts. Our department would much rather have people and companies obey the law and do the right thing, so we don’t have to see them in court. Your good work makes our jobs easier, and it makes your companies and our country better. So far, so good. The E&C community is recognized for doing their job of helping companies follow their moral compass.”

Finally, the DOJ has brought everyone into the fight against bribery and corruption. Someone as thoughtful as former Deputy US Attorney General George J. Terwilliger III, writing in the FCPA Blog, said, “The new policy is grounded in the notion that companies and the government have a shared interest in securing the rule of law, which in this context includes global commercial markets freed from the influence and corrosive effects of corruption.” When you can couple such a policy under the rule of law, it is quite an achievement. It is the final concept which makes this new Policy truly unique. Compliance hats off to the DOJ for it.