WHITE COLLAR CRIME - USA

US bribery and corruption outlook

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Introduction

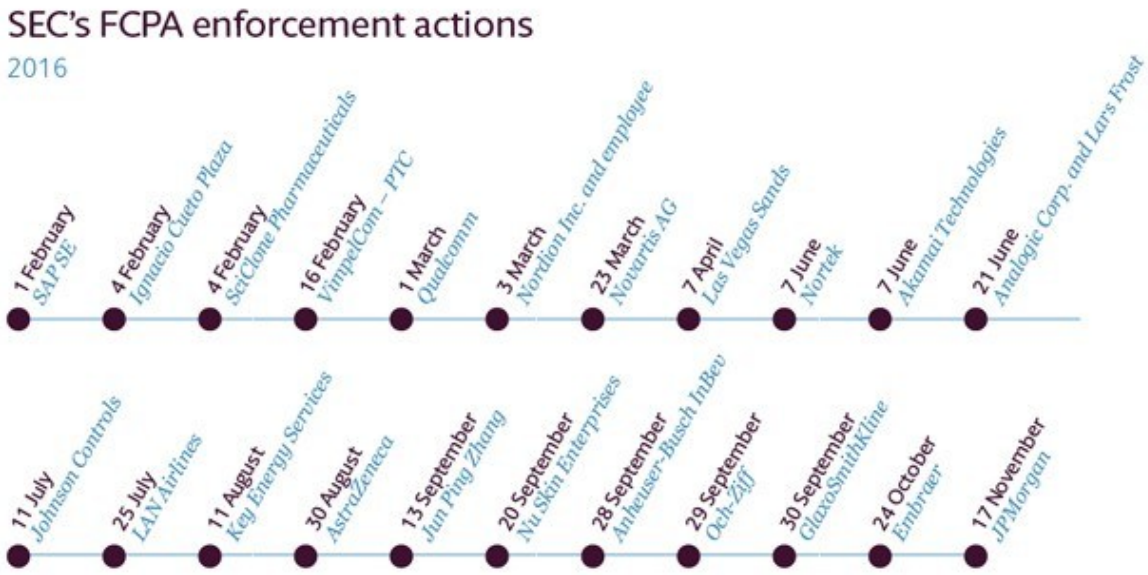
Nations across the globe increasingly focus on preventing bribery and corruption and are coordinating their efforts to do so more than ever before. In the United States, this effort is led by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC), which share jurisdiction to enforce the Foreign Corrupt Practices Act.

To undergo a Foreign Corrupt Practices Act investigation entails significant risk. Since 2008 at least 10 corporations have agreed to pay more than $300 million in penalties to resolve such investigations. Defence costs associated with a global bribery or corruption investigation can also run into the millions before any penalties are assessed.

A number of developments that emerged during 2016 will have broad implications for the coming year.

Escalating corporate Foreign Corrupt Practices Act enforcement

The DOJ resolved two corporate Foreign Corrupt Practices Act investigations in 2015 – its fewest number of resolved corporate cases in a year since 2003. In 2016 Andrew Weissmann, chief of the DOJ Criminal Division's Fraud Section, promised that this dip did not "tell the whole story". While Weissmann emphasised that a different picture would emerge in the long term, he also indicated that the complexity of prosecuting more individuals has affected the speed at which corporate investigations are resolved.**(1)** A jump in criminal Foreign Corrupt Practices Act resolutions in 2016 and a stream of actions against individuals support his assertions. More significantly, the SEC resolved 23 Foreign Corrupt Practices Act corporate actions in 2016 – more than double the nine corporate actions it resolved the year before.



The 2015 dip in corporate enforcement actions may in part relate to Federal Bureau of Investigation (FBI) resources being reorganised. In March 2015 the FBI announced plans for three dedicated Foreign Corrupt Practices Act teams in New York, Washington DC and Los Angeles. Although this transition may have delayed some investigations, the new teams have reportedly tripled the FBI's Foreign Corrupt Practices Act investigative resources.**(2)**

In the first full year since DOJ Deputy Attorney General Sally Yates announced in a memo that the DOJ would vigorously pursue culpable individuals for corporate wrongdoing, the DOJ and SEC reached Foreign Corrupt Practices Act settlements with 24 distinct corporate groups (for further details please see "DOJ calls for pursuit of executives in corporate investigations"). Six of these investigations have so far resulted in criminal or civil actions against individuals, though it is unclear whether these numbers are an outgrowth of the policies in the Yates Memo. As Yates herself indicated in a May interview, corporate investigations develop over a long period. So the effects of this new focus – to the extent that it is new – will not be known for some time.**(3)**

Beyond the individual enforcement actions linked to corporate resolutions reached in 2016, the DOJ's investigation into corruption at Venezuela's state-owned, state-controlled energy company, Petroleos de Venezuela, SA (PDVSA), resulted in six guilty pleas from individuals. Three US businessmen pleaded guilty to Foreign Corrupt Practices Act violations relating to their efforts to secure energy contracts from PDVSA. Their pleas followed those of three PDVSA foreign officials who had accepted bribes from the Americans and conspired with them to launder the proceeds. In addition, a US citizen and former high-ranking official of Equatorial Guinea was arrested and charged with laundering the proceeds of bribes received from a Chinese conglomerate.

Resolves Foreign Corrupt Practices Act corporate actions

The SEC resolved 23 Foreign Corrupt Practices Act corporate actions in 2016 – more than double the nine corporate actions it resolved in 2015. The SEC also settled one Foreign Corrupt Practices Act-related administrative proceeding against an executive at a Chinese subsidiary of Harris Corporation, but will forgo any action against the corporation. Jun Ping Zhang, a former executive at the subsidiary, agreed to pay a $46,000 civil penalty to resolve allegations that he helped to bribe Chinese government officials to retain business for Harris. Ping allegedly supported his sales staff's efforts to submit false expense reports and use the cash reimbursed to buy gifts for government officials.

In 2011 Harris bought CareFx Corporation. As part of that deal, Harris picked up a CareFx subsidiary, Hunan CareFx Information Technology, LLC, which provided electronic records management software to government healthcare providers. The SEC alleged that employees at the subsidiary made improper gifts to Chinese government officials worth at least $200,000 and pontentially up to $1 million. The gift recipients ultimately awarded contracts worth more than $9.6

million to CareFX.

Harris's due diligence while buying CareFx did not uncover the Foreign Corrupt Practices Act violations. However, the SEC was convinced that Harris's post-purchase compliance programme, which included an anonymous complaint hotline, allowed the company to detect the misconduct five months later in September 2011. Ping was relieved of his duties as chairman and chief executive officer of CareFx China in April 2012 and ended his services at Harris in July 2012. The SEC did not indict Harris due to:

> "*The company's efforts at self-policing that led to the discovery of Ping's misconduct shortly after the acquisition, prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC's investigation*".

Foreign Corrupt Practices Act pilot programme

Six months after the Yates Memo, the DOJ Fraud Section released the Foreign Corrupt Practices Act Enforcement Plan and Guidance. This memo outlines a pilot programme that allows fine reductions beyond what is available under the US Sentencing Guidelines (for further details please see "The problems that the Justice Department pilot programme is trying to solve"). To earn such a reduction, as a threshold matter, companies must disclose all relevant facts about individuals involved in wrongdoing consistent with the Yates Memo and disgorge all profits resulting from any Foreign Corrupt Practices Act violation. The programme runs for a year from April 5 2016. It grants the most extensive reductions to companies that voluntarily self-disclose possible Foreign Corrupt Practices Act violations, fully cooperate with investigators and implement timely and appropriate remediation.

The programme promotes greater accountability for individuals and corporations and enhances the Fraud Section's ability to prosecute individuals by motivating companies to self-disclose and cooperate with investigators (for further details please see "The problems that the Justice Department pilot programme is trying to solve"). Assistant Attorney General Leslie Caldwell explained that the programme provides a concrete incentive for companies to self-report Foreign Corrupt Practices Act violations and to secure evidence – which might otherwise be hard for prosecutors to obtain – about individuals responsible for the Foreign Corrupt Practices Act violation.**(4)**

Caldwell acknowledges that in recent years, self-reports have plummeted. She attributes this to a perception that companies that do not self-disclose, but cooperate when the government learns of a

Foreign Corrupt Practices Act violation are not treated much more harshly than those that investigate and self-disclose on their own.(5) The programme tries to dispel this view. It makes clear that companies that do not self-disclose will get at best a 25% reduction from the bottom end of the Sentencing Guidelines fine range. In contrast, corporations that meet the programme's other requirements and do self-disclose may qualify for a reduction of up to 50% or a declination of prosecution.(6)

Weissmann has explained that the DOJ has added 10 lawyers and five supervisors to its Foreign Corrupt Practices Act unit. They focus on companies that do not self-disclose and on parts of the world where there is a misperception that investigations are unlikely. He explained that the extra Foreign Corrupt Practices Act enforcement resources will provide the 'stick' side of the carrot and stick approach that the Fraud Section has designed to encourage self-disclosure.(7)

The programme also explains that prosecutors may issue declinations of prosecutions to some corporations that self-disclose and meet the cooperation and remediation requirements. The DOJ will reportedly consider the seriousness of the offence in deciding whether a declination is appropriate. It has indicated that a declination is unlikely if:

- executive management was involved in the wrongdoing;
- the company made a significant profit from the misconduct in relation to the company's size and wealth; or
- the company has any history of non-compliance or resolved a separate matter with the DOJ within the last five years.

The DOJ has issued five declination letters since it announced the programme.(8) In three cases – Akamai Technologies, Inc, Nortek, Inc and Johnson Controls, Inc – the letters neither made any factual findings nor required any disgorgement. In those cases, parallel SEC investigations did require disgorgement. The SEC's allegations in those cases involved alleged bribery schemes executed by the companies' Chinese subsidiaries. However, it is not clear whether those schemes had a US link that would have supported Foreign Corrupt Practices Act anti-bribery charges in the first place. So the extent to which these declinations represent a significant break from pre-pilot programme charging practices remains unclear.

In contrast, declination letters issued to HMT LLC and NCH Corporation described the DOJ's investigative findings and required each company to pay disgorgement to the Treasury. This distinction may be because HMT and NCH are both privately held companies – HMT produces above-ground storage tanks for oil and gas, and NCH manufactures cleaning products – and are thus not subject to an SEC action. In these two instances, the companies did not agree to any ongoing reporting or cooperation obligations as would likely have been required if they had resolved the action through a non-prosecution agreement.

The DOJ appears to be motivated to highlight the benefits of the pilot programme extensively to motivate companies to self-disclose. Even where the DOJ does file charges, it may seek to underscore the benefits of self-disclosure by highlighting penalty reductions for those companies that self-disclose misconduct and by seeking harsher penalties from those that do not. SEC Division of Enforcement Director Andrew Ceresney has said as much, explaining that: "I have emphasized before, if we learn the company made the decision not to self-report after learning of misconduct, there will be consequences."(9)

Joint False Claims Act and Foreign Corrupt Practices Act enforcement actions

On March 1 2016 the DOJ announced that Olympus Corporation of the Americas had entered into two deferred prosecution agreements through which it agreed to pay $646 million to resolve criminal charges under the Anti-kickback Statute and the Foreign Corrupt Practices Act. Olympus will pay:

- $312.4 million as a criminal penalty for violations of the statute;
- $310.8 million to settle related civil claims under the False Claims Act and similar state statutes; and
- $22.8 million as a criminal penalty for violations of the Foreign Corrupt Practices Act.

This case is unusual in that Olympus was investigated at the same time for violations of the False Claims Act and the Foreign Corrupt Practices Act, which prohibit similar conduct.

The Anti-kickback Statute is a criminal law that bans knowing and wilful 'remuneration' to induce or reward patient referrals or to generate business involving goods or services payable by federal healthcare programmes (eg, drugs, medical supplies and devices). Violating the Anti-kickback Statute also renders any claim tainted by a banned kickback false for purposes of the False Claims Act. In the *Olympus* case, a whistleblower alleged violations of the Anti-kickback Statute that induced physicians and hospitals to buy Olympus equipment, supplies or consumables. The alleged false claims then arose when the physicians or their affiliated hospitals submitted claims to Medicare or Medicaid for procedures performed on Olympus medical equipment, which was tainted by the kickbacks.

The case alleged that the unlawful inducements to buy Olympus equipment extended beyond US borders. The foreign conduct supported allegations that Olympus's inducements to physicians and administrators who were employed by state-owned or state-controlled hospitals violated the Foreign Corrupt Practices Act. The Foreign Corrupt Practices Act bans paying or offering to pay "anything of value" to a "foreign official" to influence him or her in an act to "obtain or retain business". US enforcement officials have for years maintained that physicians employed by state-owned or state-controlled hospitals count as foreign officials. Thus, inducements paid to healthcare providers at these institutions were alleged to have violated the Foreign Corrupt Practices Act.

Until now, it has been rare for a company facing False Claims Act charges also to face a Foreign Corrupt Practices Act enforcement action for parallel conduct. The *Olympus* case suggests this may be changing, despite the fact that the DOJ's Civil Division handles False Claims Act investigations, while its Criminal Fraud Division handles Foreign Corrupt Practices Act investigations.

Although the *Olympus* case arose in a healthcare context and involved the Anti-kickback Statute, any corporate corruption investigation of a multinational has the potential to involve both domestic corruption laws and the Foreign Corrupt Practices Act. Allegations that a corporation made corrupt payments to a domestic government official and so filed a false claim for government reimbursement could lead to the discovery of overseas conduct that would also attract Foreign Corrupt Practices Act scrutiny. Increased cooperation between the DOJ's civil and criminal divisions may increase enforcement risk for multinationals that both contract with the federal government and have contacts with foreign government officials.

International cooperation vital to enforcement officials

SEC Chair Mary Jo White noted that fighting bribery and corruption is a global effort, and called on the global regulatory community to be more effective and better coordinated. She explained that US Foreign Corrupt Practices Act enforcement efforts depend on cooperation and help from the SEC's international counterparts, and that it received help from entities in an expanding list of countries – including Austria, Bermuda, the British Virgin Islands, Canada, the Cayman Islands, Cyprus, Denmark, Estonia, Finland, Gibraltar, Ireland, Latvia, Liechtenstein, the Marshall Islands, the Netherlands, Norway, Spain, Sweden, Switzerland and the United Arab Emirates – in the last fiscal year.**(10)**

DOJ officials have also explained that the DOJ's enhanced ability to cooperate with foreign governments is important to its international enforcement efforts. Caldwell has stated that "[c]ollaboration and coordination among multiple regulators in cross-border matters is the future of major white collar criminal enforcement".**(11)** She noted that the VimpelCom investigation would not have been possible without help from law enforcement and prosecutors in Belgium, France, Ireland, Latvia, Luxembourg, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom.

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International investigations do raise concerns for companies that fear they will unfairly be asked to pay penalties to regulators from multiple countries for the same conduct. Addressing this concern,

Caldwell has explained that in the *VimpelCom* case, the DOJ calculated the total criminal sanctions based on the offence conduct and other factors and then reduced the share payable to the United States to account for penalties imposed by other countries.**(12)** A similar approach may have been taken in the settlements with Odebrecht SA and Braskem SA, through which Odebrecht agreed to pay Brazilian, US and Swiss enforcement fines totalling approximately $3.5 billion and Braskem agreed to pay fines and disgorgement totalling approximately $957 million. Caldwell also noted that US prosecutors are becoming more adept at working with other countries to avoid putting companies in the middle of a turf battle.

Looking ahead

With the FBI's three dedicated Foreign Corrupt Practices Act teams in place and increased cooperation from foreign law enforcement entities, the uptick in Foreign Corrupt Practices Act enforcement in 2016 looks set to continue. One FBI veteran explained that the FBI will focus its resources in geographical regions and industry sectors where it has the best chance of building a strong case.**(13)** The same official reported that the FBI works most closely with countries in Europe and Latin America, including Brazil and Mexico, and also has strong relationships with Australia, Japan, Hong Kong and Singapore.

In August 2016 Mexico announced changes to its anti-corruption regime. Regulations that penalise individuals and corporations that engage in bribery, bid rigging and other acts will come into effect on July 19 2017. This more aggressive enforcement regime follows the SEC's announcement that Houston-based Key Energy Services, Inc will pay $5 million in disgorgement to resolve allegations that it funnelled payments to an employee of Mexico's state-owned oil company, Petróleos Mexicanos, to win opportunities to provide rig-based oil well services. These developments suggest that US law enforcement officials may have increasingly helpful partners in Mexican law enforcement agencies.

The actions settled in 2016 also confirm that China remains a hotspot for Foreign Corrupt Practices Act investigations. Of the 24 corporate enforcement actions that the SEC and DOJ settled, 12 involved bribes to Chinese government officials. Most of these enforcement actions did not support criminal charges from the DOJ, but rather SEC proceedings for violations of the Foreign Corrupt Practices Act's internal control and books and records provisions. Despite the rarity of criminal bribery charges resulting from these investigations, the high volume of actions involving corruption in China cannot be ignored. Corporations doing business in China should scrutinise their compliance programmes to minimise this risk.

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Endnotes

(1) Trace Trends, Q&A with DOJ Fraud Chief Andrew Weissmann, Trace Anti-bribery and Compliance Solutions, January 26 2016.

(2) Richard Satran, "International Graft Crackdown Takes Hold, FBI Official Says, Citing Brazil", Reuters Financial Regulatory Forum, August 5 2016.

(3) Ross Todd, "DOJ Crim Chief Wants to Make a Deal", *The Recorder*, May 12 2016.

(4) See Todd, *supra* note 3.

(5) *Id.*

(6) This policy stands in contrast to the terms of the deferred prosecution agreement that resolved the DOJ's VimpelCom investigation. That agreement granted VimpelCom a 45% discount, despite the fact that the company did not self-disclose. See *United States v VimpelCom Ltd*, deferred

prosecution agreement, February 10 2016.

(7) See Trace Trends, *supra* note 1.

(8) See the US DOJ declanation letters here.

(9) Andrew Ceresney, director, SEC Division of Enforcement, address at Sixteenth Annual Taxpayers Against Fraud Conference, September 14 2016.

(10) Mary Jo White, chair, SEC, keynote remarks at the Legal Practice Division Luncheon, International Bar Association Annual Conference, September 21 2016.

(11) See Assistant Attorney General Leslie R Caldwell's speech at the American Bar Association's 30th Annual National Institute on White Collar Crime, March 4 2016.

(12) *Id*.

(13) See Satran, *supra* note 2.

AUTHORS

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