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Corporate FCPA Enforcement in The Era of Trump

Same Old, Same Old

Part One of a Two-Part Article

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The start of a new presidential administration brings along changes to personnel, policies and enforcement priorities. During the transition period, counsel to businesses and individuals try to anticipate which way the enforcement wind will be blowing in order to best advise anxious clients. One high-stakes area of enforcement focus, the Foreign Corrupt Practices Act (FCPA), has been subject to much speculation in this regard. Because of the enormous resources multinational companies must devote to compliance with FCPA's anti-corruption and record-keeping requirements — and, when things go awry, to paying ever-increasing penalties to the government here and abroad — the new administration's likely approach is of paramount importance. Despite predictions of a substantial pull-back in the FCPA enforcement area, the writing on the wall does not necessarily suggest such a relaxation.

As has by now been widely chronicled, in the past, then-private citizen Donald J. Trump remarked that he believes enforcement of the FCPA harms United States companies' economic interests by hindering their ability to compete on an international scale. In his words, prosecution of FCPA violations for business activities that take place in countries where bribery often is considered the cost of doing business is "absolutely crazy." Though no changes have been announced with respect to FCPA enforcement, in an analogous vein, the White House has moved to roll back consumer protections and financial regulations passed under the Dodd-Frank Act. The administration also has announced its intention to deconstruct aspects of the executive branch and regulatory scheme such as the Department of State and the Environmental Protection Agency (EPA).

In the face of such an approach, few were surprised when Trump selected as the next chairman of the Securities and Exchange Commission (SEC) the highly qualified W. Jay Clayton. When Clayton was the chair of the International Business Transactions Committee of the New York City Bar Association, the committee took a position similar to Trump's in a December 2011 article in which it wrote that ongoing enforcement of the FCPA may not be effective at achieving its purpose of combating global corruption, or may even exacerbate it, and that it also creates an international "asymmetry in regulation and enforcement."

Reading the above limited tea leaves, one might anticipate a marked drop-off in FCPA enforcement. Other evidence, however, convincingly suggests the trend of increased international cooperation and direction of enforcement resources in the FCPA arena is likely to continue. First, although the new Department of Justice (DOJ) and SEC have not fully taken shape, early indications from the new administration suggest that it will continue the FCPA focus of recent years. Second, the impact of FCPA enforcement predominantly has been borne of late by foreign companies, easing the concerns about the FCPA's anti-competitive effect on domestic companies. Third, an increasing number of countries are improving their anti-bribery enforcement efforts, perhaps attracted by the escalating disgorgement and fines being extracted in the United States for FCPA violations. Fourth, stronger foreign anti-corruption laws and increased use of mutual legal assistance treaties have led to greater cooperation between the United States and its allies. Finally, and perhaps ironically, a number of American compa-

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nies are learning as of late that good compliance can be good for business, making conscientious American businesses sought after in the international marketplace.

Early Signs of the New Regime Foretell Continued Zealous Enforcement

Predicting the shape of FCPA enforcement over the ensuing four years is perhaps premature, but the administration's early actions are a better indication than statements made years in the past. The president has yet to put in place much of his law enforcement and regulatory team. Jeff Sessions has been confirmed as Attorney General, but, as of this writing, Dana Boente is still acting as Deputy Attorney General while Rod Rosenstein awaits confirmation. Outside of Washington, the makeup of the DOJ is even murkier. On March 10, the president asked 46 holdover United States Attorneys to resign — all of those positions are yet to be filled. With respect to the SEC, the regulator that most often enforces the FCPA, its new chairman, Jay Clayton, was confirmed by the Senate only in March, and has yet to announce a Director of Enforcement.

The first definitive sign that has come from the new administration with respect to the FCPA, however, is an unequivocal endorsement of the Fraud Section of the DOJ's prior policies. The Sessions DOJ announced on March 10 that it would be renewing its Fraud Section's Obama-era FCPA Enforcement Plan and Guidance, more commonly known as the FCPA "Pilot Program." This program, created in April 2016, sets forth multiple programmatic goals, including increasing international cooperation, refocusing attention on individual violators of the FCPA, and increasing resources and staffing for FCPA enforcement. The Pilot Program also defined the circumstances under which DOJ would give a declination. It is perhaps best known for a new incentive it announced for noncompliant corporations: a 25% reduction to the bottom of the Sentencing Guidelines fine range for companies that cooperate fully and remediate and settle in an expedient manner, and an additional 25% reduction for companies that also self-report their violations.

The Pilot Program appears to have been a success in its first year. In roughly the fourth quarter of 2016 alone, the DOJ settled five significant FCPA cases against corporations each with penalties over $100 million. The SEC and DOJ combined collected nearly $2.5 billion in penalties, fines and disgorgement in all of last year. According to The FCPA Blog, of the 10 largest FCPA settlements of all time, four of them took place in 2016. The new administration is unlikely to ignore such "profitable" results in defining its enforcement priorities.

The Limited Impact of The FCPA on American Companies' Competitiveness Overseas

The articulated assumption that in theory might lead policymakers to reduce enforcement going forward — that enforcement of the FCPA hurts American business interests abroad — could well be faulty, or at least outdated, given recent enforcement trends. Recent multi-million dollar settlements have not been borne by what are generally considered "American companies." The DOJ's recent success in settling massive enforcement actions have, more often than not, been at the expense of multinational foreign-based corporations with sufficient domestic contacts or activities to fall within the broad jurisdictional reach of the FCPA.

VimpelCom Ltd., a Russian company owned primarily by Russian and Norwegian parent companies and headquartered in the Netherlands, but which trades on NASDAQ, settled FCPA (and Dutch equivalent) charges in February 2016 for a total of $795 million, split among the DOJ, the SEC, and Dutch law enforcement. Teva Pharmaceuticals, an Israeli company trading on the New York Stock Exchange, settled in December 2016 with the DOJ for $283 million and with the SEC for $236 million. Odebrecht and Braskem, parent and subsidiary Brazilian conglomerates subject to U.S. jurisdiction due to improper conduct occurring in the United States, settled in December 2016 with a number of government agencies for a combined total of $3.5 billion. The trend has continued this year. In January 2017, Rolls Royce, based in the UK, paid $809 million to American, Brazilian, and British authorities. If American companies' ability to compete overseas is harmed by the obligations of the FCPA, then, at least as of late, they likely are no worse off than much of their competition.

In Part Two of this article, the authors will discuss the current state of enforcement efforts in other countries and their likely future moves to combat corruption in the business world.

Part Two of a Two-Part Article

Editor's note: In last month's newsletter (see http://bit.ly/2q2ZSo5), the authors began discussion of whether we should expect changes in enforcement of the Foreign Corrupt Practices Act (FCPA) in the Trump era. Trump once called application of the law to deals done in countries where bribery is the cultural norm "absolutely crazy." But that was when he was purely a businessman, and a private citizen. What about now?

Enforcement Efforts By Other Countries

As the penalties being extracted by the United States from multinational corporations for violations of anti-corruption statutes have skyrocketed in recent years, an increasing number of other countries have begun to pass or enhance their own laws prohibiting, among other things, bribery of foreign officials, and have increased the financial penalties applicable to businesses that violate those laws. For example, Dutch law enforcement's ability to extract large penalties for violations of its anti-bribery laws was expanded immensely by a new law enacted on Jan. 1, 2015, that increased the maximum sanctions available to be imposed on Dutch companies to a cap of 10% of the violating company's annual turnover.

The Netherlands is not alone in enacting new laws. In December 2009, the multinational Organization for Economic Co-operation and Development (OECD) revised its recommendations to its members on best practices for anti-bribery laws and enforcement. Each member country now undergoes a three-tiered peer review of its anti-corruption effectiveness and implementation to determine strengths and areas for potential improvement. The UK Bribery Act was passed in April 2010 and gave British law enforcement a tool for virtual worldwide jurisdiction, unlimited financial penalties on corporations and a maximum prison term of 10 years. Germany has enacted a series of new an-

ti-corruption laws in the past few years, including a law passed on Nov. 26, 2015, that expanded the scope of what is considered a "public official," and extended the definitions of "money laundering;" and a second law on May 13, 2016, that extended the existing anti-bribery law to the health care sector. This trend should only continue, further reducing any previously perceived "asymmetry" among countries in enforcement.

Expansion of Anti-Bribery Statutes Has Led to Increased Cooperative Partners for the U.S.

The proliferation of foreign anti-corruption laws also means the proliferation of potential partners with whom the United States can cooperate in its investigations. The DOJ's Pilot Program, recently renewed by the Attorney General, stated the department's programmatic intent to increase cooperation with foreign law enforcement on anti-corruption cases. This statement, however, merely formalized what already had been an increasing trend in FCPA enforcement. Most emblematic of this cooperative spirit was the recent settlement with Odebrecht and Braskem. Those companies' $3.5 billion penalty was split among not only the DOJ and SEC, but also Swedish and Brazilian law enforcement. In its release in conjunction with the VimpelCom settlement, the DOJ acknowledged the governments of no fewer than nine other countries — the Netherlands, Sweden, Switzerland, Latvia, Belgium, France, Ireland, Luxembourg and the UK — for their assistance in the investigation of the case. Of the $809 million that Rolls Royce paid, only $170 million went to the DOJ.

The degree of cooperation and the extent to which U.S. law enforcement shared their penalties with other countries is a relatively new phenomenon, but it is by no means an invention of the Pilot Program. In 2010, BAE Systems settled with the DOJ for $400 million and also sent $47 million to Great Britain's fraud office. Also in 2010, Halliburton paid the government of Nigeria $35 million to settle bribery charges nearly two years after the company (and its subsidiary Kellogg Brown & Root) paid $579 million to settle with the DOJ and SEC.

The shape of international cooperation in FCPA cases has morphed over time as well. The United States increasingly has taken advantage of requests under mutual legal assistance treaties to investigate potential crimes overseas, and memoranda of understanding with foreign securities regulators have similarly increased the flow of information cross-border. The U.S. now also regularly relies on foreign countries for tracking down and forfeiting assets of malfeasants held in bank accounts overseas. For example, in connection with its VimpelCom FCPA investigation, the DOJ filed a civil forfeiture action to recover more than $550 million in assets it claimed to have resulted from the receipt of illegal bribes. The money was located in accounts held in Belgium, Luxembourg and Ireland, and allegedly had been laundered through accounts in, among other places, Latvia and Switzerland. Each of those countries worked cooperatively with the DOJ to help it achieve its goals.

The trend of increasing international cooperation is not limited to enforcement of only the FCPA. For example, the LIBOR settlements in 2012 and 2013 with Lloyd's of London, Royal Bank of Scotland, UBS AG, Barclays, and Rabobank were all global, and collected fines were shared variously with Swiss, Dutch and British law enforcement. FCPA cases are by definition international so we can safely assume that cooperation will only increase. The FCPA may once have created anticompetitive pressure on American corporations upon its first passage, but because the FCPA — and the penalties it made available to U.S. law enforcement — created the model for anti-corruption law that is now being copied worldwide, any disadvantage to U.S. companies due to zealous enforcement here is dissipating.

Business Reasons Alone May Encourage Strong Compliance

A number of U.S. companies have found that good compliance might also just be good business. In fact, a number of companies have found that they have a leg up as a subcontractor if they can demonstrate a strong anti-corruption culture and rigorous internal compliance program. General Electric, which has a strong reputation for having top-of-the-line compliance, trumpets on its website that its "reputation for integrity and compliance is a competitive advantage," and its executives commonly have touted the positive effects the compliance program has for the company.

Indeed, sophisticated companies and purchasers of services are discovering that hiring subcontractors or engaging partners with strong compliance for projects in countries where anti-corruption measures are not as robust help to safeguard them from the business and legal effects of illegal conduct. Along with the increased international enforcement of anti-corruption measures and the reduction of the previously noted asymmetry, the President and SEC chairman Jay Clayton likely will rely on this evolution as a rationale to justify a change in their view on the importance of FCPA enforcement.

Conclusion

The United States still leads the way in enforcing international anti-bribery and anti-corruption laws, and the new administration as yet has given no indication that it intends to change that position. The DOJ and SEC currently have extensive experience in building such cases, and that experience allows them to investigate and prosecute larger and more complicated cases. The world is quickly getting up to speed, however, and as the gap closes, the supposed competitive disadvantage that American companies face overseas as a result of FCPA enforcement will dissipate and the perceived benefits to U.S. companies of having strong internal compliance programs will increase. The new administration, therefore, likely will be inclined to continue on with what to law enforcement appears to be a successful undertaking.

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Since the publication of this article, former veteran federal prosecutor Steven Peikin has been named Co-Director of the SEC's Division of Enforcement along with acting Director of Enforcement Stephanie Avakian. These appointments are notable and consistent with our high regard for the SEC's Division of Enforcement.