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White-Collar Crime

Expert Analysis

FCPA Enforcement Trends: Will They Continue?

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In white-collar criminal enforcement, the final months of the Obama administration were marked by a series of high-profile resolutions of Foreign Corrupt Practices Act (FCPA) investigations conducted by the Department of Justice (DOJ). This enforcement activity grew out of increased resources and attention devoted to foreign bribery allegations in recent years as well as an initiative by the DOJ in 2016 to encourage corporate cooperation and voluntary disclosure.

We begin with a brief description of DOJ policy, notably the FCPA "Pilot Program" announced in April 2016, and then discuss several aspects of recent FCPA resolutions. A look at these resolutions allows for a partial assessment of DOJ's enforcement efforts and gives clues as to how enforcement may proceed in the new Trump administration.

Pilot Program and DOJ Activity

On April 5, 2016, the DOJ provided guidance for future FCPA investigations and prosecutions in the form of a memorandum from Andrew Weissmann, Chief of the Fraud Section of the Criminal Division. In addition to announcing greater resources for investigations and prosecutions, the memorandum described a new program to encourage voluntary disclosure of FCPA violations, commonly referred to as the "Pilot Program." A primary goal of the program is to "promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate …, and, where appropriate, remediate flaws in their controls and compliance programs."[1]

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DOJ seeks to achieve these objectives by, among other things, setting forth guidance for prosecutors about what constitutes voluntary self-disclosure, full cooperation, and remediation, and by giving incentives to companies to cooperate with government investigations. Under the Pilot Program, companies that voluntarily disclose FCPA misconduct and meet additional specified criteria are eligible to receive outright declinations or reduced fines and penalties.

Following adoption of the Pilot Program, a record number of cases have been resolved. While the data vary somewhat by the source, almost all observers agree that FCPA enforcement reached record-high levels in 2016. In "Fraud Section Year in Review 2016," the DOJ reported corporate FCPA resolutions involving 13 companies (not including the five declinations), charges or guilty pleas involving 17 individuals, and corporate criminal fines, penalties, and forfeiture of $1.36 billion.[2] By comparison, for the three-year period from 2013 to 2015, the Fraud Section reported

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16 corporate resolutions, 34 cases in which individuals were charged or pleaded guilty (or had charges against them unsealed), and $1.71 billion in corporate penalties.[3]

The flurry of FCPA enforcement activity continued into 2017. DOJ resolved FCPA-related charges with five companies in January, including Zimmer Biomet Holdings, and charged two individuals criminally. In February, two companies, Cobalt International Energy and Orthofix International N.V., announced DOJ declinations.

While the relatively large number of resolutions in recent months is likely attributable, in part, to a desire to resolve long-standing investigations before the end of the Obama administration, recent FCPA resolutions are also likely due in part to new DOJ policy and priorities. In a Nov. 3, 2016 speech, Assistant Attorney General Leslie Caldwell announced that, although she could not share "precise figures, anecdotally we've seen an uptick in the number of companies coming in to voluntarily disclose potential FCPA violations."[4] At least five of these voluntary disclosures resulted in declinations under the Pilot Program.

Below we examine several trends suggested by recent FCPA resolutions. These trends relate to (1) the impact and importance of corporate voluntary disclosure and cooperation; (2) the prosecution of individuals deemed responsible for corporate misconduct; (3) DOJ's treatment of repeat corporate offenders; and (4) DOJ's focus on disgorgement of ill-gotten profits, even in the absence of criminal fines.

Disclosure and Cooperation

Recent corporate resolutions have reflected the DOJ's goal, as stated in the Pilot Program, of encouraging voluntary disclosure by giving "markedly less" credit to companies that do not voluntarily disclose FCPA violations.[5]

The incentive given to voluntary disclosure is exemplified by two non-prosecution agreements (NPAs) entered into about one month apart in late 2016 and early 2017. In January 2017, Las Vegas Sands, which reportedly did not voluntarily disclose misconduct, entered into an NPA and received a 25 percent discount from the bottom of the applicable fines guidelines range for its full cooperation and remediation.[6] In contrast, in December 2016, General Cable, a Kentucky-based cable and wire manufacturer, made a voluntarily disclosure of more than a decade of FCPA violations and entered into an NPA under which it would pay a $20 million fine.[7] The amount of the fine reflected a 50 percent reduction from the bottom of the applicable guidelines range.

As to credit for cooperation, General Cable's agreement also reflected what DOJ deemed to be full cooperation, which included making foreign-based employees available in the United States; producing documents (including translations) in a way that did not implicate foreign data privacy laws; and identifying, investigating, and disclosing conduct outside the scope of its initial disclosures. The ways in which General Cable cooperated were referenced in other resolutions in which full cooperation credit was awarded. J.P. Morgan Securities (Asia Pacific) Limited, for example, reportedly did not voluntarily disclose misconduct but received "full credit" for cooperation similar to General Cable's, receiving an NPA and 25 percent discount from the bottom of the guidelines range.[8]

In contrast, Teva Pharmaceuticals Industries Ltd. did not receive full cooperation credit, despite what would appear to be a similar level of cooperation, because "of issues that resulted in delays to the early stages of the Fraud Section's investigation, including vastly overbroad assertions of attorney-client privilege and not producing documents on a timely basis in response to certain Fraud Section document requests."[9] Neither the deferred prosecution agreement (DPA) nor the DOJ's press release provides specifics as to Teva's privilege assertions, except to characterize them as "overbroad."[10]

Under the Pilot Program, "eligibility for full cooperation credit is not predicated upon waiver of attorney-client privilege or work product protection," but, the Teva resolution reveals that companies

should carefully consider the breadth and reasonableness of privilege assertions.

Prosecution

In response to criticism about its handling of post-financial crisis corporate investigations, in September 2015 the DOJ announced guidelines for "Individual Accountability for Corporate Wrongdoing," commonly referred to as the Yates Memorandum.[11] The Yates Memorandum articulated various DOJ investigatory practices, including requiring companies seeking cooperation credit to disclose "all relevant facts about individual misconduct" to receive "*any* consideration for cooperation."[12]

Commentators have generally observed that the Yates Memorandum did more to sum up, rather than change, DOJ policy, and that it has not yet resulted in different prosecutorial decisions from those that would otherwise have been made. Consistent with this general assessment, the Yates Memorandum appears not to have had, at least not yet, a demonstrable effect on FCPA prosecutions. The FCPA Professor Blog, which tracks FCPA enforcement activity, recently reported that "[o]f the 94 corporate DOJ FCPA enforcement actions [since 2006], 73 (or 77% have not (at least yet) resulted in *any* DOJ charges against company employees."[13] The blog also reported that not one corporate DOJ enforcement action in 2016 resulted in charges against such employees.[14]

In regard to the lack of individual FCPA prosecutions, in a November 2016 speech, Deputy Attorney General Sally Yates explained that "[t]he purpose of the Memo was never to increase individual prosecutions by a certain number or percentage, or to instruct our prosecutors to bring us the heads of certain corporate executives. From the beginning, our goal was to develop and institutionalize mechanisms to ensure that, across the department, we consistently investigate and prosecute corporate cases as effectively as possible."[15]

Although few individuals have been charged, the government's focus on responsible individuals is reflected in recent corporate resolutions. Many DOJ announcements of these resolutions have expressly referenced the settling companies' cooperation and, in some cases, their assistance with ongoing investigations and prosecutions relating to the misconduct, including of individuals. Given this assistance, individual prosecutions may very well be in the works.

Repeat Offenders

The Pilot Program reserves full mitigation credit for companies that voluntarily disclose misconduct. Repeat offenders that are obligated to disclose wrongdoing, therefore, cannot receive full credit; for example, when prior agreements with the government require disclosure. Recently, Zimmer Biomet Holdings was deemed ineligible for voluntary disclosure credit because its disclosures were mandated by a 2012 DPA, which resolved earlier allegations of FCPA misconduct.

However, Zimmer was given full cooperation credit for "conducting a thorough internal investigation, making regular factual presentations to the Fraud Section, voluntarily making employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information."[16] Zimmer also disclosed "all relevant facts," including information about individuals involved in misconduct; designed and implemented an effective compliance program; terminated or disciplined responsible employees; and disgorged profits to the SEC. Zimmer's new DPA mandates a $17.4 million criminal penalty and a three-year independent corporate compliance monitor, and an indirect subsidiary of Zimmer, JERDS Luxembourg Holding S.ár.l., agreed to plea guilty to violating the FCPA's books and records provisions.

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Zimmer's resolution reflects the steep "price" of "disregarding

its obligations under the earlier deferred prosecution agreement." DOJ's press release announcing the settlement stated that "[i]n appropriate circumstance the department will resolve serious criminal conduct through alternative means, but there will be consequences for those companies that refuse to take these agreements seriously."[17] For Zimmer the consequences were a two-point increase to its culpability score under the sentencing guidelines (for a repeat offense less than five years after a resolution) and a middle-of-the-guidelines range fine—as opposed to a fine at the low end or below the guidelines range as in many FCPA resolutions—and a subsidiary's guilty plea.

Declinations With Disgorgement

Consistent with the Pilot Program's requirement that companies disgorge all profits from FCPA misconduct, in September 2016, the DOJ announced two declinations that obligated the companies, HMT LLC and NCH Corporation, to disgorge illegal profits of $2.7 million and $335,342, respectively. In three earlier declinations under the Pilot Program, the DOJ did not elicit monetary penalties but acknowledged that the companies would disgorge profits to the SEC. The HMT and NCH declinations illustrate the DOJ's commitment "to ensuring that those who violate the law don't profit from their crimes, even when we decline to prosecute."[18]

The HMT and NCH letters also focused on the companies' termination of high level employees, including those whose failures were purely supervisory.

Conclusion

We do not yet know the white-collar enforcement priorities of the Trump administration. Some observers have questioned the new administration's commitment to FCPA enforcement based on comments critical of the law made to CNBC by President Donald Trump in 2012. Yet, during his confirmation proceedings, Attorney General Jeff Sessions promised to "enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case."[19]

Public filings suggest a substantial number FCPA investigations remain ongoing and unresolved—perhaps as many as 80 DOJ and SEC investigations targeting public companies, and over 100 additional suspected investigations against non-issuers, according to one report.[20] It is safe to say that at least some of these investigations will result in criminal charges, DPAs, NPAs, and formal declinations. As these resolutions unfold, we will have an opportunity to see whether and to what extent current DOJ enforcement goals and strategies against companies and individuals continue in the new administration.

1. Memorandum from Andrew Weissmann (April 5, 2016).
2. Fraud Section Year in Review 2016.
3. Fraud Section Year in Review 2015.
4. Prepared Remarks by Assistant Attorney General Leslie R. Caldwell, The George Washington University Law School (Nov. 3, 2016).
5. Weissmann Memorandum at 7, 8.
6. DOJ Press Release (Jan. 19, 2017).
7. DOJ Press Release (Dec. 29, 2016).
8. DOJ Press Release (Nov. 17, 2016).
9. DOJ Press Release (Dec. 22, 2016).
10. Weissmann Memorandum at 6.
11. See Elkan Abramowitz and Jonathan Sack, "Deferred Prosecution Agreements In Decline? Enforcement Implications," NYLJ (Jan. 5, 2016).
12. Memorandum from Deputy Attorney General Sally Quillian Yates to Assistant Attorneys General (Sept. 9, 2015) (emphasis in original).
13. "A Focus on DOJ Individual Actions," FCPA Professor Blog (Jan. 26, 2017).
14. "DOJ Enforcement of the FCPA—2016 Year in Review," FCPA Professor Blog (Jan. 10, 2017).
15. Prepared Remarks by Deputy Yates, 33rd Annual Intern'l Conf. on Foreign Corrupt Practices Act (Nov. 30, 2016).
16. Deferred Prosecution Agreement and DOJ Press Release (Jan. 12, 2017).
17. Id.
18. See Assistant Attorney General Caldwell's Remarks at The George Washington University Law School.
19. See Richard L. Cassin, "Jeff Sessions: I'll enforce the FCPA," The FCPA Blog (Jan. 27, 2017).
20. Richard L. Cassin, "The Corporate Investigations List," The FCPA Blog (Jan. 9, 2017).