

FCPA Enforcement: Financial Services Sector Under Scrutiny

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Enforcement of the Foreign Corrupt Practices Act (FCPA) reached record levels in 2016, with more than \$2.4 billion in disgorgement, penalties and fines. Although the first half of 2017 was comparatively quiet, enforcement is again on the rise, with the United States, Sweden and the Netherlands announcing a global \$965 million settlement with Swedish telecommunications giant Telia on September 21. Given the US government’s recent focus on FCPA compliance in the financial services sector, now is a good time for asset managers to take stock of their compliance programs and assess their FCPA risk.

The FCPA in a Nutshell

The FCPA prohibits the offer, promise or payment of anything of value to foreign government officials in order to obtain or retain business or obtain an unfair business advantage. It also requires public companies to maintain accurate financial records and have an adequate system of internal controls.

The anti-bribery provisions of the FCPA apply to conduct anywhere in the world and extend to:

- Companies that are publicly traded in the United States, as well as their officers, directors, employees, stockholders and agents
- Private US companies, as well as their officers, directors, employees, stockholders and agents
- US nationals
- Any foreign national who violates the FCPA while in the United States

Both the US Department of Justice (DOJ) and the US Securities & Exchange Commission (SEC) have dedicated units that enforce the FCPA. Violations of the FCPA can result in civil and criminal charges, disgorgement of profits, penalties or fines, and jail time for individuals.

Record Enforcement Levels in the United States

2016 was a record year for FCPA enforcement. The SEC and DOJ brought a combined 27 corporate actions, collecting approximately \$2.4 billion in disgorgement, penalties and fines. The cases spanned a wide variety of industries, ranging from pharmaceutical and life sciences to technology, oil and gas, manufacturing, and even the food and beverage industry. The pace continued into 2017, with five cases each brought by the SEC and DOJ in early 2017.

Although there was a slowdown in cases through the spring and early summer of 2017, this may have been due to a combination of senior staff turnover and a regrouping period after the frenetic activity of 2016 and early 2017. Enforcement

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activity picked up in July, with the DOJ bringing action against two private US companies, Linde Group and CDM Smith Inc., and the SEC taking action against two-time violator Halliburton Company. And on September 21, the DOJ and SEC announced a global settlement resolution with Telia Company that included actions by the Netherlands and Sweden. The \$965 million global resolution places Telia among the top ten largest FCPA cases ever brought.

the Federal Reserve also brought charges against JPMorgan for this conduct, marking the first time that the Federal Reserve has taken action in this space.

- In September 2016, Och-Ziff Capital Management settled charges that it paid tens of millions of dollars in bribes through intermediaries to government officials in Libya and Africa in order to obtain investments and other business.

seems likely that the DOJ and SEC will continue to investigate potential corruption involving financial services firms. This should keep investment advisers' attentions focused on managing their anti-corruption risks.

International Enforcement on the Rise

2016 began an unprecedented level of global enforcement, with countries ranging from Brazil, the United Kingdom, Canada, the Netherlands and Switzerland announcing enforcement actions against companies that violated their anti-corruption laws. Moreover, six of the largest corporate FCPA enforcement actions since February 2016 have involved coordinated global resolutions between the United States and other countries, including first-ever actions with Brazil, the Netherlands and Sweden:

- In February 2016, the United States and the Netherlands announced a global settlement with Vimpelcom. The Netherlands-based telecommunications provider agreed to a \$795 million global settlement to resolve its alleged violations of the FCPA to win business in Uzbekistan.
- In October 2016, Brazilian-based aircraft manufacturer Embraer agreed to pay \$205 million to settle charges by the United States and Brazil that it violated the FCPA to win business in the Dominican Republic, Saudi Arabia, Mozambique and India.
- In December 2016, Braskem, the Brazilian-based petrochemical

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Increasing Attention on the Financial Services Sector

US authorities signaled a continued focus on the financial services sector, with two major enforcement actions:

- In November 2016, JPMorgan paid \$264 million to settle charges that it violated the FCPA by offering internships to relatives of Chinese government officials in exchange for business opportunities. Investment bankers at JPMorgan's subsidiary in Asia created a client referral hiring program that bypassed the firm's normal hiring process and rewarded job candidates referred by client executives and influential government officials with well-paying, career-building JPMorgan employment. The SEC announced at the time that this was the first case to come out of an enforcement sweep examining referral hiring in Asia. Interestingly,

In addition to paying more than \$400 million in disgorgement of profits, penalties and fines, a subsidiary of the firm pled guilty, and the firm was required to retain a compliance monitor for three years. The firm's founder and CEO, Dan Och, and the former CFO settled charges that they ignored red flags and corruption risks and permitted the illicit transactions to proceed. This was the second case to come out of the SEC's enforcement sweep examining firms' interactions with sovereign wealth funds (the first was a case against BNY Mellon the prior year) and the first action brought against a hedge fund for FCPA violations.

Given the announced sweeps by the SEC and recent activity by the US government in connection with potential corruption at Malaysia's state investment fund 1MDB, it

manufacturer, pled guilty and agreed to pay \$957 million in a global settlement with the United States, Brazil and Switzerland for concealing millions of dollars in illicit bribes paid to Brazilian government officials to win business.

- Also in December, Odebrecht, a global construction conglomerate based in Brazil, pled guilty and agreed to pay a combined total penalty of at least \$2.6 billion to resolve charges with authorities in the United States, Brazil and Switzerland arising out of its schemes to pay hundreds of millions of dollars in bribes to government officials around the world.
- In January, UK-based conglomerate Rolls-Royce agreed to an \$800 million global resolution with US, UK and Brazilian authorities in connection with allegations of a long-running scheme to bribe government officials in exchange for government contracts.
- In September 2017, Sweden-based telecommunications provider Telia agreed to pay \$965 million in a global settlement with the United States, the Netherlands and Sweden to resolve alleged violations of the FCPA to win business in Uzbekistan.

Although in the past the United States took the lead in any anti-corruption enforcement action, this is no longer always the case. Indeed, in two recent actions, other countries took the lead, with a majority of the settlement amounts going to them. In the Odebrecht/Braskem set of cases, 80% of the recovery went to Brazil,

with the remaining 20% split between the United States and Switzerland. In the Rolls-Royce case, more than three-quarters of the recovery was paid to the United Kingdom, with most of the remaining amount going to the United States and a small amount to Brazil.

A senior DOJ official recently indicated that they expect to see these global resolutions continue in the future.

Global Enforcement, US-style

Other countries are increasingly adopting US-style enforcement techniques. For example, the United Kingdom adopted a framework several years ago for bringing deferred prosecution agreements (DPAs) and has now brought four DPAs, including its recent DPA in the \$800 million action against Rolls Royce. Brazil has made extensive use of cooperating witnesses and leniency agreements in the Operation Carwash investigation. Australia recently announced a proposed model to implement DPAs. Further, multiple countries have announced the creation of dedicated anti-corruption units.

Takeaways for Asset Managers

- *Make sure your compliance policy is up-to-date.* If you haven't looked at your anti-corruption policy with an eye towards the recent enforcement actions, now is the time. Pay particular attention to your use of introducers, placement agents and other third-party agents. Make sure that you have a mechanism in place to track third-party usage and ensure that they receive the appropriate due diligence.

- *Broaden the definition of "anything of value."* Non-cash benefits, such as gifts, travel or entertainment expenses, must be considered reasonable and related to a legitimate business purpose. For internships or other offers of employment, make sure that all candidates go through your normal hiring process and are qualified for your program under their own merits.

- *Do your pre-acquisition due diligence.* When considering an investment, assessment of anti-corruption risks is an important part of a firm's pre-acquisition due diligence. Thorough pre-acquisition assessments of portfolio companies, joint venture opportunities or other investments will help accurately price a target, plan post-acquisition integration and avoid successor liability. Make sure that the deal team has the information it needs to accurately evaluate the risk.

- *Regular risk assessments are key.* A periodic review of your entire portfolio can help you determine your overall corruption risk and identify portfolio companies and other investments that should be flagged for additional follow-up.

- *Get help in difficult situations.* Experienced counsel can help you determine the right approach to managing FCPA risk.

Kara Novaco Brockmeyer
kbrockmeyer@debevoise.com

Jil Simon
jsimon@debevoise.com