

FCPA & Global Anti-Corruption Webinar: 2016 Year-in-Review and Predictions for 2017

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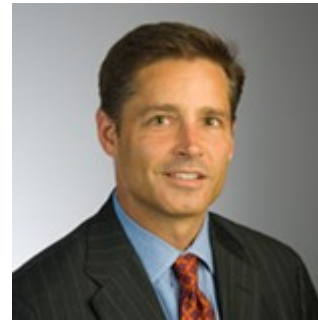
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Agenda

- I. Recent Trends in Enforcement
- II. Recent Legal Developments
- III. Predictions for 2017



I. Recent Trends in Enforcement

Anti-Corruption Enforcement Trends

- ✓ Increased Resources = Increased Enforcement Risk
- ✓ Focus on China/Latin America
- ✓ Collateral Consequences
- ✓ Aggressive Focus on Individuals
- ✓ DOJ FCPA Pilot Program
- ✓ Cross-Border Enforcement
- ✓ Rise of criminal internal controls charges
- ✓ Return of the external monitor
- ✓ Continued Risks Related to Hiring Practices, T&E and Gifts



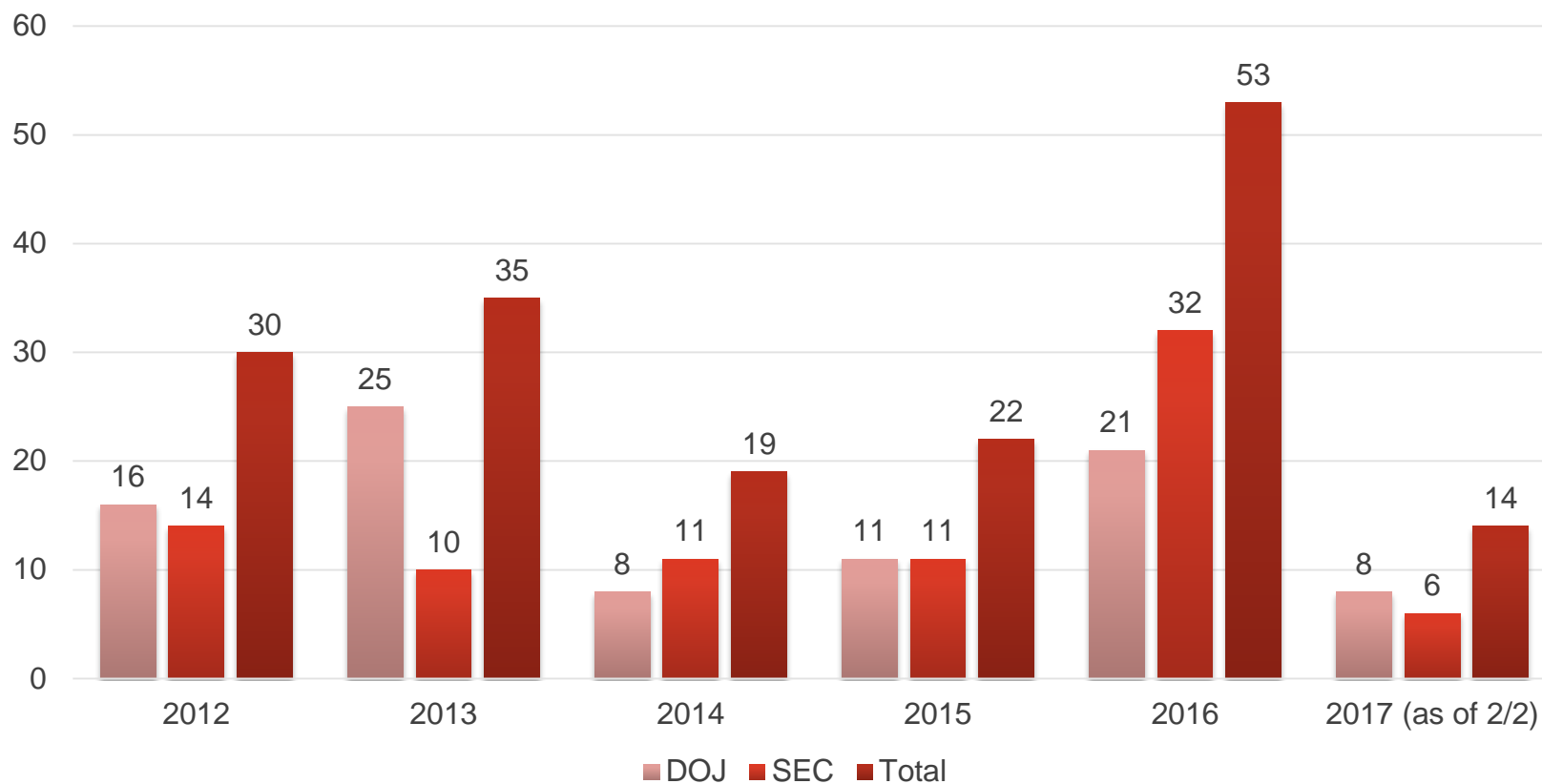
Record-Breaking 2016

- U.S. FCPA investigations continue at a rapid pace
 - Record-breaking year for number of settlements
 - 32 SEC settlements and 21 DOJ settlements
 - Total 2016 FCPA fines topped \$2 billion, the most in FCPA history
- Increased enforcement resources
 - DOJ FCPA unit now has 31 prosecutors
 - 10 new DOJ FCPA prosecutors in 2016
 - First ever FCPA compliance expert – making an impact
 - 3 new FBI squads devoted to FCPA investigations
 - SEC resources in DC and 5 regional offices
- SEC whistleblower reporting has increased
 - *International Game Technology* – first case based solely on retaliation for whistleblower reporting
- Reports of over 200 cases still under investigation



Enforcement Trend Line

FCPA Enforcement Actions Per Year (2012-2017)





Larger Monetary Settlements

Four of the top ten largest monetary settlements in FCPA history were reached in 2016. All but two were reached after 2010.

No.	Company	Total Resolution	DOJ Component	SEC Component	Date
1	Siemens AG	\$800,000,000	\$450,000,000	\$350,000,000	12/15/2008
2	Alstom S.A.	\$772,290,000	\$772,290,000	--	12/22/2014
3	KBR/Halliburton	\$579,000,000	\$402,000,000	\$177,000,000	2/11/2009
4	Teva Pharmaceuticals	\$519,000,000	\$283,000,000	\$236,000,000	12/22/2016
5	Odebrecht S.A. & Braskem S.A.	\$419,800,000	\$354,800,000	\$65,000,000	12/21/2016
6	Och-Ziff	\$412,000,000	\$213,000,000	\$199,000,000	9/29/2016
7	BAE Systems*	\$400,000,000	\$400,000,000	--	2/4/2010
8	Total S.A.	\$398,200,000	\$245,200,000	\$153,000,000	5/29/2013
9	VimpelCom	\$397,600,000	\$230,100,000	\$167,500,000	2/18/2016
10	Alcoa	\$384,000,000	\$223,000,000	\$161,000,000	1/9/2014

*BAE pleaded guilty to non-FCPA conspiracy charges of making false statements and filing false export licenses, but the alleged false statements concerned the existence of the company's FCPA compliance program, and the publicly reported conduct concerned alleged corrupt payments to foreign officials.

Key Geographic Areas

China:

- 60% of FCPA cases brought by the SEC between October 2015 and October 2016, including all 5 charged pharmaceutical companies



Latin America:

- "Operation Car Wash" in Brazil has triggered a wave of enforcement actions
- Predicted increase; "several cases in the pipeline" (SEC – Kara Brockmeyer)



Focus on Individuals

- *Yates Memo* (Sept. 9, 2015):
 - Focus on individuals from the **start** of the investigation
 - Company must provide DOJ with "all relevant facts" relating to individual misconduct to be eligible for cooperation credit
 - But company may still be eligible even if it cannot identify culpable individuals given the relevant facts
 - Absent extraordinary circumstances or approved departmental policy, DOJ will not release culpable individuals from liability when resolving a matter with a corporation
 - Civil attorneys encouraged to pursue civil enforcement against individuals despite an individual's ability to pay



Focus on Individuals at DOJ & SEC

EBRD

- Dmitrij Harder pleaded guilty in relation to bribes paid to an official at the European Bank for Reconstruction and Development

PDVSA

- Three individuals pleaded guilty in connection with a scheme to secure energy contracts from the Venezuela state-owned energy company

Mexican Aviation

- Four individuals pleaded guilty in connection with bribes paid to Mexican aviation officials

Och-Ziff

- Consultant Samuel Mebiame pleaded guilty
- Two executives also settled SEC charges: Daniel Och (CEO) & Joel Frank (CFO)
- Two additional execs charged in January 2017

Bahn et al.

- On 1/10/17, DOJ indicted 3 individuals on FCPA charges related to a bribery scheme to close sale on a building in Vietnam to a Middle Eastern sovereign wealth fund



DOJ FCPA Pilot Program

- One-year pilot program announced April 5, 2016
- Goal: encourage voluntary self-disclosure by being more transparent about benefits of disclosure and cooperation
- Requirements:
 - Voluntary self-disclosure
 - Full cooperation
 - Remediation and disgorgement
- Generally disclosure and cooperation must be timely and proactive



DOJ FCPA Pilot Program

Up to 50% off the
bottom of the
Sentencing
Guidelines Range

- If all three requirements are met
- No compliance monitor (if compliance program is effective)
- Potential declination of prosecution

Up to 25% off the
bottom of the
Sentencing
Guidelines range

- If cooperation and remediation, but no voluntary self-disclosure



Pilot Program in Action

- DOJ has issued **5 declinations** consistent with the principles of the Program:
 - Nortek; Akamai; Johnson Controls; HMT; NCH
 - HMT and NCH each agreed to pay disgorgement in amounts that represent the alleged profits earned through bribes
 - Although the investigations likely began before the Program was implemented, the declination letters provide that the DOJ's conclusion is "consistent with" the Program
- Open questions
 - Public record is unclear on whether the facts rise to a criminal violation
 - Burdens and penalties may still be substantial
 - Standards for disgorgement are unclear



Pilot Program: Weighing the Factors

General Cable December 2016

- Voluntary self-disclosure credit
- Full cooperation credit, including for producing documents while avoiding foreign data privacy laws
- Enhanced compliance & controls
- Extensive remedial measures, including termination of involved employees and business relationships with third parties

- 50% **below** the bottom of the Guidelines range
- **No independent compliance monitor**

Analogic June 2016

- Voluntary and timely disclosure
- Less than full cooperation because did not timely disclose certain facts in the view of DOJ
- Extensive remedial measures, including financial controls, training and due diligence
- Commitment to enhancing compliance program

- 30% **below** the bottom of the Guidelines range
- **No independent compliance monitor**

LATAM July 2016

- No timely voluntary disclosure
- Full cooperation
- Previously inadequate compliance program, but development of compliance program
- Inadequate remediation, in the view of DOJ, including inadequate discipline of individuals

- 25% **above** the low end of the Guidelines range
- **Compliance monitor for 27 months**



Cooperation Factors

Award of cooperation credit

- **JP Morgan** (Nov. 2016)
 - Provided regular factual presentations and frequent updates
 - Retained outside counsel for investigation
 - Produced documents in a timely manner and in ways that did not implicate foreign data privacy laws
 - Made employees available for interviews, including facilitating travel from overseas
- **General Cable** (Dec. 2016)
 - Produced documents without implicating foreign privacy laws
- **VimpelCom** (Feb. 2016)
 - Prompt acknowledgement of wrongdoing
- **GlaxoSmithKline** (Mar. 2016)
 - Provided translations of documents

Loss of cooperation credit

In the view of DOJ:

- **Teva Pharmaceuticals** (Dec. 2016)
 - Made vastly overbroad assertions of attorney-client privilege
 - Failed to produce documents on a timely basis
- **Analogic** (June 2016)
 - Did not disclose identities of SOE users of products and statements by employees
- **PTC** (Feb. 2016)
 - Did not disclose relevant facts until DOJ raised them
- **Och-Ziff** (Sept. 2016)
 - Failed to produce relevant documents



Compliance Under the Pilot Program

- An effective compliance program requires:
 - Established culture of compliance
 - Sufficient resources devoted to the compliance function
 - Quality and experience of compliance personnel
 - Independence of the compliance function
 - Performance of an effective risk assessment and a program tailored to that assessment
 - Comparative compensation and promotion
 - Audit of the compliance program
 - Appropriate reporting structure of compliance personnel
- Reflects role of new DOJ Compliance Counsel
 - Role to provide guidance on effectiveness of compliance programs
 - Former federal prosecutor and compliance officer in three companies



Comparative SEC Approach

SEC is not bound by the DOJ Pilot Program

- Publicly declined 3 cases in 2016 but without a public record explaining its conclusion
- SEC has publicly stated that voluntary disclosure is required for NPA or DPA
- SEC pursued 3 cases in 2016 where DOJ publicly declined under the Pilot Program

**But similar recognition of cooperation and remediation:
Key Energy
(Aug. 2016) – \$5 million**

- Thorough cooperation with the SEC investigation
- Remedial measures:
 - suspension of payments to third parties
 - review of vendors and enhanced due diligence procedure
 - financial controls
 - new business opportunities protocol
 - new controllers
 - in-person compliance visits
 - changes to company compliance policies
 - coordinated exit of all markets outside North America and Mexico

SEC Cooperation Credit Factors

▪ Award of cooperation credit

- *Johnson Controls, Inc.* (Sept. 2016)
 - Provided "real-time" downloads of employee interviews
 - Made foreign employees available for interviews
 - When the company caught an employee shredding documents, quickly secured the office to preserve documents
- *SAP* (Feb. 2016)
 - Facilitated employee interview without alerting the employee to the investigation into his conduct
 - Initiated a third-party audit of the local partner involved



▪ Loss of cooperation credit

- *Anheuser-Busch InBev* (Sept. 2016)
 - Did not respond to subpoenas in a timely manner
 - Made broad assertions of privilege



Increased Cross-Border Enforcement

- Cooperation and information-sharing among governments on the rise
- Sizeable share of fines paid to foreign jurisdictions
- Key issues in multi-jurisdictional enforcement
 - Divergent interests of different jurisdictions
 - Different approaches to internal investigations
 - Coordinated settlements
 - Knock-on and "me too" resolutions
 - Data privacy and other cross-border issues
 - Elevated debarment concerns



Resolution: *Odebrecht / Braskem* (2016)

- In December 2016, Brazilian conglomerate Odebrecht and petrochemical company Braskem announced a \$3.5 billion global settlement related to the Operation Car Wash corruption scandal
 - Largest foreign bribery penalty in history
 - \$420 million paid to settle charges in the United States
 - Odebrecht will pay \$260 million
 - Subsidiary Braskem will pay the DOJ and SEC \$160 million
 - Majority of the penalty will go to Brazilian authorities
 - Remainder will go to Swiss authorities

ODEBRECHT



Resolution: *VimpelCom* (2016)

- In February 2016, Amsterdam-based VimpelCom Ltd. and a subsidiary agreed to pay approximately \$795 million to settle enforcement actions with the DOJ, the SEC, and Dutch authorities
 - Of the \$795 million, VimpelCom paid almost \$398 million to Dutch prosecutors
- VimpelCom made over \$100 million in improper payments to Uzbek officials to continue operating in the Uzbek telecommunications market





Resolution: *Rolls-Royce* (2017)

- In January, UK-based power system manufacturer and distributor Rolls-Royce plc agreed to pay the U.S. nearly \$170 million as part of an \$800 million global resolution of investigations by DOJ, the UK Serious Fraud Office (SFO), and Brazilian authorities for a long-running scheme to bribe government officials for contracts (~600M went to UK)
- Rolls-Royce signed a deferred prosecution agreement (DPA) with the DOJ, admitted to conduct in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola and Iraq
 - Rolls-Royce did not disclose conduct even after media reports of corruption, but received a 25% reduction in fine because of its cooperation and remedial measures.
- The UK resolution also covered conduct in China, India, Indonesia, Malaysia, Nigeria, and Russia



Rolls-Royce



Not Just the FCPA: International Commercial Bribery Enforcement

- On December 13, 2016, Argentine sports marketing company Torneos y Competencias settled **wire fraud conspiracy** charges related to FIFA corruption
 - No FCPA charges filed but detailed allegations of bribery of soccer officials at CONMEBOL and FIFA
 - Paid \$113 million in forfeiture and criminal penalties
 - Agreed to implement enhanced internal controls and a corporate compliance program
 - Received 45% reduction on fine for substantial cooperation



Criminal Internal Controls Charges

- Difficult burden of proving beyond a reasonable doubt that an issuer *knowingly* failed to devise or maintain an adequate system of internal controls
- 2016 increased use of criminal FCPA internal controls allegations
 - Embraer, Latam, Teva, General Cable, Och-Ziff
- 2017 continuation with two DOJ resolutions with internal controls allegations: Las Vegas Sands and SQM





External Monitors

- Return to DOJ and SEC requiring external monitors
 - LATAM: 27 month term
 - Olympus Latin America: 3 years
 - Embraer: 3 years
 - VimpelCom: 3 years
 - Och-Ziff: 3 years
 - SQM: 2 years
- Broke trend of resolutions mandating self-reporting only
- Encouragement to companies to timely self-disclose, cooperate, and remediate





Continued Risks – Third Parties

- ***Embraer (Oct. 2016)*** –
 - Paid \$205 million to DOJ, SEC, and Brazilian authorities to settle charges based on bribes paid to government officials through false agency agreements

- ***Analogic (June 2016)*** –
 - Paid \$15 million to the DOJ and SEC to settle internal controls and books and records charges even though no bribery alleged
 - Allegations that its subsidiary moved money to distributors who overpaid on contracts to allow payments to third parties

Continued Risks – Hiring and Favors

"[A]warding prestigious employment opportunities to unqualified individuals in order to influence government officials is corruption, plain and simple." – *Former Assistant Attorney General Leslie Caldwell*

- **Qualcomm (Mar. 2016)**
 - Paid \$7.5 million to settle charges related to hiring the relatives of Chinese officials who were deciding whether to select Qualcomm's mobile technology products
- **Bank of New York Mellon (Aug. 2015)**
 - First case charging a bank under the FCPA
 - Paid \$14.8 million to settle SEC charges that it bribed sovereign-wealth-fund officials with internships for relatives
- **JP Morgan Chase (Nov. 2016) - the "Sons and Daughters" matter**
 - Paid \$264 million to the SEC, DOJ, and Federal Reserve to settle charges related to a practice of hiring relatives and friends of Chinese officials to win banking deals
 - The SEC criticized the bank's internal accounting controls around its hiring practices – employees obtained approval for hires by providing misleading responses to compliance questionnaires

Continued Risks – Gifts and Travel

- **Olympus (Mar. 2016)**
 - Paid \$22.8 million to settle charges that it provided cash, money transfers, travel, and free or heavily discounted equipment to Latin American officials
 - The company kept a spreadsheet of illegal gifts
- **AstraZeneca (Aug. 2016)**
 - Paid \$5.5 million to settle charges it made improper payments to doctors in China and Russia through cash and gifts
 - Sales staff used fake tax receipts and fake or inflated invoices
- **PTC (Feb. 2016)**
 - Paid \$28 million to DOJ and SEC to settle charges related to gifts, travel, and excessive entertainment provided to Chinese SOE officials
 - Value of gifts and T&E generally ranged from \$50 to \$600
 - Gifts included small electronics (e.g., cell phones, iPods, and GPS systems), gift cards, wine, and clothing





Continued Risks – Charitable Contributions

- Charitable contributions and recommendation letters may form the basis of charges:
 - ***Nu Skin Enterprises (Sept. 2016)*** agreed to pay \$766,000 to the SEC to settle internal controls and books and records charges
 - Based on a \$150,000 payment to a charity set up by a high-ranking Chinese official
 - At the official's request, the company also facilitated obtaining college recommendation letters to U.S. universities for the official's child
 - **Vimpelcom (Feb. 2016)**
 - Bribes disguised as charitable donations made to charities directly affiliated with Uzbek official.



II. Recent Legal Developments

Disgorgement: Circuit Split

- 28 U.S.C. § 2462 generally bars suit to enforce "any civil fine, penalty, or forfeiture" after five years from when the claim accrues
- The Eleventh Circuit held that the 5-year statute of limitations *does* bar disgorgement claims. *S.E.C. v Graham*, 823 F.3d 1357 (11th Cir. 2016)
- The Tenth Circuit disagreed, holding that disgorgement is not a penalty subject to the statute of limitations. *Kokesh v. S.E.C.* (10th Cir. 2016)
- Supreme Court granted cert. petition in *Kokesh* on January 13, 2017



Disgorgement Not Tax Deductible

- IRS issued a Chief Counsel Advisory on May 6, 2016, concluding that Internal Revenue Code § 162(f) prohibits a deduction for an amount paid to the SEC for violating the FCPA
- Section 162(f) of the Code provides that no deduction shall be allowed under section 162(a) for any fine or similar penalty paid to a government for the violation of any law
- Exceptions for payments made for prompt compliance with the law and compensatory measures, but they must be in the nature of a late filing charge or interest charge
- Disgorgement that is primarily compensatory, as opposed to punitive, may be deductible



Jurisdiction Over Foreign Nationals

- ***United States v. Hoskins*** (D. Conn. Mar. 16, 2016)
 - Court denied DOJ's motion to reconsider its 2015 ruling that non-resident foreign nationals are not subject to the FCPA unless they were agents of a domestic concern or acted "while physically present" within the United States
 - DOJ had charged Lawrence Hoskins with conspiring to violate or aiding and abetting a violation of the FCPA
 - DOJ alleged that while employed by Alstom UK and assigned to another Alstom entity in France, he had oversight of the hiring of consultants by Alstom and its subsidiaries in Asia
 - The court concluded that a non-resident foreign national could not be subject to criminal liability under the FCPA solely on the basis of a conspiracy or accomplice theory
- DOJ has appealed to the Second Circuit



III. Predictions for 2017

2017 Enforcement Action Cases (To Date)

- Las Vegas Sands Corp.
- Orthofix International
- Rolls-Royce plc
- Sociedad Quimica y Minera de Chile S.A.
- Zimmer Biomet Holdings
- Mondelez International, Inc.
- Joo Hyun Bahn et al.

New Leadership

- **President Donald Trump (May 2012)**
 - FCPA is a "horrible law and it should be changed"
 - "This country is absolutely crazy" to prosecute violations in Mexico and China
 - Puts U.S. business at a "huge disadvantage"
- **Jay Clayton (nominee as SEC Chair)**
 - Chaired New York City Bar Association Committee on International Business Transactions
 - December, 2011 report urged "re-evaluation" of U.S. enforcement in light of "lighter touch" by non-U.S. authorities, noting that "the continued unilateral and zealous enforcement of the FCPA by the U.S. may not be the most effective means to combat corruption globally"
- **Jeff Sessions (AG nominee) – I will enforce the FCPA**

Predictions for 2017

- Pilot Program principles will continue to guide DOJ
- Continued commitment to compliance and crack down on "paper" compliance programs
- Rise of criminal internal controls cases





Questions?

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