

Government Investigations

Contributing editors

David M Zornow and Jocelyn E Strauber



2018

GETTING THE
DEAL THROUGH 

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Global overview

David M Zornow and Jocelyn E Strauber*

Skadden, Arps, Slate, Meagher & Flom LLP

The events of the past year make clear that this fourth edition of *Getting the Deal Through – Government Investigations* – a practitioner’s guide to civil and criminal investigations of businesses by government agencies around the world – and the legal and strategic issues it addresses, continue to be highly relevant to today’s corporations and financial institutions. US and foreign authorities continue to pursue increasingly aggressive law enforcement and regulatory actions against multinational corporations and financial institutions, and there is no reason to expect that activity to abate in the coming year.

In cross-border matters, US and foreign regulators and law enforcement agencies continue to deepen their collaboration, working together to overcome the legal challenges posed by distinct legal systems with different approaches to, among other things, data privacy and compelled testimony. Particularly in international fraud and public corruption cases, the Department of Justice (DoJ), the Securities and Exchange Commission (SEC) and other US regulators are working closely with their foreign counterparts to pursue increasingly aggressive enforcement actions. Within the US and abroad, these actions do not stop with corporations and financial institutions. The prosecution of individuals responsible for corporate misconduct – a key DoJ priority under former Attorney General Loretta Lynch – is unlikely to change with the new administration. The DoJ’s focus on individual accountability was formally emphasised in then-Deputy Attorney General Sally Yates’ September 2015 memorandum outlining a series of department steps to ensure that corporate officers and employees engaged in wrongdoing, and not just corporate entities, are held accountable. In the absence of a compelling reason to reverse these policies, the department under Attorney General Jeff Sessions is expected to stay the course.

Public corruption cases have been a particular focus in the past year, for both US and foreign authorities, and both have developed innovative legal and strategic approaches to these investigations. The DoJ and SEC brought a total of 27 Foreign Corrupt Practices Act (FCPA) corporate enforcement actions in 2016, collecting approximately \$2.48 billion in fines, penalties, disgorgement and interest. Indeed, the number of FCPA corporate resolutions in 2016 was a record high since the FCPA’s enactment in 1977. Thus far in 2017, the DoJ and the SEC have resolved eight FCPA corporate enforcement actions. With respect to FCPA enforcement actions against individuals, in 2017 nine individuals have been charged to date by the DOJ and the SEC, in connection with four separate FCPA enforcement actions.

The DoJ has explored policies to encourage corporate voluntary disclosures and resolve its FCPA prosecutions more quickly and efficiently, including a one-year pilot programme announced in April 2016 that seeks to quantify the benefits from voluntary self-disclosure of corruption-related conduct, full cooperation with the DOJ and remediation. To date, the DoJ has announced seven declinations in connection with the pilot programme. About one month before the programme was set to expire in April 2017, Acting Assistant Attorney General Kenneth Blanco announced that the programme would remain in effect for the foreseeable future while the DoJ evaluated its ‘utility and efficacy’.

The SEC has similarly expressed its commitment to FCPA prosecutions and has been the more active of the two agencies in bringing FCPA enforcement actions in 2016. The SEC initiated charges in 24 of the 27 FCPA enforcement actions in 2016 – 14 of which did not involve DoJ prosecutions. The DoJ brought 13 of the 27 FCPA enforcement actions

from 2016 and independently brought charges in only three of those cases. The SEC has also emphasised the importance of self-reporting of misconduct by companies and its commitment to pursuing individual liability, while acknowledging the challenges to bringing individual cases, especially against foreign nationals residing outside the US. Six of the SEC’s corporate enforcement actions included related enforcement actions against seven individuals brought in 2016.

Foreign authorities have been similarly focused on corruption cases. In late 2016, France adopted its new Law on Transparency, the Fight against Corruption and Modernisation of Economic Life (Sapin II). The law requires that companies take measures designed to prevent and detect corruption; imposes additional penalties for companies that fail to comply with the requirements of Sapin II; creates a protected status for whistle-blowers and a new national anti-corruption agency that, unlike its predecessor, has broad enforcement powers, including the imposition of administrative fines; and provides an alternative to criminal prosecution for companies in the form of Deferred Prosecution Agreements (DPAs). In addition, Sapin II imposes a new obligation on companies above a certain size to implement robust anti-corruption compliance programmes.

In the UK, investigation and prosecution of corporate and individual wrongdoing have continued to gain significant momentum, with the Serious Fraud Office entering its third and fourth DPA in January 2017 and initiating new investigations against a number of companies. There has been a continued emphasis by both prosecutors and regulators on individual and corporate responsibility, in addition to an increased focus on money laundering. The Criminal Finances Act, along with other bills under consideration, expands the range of offences for which corporations can be held strictly liable, including corporate failure to prevent tax evasion and corporate failure to prevent economic crimes, including crimes such as money laundering, false accounting and fraud.

Growing public anti-corruption sentiment in Central and South America has led to more rigorous investigation and prosecution of corruption offences in those regions, and Chinese enforcement agencies have launched investigations into high-profile individuals and government officials, banks and other large corporations on an ever-growing scale in order to combat bribery and corruption. In addition to increased enforcement by non-US anti-corruption authorities, the past year has seen substantial cooperation among such authorities: both active sharing of evidence and several notable multilateral resolutions.

In the public corruption context, as well as other areas, there is therefore every reason to expect aggressive law enforcement and regulatory investigations to continue in the US and abroad for the foreseeable future, and for international law enforcement collaboration to continue to deepen. Financial institutions and corporations suspected of wrongdoing, regardless of their size or global reach, are likely to face multiple inquiries from law enforcement and regulatory agencies in different countries. Such investigations are expensive, time-consuming and challenging for management, employees and counsel alike. We hope that this fourth edition of *Government Investigations* serves as a valuable introduction to the unique features of law and practice that shape civil and criminal investigations across multiple jurisdictions.

**The authors would like to thank Yoosun Koh for her assistance in the preparation of this chapter.*

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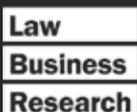
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