JUST **ANTI-CORRUPTION**

Major recent FCPA developments and their implications

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The 2017 change in presidential administration raised questions about whether the US Department of Justice would continue aggressively enforcing the Foreign Corrupt Practices Act (FCPA), particularly given historical comments made by President Donald Trump and other incoming officials. One year later, enforcement trends and statements by DOJ and US Securities and Exchange Commission officials indicate that enforcers will continue to incentivise corporations to voluntarily disclose violations. The agencies also seem likely to maintain their focus on bringing cases against individuals and to keep deepening cooperation with non-US regulators.

Below we summarise and discuss five key developments from 2017.

DOJ's Corporate Enforcement Policy

On 29 November, Deputy Attorney General Rod Rosenstein announced the DOJ's revised FCPA Corporate Enforcement Policy (Policy), which modified the FCPA "Pilot Program" that had been announced on 5 April 2016. Pursuant to the revised Policy, there will be a "presumption" that prosecutors will decline to prosecute a company for a first offence if that company voluntarily discloses misconduct to the DOJ, fully cooperates with any DOJ investigation, and undertakes timely and appropriate remedial efforts. Declinations will be public and will require a company to disgorge profits from the improper conduct. The Policy also outlines the likely outcome if a company meets DOJ requirements but aggravating circumstances nonetheless compel an enforcement action, or if a company does not voluntarily disclose misconduct but later fully cooperates and remediates.

DOJ officials have highlighted three significant differences between the new Policy and the Pilot Program:

- While the Pilot Program provided a range of mitigation credit a company might receive following voluntary disclosure and full cooperation, the new Policy states that there will be a presumption that declination to prosecute is the correct resolution of potential cases, provided that no aggravating circumstances exist and the offender is not a criminal recidivist. The Policy builds on the efforts under the Pilot Program to further incentivise self-reporting and cooperation, and in announcing the Policy, Rosenstein noted that the number of voluntary disclosures to DOJ during the Pilot Program nearly doubled – 30 voluntary disclosures were made during the 18-month Pilot Program, compared with 18 voluntary disclosures during the previous 18 months.

- Under the new Policy, a disclosure that a company is required to make by law might still be considered a voluntary self-disclosure for the purpose of assessing eligibility for leniency. In contrast, under the Pilot Program, "[a] disclosure that a company is required to make, by law, agreement, or contract, does not constitute voluntary self-disclosure for purposes of [the Pilot Program]." The new Policy does not include this exception.

- The new Policy provides increased guidance on when companies should defer investigating their own conduct (such as by delaying interviews of employees or third parties) until after the government has had an opportunity to do so (so-called "de-confliction"). The new Policy mentions that de-confliction requests "will be made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose."

The new DOJ Policy also specifies DOJ's expectations surrounding companies' business record and communication retention policies. To receive full remediation credit, a company must appropriately retain business records and prohibit "the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications." The Policy's language appears to suggest that to secure full credit for remediation, companies must forbid their employees from using software that does not properly store relevant business communications data, such as Snapchat or Signal.

Continued focus on individual accountability

Both the DOJ and SEC have continued to emphasise the importance of individual accountability and prosecution of individuals. Indeed, the new administration may prioritise holding responsible executives accountable over corporate fines and prosecutions. SEC commissioner Paul Atkins noted in a 2005 speech that "[u]nless the corporation is a criminal enterprise, or the shareholders themselves have somehow benefited from the fraud to the detriment of other corporations or the marketplace as a whole, and the fine serves as a disgorgement of ill-gotten profits, fines against shareholders are often not appropriate." SEC Chairman Walter J Clayton III echoed this sentiment during his confirmation hearing, stating: "I firmly believe that individual accountability drives behaviour more than corporate accountability . . . [and] that will be in my mind." In announcing the new FCPA Policy, Rosenstein said: "It makes sense to treat corporations differently than individuals, because corporate liability is vicarious; it is only derivative of individual liability."

In 2017, the DOJ convicted 19 individuals for FCPA violations and criminally charged an additional 16 individuals under the FCPA (or related statutes), which DOJ officials have noted is the largest number of individual prosecutions in a year in the history of the FCPA. SEC officials have stated that SEC seeks to hold individuals accountable when possible, notwithstanding that FCPA cases often involve challenging jurisdictional questions.

In 2018, the DOJ and SEC will likely continue to focus on individual liability. Because individuals are more likely than companies to litigate with the government rather than settle, the increase in enforcement actions against them might lead to court rulings in areas that had not previously been litigated and could significantly alter longstanding practices.

Increased international cooperation and challenges

Several recent large investigations and settlements have solidified the trend of international cooperation among prosecuting authorities, which facilitates the US government's efforts to obtain evidence, conduct investigations, prosecute individuals and ultimately reach global resolutions. The DOJ and SEC officials have highlighted both formal and informal cooperation between US, UK, Brazilian and Swiss authorities, and said that more countries than ever are engaged in fighting corruption. In the most recent fiscal year, the SEC acknowledged assistance from 19 jurisdictions, and SEC officials have indicated that increasing international cooperation has led to an uptick in actions against non-US companies.

Against this backdrop of cross-border cooperation, the US Court of Appeals for the Second Circuit's opinion in *United States v Allen* indicates that the DOJ will remain careful to impose safeguards around evidence gathered by non-US authorities to respect US constitutional protections. In *Allen*, the Second Circuit vacated the convictions of two former currency traders for allegedly manipulating Libor on the grounds that a trial witness had reviewed prior testimony by the defendants that had been compelled by the UK's Financial Conduct Authority. Although the testimony had been compelled lawfully under UK laws, the process was inconsistent with the individuals' rights against self-incrimination under the US Constitution. The Second Circuit ruled that, when a US government trial witness has been exposed to a defendant's compelled testimony, the government bears a "heavy burden" to prove that exposure to that testimony did not "shape, alter, or affect the evidence used by the government". The ruling could be implicated in circumstances when the DOJ receives evidence from non-US authorities that has not been gathered in a manner consistent with a US defendant's constitutional rights.

The increase in parallel international enforcement proceedings leads to concerns that a company may be punished in multiple countries for the same conduct. Rosenstein has acknowledged this concern noting that: "Repeated punishment for the same conduct has the potential to undermine the spirit of fair play and the rule of law." The DOJ also attempts to address this concern through its efforts to cooperate with authorities in other jurisdictions.

In multi-jurisdictional investigations, companies frequently encounter difficulties navigating data protection laws. DOJ and SEC officials have stated that foreign regulations pertaining to data privacy or state secrecy may impact the nature and the scope of companies' disclosures but not their ability to self-report. US enforcement agencies have repeatedly made it clear they expect companies to be creative about finding alternative ways to provide requested materials that might be subject to data transfer restrictions (or, at a minimum, to explain how those restrictions preclude productions). Indeed, the Policy states: "Where a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents."

Compliance programmes and corporate remediation

In February 2017, the DOJ provided enhanced guidance on how it evaluates corporate compliance by issuing a list of questions companies can use to assess their programmes. The DOJ's compliance counsel, Hui Chen, resigned in 2017, a few months after DOJ issued this guidance, and the position remains unfilled. However, the new Policy reiterates that companies need to have effective compliance and ethics programmes to be eligible for

full credit, and some of the new Policy's timely reporting requirements might be difficult to meet in the absence of a functioning compliance programme. Accordingly, the DOJ does not appear to have relaxed its expectations in this regard.

Monitorships continue to be a challenging issue in FCPA resolutions, particularly for non-US companies. DOJ officials have stated that when a company has a compliance programme that has not been fully implemented or tested, the DOJ will impose a monitor. The DOJ also will consider other factors, such as voluntary disclosure and cooperation. However, even if a company does not voluntarily disclose or cooperate, and has engaged in egregious conduct, the DOJ might not impose a monitor if the company's compliance programme is sufficient. The purpose of a monitor is to prevent recurrence of misconduct, and if a monitor is necessary to prevent recidivist conduct, the DOJ will impose one. In deciding whether to impose a monitor, the SEC considers factors including the conduct at issue, the pervasiveness and length of time the alleged misconduct occurred, what has happened since, and developments made in the company's compliance programme.

DOJ guidance on corporate prosecutions and the analogous SEC policies take into account remedial steps a company has taken in assessing improvements in conjunction with any resolution. Although both the DOJ and SEC have stated they do not get involved in specific disciplinary decisions, DOJ officials have noted that if a company waits for it to ask about discipline of wrongdoers, rather than taking action when misconduct is discovered, the company will lose remediation credit.

Effect of Kokesh v SEC

On 5 June, the Supreme Court ruled in *Kokesh v SEC* that disgorgement is a legal remedy (rather than equitable remedy) and, as such, is subject to SEC's statutory five-year limitations period. At a November 2017 conference, the SEC's FCPA unit chief Charles Cain stated that the regulator interprets the opinion to hold that statutes of limitations apply to disgorgement, but disgorgement is not punitive per se. In Cain's view, *Kokesh* affects the availability of certain remedies, but the SEC can still reach benefits obtained by companies within the limitations or tolling period, or can reach older conduct through injunctions.

Nonetheless, as a practical matter, we expect that *Kokesh* might reduce SEC's incentive to address older conduct, but it will likely further encourage SEC to pursue investigations and resolutions with a bit more urgency.