



# **FCPA: 2017 Mid-Year Review**

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# Presenters



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# Topics of Discussion

- The FCPA: Brief Reminder
- Overview of 2016 FCPA Enforcement
- The New Administration: Reading the Tea Leaves
- FCPA Pilot Program
- 2017 FCPA Actions and On-the-Horizon
- Global Anti-Corruption Update
- Compliance Reminders

# **THE FCPA: BRIEF REMINDER**

# Structure of FCPA

## Antibribery Provisions

- Prohibits bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage
- Mainly enforced as criminal violations by the Department of Justice

## Books and Records Provisions

- Requires SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls
- Mainly enforced as civil violations by the Securities and Exchange Commission

# Antibribery Prohibited Acts

- It is unlawful for
  - an “issuer,” “domestic concern,” or “any person acting within the territory of the United States”
  - with “corrupt intent”
  - directly or indirectly
  - to offer, pay, promise to pay, or authorize payment
  - of “anything of value”
  - to a “foreign official”
  - for the purpose of obtaining or retaining business or securing any improper business advantage

# Jurisdiction

- Any “issuer” that files reports to the SEC or trades equity or debt on a U.S. exchange
  - Includes any foreign company that trades, for example, American Depository Receipts (ADRs) on a U.S. exchange
- Any “domestic concern”
  - Includes U.S. citizens, nationals, and residents as well as any entity (corporation, partnership, etc.) that is organized under the laws of the U.S. or a U.S. territory or that has its principal place of business in the United States
- Any “person,” including an organization, wherever located, that, while in a U.S. territory, does any act in furtherance of the prohibited conduct
  - Government argues minimum contacts include emails, telephone calls, transfers through correspondent bank accounts in U.S. intermediary banks

# **OVERVIEW OF 2016 FCPA ENFORCEMENT**



# FCPA Statistics: Monetary Settlements

- Monetary Settlements (DOJ / SEC)
  - 2016: \$2.48 billion
  - 2015: \$133 million
  - 2014: \$1.56 billion
  - 2013: \$731 million
  - 2012: \$259 million
  - 2011: \$509 million
  - 2010: \$1.8 billion
- Four Changes to Top Ten List in 2016
- Largest 2016 Settlement
  - Teva Pharmaceutical's \$519 million settlement to the SEC & DOJ

# FCPA Statistics: Types of Settlements

- Corporate Settlements (DOJ / SEC)
  - 2016: 27 companies
  - 2015: 11 companies
  - 2014: 10 companies
  - 2013: 12 companies
  - 2012: 12 companies
  - 2011: 15 companies
  - 2010: 23 companies
- Individuals Charged by DOJ
  - 2016: 12 individuals
  - 2015: 8 individuals
  - 2014: 10 individuals
  - 2013: 12 individuals
  - 2012: 2 individuals
  - 2011: 10 individuals
  - 2010: 33 individuals

# FCPA Top Ten Settlements

1. Siemens (Germany): \$800 million (2008)
2. Alstom (France): \$772 million (2014)
3. KBR / Halliburton (U.S.): \$579 million (2009)
4. Teva Pharmaceutical (Israel): \$519 million (2016)
5. Odebrecht/Braskem (Brazil): \$420 million (2016)
6. Och-Ziff (U.S.): \$412 million (2016)
7. BAE (UK): \$400 million (2010)
8. Total SA (France): \$398 million (2013)
9. VimpelCom (Holland): \$398 million (2016)
10. Alcoa (U.S.): \$384 million (2014)

# **THE NEW ADMINISTRATION: READING THE TEA LEAVES**

# Trump on FCPA (Before POTUS)

“It’s a horrible law and it should be changed.”

U.S. shouldn’t prosecute companies that are “getting business and creating jobs in this country.”

“... for this country to prosecute because something happened in India is outrageous.”

*May 15, 2012 CNBC Squawk box interview*

# Sessions Pre-Confirmation

“Will you commit to continued vigorous enforcement of the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998?”

“Yes, if confirmed as Attorney General, I will 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.”

*Question from Senator Whitehouse,  
Sessions confirmation hearing*

# Sessions Post-Confirmation

“Corruption harms free competition, distorts prices [and] often leads to substandard products and services coming into this country[, ]...increases the cost of doing business, and hurts honest companies that don’t pay these bribes.”

Because the DOJ “wants to create an even playing field for law-abiding companies,” DOJ will “continue to strongly enforce the FCPA and other anti-corruption laws.”

“Congress enacted this law 40 years ago, when companies considered it a routine expense to bribe foreign officials in order to gain business advantages abroad”

*Attorney General Jeff Sessions*

# Department of Justice

The strategy of the Trump administration's anti-fraud effort "is to motivate companies and individuals to comply with the law" and "not to prosecute every company we can, or break our own records for the largest fines or longest prison sentences."

*Trevor McFadden*  
*Deputy Attorney General*  
*DOJ Criminal Division*



# Investigation Timeline

“[Future FCPA investigations will] be measured in months, not years” as the DOJ makes “a concerted effort to move corporate investigations expeditiously.”

*Trevor McFadden*  
*Deputy Attorney General*  
*DOJ Criminal Division*

# Securities & Exchange Commission

“Combatting corruption is an important governmental mission.”

[I plan to work] “with my fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws.”

*SEC Chair Jay Clayton*

# International Cooperation

- **Global cooperation on the rise**
  - 150% increase in annual requests from foreign prosecutors related to bribery and corruption investigations since 2011
  - 75% increase in annual requests from the U.S. to its foreign partners
- **DOJ sending prosecutor on detail to the U.K.**
  - Will work with Financial Conduct Authority
  - First DOJ Criminal Division employee to work within a foreign regulatory agency on issues of white-collar crime
  - Intended to foster information exchange and greater collaboration with foreign nations

# Corporate Prosecutions

“You’re saying BP is too big to fail. They’ve got employees, too. This is a dangerous philosophy. Normally, I was taught if they violated a law, you charge them. If they didn’t violate the law, you don’t charge them.”

*Attorney General Jeff Sessions  
Cole confirmation hearing, June 15, 2010*

# Trump Administration—Tough or Tender?

## TOUGH

- AG committed to enforcing anti-corruption laws against corporations & individuals
- SEC Chair and DOJ DAG recognize the importance of anti-corruption enforcement and U.S. partnership with domestic and foreign authorities

## TENDER

- President made clear, unequivocal anti-FCPA statements
- DAG says DOJ not focused on record fines and prosecutions
- Greater effort to speed investigations, thereby saving companies money

# FCPA PILOT PROGRAM

# FCPA Pilot Program

- Began April 5, 2016
- Goal:
  - formalize DOJ practice of rewarding cooperation
  - incentivize prompt and voluntary disclosure
  - issue declinations and reduce fines up to 50%

# FCPA Pilot Program

## In the first year:

- **22 companies self-disclosed FCPA violations vs. 13 in the previous year**
- **18 FCPA matters resolved vs. 7 in the previous year**
- **7 self-disclosed matters resolved**
  - 5 declinations issued, all with disgorgement
  - 2 fine reductions of 50% and 30%, respectively



# FCPA Pilot Program

- Program extended past April 5 expiration date
- DOJ currently reviewing efficacy for an indeterminate period
- Generally deemed to have had a significant impact on companies

# FCPA Pilot Program

## Future of the Program:

- DOJ focus on the role of the individual in the corrupt conduct (as set forth in the Yates Memo)
- Consideration of voluntary self-disclosure, cooperation and remediation efforts when making charging decisions
- Intent to conclude investigations as soon as possible

Primary aim is to “motivate companies and individuals voluntarily to comply with the law”

# **2017 FCPA ACTIONS AND ON- THE-HORIZON**

# United States v. Orthofix International

- **No corporate settlements since Trump took office**
  - Formed in Curacao, HQ in Texas, conduct occurred in Brazil
  - Allegations:
    - Commissions paid to doctors employed by state-owned facilities
    - Funding a cache of money used to pay bribes
  - Will pay \$14 million
- **Two individuals entered civil settlements with the SEC**
  - Executives with a hedge fund
  - Bribed government officials through third parties and corrupt transactions
  - Retained business and obtained special access to investment opportunities

# United States v. Hoskins (D. Conn.)

- **Indictment alleges that Hoskins:**
  - Performed functions and services for other Alstom subsidiaries, including Alstom Power, Inc., located in the U.S.
  - Authorized payments to consultants that were used as bribes to obtain a contract in Indonesia to build power stations for Indonesia's state-owned and controlled electricity company
- **Court held:**
  - Non-resident foreign national, who is not an agent of a domestic concern or issuer, cannot be subject to criminal liability under the FCPA under an accomplice theory of liability where he or she is not an agent of a domestic concern and does not commit acts while physically present in US territory
- **On appeal to the Second Circuit; oral argument held March 2**

# United States v. Firtash (N.D. Ill.)

- **The allegations:**
  - Indian officials bribed in connection with a mining project
- **The facts:**
  - Project took place entirely in India
  - Carried out by foreign companies with no ties to the U.S.
  - Defendant possesses Ukrainian citizenship
  - Never a citizen of, visitor to, or even a visa applicant for the U.S.
  - No allegation of illicit acts occurring in or affecting the U.S.

# United States v. Firtash (N.D. Ill.)

- **Claimed nexus to the U.S. through co-conspirators:**
  - Transferred funds through U.S. correspondent banks
  - Traveled within the U.S.
  - Used internet and email accounts hosted on U.S. servers
  - Used a U.S.-located cellular phone on a U.S. network
- **No allegation that the acts were in furtherance of a conspiracy**
- **Motion to Dismiss the Indictment filed May 9, will be briefed in July**

# Kokesh v. SEC

- 5-year statute of limitations on civil fines, penalties or forfeitures
- SEC claimed unlimited look-back on disgorgement, terming it “equitable relief”
- Supreme Court held that disgorgement:
  - Is paid to victim and U.S. Treasury
  - Is compensatory and punitive
  - Must be treated as a penalty for statute of limitations purposes



# **GLOBAL ANTI-CORRUPTION UPDATE**

# Brazil: Operation Car Wash

- **Massive corruption probe began with a gas station network accused of money laundering in early 2014**
- **Informant revealed comprehensive political corruption scheme**
  - State-run oil company Petrobras overcharged on contracts
  - Surplus funds were used for campaign finance and to buy support for Worker's Party
- **Results of corruption probe:**
  - Unprecedented cooperation among foreign governments
  - “Whole pie” settlement approach
  - At least \$3.5 billion in fines paid to Brazil, Switzerland & U.S.

# France: *Sapin II*, passed November 8

- **New law aimed at preventing and fighting foreign bribery**
  - Applies to companies with 500+ employees and \$100+ million in revenue
  - Requires implementation of measures to prevent and detect corruption
- **Sapin II creates:**
  - The Agence Française Anticorruption (AFA), to provide oversight
  - French Deferred Prosecution Agreements
  - Certain whistleblower protections
- **Expands scope of French anti-corruption laws**

# U.K.: Strengthened Enforcement by SFO

- **\$800 million global settlement with Rolls-Royce (Jan. 2017)**
  - \$605 million to Serious Fraud Office
  - \$170 million to Department of Justice
  - \$25.6 million to Ministério Público Federal
- **Paid bribes in at least twelve countries in exchange for confidential information or contract awards**
- **Potential for future prosecution of 30+ individuals**
- **Enforcement potentially weakened if subsumed by National Crime Agency**

# COMPLIANCE TIPS

# Essential Elements to Compliance Program

- Tone at the top – commitment from senior management and clearly articulated policy against corruption
- Code of conduct, compliance policies & procedures
- Oversight, autonomy, and resources
- Risk assessment
- Training and continuing advice
- Incentives and disciplinary measures
- Third-party due diligence
- Confidential reporting and internal investigation

# Criteria to Evaluate Compliance Program

DOJ's new compliance counsel recently identified four criteria for evaluating the effectiveness of a compliance program:

- **Addressing Risk** – Does the compliance program demonstrate thoughtful design to address current risks?
- **Active Compliance** – How operational is the program (not a paper program)?
- **Coordination** – How well are stakeholders working with each other?
- **Resources** – How well is the program resourced?

# Third Parties

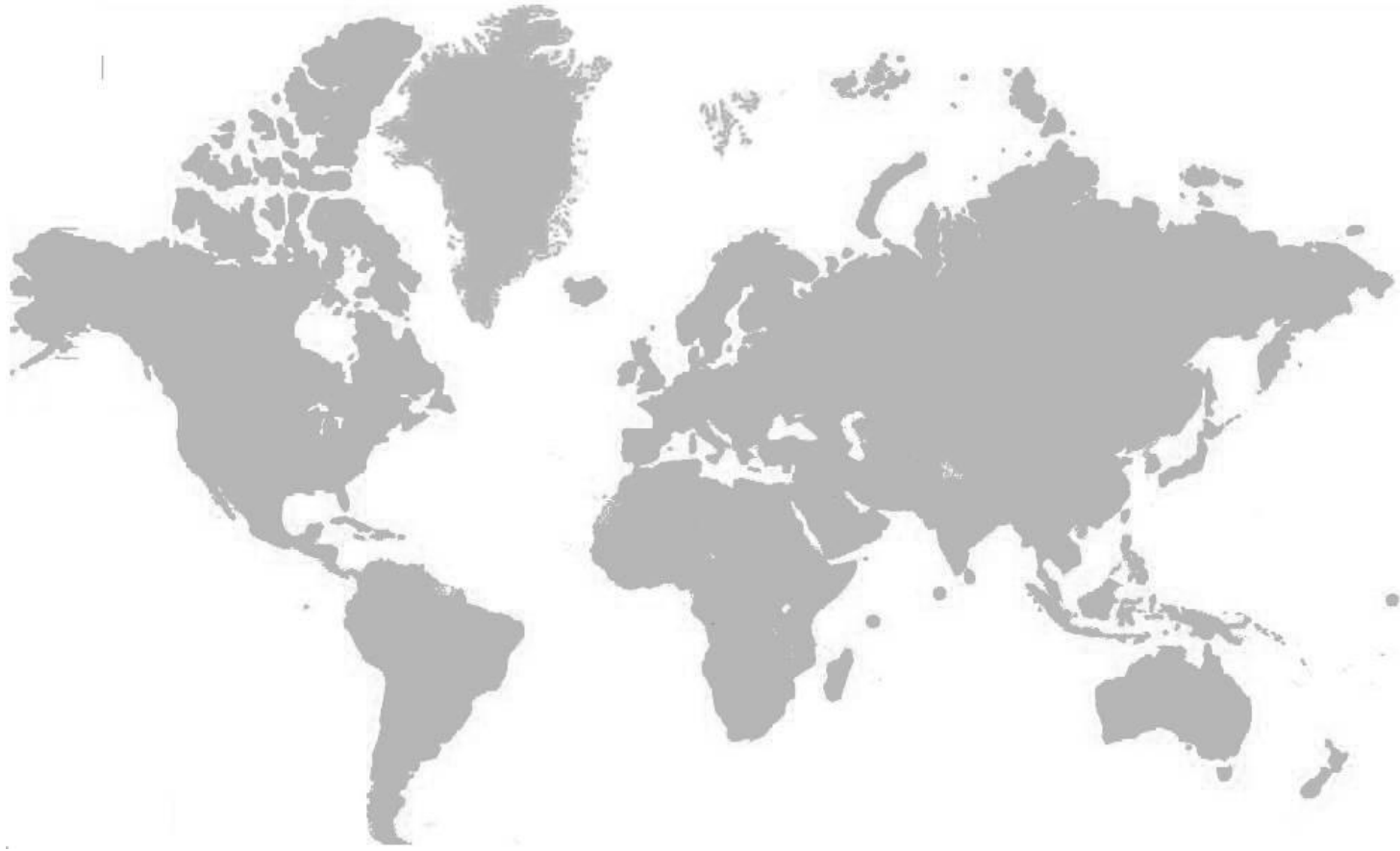
- **Third parties remain one of the top risk areas for companies conducting business abroad**
- **Best practices include:**
  - Due diligence on potential third parties
  - FCPA compliance certification
  - Continuous monitoring of third party transactions
  - Auditing third party for compliance



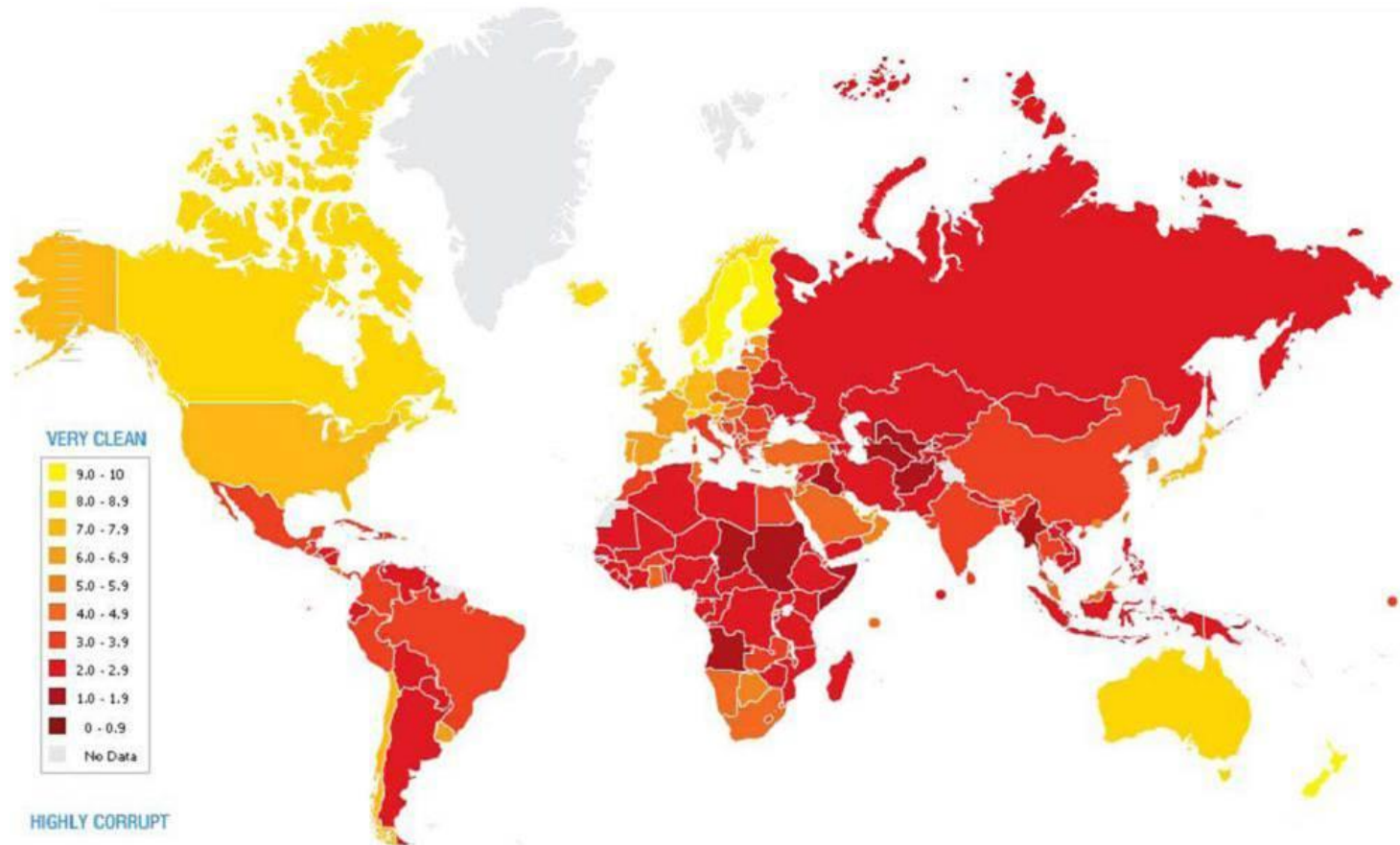
# Mergers & Acquisitions

- **DOJ continues to emphasize importance of effective anti-corruption due diligence in deal context**
- **DOJ/SEC urge the following:**
  - Pre-acquisition due diligence
  - Post-acquisition compliance integration
  - Anti-corruption training
  - FCPA audits
  - Disclosures to government

# The Sales Personnel See...



# Prosecutors see...



# QUESTIONS