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Foreign Corrupt Practices Act Continuity in a Transition Year

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FOREIGN CORRUPT PRACTICES ACT CONTINUITY IN A TRANSITION YEAR

Mike Koehler*

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This Article is part of the author’s continuing series of yearly analyses of FCPA enforcement data and related developments. For 2016, see Mike Koehler, *The FCPA’s Record-Breaking Year*, 50 CONN. L. REV. 91 (2018) [hereinafter Koehler, *Record-Breaking*]; for 2015, see *Foreign Corrupt Practices Act Statistics, Theories, Policies, and Beyond*, 65 CLEV. ST. L. REV. 157 (2017); for 2014, see *A Snapshot of the Foreign Corrupt Practices Act*, 14 SANTA CLARA J. INT’L L. 143 (2016); for 2013, see *A Foreign Corrupt Practices Act Narrative*, 22 MICH. ST. INT’L L. REV. 961 (2014); for 2012, see *An Examination of Foreign Corrupt Practices Act Issues*, 12 RICH. J. GLOBAL L. & BUS. 317 (2013); for 2011, see *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1 (2012); for 2010, see *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99 (2011); for 2009, see *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389 (2010).

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With the election of Donald Trump as President, and based on citizen Trump's prior blunt statement that the Foreign Corrupt Practices Act (FCPA) is a "horrible law and it should be changed,"¹ some apprentice commentators predicted that the FCPA was "likely to be substantially weakened, perhaps even repealed" and that "the era of vigorous FCPA enforcement . . . [was] over."² However, those hyperventilating regarding the FCPA's future were encouraged to take a deep breath, focus on facts and enforcement fundamentals, and realize that the FCPA was not going away and that FCPA enforcement was not going to substantially change. While 2017 enforcement did not eclipse 2016's record breaking year of enforcement³ (after all, records can't be broken every year), this Article highlights that in 2017 there was a continuation of robust FCPA enforcement by the Trump administration involving the same enforcement theories and same resolution vehicles used in prior administrations.

Like prior years, 2017 was notable for enforcement actions against business organizations across a wide industry spectrum, involving conduct around the globe, and ranging from egregious instances of corporate bribery executed at the highest levels of the company and involving hundreds of millions of dollars to garden variety allegations of sports tickets, internships for family members of alleged foreign officials, and charitable donations.⁴ Additionally, 2017 was also notable for enforcement agency policy and related developments including the Department of Justice's announcement of an "FCPA Corporate Enforcement Policy."⁵ This Article, part of a continuing

1. *Trump: Dimon's Woes & Zuckerberg's Prenuptial*, CNBC (May 15, 2012), <https://www.cnbc.com/video/2012/05/15/trump-dimons-woes-zuckerbergs-prenuptial.html?play=1>.

2. Matthew Stephenson, *US Anticorruption Policy in a Trump Administration: A Cry of Despair from the Heart of Darkness*, GLOBAL ANTICORRUPTION BLOG (Nov. 10, 2016), <https://globalanticorruptionblog.com/2016/11/10/us-anticorruption-policy-in-a-trump-administration-a-cry-of-despair-from-the-heart-of-darkness>.

3. See Koehler, *Record-Breaking*, *supra* note *, at 93.

4. See *id.*

5. See Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017) (transcript available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>); see also LUCINDA A. LOW ET AL., 2017 FCPA MID-YEAR REVIEW 1–2 (2017) (reviewing FCPA enforcement in mid-year of 2017); Richard L. Cassin, *Month in Review: January 2017 Was an FCPA Enforcement Blowout*, THE FCPA BLOG (Feb. 1, 2017, 8:28 AM), <http://www.fcpablog.com/blog/2017/2/1/month-in-review-january-2017-was-an-fcpa-enforcement-blowout.html> (reviewing the individual FCPA enforcements during January 2017).

yearly analysis of FCPA enforcement and related developments, provides a detailed overview of 2017 FCPA enforcement and will be of value to anyone seeking to elevate their FCPA knowledge.

I. 2017 FCPA ENFORCEMENT STATISTICS, HISTORICAL COMPARISONS, AND DATA POINTS OF INTEREST

While it is beyond the scope of this article to provide a detailed summary of *each* 2017 enforcement action, this section highlights certain enforcement statistics from 2017 and provides historical comparisons by examining the following sources: corporate DOJ enforcement actions; corporate SEC enforcement actions; aggregate corporate enforcement actions; and individual DOJ and SEC enforcement actions. For each discrete statistical category, January 20, 2017, (the beginning of the Trump administration) is highlighted so that readers can clearly see how robust FCPA enforcement involving the same enforcement theories and same resolution vehicles of prior administrations continued in the Trump administration. This demarcation also demonstrates that the first few weeks of January 2017 witnessed an unusual amount of FCPA enforcement activity in the final days of the Obama administration.

A. Corporate DOJ Enforcement Actions

As demonstrated in Table I, in nine corporate FCPA enforcement actions⁶ in 2017, the DOJ collected approximately \$845 million in net settlement amounts.

6. Corporate FCPA enforcement statistics in this article use the “core” approach. The core approach focuses on unique instances of corporate conduct regardless of whether the conduct at issue involved a DOJ or SEC enforcement action or both (as is frequently the case), regardless of whether the corporate enforcement action involved a parent company, a subsidiary or both (as is frequently the case), and regardless of whether the DOJ and/or SEC brought any related individual enforcement action (as is occasionally the case).

Mike Koehler, *What Is an FCPA Enforcement Action?*, FCPA PROFESSOR (Jan. 7, 2013), <http://fcpprofessor.com/what-is-an-fcpa-enforcement-action>. This method of computing FCPA statistics is consistent with the DOJ’s approach, see Mike Koehler, *Friday Roundup*, FCPA PROFESSOR (Mar. 22, 2013), <http://www.fcpprofessor.com/friday-roundup-72>, and is a commonly accepted method used by other scholars in other areas, see, e.g., Jason Hegland & Michael Klausner, *SEC Practice in Targeting and Penalizing Individual Defendants*, THE HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 3, 2013), <http://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants>.

Table I 2017 DOJ Corporate FCPA Enforcement Actions				
Company (Industry)	Settlement Amount	Resolution Vehicle ⁷	Origin ⁸	Related Individual Action ⁹
Zimmer Biomet ¹⁰ (Medical Devices)	\$17.4M	Plea/DPA ¹¹	Breach of Prior Deferred Prosecution Agreement	No
SQM ¹² (Chemicals) (Chile)	\$15.5M	DPA	Foreign Law Enforcement Investigation /Media Reporting ¹³	No

7. DPA refers to a deferred prosecution agreement, and NPA refers to a non-prosecution agreement. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909 (2010); see also Mike Koehler, *DOJ Releases Two So-Called "Declination" Letters, yet "Pursuant to" the Letters, HMT LLC and NCH Corp. Agree to Disgorge \$2.7 Million and \$335,000*, FCPA PROFESSOR (Sept. 30, 2016), <http://fcpaprofessor.com/doj-releases-two-called-declination-letters> (discussing the meaning of declinations with disgorgement).

8. Refers to the event or events that initially prompted the scrutiny that resulted in the FCPA enforcement action.

9. Refers to employees of the corporate entity resolving the FCPA enforcement action.

10. See Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges (last updated Oct. 3, 2017), <https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act>.

11. The enforcement action involved a criminal information against JERDS Luxembourg Holding S.à.r.l. that was resolved via a plea agreement and a criminal information against Zimmer Biomet Holdings that was resolved via a DPA. See *id.*

12. See Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Chilean Chemicals and Mining Company Agrees to Pay More Than \$15 Million to Resolve Foreign Corrupt Practices Act Charges (last updated Oct. 3, 2017), <https://www.justice.gov/opa/pr/chilean-chemicals-and-mining-company-agrees-pay-more-15-million-resolve-foreign-corrupt>.

13. The SEC's administrative order states: "In 2015, in response to inquiries from Chilean tax authorities and related news articles in the Chilean press, SQM conducted an internal investigation based on allegations that SQM had taken improper tax deductions for payments to certain vendors." Sociedad Química y Minera de Chile, S.A., Exchange Act Release No. 79,795, 115 SEC Docket 17 (Jan. 13, 2017).

Table I 2017 DOJ Corporate FCPA Enforcement Actions				
Company (Industry)	Settlement Amount	Resolution Vehicle ⁷	Origin ⁸	Related Individual Action ⁹
Rolls-Royce ¹⁴ (Power Systems) (U.K.)	\$170M	DPA	Foreign Media Reports ¹⁵	Yes
Las Vegas Sands ¹⁶ (Hotel / Gaming)	\$7M	NPA	Civil Litigation ¹⁷	No
January 20, 2017 (Start of the Trump Administration)				
Linde Gas ¹⁸ (Gas)	\$11.2M	Declination with Disgorgement	Voluntary Disclosure	No
CDM Smith ¹⁹ (Engineering and Construction)	\$4M	Declination with Disgorgement	Voluntary Disclosure	No

14. See Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (last updated Oct. 3, 2017), <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

15. The DPA states: "The Company did not voluntarily or timely disclose [to the DOJ] . . . as the Company's disclosures occurred only after media reports first alleging corruption by the Company and the U.K. Serious Fraud Office initiated an inquiry into the Company's misconduct . . ." Deferred Prosecution Agreement at 3, United States v. Rolls-Royce PLC, No. 2:16-cr-00247, 7 FOREIGN CORRUPT PRAC. ACT REP. § 39:35 (2d ed. 2018) (S.D. Ohio Dec. 20, 2016).

16. See Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Las Vegas Sands Corporation Agrees to Pay Nearly \$7 Million Penalty to Resolve FCPA Charges Related to China and Macao (last updated Oct. 3, 2017), <https://www.justice.gov/opa/pr/las-vegas-sands-corporation-agrees-pay-nearly-7-million-penalty-resolve-fcpa-charges-related>.

17. Complaint, Jacobs v. Las Vegas Sands Corp, No. A-10-627691-C, 2011 WL 5827090 (Nev. Dist. Ct. Apr. 1, 2011).

18. Letter from Jacob T. Elberg, Chief, Health Care & Gov't Fraud Unit, U.S. Attorney's Office of N.J., Laura N. Perkins, Assistant Chief, U.S. Dep't of Justice Criminal Div. Fraud Section, & Nicholas Acker, Senior Trial Attorney, U.S. Dep't of Justice Criminal Div. Fraud Section to Lucinda Low, Esq., Steptoe & Johnson LLP & Thomas Best, Esq., Steptoe & Johnson LLP (June 16, 2017), <https://www.justice.gov/criminal-fraud/file/974516/download>.

19. Letter from Nicola J. Mrazek, Senior Litig. Counsel & Daniel Kahn, Chief, U.S. Dep't of Justice Criminal Div. Fraud Section, to Nathaniel B. Edmonds, Esq., Paul Hastings LLP (June 21, 2017), <https://www.justice.gov/criminal-fraud/page/file/976976/download>.

Table I 2017 DOJ Corporate FCPA Enforcement Actions				
Company (Industry)	Settlement Amount	Resolution Vehicle ⁷	Origin ⁸	Related Individual Action ⁹
Telia ²⁰ (Telecommuni- cations) (Sweden)	\$275M ²¹	Plea / DPA ²²	Foreign Media Reporting ²³	No
SBM Offshore ²⁴ (Oil Services) (Netherlands)	\$238M ²⁵	Plea/DPA ²⁶	Voluntary Disclosure ²⁷	Yes

20. See Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than \$965 Million for Corrupt Payments in Uzbekistan (last updated Apr. 13, 2018), <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965>.

21. See *id.*

22. See *id.*

23. According to the resolution documents,

[i]n or around September 2012, Swedish public television broadcast a documentary that exposed Telia's corrupt dealings with the Foreign Official and the Shell Company in Uzbekistan, and caused Telia to initiate an internal investigation. Soon thereafter, the Swedish Prosecution Authority also opened an investigation into Telia's corrupt dealings in Uzbekistan.

Information at 21, United States v. Telia Co. AB, No. 17-CR-581-GBD, 7 FOREIGN CORRUPT PRAC. ACT REP. § 40:13 (2d ed. 2018) (S.D.N.Y. Sept. 21, 2017) [hereinafter *Telia*].

24. See Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (last updated Nov. 29, 2017), <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>.

25. *Id.*

26. The enforcement action involved a criminal information against SBM Offshore USA Inc. resolved via a plea agreement and a criminal information against SBM Offshore resolved via a DPA. *Id.*

27. See *id.*

Table I 2017 DOJ Corporate FCPA Enforcement Actions				
Company (Industry)	Settlement Amount	Resolution Vehicle ⁷	Origin ⁸	Related Individual Action ⁹
Keppel Offshore & Marine ²⁸ (Oil Services) (Singapore)	\$105.5M ²⁹	Plea/DPA ³⁰	Foreign Law Enforcement Investigation	Yes
TOTAL	\$845M			

B. Corporate SEC Enforcement Actions

As demonstrated in Table II, in seven corporate FCPA enforcement actions in 2017, the SEC collected approximately \$289 million in settlement amounts.

Table II 2017 SEC Corporate FCPA Enforcement Actions				
Company (Industry)	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
Mondelēz Int'l ³¹ (Food Products)	\$13M	Administrative Action	SEC Investigation ³²	No

28. See Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case (last updated Dec. 22, 2017), <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>.

29. This number accounts for various credits and deductions for Singapore and Brazil enforcement actions. See *id.*

30. The enforcement action involved a criminal information against Keppel Offshore & Marine USA was resolved via a plea agreement and a criminal information against Keppel Offshore & Marine was resolved via a DPA. *Id.*

31. Cadbury Ltd. and Mondelēz Int'l Inc., Exchange Act Release No. 79,753, 115 SEC Docket 16 (Jan. 6, 2017).

32. The company previously disclosed that "on February 1, 2011, we received a subpoena from the SEC in connection with an investigation under the FCPA, primarily related to a facility in India that we acquired in the Cadbury acquisition." Mike Koehler, *Scrutiny Alerts*, FCPA PROFESSOR (Sept. 25, 2012), <http://fcpaprofessor.com/scrutiny-alerts>.

Table II 2017 SEC Corporate FCPA Enforcement Actions				
Company (Industry)	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
Zimmer Biomet ³³ (Medical Devices)	\$13M	Administrative Action	Breach of Prior Deferred Prosecution Agreement ³⁴	No
SQM ³⁵ (Chemical) (Chile)	\$15M	Administrative Action	Foreign Law Enforcement Investigation / Media Reporting ³⁶	No
Orthofix Int'l ³⁷ (Medical Devices)	\$6M	Administrative Action	Breach of Prior Deferred Prosecution Agreement ³⁸	No
January 20, 2017 (Start of the Trump Administration)				
Halliburton ³⁹ (Oil and Gas)	\$29.2M	Administrative Action	Voluntary Disclosure ⁴⁰	Yes

33. Biomet, Inc., Exchange Act Release No. 79,780, 115 SEC Docket 17 (Jan. 12, 2017).

34. *See id.*

35. Press Release, U.S. Sec. and Exch. Comm'n, Chemical and Mining Company in Chile Paying \$30 Million to Resolve FCPA Cases (Jan. 13, 2017), <https://www.sec.gov/news/pressrelease/2017-13.html>.

36. Sociedad Química y Minera de Chile, S.A., *supra* note 13.

37. Press Release, U.S. Sec. and Exch. Comm'n, Medical Device Company Charged with Accounting Failures and FCPA Violations (Jan. 18, 2017), <https://www.sec.gov/news/pressrelease/2017-18.html>.

38. Mike Koehler, *Orthofix International Resolves Enforcement Action Based on the Conduct of Its Mexican Subsidiary*, FCPA PROFESSOR (July 12, 2012), <http://fcpprofessor.com/orthofix-international-resolves-enforcement-action-based-on-the-conduct-of-its-mexican-subsidiary>.

39. Press Release, U.S. Sec. and Exch. Comm'n, Halliburton Paying \$29.2 Million to Settle FCPA Violations (July 27, 2017), <https://www.sec.gov/news/press-release/2017-133>.

40. Mike Koehler, *Issues to Consider from the Halliburton Enforcement Action*, FCPA PROFESSOR (Aug. 2, 2017), <http://fcpprofessor.com/issues-consider-halliburton-enforcement-action/#more-22850>.

Table II 2017 SEC Corporate FCPA Enforcement Actions				
Company (Industry)	Settlement Amount	Resolution Vehicle	Origin	Related Individual Action
Telia ⁴¹ (Telecomm- unications)	\$209M ⁴²	Administrative Action	Foreign Media Reporting ⁴³	No
Alere ⁴⁴ (Diagnostics)	\$3.8M	Administrative Action	SEC Investigation ⁴⁵	No
TOTAL	\$289M			

As the demarcation in the above tables demonstrates, the first few weeks of January 2017 witnessed an unusual amount of FCPA enforcement activity in the final days of the Obama administration. This dynamic was not unique to the FCPA space—as the *Wall Street Journal* noted in an article titled “Obama Administration Races to Finish Probes, Writing Payments From Firms:”

The Obama administration rushed to complete a raft of investigations of big business before relinquishing power, reaching settlements worth around \$20 billion in the past week alone with megabanks, auto makers, drug companies and others.

The settlements—involving allegations of wrongdoing ranging from misdeeds during the financial crisis to emissions cheating, from discrimination in lending to squelching competition—are part of the usual scramble to close the books on lingering cases when a presidential administration winds down, especially when transferring control to the opposition party.⁴⁶

41. Press Release, U.S. Sec. and Exch. Comm’n, Telecommunications Company Paying \$965 Million for FCPA Violations (Sept. 21, 2017), <https://www.sec.gov/news/press-release/2017-171>.

42. This number accounts for various credits and deductions for contemplated Swedish and Dutch enforcement actions. *See id.*

43. *Telia*, *supra* note 23.

44. Alere, Inc., Securities Act Release No. 10,417, Exchange Act Release No. 81,742, 117 SEC Docket 14 (Sept. 28, 2017).

45. *See id.*

46. Aruna Viswanatha, *Obama Administration Races to Finish Probes, Writing Payouts from Firms*, WALL ST. J. (Jan. 18, 2017), <https://www.wsj.com/articles/obama-administration-races-to-finish-probes-wring-payouts-from-firms-1484792587?mg=prod/accounts-wsj>.

In a legal system supposedly based on the rule of law, it would be nice to think that the timing of enforcement actions is not based on the career paths of the individuals occupying the seats of authority. Yet, such thinking ignores the likely reality that professional aspirations indeed explain the unusual amount of FCPA and related enforcement actions during the first few weeks of January 2017. For instance, the above-highlighted DOJ enforcement action against Las Vegas Sands was announced literally in the final hours of the Obama administration and was based on the same core conduct alleged in the SEC's April 2016 against the company.⁴⁷ Parallel DOJ and SEC FCPA enforcement actions against issuers based on the same core conduct are rather common. However, such actions are typically coordinated and announced on the same day and the Las Vegas Sands enforcement action represents what is believed to be the only instance in FCPA history in which the DOJ and SEC enforcement actions were separated (in this matter by approximately nine months).⁴⁸ Adding to the intrigue, Sheldon Adelson (founder, chairman, and chief executive officer of Las Vegas Sands) was a major Republican contributor during the 2016 election and was in Washington, D.C. for Trump's inauguration on the same day the DOJ enforcement action was announced.⁴⁹

As the demarcation in the above tables also clearly demonstrates, robust FCPA enforcement involving the same enforcement theories and same resolution vehicles has continued in the Trump administration. This enforcement has occurred despite the predictions of some apprentice commentators that during the Trump administration the FCPA "[was] likely to be substantially weakened, perhaps even repealed" and that "the era of vigorous FCPA enforcement . . . [was] over."⁵⁰ For instance, mere hours after Trump's victory on November 8, 2016, Harvard Law Professor Matthew Stephenson wrote:

Like many people, both here in the US and across the world, I was shocked and dismayed by the outcome of the US Presidential election. To be honest, I'm still in such a state of numb disbelief, I'm not sure I'm in a position to think or write clearly. And I'm not even

47. Las Vegas Sands Corp., Exchange Act Release No. 77,555, 113 SEC Docket 17d (Apr. 7, 2016).

48. See *id.*; U.S. Dep't of Justice, *supra* note 16.

49. See Nicholas Confessore, et al. *Trump Inaugural Drew Big Dollars from Donors with Vested Interests*, N.Y. TIMES (Apr. 19, 2017), <https://www.nytimes.com/2017/04/19/us/politics/trump-inauguration-sheldon-adelson-fundraising.html>.

50. Stephenson, *supra* note 2.

sure there's much point to blogging about corruption. As I said in [a prior post], the consequences of a Trump presidency are potentially so dire for such a broad range of issues—from health care to climate change to national security to immigration to the preservation of the fundamental ideals of the United States as an open and tolerant constitutional democracy—that even thinking about the implications of a Trump presidency for something as narrow and specific as anticorruption policy seems almost comically trivial. But blogging about corruption is one of the things I do, and to hold myself together and try to keep sane, I'm going to take a stab at writing a bit about the possible impact that President Trump will have on US anti[-]corruption policy, at home and abroad. I think the impact is likely to be considerable, and uniformly bad:

- First, the Foreign Corrupt Practices Act (FCPA) is likely to be substantially weakened, perhaps even repealed (though I think the latter possibility is still relatively unlikely). The FCPA “reform” crowd—the Chamber of Commerce, the defense bar, and their various supporters—will now have a Congress that is likely to support “reforms” that substantially weaken the statute, and a President who is already on record as calling the FCPA a “horrible law.” It may not be a top priority of the Republican Congress and the Trump Administration, but I expect that the Chamber and others will seize this legislative opportunity to push through many of the reforms that have been on their wish list for quite some time.
- Second, even putting aside possible changes to the FCPA itself, I fully expect that the era of vigorous FCPA enforcement . . . is over. It's hard for me to imagine that the Attorney General of a Trump Administration (Rudy Giuliani, perhaps?) would make prosecuting foreign bribery a significant priority, or would devote substantial resources to this area. It might take a little while for the change to become apparent[—]there are still some cases in the pipeline, after all[—]but I'd be shocked if the US maintained anything like its current level of FCPA enforcement.⁵¹

51. *Id.*

Perhaps a law professor in a self-described “state of numb disbelief” and not in a “position to think or write clearly” should decline to hit the publish button. But that did not happen, and reflective of the troubled state of “news” in this modern era, and perhaps due to the institutional affiliation of the law professor (i.e. a Harvard Law Professor can’t possibly be wrong), the above doom and gloom predictions soon became a narrative that spread like wildfire.⁵²

This author however, days after the 2016 elections, encouraged all to take a deep breath regarding FCPA enforcement in the Trump administration and focus on facts and not speculative narratives. Among other things, the following salient points were highlighted:

- Citizen Trump’s statement that the FCPA is a “horrible law and it should be changed” occurred in mid-May 2012 at the height of public awareness of Wal-Mart’s FCPA scrutiny—scrutiny focused on alleged payments in Mexico to obtain various licenses and permits. Relevant to this type of scrutiny, the FCPA’s legislative history clearly evidences that Congress did not intend to capture such payments in enacting the FCPA’s anti-bribery provisions and the government has an overall losing record when put to its burden of proof concerning payments outside the context of foreign government procurement.
- In any given year, approximately 50% of corporate FCPA enforcement actions (which then sometimes spawn individual enforcement actions, related corporate enforcement actions, or industry sweeps) originate with corporate voluntary disclosures. To think that FCPA Inc. is going to stop making voluntary disclosures (disclosures that fuel FCPA enforcement) on January 20, 2017 is fanciful. Among other things, there are too many people making lots of money based on the current FCPA enforcement environment for FCPA enforcement to experience a sudden and dramatic change. In short, voluntary disclosures will still likely fill up a significant portion of the FCPA pipeline after January 20, 2017. If you believe that FCPA enforcement will decline in a Trump administration then

52. See John T. Aquino, *Trump Enforcement of Foreign Bribery Law Uncertain*, BLOOMBERG BNA (Dec. 22, 2016), <https://www.bna.com/trump-enforcement-foreign-n73014449002>; Adam Dobrik, *What Will Trump Mean for FCPA Enforcement*, GLOBAL INVESTIGATION REVIEW (Nov. 14, 2016), <https://globalinvestigationsreview.com/article/jac/1073757/what-will-trump-mean-for-fcpa-enforcement>; CHARLES E. DUROSS ET AL., TOP TEN INTERNATIONAL ANTI-CORRUPTION DEVELOPMENTS FOR NOVEMBER 2016 (Dec. 16, 2016).

you presumably must think that the DOJ and the SEC will start refusing to “process” these corporate voluntary disclosures.

To his credit, one year after making the above “doom and gloom predictions” (and with much FCPA enforcement still to occur in 2017) Professor Stephenson publicly admitted that he was “totally wrong” or “mostly wrong” as to his predictions.⁵³ Around the same general time, *Wall Street Journal Risk and Compliance* reported the following:

[FCPA Unit Chief Daniel Kahn] dismissed the suggestion that President Donald Trump’s previous criticism of the FCPA has had any effect on the department’s enforcement of the law. Mr. Kahn said he “spanned both administrations,” referring to Mr. Trump’s predecessor, President Barack Obama, adding, “I am continuing to do what I do.”⁵⁴

This statement from the head of the DOJ’s FCPA unit echoed previous comments from DOJ officials early in the Trump administration. For instance, in April 2017 the DOJ’s Acting Principal Deputy Assistant Attorney General stated that “the [DOJ] remains committed to enforcing the FCPA and to prosecuting fraud and corruption more generally.”⁵⁵ Shortly thereafter, Attorney General Jeff Sessions stated: “We will continue to strongly enforce the FCPA and other anti-corruption laws.”⁵⁶

Even so, what some have referred to as “Trump Derangement Syndrome”⁵⁷ continued to appear in certain FCPA commentary in 2017. For

53. Matthew Stephenson, *US Anticorporation Policy in a Trump Administration: An Evaluation of Last Year’s Doom-and-Gloom Predictions*, GLOBAL ANTICORRUPTION BLOG (Nov. 9, 2017), <https://globalanticorruptionblog.com/2017/11/09/us-anticorruption-policy-in-a-trump-administration-revisited-an-evaluation-of-last-years-doom-and-gloom-predictions/>.

54. Samuel Rubenfield, *U.S. Justice Dep’t Official: Corporate Compliance is ‘More Sophisticated,’* WALL ST. J.: L. BLOG (Nov. 15, 2017, 5:14 PM), <https://blogs.wsj.com/riskandcompliance/2017/11/15/u-s-justice-dept-official-corporate-compliance-is-more-sophisticated/>.

55. Trevor N. McFadden, Acting Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice Criminal Div., Remarks at Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit (Apr. 18, 2017) (transcript available at <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>).

56. Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2018) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>).

57. *Trump Derangement Syndrome*, URBAN DICTIONARY (updated Aug. 7, 2018), <https://www.urbandictionary.com/define.php?term=Trump%20Derangement%20Syndrome>.

instance, when the Trump administration brought its first two corporate FCPA enforcement actions against Linde and CDM Smith in quick succession during the summer of 2017, some were aghast that the enforcement actions were resolved via so-called “declination with disgorgement” agreements.⁵⁸ A commentator stated:

What’s frustrating is that we don’t really know *how* Linde or CDM Smith met the criteria of the [2016] Pilot Program; or why meeting the criteria resulted in *no* prosecution, when under the Obama Administration a company might have received a deferred-prosecution agreement or some amount of penalties. Did these companies handle their FCPA violations in some fundamentally better way? Or have prosecutors in the Trump Administration fundamentally changed their tune, in favor of no corporate prosecutions?

. . . .

. . . If we can’t identify what these companies did right, we can’t determine how to emulate that behavior—or whether we can adopt the cynical view that the Trump Administration just isn’t interested in prosecuting corporations any more

. . . .

I’m not arguing that the Trump Administration needs to punish all FCPA violations at the more severe levels we saw during the Obama Administration. It doesn’t. There are plenty of good arguments for declinations. But we don’t have any arguments right now; just declination letters with generic language that the company met the criteria of the FCPA Pilot Program.⁵⁹

Noticeably absent from the commentator’s rant were the following facts (facts perhaps inconvenient if one is trying to spin a narrative that FCPA enforcement was changing in the Trump administration):

58. See Matt Kelly, *Another Vague FCPA Enforcement Action*, RADICAL COMPLIANCE (July 10, 2017), <http://www.radicalcompliance.com/2017/07/10/another-vague-fcpa-enforcement-action/>.

59. *Id.*

- The Obama DOJ created the FCPA Pilot Program in April 2016;
- The Obama DOJ announced 5 matters as being resolved consistent with the FCPA Pilot Program. Three of these matters (Akamai, Nortek, and Johnson Controls) were ‘declinations’ (i.e. no enforcement action whatsoever) and [two] of these matters (HMT and NCH) were ‘declinations with disgorgement’ (the same resolution vehicle the commentator criticized the Trump DOJ for using);
- Outside the context of the FCPA Pilot Program, the Obama DOJ resolved 22 corporate FCPA enforcement actions through non-prosecution agreements (in other words the commentator’s assertion/inference that the Obama DOJ typically resolved corporate FCPA enforcement actions more harshly than the two instances in the Trump administration was just plain false); and
- The ‘boilerplate language’ the commentator objected to in the first two ‘declinations with disgorgement’ used in the Trump administration was the same general ‘boilerplate language’ used by the Obama DOJ.

“Doom and gloom” narratives aside, facts actually matter and as the above tables clearly demonstrate robust FCPA enforcement involving the same enforcement theories and the same resolution vehicles has continued in the Trump administration. Indeed, as highlighted in Tables III and IV below, corporate FCPA enforcement by the DOJ in 2017 (measured both in terms of the number of core actions and aggregate settlement amount), while lower than 2016’s record-breaking year of enforcement, was consistent with historical averages.

Table III Corporate DOJ FCPA Enforcement Actions (2010–2017) ⁶⁰	
Year	Core Actions
2017	9
2016	13
2015	2
2014	7

60. Mike Koehler, *Corporate FCPA Enforcement in 2017 Compared to Prior Years*, FCPA PROFESSOR (Jan. 2, 2018), <http://fcpprofessor.com/corporate-fcpa-enforcement-2017-compared-prior-years>.

Table III Corporate DOJ FCPA Enforcement Actions (2010–2017)⁶⁰	
Year	Core Actions
2013	7
2012	9
2011	11
2010	17

Table IV Corporate DOJ FCPA Enforcement Action Settlement Amounts (2010–2017)⁶¹	
Year	Settlement Amounts
2017	\$845M
2016	\$1.34B
2015	\$24.2M
2014	\$1.25B
2013	\$420M
2012	\$142M
2011	\$355M
2010	\$870M

Similarly, as highlighted in Tables V and VI below, corporate FCPA enforcement by the SEC in 2017 (measured both in terms of the number of core actions and aggregate settlement amount), while again lower than 2016's record-breaking year of enforcement, was also relatively consistent with historical averages.

Table V Corporate SEC FCPA Enforcement Actions (2010–2017)⁶²	
Year	Actions
2017	7
2016	24
2015	9
2014	7
2013	8
2012	8
2011	13
2010	19

61. *Id.*

62. *Id.*

Table VI SEC FCPA Enforcement Action Settlement Amounts (2010–2017) ⁶³	
Year	Settlement Amounts
2017	\$289M
2016	\$1.07B
2015	\$114M
2014	\$327M
2013	\$300M
2012	\$118M
2011	\$148M
2010	\$530M

Analyzing DOJ and SEC FCPA enforcement data separately in Tables I–VI above is informative given that the DOJ and SEC are separate law enforcement agencies and different issues may arise in DOJ and SEC FCPA enforcement actions.⁶⁴ On the other hand, analyzing DOJ and SEC FCPA enforcement data in the aggregate is also informative because it provides a more holistic view of FCPA enforcement.

C. Aggregate Corporate Enforcement Actions

As highlighted in Table VII, in 2017 the DOJ and SEC together collected approximately \$1.13 billion in thirteen core corporate enforcement actions. The table also compares aggregate figures to historical figures and highlights unique circumstances that may have significantly skewed enforcement data in any particular year.

63. *Id.*

64. As a general matter, the SEC has jurisdiction over “issuers” (companies—domestic and foreign—with shares registered on a U.S. exchange or otherwise required to make filings with the SEC). In other words, the SEC generally does not have jurisdiction over private companies or foreign companies that are not issuers. Thus, certain DOJ corporate enforcement actions from 2017 did not have a SEC component because the companies (for instance, CDM Smith) were private companies not subject to SEC jurisdiction. Furthermore, the DOJ has criminal jurisdiction over “issuers,” “domestic concerns,” (i.e., any business entity with a principal place of business in the U.S. or organized under U.S. law), and non-U.S. companies and persons to the extent a bribery scheme involved conduct “while in the territory of the U.S.” Compared to the SEC’s civil burden of proof of “preponderance of the evidence,” the DOJ has a higher “beyond a reasonable doubt” burden of proof in a criminal prosecution. Perhaps based on this difference, several SEC enforcement actions in 2017 (such as Mondelēz International, Orthofix International, Halliburton, and Alere) did not involve a related DOJ component.

Table VII Corporate FCPA Enforcement Actions (2007–2017)⁶⁵			
Year	Core Actions	Settlement Amounts	Of Note
2007	15	\$149M	Six enforcement actions involved Iraq Oil for Food conduct and these enforcement actions comprised 40% of all enforcement actions and approximately 50% of the \$149 million amount.
2008	10	\$885M	The \$800 million Siemens enforcement action comprised approximately 90% of the \$885 million amount.
2009	11	\$645M	The \$579 million KBR / Halliburton Bonny Island, Nigeria enforcement action comprised approximately 90% of the \$645 million amount.
2010	21	\$1.4B	<p>Six enforcement actions, all resolved on the same day, involved various oil and gas companies' use of Panalpina in Nigeria. Panalpina also resolved an enforcement action on the same day.</p> <p>Two enforcement actions (Technip and Eni/Snamprogetti) involved Bonny Island conduct.</p> <p>In other words, there were 14 unique corporate enforcement actions in 2010. Of further note, the two Bonny Island enforcement actions, Technip (\$338 million) and Eni/Snamprogetti (\$365 million) comprised approximately 50% of the \$1.4 billion amount.</p>
2011	16	\$503M	The \$219 million JGC Corp. enforcement action involved Bonny Island conduct and comprised approximately 44% of the \$503 million amount.
2012	12	\$260M	No enforcement actions significantly skewed the statistics.
2013	9	\$720M	The \$398 million Total enforcement action comprised approximately 55% of the \$720 million amount.
2014	10	\$1.6B	Two enforcement actions (Alstom at \$772 million and Alcoa at \$384 million) comprised approximately 72% of the \$1.6 billion amount.
2015	11	\$139M	No enforcement actions significantly skewed the statistics.

Table VII Corporate FCPA Enforcement Actions (2007–2017) ⁶⁵			
Year	Core Actions	Settlement Amounts	Of Note
2016	27	\$2.41B	Three enforcement actions (Teva, Odebrecht/Braskem and VimpelCom) comprised approximately 56% of the \$2.41 billion amount and five enforcement actions (the three mentioned above plus JP Morgan and Embraer) comprised approximately 72% of the amount.
2017	13	\$1.13B	Two enforcement actions (Telia and SBM Offshore) comprised approximately 65% of the \$1.13 billion amount and four enforcement actions (the two mentioned above plus Rolls-Royce and Keppel Offshore & Marine) comprised approximately 88% of the amount.
Total	155	\$9.9B	

Once again, “doom and gloom” narratives aside about the future of FCPA enforcement in the Trump administration, the above tables clearly demonstrate that robust FCPA enforcement involving the same enforcement theories and same resolution vehicles has continued in the Trump administration.

As to the same enforcement theories, Table VIII below highlights the alleged “foreign officials” in 2017 corporate enforcement actions. In terms of background, the legislative history is clear that the recipient category Congress had in mind when enacting the FCPA was bona fide foreign government officials such as Presidents, Prime Ministers, and other heads of state.⁶⁶ However, in 2017 like in prior years, FCPA enforcement actions did not always involve such “foreign officials,” but rather individuals deemed “foreign officials” under creative enforcement theories not subjected to any meaningful judicial scrutiny.

66. See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012), for a detailed discussion of the FCPA’s history.

Table VIII “Foreign Officials” Alleged in 2017 Corporate Enforcement Actions	
Enforcement Action	Alleged “Foreign Officials”⁶⁷
Mondelēz International	Indian government officials to obtain licenses and approvals for a chocolate factory
Zimmer / Biomet	Mexico customs officials
SQM	Chilean politicians, political candidates, and individuals connected to them
Orthofix International	Doctors employed at government-owned hospitals
Las Vegas Sands	The enforcement action concerned the transfer of approximately \$60 million to a Consultant for the purpose of promoting Sands’ business and brands. According to the DOJ: “Several of Sands’ contracts with and payments to Consultant had no discernible legitimate business purpose, Sands senior executives were repeatedly warned about the Consultant’s dubious business practices and the high risk of Sands’ transactions with Consultant [including those involving Chinese SOEs].”

67. Mike Koehler, *The “Foreign Officials” of 2017*, FCPA PROFESSOR (Jan. 22, 2018), <http://fcpaprofessor.com/foreign-officials-2017>. Certain enforcement actions technically only involved FCPA books and records and internal control charges or findings. However, actual charges in many FCPA enforcement actions hinge on voluntary disclosure, cooperation, collateral consequences, and other non-legal issues. Thus, even if a FCPA enforcement action is resolved without FCPA anti-bribery charges, most such actions remain very much about the “foreign officials” involved—a fact evident when reading the actual enforcement action. See *supra* notes 10–60 for these enforcement actions.

Table VIII “Foreign Officials” Alleged in 2017 Corporate Enforcement Actions	
Enforcement Action	Alleged “Foreign Officials”⁶⁷
Rolls-Royce	<p>Individuals at PTT Public Company Ltd. [a Thai state-owned and state-controlled oil and gas company, which owned extensive submarine gas pipelines in the Gulf of Thailand, and was controlled by the Thai government and performed government functions that the Thai government treated as its own]</p> <p>Individuals at Petrobras [a corporation in which the Brazilian government directly owned a majority of common shares with voting rights, while additional shares were controlled by the Brazilian Development Bank and Brazil’s Sovereign Wealth Fund]</p> <p>Individuals at Asia Gas Pipeline [AGP a joint venture between Kazakh and Chinese state-owned and state-controlled entities that was designed to transport gas through a pipeline between Kazakhstan and China. AGP was controlled by the Kazakh and Chinese governments and performed government functions for Kazakhstan and China]</p> <p>Individuals at SOCAR [the Azeri state-owned and state-controlled oil and gas company]</p> <p>Individuals at SOC [South Oil Company, an Iraqi state-owned and state-controlled oil company]</p> <p>Individuals at Sonangol [an Angolan state-owned and state-controlled oil company]</p>
Linde Gas	Officials at the National High Technology Center (NHTC) of the Republic of Georgia, a 100% state-owned and-controlled entity
CDM Smith	Officials in the National Highways Authority of India (“NHAI”), India’s state-owned highway management agency
Halliburton	Sonangol official
Telia	An Uzbek government official, and a relative of a high-ranking Uzbek government official, with influence over decisions made by the Uzbek Agency for Communications and Information (“UzACT”) – this individual has been widely reported to be Gulnara Karimova]

Table VIII “Foreign Officials” Alleged in 2017 Corporate Enforcement Actions	
Enforcement Action	Alleged “Foreign Officials”⁶⁷
Alere	<p>Individuals associated with a “set of entities known as an Entidad Promotora de Salud, or EPS, which provided health insurance services for their members. These entities were created by Colombian law as part of the Colombian government’s efforts to provide universal health benefits to its citizens. Under this system, EPSs were responsible for organizing and guaranteeing the provision of health services for their enrolled participants and managing their participants’ health risks. Among other things, EPSs contracted for health services on behalf of their participants through a network of public, private, and their own health service providers. EPSs were both private and government controlled.”</p>
SBM Offshore	<p>“State-owned oil companies in Brazil, Angola, Equatorial Guinea, Kazakhstan, Iraq and elsewhere”</p> <p>Petrobras officials</p> <p>Angolan officials within Sonangol and Sonusa. [Sonusa refers to Sonangol USA Co. which is described as a Houston-Texas based company that is a wholly-owned subsidiary of Sonangol described as a state-owned and state-controlled oil company. Sonusa was controlled by the Angolan government and performed government functions for Angola.]</p> <p>Equatorial Guinean officials within GEPetrol and MMIE. GEPetrol is described as the national oil company of Equatorial Guinea, controlled by the country’s Ministry of Mines, Industry and Energy [MMIE] and performed government functions for Equatorial Guinea.</p> <p>KazMunayGas officials at least one Company 1 employee. [KazMunayGas is described as Kazakhstan’s state-owned and state-controlled oil company, controlled by the Kazakh government that performed government functions. Company 1 is described as a subsidiary of an Italian oil and gas company in which the government of Kazakhstan granted the company a concession as the operator of the Kashagan oil field development in Kazakhstan. In this capacity, Company 1 was acting in an official capacity for or on behalf of KazMunayGas in awarding contracts]. Iraqi officials within SOC. [SOC is described as South Oil Company, an Iraqi state-owned and state-controlled oil company, controlled by the Iraqi government that performed government functions.</p>
Keppel Offshore	<p>Brazilian Official 1 [described as an employee of Petrobras], Brazilian Official 2 [described as an employee of Petrobras] and the Worker’s Party [described as a political party in Brazil].</p>

As demonstrated by the above table, of the thirteen corporate enforcement actions in 2017, seven (54%) involved, in whole or in part, employees of alleged state-owned or state-controlled entities (“SOEs”) with an additional two actions (15%) involving, in whole or in part, individuals associated with foreign health care systems.

The SBM Offshore enforcement action is worthy of additional discussion because buried deep within the approximately one hundred seventy pages of resolution documents was a notable “foreign official” theory.⁶⁸ The notable theory was likely not a significant factor in the overall resolution of the matter (after all, the conduct at issue “lasted over 16 years, was carried out by employees at the highest level of the organization, including two high-level executives who were at times directors of a wholly-owned U.S. domestic concern, involved large bribe payments, and included deliberate efforts to conceal the scheme”).⁶⁹ Even so, there are two ways to look at such non-determinative allegations in FCPA enforcement actions: (1) either the DOJ (or SEC) are practicing their typing skills; or (2) the DOJ (or SEC) are using the enforcement action to send a message to the business community, regarding their FCPA interpretations. The best answer is probably the latter, and as demonstrated in the above chart, the DOJ alleged that: (1) Sonusa (a Texas-incorporated, Texas-based company) was an “instrumentality” of the Angolan government; and (2) a subsidiary of an Italian oil and gas company was an “instrumentality” of the Kazakh government because it was granted a concession by the Kazakh government and was thus “acting in an official capacity for or on behalf” of the Kazakh government.⁷⁰ In *United States v. Castle*, the Fifth Circuit correctly noted that “foreign officials” were a “well-defined group of persons.”⁷¹ However, the breadth of the above type of “foreign official” allegations are practically boundless.

In addition to the same FCPA enforcement theories and resolution vehicles continuing in the Trump administration, certain concerning enforcement statistics have also continued such as: (1) much of the largeness of corporate enforcement resulted from actions against foreign companies; (2) the continued prominence of NPAs, DPAs, and other alternative resolution vehicles to resolve corporate FCPA enforcement actions; and (3) the

68. Mike Koehler, *Issues to Consider from the SBM Offshore Enforcement Action*, FCPA PROFESSOR (Dec. 4, 2017), <http://fcpaprofessor.com/issues-consider-sbm-offshore-enforcement-action>.

69. Deferred Prosecution Agreement at 7, *United States v. SBM Offshore, N.V.*, Criminal No. 17-686, 7 FOREIGN CORRUPT PRAC. ACT REP. § 40:21 (2d ed. 2018) (S.D. Tex. 2017).

70. See *supra* Table VIII.

71. 935 F.2d 831, 836 (5th Cir. 1991).

continued lack of related individual prosecutions in connection with most corporate enforcement actions.

The first concerning statistic from 2017 corporate FCPA enforcement was, consistent with prior years,⁷² much of the largeness of corporate enforcement resulted from actions against foreign companies. Specifically, of the thirteen corporate enforcement actions from 2017, five (approximately 40%) were against foreign companies (based in many instances on the mere listing of securities on U.S. markets and in a few instances on sparse allegations of a U.S. nexus in furtherance of an alleged bribery scheme).⁷³ Even more dramatic, of the net \$1.13 billion FCPA settlement amounts from 2017 corporate enforcement actions, approximately 90% was from enforcement actions against foreign companies.⁷⁴

With one exception (Keppel Offshore—Singapore), all of the foreign companies that resolved 2017 FCPA enforcement actions were headquartered in countries that, like the U.S., are parties to the Organization for Economic Cooperation and Development (“OECD”) and Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).⁷⁵ The issue thus arises whether these FCPA enforcement actions represented a proper use of the FCPA—at least from a policy standpoint. In other words, what legitimate U.S. law enforcement interests are implicated when for example:

- A Chilean company like SQM interacts with Chilean officials?;
- A U.K. company like Rolls-Royce interacts with alleged officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola and Iraq?;
- A Swedish company like Telia interacts with Uzbekistan officials?; or
- A Dutch company like SBM Offshore interacts with alleged officials in Brazil, Angola, Equatorial Guinea, Kazakhstan and Iraq?

72. Mike Koehler, *FCPA Enforcement Actions Against Foreign Companies from OECD Convention Peer Countries*, FCPA PROFESSOR (May 3, 2017), <http://fcpaprofessor.com/fcpa-enforcement-actions-foreign-companies-oecd-convention-peer-countries>.

73. See *supra* Tables I and II.

74. See *supra* Tables I and II.

75. *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, ORG. ECON. CO-OPERATION DEV., <https://www.oecd.org/corruption/countryreports/ontheimplementationoftheoecdanti-briberyconvention.htm> (last visited Sept. 16, 2018).

Chile, the U.K., Sweden, and the Netherlands are all “peer” countries with mature FCPA-like laws governing the conduct of their companies coupled with reputable legal systems to prosecute such offenses. Given this reality, as well as the specific provision in Article 4 of the OECD⁷⁶ Convention that “[w]hen more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution,”⁷⁷ can it truly be said that the U.S. was the most appropriate jurisdiction to prosecute certain foreign companies for alleged interactions with non-U.S. officials?

In this regard, the \$30.5 million SQM enforcement action is worth contemplating as the U.S. enforcement action against the Chilean company lacked any U.S. nexus other than SQM having a form of American Depository Shares listed on the New York Stock Exchange.⁷⁸ Further, the problematic conduct was exclusively focused on the Chilean company’s conduct with Chilean officials, including political donations made by the company to Chilean politicians and candidates.⁷⁹ When thinking about FCPA enforcement actions against foreign companies based on sparse U.S. jurisdictional allegations, it is useful to think about the “flip side” of the action. The “flip side” of the SQM enforcement action would be Chile law enforcement bringing an enforcement action against a U.S. company for its interactions, including political contributions, with U.S. officials premised solely on the U.S. company listing certain of its securities on a Chilean stock exchange. Is the U.S. prepared for such a foreign prosecution of a U.S. company given that some in the world view certain aspects of the U.S. political system to be corrupt?

Even the DOJ seems to recognize the public policy issues associated with FCPA enforcement actions against foreign companies. For instance, Sandra Moser (Principal Deputy Chief of the DOJ’s Fraud Section) stated in 2017 that the DOJ is “working harder than ever to coordinate with global partners

76. *See id.*; *Country Monitoring of the OECD Anti-Bribery Convention*, ORG. ECON. CO-OPERATION DEV., <https://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Sept. 16, 2018).

77. ORG. FOR ECON. CO-OPERATION & DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS 8 (2011).

78. *See* 15 U.S.C. §§ 78m(b)(2)(B), 78m(b)(2)(A), 78m(b)(5), 78ff(a); 18 U.S.C. § 2, at 2, *United States v. Sociedad Quimica y Minera De Chile*, No. 1:17-cr-00013-TSC (D.D.C. Jan. 31, 2017) [hereinafter *Sociedad Indictment*]; *see also* *Sociedad Quimica y Minera de Chile, S.A.*, *supra* note 13 (noting the company had “been listed on the NYR since 1993”).

79. *See* *Sociedad Indictment*, *supra* note 78, at 3; *see also* *Sociedad Quimica y Minera de Chile, S.A.*, *supra* note 13 (noting the company made “improper payments” to politicians).

and avoid what some have termed ‘piling on’ in attendant global resolutions.”⁸⁰ She further stated:

Coordination with foreign countries will continue, and that number of coordinated resolutions will grow, including with new countries. This is important for several reasons. First and foremost, it is fair to companies. It encourages companies to cooperate across the board, because we understand that, at the end of a case, money paid out is derived from one pie. A resolving company should not have piled upon it duplicative fines via separate resolutions that do not credit one another. Although the ‘piling on’ problem is not entirely solved by doing this (other countries may certainly try to reach additional resolutions), our efforts do mitigate this problem, and we are trying to do better in this regard.⁸¹

In most of the 2017 enforcement actions against foreign companies highlighted above there were credits or offsets in terms of U.S. FCPA settlement amounts for related foreign law enforcement actions.⁸² However, the broader issue is whether the U.S. should have simply backed away from these enforcement actions because of the related foreign law enforcement action. For instance, an FCPA practitioner rightly observed that “[n]on-U.S. efforts to prosecute overseas bribery are hampered by the absence of clear, credible statements from U.S. prosecutors that they will desist from prosecuting if a local prosecutor does so in good faith.”⁸³ The practitioner further explained:

This matters because of the baleful, disruptive effect a U.S. prosecution has on efforts elsewhere. Simply put, U.S. prosecutors have powers that most of their European counterparts can only dream of: unfettered discretion, virtual absence of judicial control over investigations and negotiated outcomes, expansive views of their extraterritorial powers coupled with the fact that more than eighty

80. Sandra Moser, Acting Chief, U.S. Dep’t of Justice Criminal Div. Fraud Section, Remarks at the ACI 8th Global Forum on Anti-Corruption in High Risk Markets 2 (July 25, 2017) (transcript available at <https://www.scribd.com/document/355621572/Sandra-Moser-Remarks>).

81. *Id.* (emphasis in original).

82. See sources cited *supra* notes 28–29, 41–42.

83. Frederick T. Davis, *Where Are We Today in the International Fight against Overseas Corruption: An Historical Perspective, and Two Problems Going Forward*, 23 ILSA J. INT’L & COMP. L. 337, 340 (2017).

percent of international business deals are denominated in U.S. dollars, very helpful laws on corporate criminal responsibility, the risk of huge corporate penalties and the ability to cumulate such penalties, investigations that last months rather than multiple years, powers of evidence-gathering from which corporations are virtually helpless in shielding incriminating information, virtual freedom from any double jeopardy/*ne bis in idem* constraints, and flexible procedures such as DPAs and NPAs—all enable them to move more quickly, and to strike far more terror into the hearts of corporate decision-makers, than can European prosecutors.

....

This situation could lead to trouble. The “level playing field” that the OECD Convention envisioned was not only a world in which companies of all nationalities faced the same prohibitions and comparable risks of prosecution, but in which prosecutors would have an equal say in outcomes. Given the relative ineffectiveness of many countries’ efforts, the fact that the U.S. prosecutors have attempted to fill this gap is neither surprising nor, in itself, wrong. But there are already indications of resentment [in various countries]. . . .⁸⁴

In the minds of some,⁸⁵ FCPA enforcement has become a convenient cash cow for the U.S. government and the numerous (and large) 2017 enforcement actions against foreign companies, which resulted in approximately \$1 billion flowing into the U.S. treasury,⁸⁶ only amplify these concerns.

From a historical perspective, it is worth noting that part of the FCPA reform discussion in the 1980’s were bills introduced by Democrats seeking to waive the FCPA’s provisions in the case of any country which the Attorney General had certified as having “(1) effective bribery or corruption statutes; and (2) an established record of aggressive enforcement of such statutes.”⁸⁷

84. *Id.* at 340–42 (citing Frederick T. Davis, *Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws*, GLOBAL ANTICORRUPTION BLOG (Sept. 1, 2016), <https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws>).

85. Mike Koehler, “*Total*”ly Milking the FCPA Cash Cow?, FCPA PROFESSOR (June 3, 2013), <http://fcpaprofessor.com/totally-milking-the-fcpa-cash-cow>.

86. *See supra* Tables I and II.

87. Competitive America Trade Reform Act of 1985, S. 1797, 99th Cong. (1985); Competitive America Trade Reform Act of 1985, H.R. 3813, 99th Cong. (1985).

While waiving the FCPA's provisions—as those bills sought to do—does not seem like a good idea, perhaps the time has come with the maturity of the OECD Convention for U.S. enforcement agencies to adopt a policy of not bringing FCPA enforcement actions against foreign companies from peer OECD Convention countries.

The second concerning statistic from 2017 corporate FCPA enforcement was that, consistent with the trend in the FCPA's modern era, 100% of corporate enforcement actions included a DOJ NPA, DPA, or declination with disgorgement agreement or an SEC administrative action.⁸⁸ The common thread in all of these alternative resolution vehicles is the lack of meaningful judicial scrutiny. This is ironic because the FCPA enforcement agencies often preach about the rule of law and how law enforcement should be characterized by consistency and predictability.⁸⁹ For instance, in 2017 the DOJ's Deputy Assistant Attorney General Rod Rosenstein stated: "The term 'rule of law' refers to the principle that the United States is governed by law and not arbitrary decisions of government officials. Rule of law systems are characterized by consistency and predictability."⁹⁰

Moreover, in 2017 Rosenstein stated: "Corporate enforcement and settlement demands must always have a sound basis in the evidence and the law. We should never use the threat of federal enforcement unfairly to extract settlements."⁹¹

Yet, in the minds of many, the alternative resolution vehicles used in certain corporate FCPA enforcement actions are used to extract settlements⁹²

88. See *supra* Tables I and II.

89. See generally Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, Remarks at the Penn Wharton Public Policy Initiative Titled "Ethics, Business and The Rule of Law" (Sept. 18, 2017) (transcript available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-penn-wharton-public-policy>) ("Rule of law systems are characterized by consistency and predictability.").

90. *Id.*

91. Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, Keynote Address at the U.S. Chamber Institute for Legal Reform (Oct. 25, 2017) (transcript available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-morning-keynote-address-us-chamber-institute>).

92. See David W. Ogden, Partner & Chair, Gov't and Regulatory Litig. Grp., Keynote Remarks at the U.S. Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium on "The Enforcement Maze: Over-Criminalizing American Enterprise" (May 26, 2016) (transcript available at https://www.wilmerhale.com/-/media/files/Shared_Content/Editorial/News/Documents/2016-06-09-Keynote-Remarks-Delivered-at-US-Chamber-of-Commerce-Institute-for-Legal-Reform-and-National-Association-of-Criminal-Defense-Lawyers-Symposium.pdf); see also Mike Koehler, *FCPA Flash—A Conversation with David Ogden*, FCPA PROFESSOR (July 8, 2016), <http://fcpaprofessor.com/fcpa-flash-conversation-david-ogden> (providing an interview with David Ogden where he elaborated on his Keynote remarks).

and arbitrary decisions of government officials that lack consistency and predictability have been part of the FCPA conversation nearly as long as the FCPA itself. For instance, one of the best things ever written about the FCPA was penned by Robert Primoff, who stated:

The government has the option of deciding whether or not to prosecute. For practitioners, however, the situation is intolerable. We must be able to advise our clients as to whether their conduct violates the law, not whether this year's crop of administrators is likely to enforce a particular alleged violation. That would produce, in effect, a government of men and women rather than a government of law.⁹³

Although this observation was from 1982, the more things change the more they stay the same. The above comment applies with equal or greater force in the FCPA's modern era and is relevant to a development discussed in the next section (i.e., the DOJ announcing yet another non-binding FCPA enforcement policy).⁹⁴

The third concerning statistic from 2017 corporate FCPA enforcement is the general lack of individual enforcement actions in connection with most corporate enforcement actions.⁹⁵ Specifically, of the nine DOJ corporate enforcement actions in 2017, six (67%) lacked (thus far any related DOJ charges against company employees.⁹⁶ Similarly, of the seven SEC corporate enforcement actions in 2017, six (86%) lacked (thus far) any related SEC charges against company employees.⁹⁷ These 2017 enforcement statistics are generally consistent with historical averages given that approximately 80% of DOJ and SEC corporate enforcement actions since 2006 have not resulted in any related DOJ charges against company employees.⁹⁸

These statistics are all the more troubling given the DOJ's and SEC's frequent rhetoric about the importance of individual prosecutions. For instance, in 2017 DOJ enforcement officials stated: "[the DOJ is committed to holding] individuals accountable for criminal activity" and that "[e]ffective

93. Robert Primoff, *The Foreign Corrupt Practices Act: Implications for the Private Practitioner*, 9 SYRACUSE J. INT'L L. & COM. 325, 329 (1982).

94. See Rosenstein, *supra* note 5.

95. See *supra* Tables I and II, and sources cited therein.

96. See *supra* Table I, and sources cited therein.

97. See *supra* Table II, and sources cited therein.

98. See Mike Koehler, *A Focus on DOJ Individual Actions*, FCPA PROFESSOR (Jan. 17, 2018) [hereinafter Koehler, *DOJ Individual Actions*], <http://fcpaprofessor.com/focus-doj-individual-actions-2>; Mike Koehler, *A Focus on SEC Individual Actions*, FCPA PROFESSOR (Jan. 10, 2018) [hereinafter Koehler, *SEC Individual Actions*], <http://fcpaprofessor.com/focus-sec-individual-actions-2>.

deterrence of corporate corruption requires prosecution of culpable individuals. [The DOJ] should not just announce large corporate fines and celebrate penalizing shareholders.”⁹⁹

Likewise, SEC enforcement officials stated in 2017:

[C]ompanies cannot engage in bribery without the actions of culpable individuals. The Enforcement Division is broadly committed to holding individuals accountable when the facts and the law support doing so . . . individual accountability drives behavior more than corporate accountability, a point which is supported by both logic and experience. The Division of Enforcement considers individual liability in every case it investigates; it is a core principle of our enforcement program.¹⁰⁰

In 2017, the DOJ’s Rosenstein stated: “the [DOJ’s] rhetoric gets a lot of attention—the policy memos and speeches. But performance is what matters most.”¹⁰¹ Indeed, actions do speak louder than words, and similar to prior years, the DOJ’s and SEC’s rhetoric regarding individual prosecutions, at least as measured against corporate enforcement actions, remains hollow as demonstrated by the above statistics.

D. Individual DOJ and SEC FCPA Enforcement Actions

The statistics highlighted above regarding the notable gap between corporate FCPA enforcement actions and related individual enforcement against company employees was not meant to suggest that the DOJ or SEC do not bring individual FCPA enforcement actions. The next section profiles 2017 DOJ and SEC individual FCPA enforcement actions (including historical comparisons) and highlights the noticeable increase in DOJ individual enforcement actions compared to historical averages.

99. Rosenstein, *supra* note 5.

100. Steven R. Peikin, Co-Dir., SEC Enf’t. Div., Reflections on the Past, Present, and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017) (citing Responses to Written Questions from Jay Clayton to Sherrod Brown, Senator, U.S. Senate (available at <https://www.gpo.gov/fdsys/pkg/CHRG-115shrg24998/html/CHRG-115shrg24998.htm>)), (transcript available at <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>).

101. Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep’t of Justice, Keynote Address on Corporate Enforcement Policy (Oct. 6, 2017) (transcript available at https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/) [hereinafter Rosenstein, Corporate Enforcement Policy Remarks].

As demonstrated in Table IX, in 2017 the DOJ filed or announced FCPA criminal charges against eighteen individuals.

Table IX 2017 DOJ Individual FCPA Enforcement Actions		
Individuals	Employer/Former Employer	Related Corporate Enforcement Action
Juan Hernandez ¹⁰² Charles Beech Fernando Ardila ¹⁰³	Associated with various privately-held energy companies	No
Joo Hyun Bahn ¹⁰⁴ Ban Ki Sang San Woo	A commercial real estate project involving Keangnam Enterprises Co. Ltd	No
Joseph Baptiste ¹⁰⁵	Haitian focused non-profit	No
Keith Barnett ¹⁰⁶ Andreas Kohler James Finley Aloysius Zuurhout Petros Contoguris	Rolls Royce	Yes
Anthony Mace ¹⁰⁷ Robert Zubiarte	SBM Offshore	Yes

102. Press Release, U.S. Dep't of Justice, Two Businessmen Plead Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Schemes (Jan. 10, 2017), <https://www.justice.gov/opa/pr/two-businessmen-plead-guilty-foreign-bribery-charges-connection-venezuela-bribery-schemes>.

103. Press Release, U.S. Dep't of Justice, Florida Businessman Pleads Guilty in Connection with Venezuela Bribery Scheme (Oct. 11, 2017), <https://www.justice.gov/usao-sdtx/pr/florida-businessman-pleads-guilty-connection-venezuela-bribery-scheme>.

104. Press Release, U.S. Dep't of Justice, Four Individuals Charged for Alleged Involvement in Foreign Bribery Scheme Involving \$800 Million International Real Estate Deal (Jan. 10, 2017), <https://www.justice.gov/opa/pr/four-individuals-charged-alleged-involvement-foreign-bribery-scheme-involving-800-million>.

105. Press Release, U.S. Dep't of Justice, Retired U.S. Army Colonel Charged with Conspiring to Bribe Senior Officials of the Republic of Haiti (Aug. 29, 2017), <https://www.justice.gov/opa/pr/retired-us-army-colonel-charged-conspiring-bribe-senior-officials-republic-haiti>.

106. Press Release, U.S. Dep't of Justice, Five Individuals Charged in Foreign Bribery Scheme Involving Rolls-Royce Plc and Its U.S. Subsidiary (Nov. 7, 2017), <https://www.justice.gov/opa/pr/five-individuals-charged-foreign-bribery-scheme-involving-rolls-royce-plc-and-its-us>.

107. Press Release, U.S. Dep't of Justice, Two Executives Plead Guilty to Role in Foreign Bribery Scheme (Nov. 9, 2017), <https://www.justice.gov/opa/pr/two-executives-plead-guilty-role-foreign-bribery-scheme>.

Table IX 2017 DOJ Individual FCPA Enforcement Actions		
Individuals	Employer/Former Employer	Related Corporate Enforcement Action
Chi Ping Patrick Ho ¹⁰⁸ Cheikh Gadio	Associated with China Energy Fund Committee, CEFC China Energy Company Limited	No
Colin Steven ¹⁰⁹	Embraer	Yes
Jeffrey Chow ¹¹⁰	Keppel Offshore & Marine	Yes

As demonstrated by Table X, the number of DOJ individual FCPA enforcement actions in 2017 was significantly above historical averages.

Table X DOJ Individual FCPA Enforcement Actions (2007–2017)¹¹¹	
Year	Individuals Charged with Criminal FCPA Offenses
2017	18
2016	8
2015	8
2014	10
2013	12
2012	2
2011	10
2010	33 (including 22 in the manufactured Africa Sting case)
2009	18
2008	14
2007	7

108. Press Release, U.S. Dep’t of Justice, Head of Organization Backed by Chinese Energy Conglomerate, and Former Foreign Minister of Senegal, Charged with Bribing High-Level African Officials (Nov. 20, 2017), <https://www.justice.gov/opa/pr/head-organization-backed-chinese-energy-conglomerate-and-former-foreign-minister-senegal-0>.

109. Press Release, U.S. Dep’t of Justice, Former Embraer Sales Executive Pleads Guilty to Foreign Bribery and Related Charges (Dec. 21, 2018), <https://www.justice.gov/opa/pr/former-embraer-sales-executive-pleads-guilty-foreign-bribery-and-related-charges>.

110. Information at 5–6, *United States v. Chow*, No. 1:17-cr-00466-KAM (E.D.N.Y. Aug. 29, 2017).

111. Koehler, *DOJ Individual Actions*, *supra* note 98.

At first blush, it appears from Table X above that the DOJ brought numerous individual enforcement actions in 2017 when the reality is that the bulk of these actions were clustered around just a few core sets of facts. This observable fact is consistent with prior years as approximately 50% of individuals charged by the DOJ with FCPA criminal offenses since 2006 have been in just eight core actions.¹¹²

Two individual DOJ FCPA enforcement actions in 2017 are worth highlighting in greater detail. The first involved Joo Hyun Bahn, Ban Ki Sang, and San Woo, and involved a real estate project in Vietnam.¹¹³ What made the enforcement action unusual is that the third party intended to facilitate the bribery scheme of a foreign official simply pocketed the money for himself.¹¹⁴ As stated by the DOJ: “This alleged conduct proves the adage that there is truly no honor among thieves The indictment alleges that two defendants wanted to bribe a government official; instead they were defrauded by their co-defendant.”¹¹⁵ The enforcement action thus serves as an important reminder that even unsuccessful bribery schemes are actionable under the FCPA.

The second notable individual enforcement action was against Anthony Mace (the former CEO of SBM Offshore). In terms of general FCPA background:

- Criminal FCPA enforcement actions against large company employees are unusual;
- Criminal FCPA enforcement actions against high-level executives are even more unusual (the vast majority of individual criminal FCPA enforcement actions are against sales employees and agents); and
- Criminal FCPA enforcement actions against high-level executives based on schemes devised before the executive assumed their position in which the executive acted with reckless disregard / conscious avoidance are even more unusual.

Yet, the Anthony Mace enforcement action alleged the following salient issues:

112. *Id.*

113. U.S. Dep’t of Justice, *supra* note 104.

114. *See id.*

115. *Id.*

- *Before Mace became CEO*, SBM Offshore, its U.S. subsidiary, and others including certain intermediaries entered into an agreement to pay bribes to foreign officials in order to obtain or retain business for SBM Offshore in violation of the FCPA;
- When Mace became CEO of SBM Offshore, he *held oversight authority over the entire company*, including its Marketing and Sales Department and was required to personally approve payments exceeding a certain dollar amount, including those made to outside sales agents;
- At the time Mace became CEO, he was aware that paying bribes to foreign officials was a crime under the FCPA and that SBM Offshore was operating in countries with a high risk of corruption;
- Despite this, Mace joined the conspiracy by continuing to make payments that furthered the bribery scheme and deliberately avoided learning that certain payments, including payments Mace authorized and approved, were in fact bribes paid to foreign officials. Mace's deliberate avoidance was solely and entirely due to his own actions and decisions.

The Mace enforcement should be a required read for all business executives who have oversight authority over a company's operations and are frequently called upon to authorize or approve various expenditures.

U.S. v. Seng represented another notable development in DOJ individual FCPA enforcement. Although this enforcement action originated in 2015, in 2017 Seng put the DOJ to its burden of proof at trial, and after a four week trial, a federal jury convicted him of two counts of violating the FCPA, one count of paying bribes and gratuities, one count of money laundering, and two counts of conspiracy "for his role in a scheme to bribe United Nations ambassadors to obtain support to build a conference center in Macau that would host, among other events, the annual United Nations Global South-South Development Expo."¹¹⁶ The trial was notable because FCPA trials are

116. Press Release, U.S. Dep't of Justice, Chairman of a Macau Real Estate Development Company Convicted on All Counts for Role in Scheme to Bribe United Nations Ambassadors to Build a Multi-Billion Dollar Conference Center (July 28, 2017), <https://www.justice.gov/opa/pr/chairman-macau-real-estate-development-company-convicted-all-counts-role-scheme-bribe-united>.

rare and the DOJ victory in *Seng* broke a long streak of DOJ FCPA trial court debacles between 2011 and 2015.¹¹⁷

Switching from DOJ individual enforcement to SEC enforcement, as demonstrated in Table XI below, the SEC brought FCPA civil charges against three individuals in 2017.

Table XI 2017 SEC Individual FCPA Enforcement Actions		
Individual	Employer / Former Employer	Related Corporate Enforcement Action
Michael Cohen Vanja Baros ¹¹⁸	Och-Ziff	Yes
Jeannot Lorenz ¹¹⁹	Halliburton	Yes

As highlighted in Table XII below, the number of SEC individual FCPA enforcement actions in 2017 was generally consistent with historical averages.

Table XII SEC Individual FCPA Enforcement Actions (2007–2017)¹²⁰	
Year	Individuals Charged with Civil FCPA Offenses
2017	3
2016	8
2015	2
2014	2
2013	0
2012	4
2011	12
2010	7
2009	5
2008	5
2007	7

117. See Mike Koehler, *For the First Time in Six Years, the DOJ Prevails in a Contested FCPA Proceeding When Put to Its Ultimate Burden of Proof*, FCPA PROFESSOR (July 31, 2017), <http://fcpaprofessor.com/first-time-six-years-doj-prevails-contested-fcpa-proceeding-put-ultimate-burden-proof>.

118. Press Release, Securities & Exch. Comm'n, SEC Charges Two Former Och-Ziff Executives with FCPA Violations (Jan. 26, 2017), <https://www.sec.gov/news/pressrelease/2017-34.html>.

119. Halliburton Co., Exchange Act Release No. 81,222, 117 SEC Docket 5 (July 27, 2017).

120. Koehler, *SEC Individual Actions*, *supra* note 98. Yearly analysis of FCPA enforcement data and related developments can be found in the biographical footnote.

As highlighted in this section, despite “doom and gloom” predictions about FCPA enforcement (and the statute itself) in the new Trump administration, robust FCPA enforcement involving the same enforcement theories and same resolution vehicles has continued in the Trump administration. As discussed next, 2017 was also notable for enforcement agency policy and related developments.

II. OTHER NOTEWORTHY DEVELOPMENTS FROM 2017

This section discusses two notable enforcement agency policy and related developments from 2017: first, the DOJ’s announcement of an “FCPA Corporate Enforcement Policy”; and second, the Supreme Court’s unanimous decision rejecting the SEC’s position on the disgorgement remedy (the dominant remedy the SEC seeks in corporate FCPA enforcement actions). Finally, this section concludes by noting that 2017 was the 40th anniversary of the FCPA’s enactment and encourages readers to ponder, using certain 2017 enforcement statistics, whether the FCPA has been successful in achieving its objectives.

A. DOJ “FCPA Corporate Enforcement Policy”

In late 2017, the DOJ announced a new “FCPA Corporate Enforcement Policy” (CEP) representing its latest attempt (spanning over a decade) to “increase the volume of voluntary disclosures, and enhance [its] ability to identify and punish culpable individuals” by “providing additional benefits to companies based on their corporate behavior once they learn of misconduct.”¹²¹ After providing a detailed overview of the CEP, the following issues are discussed:

- The obvious logical gap in the CEP;
- Ten specific reasons why the corporate community should take the CEP with a grain of salt; and
- How the CEP falls short of accomplishing the laudable goals articulated by the DOJ compared to other alternatives previously advanced.

121. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-47.120 (2017).

For starters, the CEP is non-binding DOJ guidance. As stated by Deputy Attorney General Rosenstein: “The new policy, like the rest of the Department’s internal operating policies, creates no private rights and is not enforceable in court. . . . The new policy does not provide a guarantee. We cannot eliminate all uncertainty. Preserving a measure of prosecutorial discretion is central to ensuring the exercise of justice.”¹²²

According to the DOJ, the CEP is “aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct.”¹²³ In announcing the CEP, Deputy Attorney General Rosenstein stated:

The new policy enables the Department to efficiently identify and punish criminal conduct, and it provides guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing.

. . . .

We expect the new policy to reassure corporations that want to do the right thing. It will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals.¹²⁴

The above policy goals are nothing new. For over a decade, the DOJ has encouraged business organizations to voluntarily disclose conduct that may implicate the FCPA so that it can, among other things, increase prosecution of individuals.¹²⁵ For instance, the DOJ’s April 2016 FCPA Pilot Program stated:

The principal goal of [the Pilot] program is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct

122. Rosenstein, *supra* note 5.

123. U.S. DEP’T OF JUSTICE, *supra* note 121.

124. Rosenstein, *supra* note 5.

125. Mike Koehler, *FCPA Insanity: Doing the Same Thing Over And Over Again and Expecting Different Results*, FCPA PROFESSOR (Apr. 11, 2016), <http://fcpaprofessor.com/fcpainsanity>.

....

... [T]his pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement.¹²⁶

As stated by former DOJ FCPA Unit Chief Charles Duross and former DOJ FCPA Unit Assistant Chief James Koukios: “[t]he [CEP’s] elements largely track those of the Pilot Program.”¹²⁷ Likewise, others noted that “[w]hile Mr. Rosenstein characterized these revisions as ‘new policy,’ they largely restate the terms and definitions of the prior Pilot Program. . . .”¹²⁸ Nevertheless, the key features of the CEP are the following:

When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated . . . there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and

126. U.S. DEP’T OF JUSTICE, THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 2 (2016).

127. CHARLES E. DUROSS ET AL., BUILDING ON PILOT PROGRAM, DOJ ANNOUNCES NEW FCPA CORPORATE ENFORCEMENT POLICY (Dec. 4, 2017).

128. STEPHEN A. BEST ET AL., THE U.S. DEPARTMENT OF JUSTICE ANNOUNCES A REVISED FCPA CORPORATE ENFORCEMENT POLICY THAT ENHANCES REWARDS FOR COMPANIES THAT CHOOSE TO COOPERATE 2 (Nov. 30, 2017).

- generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.

....

The requirement that a company pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue may be satisfied by a parallel resolution with a relevant regulator (*e.g.*, the United States Securities and Exchange Commission).¹²⁹

Here again, the CEP's key features of voluntary disclosure, cooperation, and remediation are nothing new as the Pilot Program contained the same key features.¹³⁰ Nevertheless, the CEP is a bit different than the previous Pilot Program which provided that when those same three steps were met the "Fraud Section's FCPA Unit will consider a declination of prosecution."¹³¹ However, the difference between the CEP's "presumption" and the Pilot Program's "will consider" in non-binding DOJ guidance is likely slight.

Moreover, and very importantly, the "presumption" in the CEP is not a presumption that there will be no enforcement action, only that the enforcement action will take the form of disgorgement/forfeiture.¹³² As alluded to above, even if a business organization engages in the three steps contemplated by the CEP and the aggravating circumstances are not present, a business organization will still be subject to an enforcement action by the DOJ, SEC, or another relevant regulatory agency to pay "all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue."¹³³ This form of resolution is nothing new, as the DOJ publicly announced seven so-called "declinations" consistent with the previous Pilot Program.¹³⁴ Three of the so-called "declinations" involved issuers (Nortek, Akamai Technologies,

129. U.S. DEP'T OF JUSTICE, *supra* note 121.

130. *See* U.S. DEP'T OF JUSTICE, *supra* note 126.

131. *Id.*, at 9.

132. *See* U.S. DEP'T OF JUSTICE, *supra* note 121.

133. *Id.*

134. *See Declinations*, U. S. DEP'T JUST., <https://www.justice.gov/criminal-fraud/pilot-program/declinations> (last updated Aug. 23, 2018).

and Johnson Controls)¹³⁵ and thus the disgorgement was satisfied by a parallel resolution with the SEC. Four of the so-called “declinations” involved non-issuers (HMT, NCH, Linde and CDM Smith) and pursuant to these resolutions the companies were required to pay disgorgement and/or forfeiture in the following amounts: \$2.7 million; \$335,000; \$11.2 million; and \$4 million.¹³⁶ In short, the notion that the CEP provides amnesty or allows a business organization to escape an enforcement action is simply false.

If certain of the aggravating circumstances are present, the CEP states:

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and

135. See Letter from Daniel Kahn, Deputy Chief, U.S. Dep’t of Justice Criminal Div. Fraud Section, to Jay Holtmeier, Esq. & Erin G.H. Sloane, Esq., WilmerHale (June 21, 2016), <https://www.justice.gov/criminal-fraud/file/874566/download>; Letter from Daniel Kahn, Deputy Chief, U.S. Dep’t of Justice Criminal Div. Fraud Section, to Josh Levy, Esq. & Ryan Rohlfen, Esq., Ropes & Gray LLP (June 6, 2016), <https://www.justice.gov/criminal-fraud/file/865411/download>; Letter from Daniel Kahn, Deputy Chief, U.S. Dep’t of Justice Criminal Div. Fraud Section, to Luke Cadigan, Esq., K&L Gates (June 3, 2016), <https://www.justice.gov/criminal-fraud/file/865406/download>.

136. See Letter from Nicola J. Mrazek, Senior Litigation Counsel & Daniel Kahn, Chief, U.S. Dep’t of Justice Criminal Div. Fraud Section, to Nathaniel B. Edmonds, Esq., Paul Hastings LLP (June 21, 2017), <https://www.justice.gov/criminal-fraud/page/file/976976/download>; Letter from Jacob T. Elberg, Chief, U.S. Attorney’s Office Health Care & Gov’t Fraud Unit & Laura N. Perkins, Assistant Chief, & Nicholas Acker, Senior Trial Attorney, U.S. Dep’t of Justice Criminal Div. Fraud Section, to Lucinda Low, Esq. & Thomas Best, Esq., Steptoe & Johnson LLP (June 16, 2017), <https://www.justice.gov/criminal-fraud/file/974516/download>; Letter from Daniel Kahn, Deputy Chief, & Lorinda Laryea, Trial Attorney, U.S. Dep’t of Justice Criminal Div. Fraud Section, to Steven A. Tyrell, Esq. (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899116/download>; Letter from Laura N. Perkins, Assistant Chief, Rohan A. Virginkar, Trial Attorney, & Daniel S. Kahn, Deputy Chief, U.S. Dep’t of Justice Criminal Div. Fraud Section, to Paul E. Coggins, Esq. & Kiprian Mendrygal, Esq., Locke Lord LLP (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899121/download>.

- generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.¹³⁷

In this regard, the CEP is slightly different compared to the previous Pilot Program, which stated:

[I]f a criminal resolution is warranted, the Fraud Section's FCPA Unit:

- *may* accord up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought; and
- generally *should* not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.¹³⁸

Here again however, the difference between “will” and “may / should” in non-binding DOJ guidance is likely slight.

If a business organization does not voluntarily disclose, but the DOJ learns of the organization's alleged improper conduct, the CEP states (similar to the previous Pilot Program):

If a company did not voluntarily disclose its misconduct to the Department of Justice (the Department) in accordance with the standards set forth [elsewhere in the policy], but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth [elsewhere in the policy], the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.¹³⁹

With a comprehensive understanding of the CEP, the following issues are next discussed:

- The obvious logical gap in the CEP;
- How the CEP, both in terms of rhetoric and substance, is really nothing new;

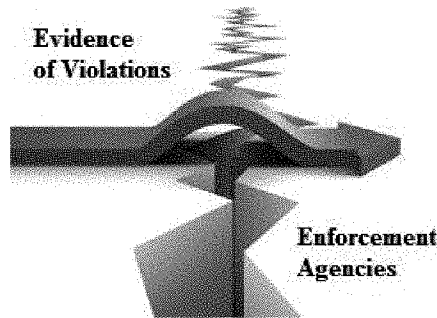
137. U.S. DEP'T OF JUSTICE, *supra* note 121.

138. U.S. DEP'T OF JUSTICE, *supra* note 126, at 8 (emphasis added).

139. U.S. DEP'T OF JUSTICE, *supra* note 121.

- Ten specific reasons why the corporate community should take the CEP with a grain of salt; and
- How the CEP falls short of accomplishing the laudable goals articulated by the DOJ compared to other alternatives previously advanced.

Prior to addressing the obvious logical gap in the CEP, it is important to understand the informational gap that the CEP (and prior to that the Pilot Program and prior to that, numerous DOJ pronouncements) seeks to address. This gap is best demonstrated by the below picture.



In other words, business organizations (whether through internal audits, compliance hotlines, or other means) often possess information that employees within the organization or third parties engaged by the organization may have violated the FCPA. Because business organizations generally do *not* have a legal obligation to disclose this information (a fact rightly recognized in the CEP and previously in the pilot program), the FCPA's dual enforcers—the DOJ and SEC—often do not learn about potential FCPA violations.¹⁴⁰ As candidly stated by then Assistant Attorney General Leslie Caldwell in connection with the Pilot Program, “the DOJ is ‘confident that there are lots of FCPA violations’ that do not come to the DOJ’s attention.”¹⁴¹ As a result, there are likely many FCPA violations (at least based on current enforcement theories) that occur in the global marketplace that are not disclosed to the

140. Mike Koehler, *Grading the DOJ's Foreign Corrupt Practices Act 'Pilot Program,'* 11 WHITE COLLAR CRIME REP. 353, 354 (Apr. 29, 2016); *see also* U.S. DEP'T OF JUSTICE, *supra* note 126, at 4 (“Nothing in the Guidance is intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options and forego the credit available under the pilot program.”).

141. Mike Koehler, *DOJ Announces “New” One-Year FCPA “Pilot Program,”* FCPA PROFESSOR (Apr. 5, 2016), <http://fcpaprofessor.com/doj-announces-new-one-year-fcpa-pilot-program>.

enforcement agencies.” Because such violations (again in the eyes of the enforcement agencies) are not disclosed to the enforcement agencies, there is no enforcement action. Because there is no enforcement action, the individual or individuals engaging in the problematic conduct will not be held legally accountable. Because the individuals are not being held legally accountable, FCPA enforcement is not as effective as it could be for achieving maximum deterrence. Indeed, in announcing the CEP, Deputy Attorney General Rod Rosenstein rightly observed that “[e]ffective deterrence of corporate corruption requires prosecution of culpable individuals.”¹⁴²

As depicted in the above picture, the FCPA enforcement landscape thus has a deep gorge, and how to bridge this gorge has long perplexed the FCPA enforcement agencies. As discussed below, encouraging voluntary disclosure of FCPA violations by business organizations has long been part of the DOJ’s FCPA talking points.

Yet, this objective suffers from an obvious logical gap in that for years the DOJ has had the opportunity to do just what the CEP (and previously the Pilot Program) seeks to accomplish. Specifically, since 2011 twenty-five corporate FCPA enforcement actions originated with voluntary disclosures.¹⁴³ However, in only five instances (20%) was there a related DOJ prosecution of a company employee.¹⁴⁴ Perhaps even more on point, since the April 2016 Pilot Program, the DOJ has self-identified seven corporate matters as being resolved consistent with the Pilot Program, yet *not one* instance resulted in a related FCPA prosecution of a company employee.¹⁴⁵ The DOJ’s stated objective in establishing the CEP thus seems to lack credibility for the simple fact that if the goal of the CEP is to encourage voluntary disclosures in order to permit the DOJ to prosecute company employees, then why have zero of the matters the DOJ has self-identified as being resolved consistently with the Pilot Program—and more broadly 80% of DOJ corporate actions over the past six years—not resulted in any related DOJ FCPA prosecution of company employees? Logical gaps aside, it is important to recognize, as alluded to above, that the CEP, both in terms of rhetoric and substance, is really nothing new.

To be clear, this section does not advocate or even imply that the corporate community should ignore the CEP. After all, the DOJ has extreme leverage over business organizations subject to FCPA scrutiny and it is always wise to at least be cognizant of what an adversary possessing a big and sharp

142. Rosenstein, *supra* note 5.

143. Statistics on file with author.

144. Statistics on file with author.

145. See sources cited *supra* 135–36.

stick is saying. Nevertheless, absent limited circumstances not often present in instances of FCPA scrutiny, how to respond to internal breaches of FCPA compliance policies is a business decision entrusted to those charged with managing the business organization. In exercising this business judgment, the corporate community should take the CEP with a grain of salt for the reasons described above and for the additional ten reasons described below.

First, as discussed above, the CEP is non-binding and commits the DOJ to absolutely nothing. Like prior DOJ FCPA guidance, such as the 2016 Pilot Program and the 2012 FCPA Guidance, in connection with release of the CEP Deputy Attorney General Rosenstein stated: “The new policy, like the rest of the Department’s internal operating policies, creates no private rights and is not enforceable in court.”¹⁴⁶

Sure, unlike prior FCPA Guidance, the CEP is incorporated into the U.S. Attorneys’ Manual but here again it is important to highlight that the first section of the USAM (1-1.200) states:

The Justice Manual provides [only] internal DOJ guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the DOJ.¹⁴⁷

Second, the notion that the CEP somehow provides immunity, a pass, or promises no enforcement action is simply false. Yet here again, certain commentators were either uninformed or suffering from Trump Derangement Syndrome. For instance, referring to the CEP Ren Steinzor (a University of Maryland law professor and member scholar at the Center for Progressive Reform) wrote:

In November 2017, Deputy Attorney General Rod Rosenstein told a group of industry executives that DOJ would not indict companies that voluntarily came forward to report violations of the Foreign Corrupt Practices Act. Although he preserved “a measure of prosecutorial discretion,” his announcement was clearly intended to eliminate an Obama-era policy that required companies to come

146. Rosenstein, *supra* note 5.

147. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 1-1.200 (2018).

forward to share information about their employees' illegal activities without receiving such assurances.¹⁴⁸

As the above information demonstrates, the notion that the CEP represents a DOJ position not to “indict companies that voluntarily c[o]me forward to report [FCPA] violations” is clearly false and the CEP is clearly an extension of the Obama-era Pilot Program not an “elimination” of the Pilot Program.¹⁴⁹

Regardless, and as highlighted above, even if a business organization does all that the DOJ wants it to do under the CEP, there is still a requirement that a “company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.”¹⁵⁰ In short, the best a business organization can do under the CEP is an FCPA enforcement action (albeit using a recently invented and creative form) and all of the potential collateral consequences of an FCPA enforcement action (negative media coverage, reputational damage, related civil litigation, etc.) are still likely to result.

Third, even gaining the greatest benefit under the CEP (a mere requirement of a disgorgement / forfeiture enforcement action) is contingent upon a business organization meeting the DOJ's vague concepts of “voluntary self-disclosure,” “full cooperation,” and “timely and appropriate remediation.”¹⁵¹ Among other key terms or concepts that the DOJ possesses absolute, unreviewable discretion over are:

- the definition of an “imminent threat of disclosure”;
- the definition of “reasonably prompt time”;
- the definition of “all relevant facts”;
- the definition of “disclosure on a timely basis of all facts relevant”;
- the definition of “proactive cooperation”;

148. Rena Steinzor, *Justice Department's Enforcement Policies Make Change for the Worse*, THE HILL (Feb. 21, 2018, 12:30 PM), <http://thehill.com/opinion/judiciary/374857-justice-depts-corporate-enforcement-policies-make-change-for-the-worse>.

149. See discussion *supra* Section A.1.

150. U.S. DEP'T OF JUSTICE, *supra* note 121.

151. *Id.*

- the definition of “timely preservation, collection, and disclosure of relevant documents and information,”;
- the definition of “de-confliction of witness interviews and other investigative steps”;
- the definition of “demonstration of thorough analysis of causes of underlying conduct”;
- the definition of “appropriate discipline of employees”;
- the definition of “appropriate retention of business records,” and
- the definition of “any additional steps that demonstrate recognition of the seriousness of the company’s misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.”¹⁵²

In short, even gaining the greatest benefit under the CEP (a mere requirement of a disgorgement / forfeiture enforcement action) is contingent upon a business organization meeting the DOJ’s *vague concepts* of various key terms. Indeed, as Deputy Attorney General Rosenstein stated: “The new policy does not provide a guarantee. We cannot eliminate all uncertainty. Preserving a measure of prosecutorial discretion is central to ensuring the exercise of justice.”¹⁵³

Fourth, gaining the greatest benefit under the CEP is further contingent upon the DOJ not finding the existence of certain “aggravating circumstances.”¹⁵⁴ As stated in the CEP, these “aggravating circumstances” are non-exclusive (which in and of itself is a big deal) and may include: “involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.”¹⁵⁵

Here again, the DOJ possesses absolute, unreviewable discretion as to the existence of “aggravating circumstances” and the DOJ has refused to provide

152. *Id.*

153. Rosenstein, *supra* note 5.

154. U.S. DEP’T OF JUSTICE, *supra* note 121.

155. *Id.*

greater clarity as to what certain key terms, such as “executive management” and “significant profit,” actually mean.¹⁵⁶

Perhaps the most vague and ambiguous term is “criminal recidivism.” Does “criminal recidivism” refer to enforceability under the FCPA or any criminal statute? Regardless of the answer, does “criminal recidivism” refer to any form of DOJ resolution, such as (in addition to actual plea agreements) deferred prosecution agreements, non-prosecution agreements, and “declinations with disgorgement”? Here again, the DOJ has refused to provide greater clarity.¹⁵⁷

Fifth, even if a business organization gains the greatest benefit under the CEP (a “mere” requirement of a disgorgement/forfeiture enforcement action) or failing this:

- (i) because of “aggravating circumstances” a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range; or
- (ii) because of the lack of voluntary disclosure an “up to a 25% reduction off of the low end of the U.S.S.G. fine range,” the DOJ possesses extreme leverage and absolute, unreviewable discretion as to what the disgorgement/forfeiture/guidelines range amounts will be.

The reality is that this “final number” is the product of and contingent upon several less than transparent discretionary calls made by the DOJ. Indeed, as FCPA practitioners have rightly observed: “the exercise of calculating tainted profits is subjective and is the focus of considerable negotiation with the DOJ (and the SEC), often involving experts. Unsurprisingly, the government’s calculation of ‘profits’ often exceeds that of the disclosing party, and the government has substantial leverage to impose its conclusion.”¹⁵⁸

Sixth, the CEP states that even if “aggravating circumstances” are present and thus a criminal resolution may be warranted that (for a company that voluntarily disclosed, fully cooperated, and timely and appropriately

156. Mike Koehler, *Mum’s the Word as the DOJ Declines to Provide Clarity About the “Aggravating Circumstances” in Its New FCPA Corporate Enforcement Policy*, FCPA PROFESSOR (Dec. 6, 2017), <http://fcpaprofessor.com/mums-word-doj-declines-provide-clarity-aggravating-circumstances-new-fcpa-corporate-enforcement-policy>.

157. *See id.*

158. ZACHARY S. BREZ ET AL., DOJ SOLIDIFIES AND SHARPENS FCPA ENFORCEMENT GUIDANCE (Dec. 5, 2017).

remediated) there will “generally” not be a requirement for “appointment of a monitor.”¹⁵⁹

While this sounds significant, in reality it isn't. In fact, very few FCPA enforcement actions in recent years against U.S. companies (as opposed to foreign companies) have required the formal appointment of a compliance monitor.¹⁶⁰ Nevertheless, in nearly all instances the DOJ has required, as a condition of settlement, that the company, through counsel, report to the DOJ (and SEC) throughout the 1–3 year term of the resolution agreement.¹⁶¹ While this is no doubt cheaper for the company than the appointment of a formal monitor, such post-enforcement action reporting requirements can easily aggregate into the millions of dollars and the CEP is silent on this form of post-enforcement action reporting.

Seventh and implicit in the above reasons as well, for why the corporate community should take the CEP with a grain of salt is perhaps obvious but bears repeating: the DOJ is an adversary.

Imagine a business organization facing an adversary in other legal actions where the adversary possesses absolute, unreviewable discretion as to how the action will be resolved. It is doubtful that any business organization would accede to the demands of this adversary and rightly so. While the DOJ possesses bigger and sharper sticks than most legal adversaries, the two simple fact remains: (1) the DOJ is an adversary to a business organization under FCPA scrutiny, and (2) a business organization has no legal or moral obligation to assist the DOJ.¹⁶² As Deputy Attorney General Rosenstein rightly noted: “Of course, companies are free to choose not to comply with the FCPA Corporate Enforcement Policy. A company needs to adhere to the policy only if it wants the Department’s prosecutors to follow the policy’s guidelines.”¹⁶³

In short, business managers and others making decisions on behalf of an organization need to understand that thoroughly investigating an issue, promptly implementing remedial measures, and effectively revising and enhancing compliance policies and procedures—all internally and without disclosing to the enforcement agencies—is a perfectly acceptable, legitimate, and legal response to FCPA issues in but all the rarest of circumstances.

159. U.S. DEP'T OF JUSTICE, *supra* note 121.

160. See Mike Koehler, *DOJ FCPA Enforcement—2017 Year in Review*, FCPA PROFESSOR (Jan. 16, 2018), <http://fcpaprofessor.com/doj-fcpa-enforcement-2017-year-review>.

161. See, e.g., *Deferred Prosecution Agreement at D-1, United States v. Keppel Offshore & Marine Ltd.*, No. 17-cr-697 (E.D.N.Y. 2017).

162. See Rosenstein, *supra* note 5.

163. *Id.*

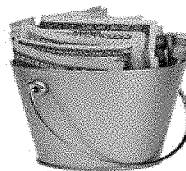
An eighth reason why the corporate community, or at least so-called “issuers” under the FCPA, should take the CEP with a grain of salt is that it is an incomplete program because issuers are subject to FCPA enforcement by both the DOJ and SEC. However, the CEP is a DOJ program only. To be sure, just like the DOJ, the SEC has long encouraged voluntary disclosure of FCPA violations coupled with repeated assurances that voluntary disclosure will result in meaningful credit.¹⁶⁴ However, unless and until the SEC articulates a similar FCPA program (a program that will likely suffer from the same deficiencies as the DOJ’s program), the CEP addresses only half of the enforcement landscape facing issuers.

The ninth and perhaps the biggest reason why the corporate community should take the CEP with a grain of salt is that it only addresses a relatively minor component of the overall financial consequences to a business organization that is the subject of FCPA scrutiny and enforcement.

For obvious reasons, settlement amounts in an FCPA enforcement action tend to get the most attention. After all, settlement amounts are mentioned in DOJ/SEC press releases, press releases generate media coverage, and the corporate community reads the media. However, knowledgeable observers recognize, as depicted in the below representative picture, that FCPA scrutiny and enforcement results in “three buckets” of financial exposure to a business organization.¹⁶⁵



Pre-Enforcement Action
Professional Fees and Expenses



Enforcement Action Day



Post-Enforcement Action
Professional Fees and Expenses

164. See Andrew Ceresney, Dir., Securities and Exch. Comm’n Div. of Enft, Keynote Speech at the ACI’s 33rd International Conference on the FCPA (Nov. 30, 2016) (transcript available at <https://www.sec.gov/news/speech/speech-ceresney-113016.html>).

165. See Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391, 393–94 (2014).

In nearly every instance of FCPA scrutiny and enforcement, bucket #1 (pre-enforcement action professional fees and expenses) is the largest financial hit to a business organization. The reasons for this are both practical and potentially provocative.¹⁶⁶ In terms of the practical, all instances of FCPA scrutiny have a point of entry, for instance problematic conduct in China that then often results (if there is a voluntary disclosure) in the “where else” question from the enforcement agencies which often prompts the company under scrutiny to conduct a much broader review of its business operations. In terms of the provocative, FCPA scrutiny arising from voluntary disclosure can easily become a billing boondoggle for FCPA Inc. participants.

A couple of specific examples highlight how extensive pre-enforcement action professional fees and expenses can become.

For instance, Avon resolved an FCPA enforcement action for \$135 million in aggregate DOJ and SEC settlement amounts but disclosed approximately \$550 million in pre-enforcement action professional fees and expenses (a 2.5:1 ratio compared to the settlement amount). Likewise, Bruker Corp. resolved an FCPA enforcement action for \$2.2 million, but disclosed approximately \$22 million in pre-enforcement action professional fees and expenses (a 10:1 ratio).¹⁶⁷

Similarly, Hyperdynamics resolved an FCPA enforcement action for \$75,000, but disclosed approximately \$12.7 million in pre-enforcement action professional fees and expenses (a 170:1 ratio).¹⁶⁸ Perhaps most eye-popping, NATCO group resolved an FCPA enforcement action for \$65,000, but disclosed approximately \$11 million in pre-enforcement action professional fees and expenses (a 170:1 ratio).¹⁶⁹

Even if the CEP was binding on the DOJ (which it is not), the fact is the policy only addresses bucket #2 (settlement amount) and does not address pre-enforcement action professional fees and expenses—the biggest financial hit to a business organization that is the subject of FCPA scrutiny.

166. *See id.* at 396–98.

167. Mike Koehler, *Ten Reasons Why the Corporate Community Should Take the DOJ's "FCPA Corporate Enforcement Policy" with a Grain of Salt*, FCPA PROFESSOR (Dec. 7, 2017), <http://fcpaprofessor.com/ten-reasons-corporate-community-take-doj-fcpa-corporate-enforcement-policy-grain-salt>.

168. Mike Koehler, *Hyperdynamics Resolves FCPA Enforcement Action for \$75,000, but Spends \$12.7 Million to Get There*, FCPA PROFESSOR (Sept. 30, 2015), <http://fcpaprofessor.com/hyperdynamics-resolves-fcpa-enforcement-action-for-75000-but-spends-12-7-million-to-get-there>.

169. Koehler, *supra* note 165 at 397 (citing Nathan Vardi, *The Bribery Racket*, FORBES (June 7, 2010), <https://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html#68a0ac3f1b5a>).

On this issue, it is perhaps notable that the CEP falls short and is less explicit than the 2016 FCPA Pilot Program. On the issue of internal investigations, the prior Pilot Program stated:

[T]he Fraud Section does not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company. Nor do we generally expect a company to investigate matters unrelated in time or subject to the matter under investigation in order to qualify for full cooperation credit. An appropriately tailored investigation is what typically should be required to receive full cooperation credit; the company may, of course, for its own business reasons seek to conduct a broader investigation.

....

For instance, absent facts to suggest a more widespread problem, evidence of criminality in one country, without more, would not lead to an expectation that an investigation would need to extend to other countries. By contrast, evidence that the corporate team engaged in criminal misconduct in overseeing one country also oversaw other countries would normally trigger the need for a broader investigation. In order to provide clarity as to the scope of an appropriately tailored investigation, the business organization (whether through internal or outside counsel, or both) is encouraged to consult with Fraud Section attorneys.”¹⁷⁰

This language followed then Assistant Attorney General Caldwell’s April 2015 statement that the DOJ “do[es] not expect companies to aimlessly boil the ocean” in FCPA investigations.¹⁷¹ The mention of the scope and breath of FCPA internal investigation in the 2016 Pilot Program was welcomed by the corporate community and the absence of this issue in the CEP is notable.

Yet another reason why the corporate community should take the CEP with a grain of salt is that it does not address the many other “ripple effects” of FCPA scrutiny and enforcement.

A company (particularly an issuer) subject to FCPA scrutiny and enforcement will often also experience several other negative financial

170. U.S. DEP’T OF JUSTICE, *supra* note 126, at 6 & n.5.

171. Leslie R. Caldwell, Assistant Attorney General, U.S. Dep’t of Justice, Remarks at New York University Law School’s Program on Corporate Compliance and Enforcement (Apr. 17, 2015) (transcript available at <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law>).

consequences above and beyond the “three buckets” of financial exposure highlighted above.¹⁷² Such financial consequences can include a drop in market capitalization, an increase in the cost of capital, a negative impact on merger and acquisition activity, lost or delayed business opportunities, and shareholder litigation.¹⁷³ In certain cases, these other negative financial consequences can far exceed even the “three buckets” of financial exposure.¹⁷⁴

Moreover, FCPA scrutiny and enforcement actions are increasingly spawning related foreign law enforcement investigations and enforcement actions. Indeed, as the DOJ is fond of saying, “an international approach is being taken to combat an international criminal problem. We are sharing leads with our international law enforcement counterparts, and they are sharing them with us.”¹⁷⁵

In short, corporate leaders need to fully understand and appreciate (in addition to the specific issues discussed above) that a voluntary disclosure of potential FCPA violations is going to set into motion a wide-ranging sequence of events that will be far more costly to the company than any marginal settlement amount benefit obtained through the CEP.

The deep gorge in the FCPA enforcement landscape visually depicted earlier in this section is a concerning policy issue and it is a laudable goal of the CEP (as well as the prior Pilot Program) to encourage voluntary disclosure in order to enhance the DOJ’s “ability to identify and punish culpable individuals.”¹⁷⁶

However, there is an even better alternative than the CEP to bridge this gap. In this regard, it is notable that the CEP, which is after all based on the 2016 Pilot Program, is widely viewed as the brainchild of Andrew Weissmann (whose signature appears on the Pilot Program).¹⁷⁷ Prior to Weissmann becoming Chief of the DOJ’s Fraud Section in January 2015, he was a vocal critic of various aspects of the DOJ’s FCPA enforcement program as well as corporate criminal liability principles generally.¹⁷⁸ Among other things, Weissmann advocated for an FCPA compliance defense and stated:

172. To learn more about this dynamic including specific examples, see Koehler, *supra* note 167.

173. Koehler, *supra* note 165, at 393.

174. *Id.* at 451.

175. U.S. DEP’T OF JUSTICE, *supra* note 126, at 2.

176. *See id.*; Rosenstein, *supra* note 5.

177. *See* U.S. DEP’T OF JUSTICE, *supra* note 126, at 9.

178. *See generally* Mike Koehler, *FCPA Enforcement Critic and Reform Advocate Selected as New DOJ Fraud Section Chief*, FCPA PROFESSOR (Jan. 12, 2015), <http://fcpaprofessor.com/fcpa-enforcement-critic-and-reform-advocate-selected-as-new-doj->

The FCPA should incentivize the company to establish compliance systems that will actively discourage and detect bribery, but should also permit companies that maintain such effective systems to avail themselves of an affirmative defense to charges of FCPA violations. This is so because in such countries even if companies have strong compliance systems in place, a third-party vendor or errant employee may be tempted to engage in acts that violate the business's explicit anti-bribery policies. It is unfair to hold a business criminally liable for behavior that was neither sanctioned by or known to the business.¹⁷⁹

According to Weissmann, an FCPA compliance defense as well as other FCPA reforms he advocated were “best suited for Congressional action.”¹⁸⁰ In other words, Weissmann did not believe that changes to DOJ policy (which is all that the CEP and before that the Pilot Program represent) were enough. Moreover, when the DOJ announced in Fall 2015 the appointment of a compliance counsel to assist DOJ prosecutors in evaluating corporate compliance programs at the time of improper conduct to determine if fine reductions were warranted,¹⁸¹ Weissmann (widely viewed as the architect of this position as well)¹⁸² stated that a motivation in creating the position was to “empower a robust compliance function within organizations.”¹⁸³ Asked what he “hope[d] to accomplish in general and specifically to assist the compliance professional,” Weissmann responded: “I hope that, in seeing how seriously the Department of Justice takes compliance, we will strengthen the voice of the compliance professionals and help them get a stronger seat at the table as a key stakeholder in how businesses are run.”¹⁸⁴

Whether it's the CEP's goal to, in the words of Deputy Attorney General Rosenstein, “motivate[] and reward[] companies that want to do the right

fraud-section-chief (highlighting Weissmann's position and including links to original source documents).

179. ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 6–7 (U.S. Chamber Inst. for Legal Reform 2010).

180. *Id.* at 7.

181. See Press Release, U.S. Dep't of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 2, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download>.

182. See Interview by Laura Jacobus with Hui Chen, U.S. Dep't of Justice Compliance Expert & Andrew Weissmann, Chief of U.S. Dep't of Justice Criminal Div. Fraud Section (Feb. 2, 2016), <https://connects.ethics.org/blogs/laura-jacobus/2016/02/01/doj-interview>.

183. *Id.*

184. *Id.*

thing and voluntarily disclose misconduct,”¹⁸⁵ the prior Pilot Program’s goal of “encourage[ing] companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations,”¹⁸⁶ or simply to best “empower a robust compliance function within organizations” and best “strengthen the voice of the compliance professional[] [to] help them get a strong seat at the table.”¹⁸⁷ there are better alternatives to accomplish these laudable goals.

Like several former high-ranking DOJ officials and others, this author has long argued that an FCPA compliance defense (an actual statutory amendment, not merely a change in non-binding DOJ internal policy that grants the DOJ a wide amount of discretion) can best allow the FCPA enforcement agencies to accomplish their stated objectives.¹⁸⁸ My 2012 Article “Revisiting a Foreign Corrupt Practices Act Compliance Defense” I stated:

An FCPA compliance defense will better facilitate the DOJ’s prosecution of culpable individuals and advance the objectives of its FCPA enforcement program. At present, business organizations that learn through internal reporting mechanisms of rogue employee conduct implicating the FCPA are often hesitant to report such conduct to the enforcement authorities. In such situations, business organizations are rightfully diffident to submit to the DOJ’s opaque, inconsistent, and unpredictable decision-making process and are rightfully concerned that its pre-existing FCPA compliance policies and procedures and its good-faith compliance efforts will not be properly recognized. The end result is that the DOJ often does not become aware of individuals who make improper payments in violation of the FCPA and the individuals are thus not held legally accountable for their actions. An FCPA compliance defense surely will not cause every business organization that learns of rogue employee conduct to disclose such conduct to the enforcement agencies. However, it is reasonable to conclude that an FCPA compliance defense will cause more organizations with robust FCPA compliance policies and procedures to disclose rogue employee conduct to the enforcement agencies. Thus, an FCPA compliance

185. Rosenstein, *supra* note 5.

186. U.S. DEP’T OF JUSTICE, *supra* note 126.

187. Interview by Laura Jacobus, *supra* note 182.

188. Mike Koehler, *Revisiting a Foreign Corrupt Practices Compliance Defense*, WIS. L. REV. 609, 609 (2012).

defense can better facilitate DOJ prosecution of culpable individuals and increase the deterrent effect of FCPA enforcement actions.¹⁸⁹

This was written before the 2016 Pilot Program and obviously before the CEP, but the logic still remains sound. Another policy objective that a compliance defense can achieve better than the CEP is increasing “soft enforcement” of the FCPA. In other words, a compliance defense can best incentivize business organizations to implement more robust FCPA policies and procedures and more robust policies and procedures can reduce instances of improper conduct and thereby advance the FCPA’s objectives. Critics of an FCPA compliance defense have ignored its potential “soft enforcement” impact focusing instead on “hard enforcement” issues such as the possibility that the defense would prove to be unworkable in a contested proceeding or lack practical value given that business organizations tend not to put the FCPA enforcement agencies to their burdens of proof.¹⁹⁰

Such criticisms of a compliance defense miss the point entirely. In passing the FCPA, Congress anticipated that the “criminalization of foreign corporate bribery will to a significant extent act as a self-enforcing preventative mechanism.”¹⁹¹ Likewise, since the FCPA’s earliest days, the DOJ has recognized that the “most efficient means of implementing the FCPA is voluntary compliance by the American business community.”¹⁹² Indeed, Weissmann himself previously stated that FCPA reform should best motivate compliance “on a daily basis” and “regardless of what the DOJ is doing.”¹⁹³

This is precisely what a compliance defense can better accomplish than the CEP. To best conceptualize this issue, consider three scenarios:

- Scenario A: the landscape for at least the past decade with the italicized language representing the prior Pilot Program and DOJ compliance counsel position.

189. *Id.* at 659.

190. See Thomas R. Fox, *Why a Compliance Defense Will Not Make a Compliance Program Effective*, FCPA COMPLIANCE & ETHICS (Sept. 18, 2013), <http://fcpacompliancereport.com/2013/09/why-a-compliance-defense-will-not-make-a-compliance-program-effective>.

191. S. REP. NO. 93-114, at 10 (1977).

192. *Justice Outlines Priorities in Prosecuting Violations of Foreign Corrupt Practices Act*, AMERICAN BANKER (Nov. 21, 1979).

193. *Examining Enforcement of the Foreign Corrupt Practices Act: Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 117th Cong. 20 (2010) (statement of Andrew Weissmann, Partner, Jenner & Block, LLP).

- Scenario B: the new landscape as a result of the CEP.
- Scenario C: the landscape if the FCPA were amended to include a compliance defense.

Ask yourself under which scenario is a compliance officer most likely to receive the budget and internal support to adopt best-in-class FCPA compliance policies?

Scenario A

Compliance Officer: Boss, I need more money and resources to devote to FCPA compliance.

Executive: Why?

Compliance Officer: Well, boss, if anything ever happens within our business organization, an effective FCPA compliance program can lessen the impact of our legal liability.

Executive: What do you mean?

Compliance Officer: Well, the money we spend on FCPA compliance will not eliminate our legal exposure, but the DOJ (and SEC) have said that the existence of an effective compliance program may perhaps lower our criminal or civil fine or penalty amount and perhaps even persuade an enforcement attorney to go lightly on us in case our compliance program is ever circumvented by an employee. *Indeed, the DOJ has non-binding guidance under which it may offer us a criminal fine reduction to the extent we voluntarily disclose any conduct in breach of our FCPA policies, cooperate with the enforcement agencies, and remediate. Moreover, the DOJ has a compliance consultant on its staff who is going to assist DOJ prosecutors in evaluating our compliance program at the time of the improper conduct to see if we should qualify for a fine reduction.*

Scenario B

Compliance Officer: Boss, I need more money and resources to devote to FCPA compliance.

Executive: Why?

Compliance Officer: Well, boss, if anything ever happens within our business organization, an effective FCPA compliance program can lessen the impact of our legal liability.

Executive: What do you mean?

Compliance Officer: Well, the money we spend on FCPA compliance will not eliminate our legal exposure, but the DOJ (and SEC) have said that the existence of an effective compliance program may perhaps lower our criminal or civil fine or penalty amount and perhaps even persuade an enforcement attorney to go lightly on us in case our compliance program is ever circumvented by an employee. In fact, the DOJ has a non-binding program which states that if a company has voluntarily disclosed misconduct, fully cooperated, and timely and appropriately remediated, there will be a presumption that the company will receive a declination absent various vague aggravating circumstances, subject, of course, to the requirement that we pay all disgorgement, forfeiture, and/or restitution resulting from the alleged misconduct.

Scenario C

Compliance Officer: Boss, I need more money and resources to devote to FCPA compliance.

Executive: Why?

Compliance Officer: Well, boss, an effective FCPA compliance program can reduce our legal exposure as a matter of law.

Executive: What do you mean?

Compliance Officer: Well, the money we spend on investing in FCPA best practices will be relevant as a matter of law. In other words, if we make good faith efforts to comply with the FCPA when doing business in the international marketplace, we will not face any legal exposure when a non-executive employee or agent acts contrary to our compliance policies and/or circumvents our policies.

Scenario C will likely best allow the compliance officer to receive the budget and support needed to most effectively do his/her job. An FCPA compliance defense will not magically result in 100% best-in-class FCPA

compliance in all business organizations or cause all business organizations to disclose all FCPA violations. However, the DOJ's announcement of the CEP in 2017 (and prior to that the Pilot Program in 2016) are not the best answers if the DOJ's true goals are to "motivate[] and reward[] companies that want to do the right thing and voluntarily disclose misconduct,"¹⁹⁴ "encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations,"¹⁹⁵ best "empower a robust compliance function within organizations" and best "strengthen the voice of the compliance professional[] and help them get a strong seat at the table."¹⁹⁶

In short, while certain FCPA commentators have called the CEP a "bold new" development¹⁹⁷ this section exposes an obvious logical gap in the CEP and uses the DOJ's own prior words and practices to demonstrate how the CEP, both in terms of rhetoric and substance, is really nothing new. Because of this, the corporate community should take the CEP with a grain of salt. While the CEP's objectives are certainly laudable, it falls short of accomplishing these goals compared to an FCPA compliance defense.

B. Supreme Court Unanimously Rejects the SEC's Disgorgement Position in Kokesh

Another notable development from 2017 was the Supreme Court's rejection of the SEC's disgorgement position in *SEC v. Kokesh*.¹⁹⁸ The issue before the court in *Kokesh* was whether SEC disgorgement is subject to a five-year statute of limitations and in a unanimous decision authored by Justice Sotomayor the court rejected the SEC's position and held that "[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of [28 U.S.C.] § 2462 and so disgorgement actions must be commenced within five years of the date the claim accrues."¹⁹⁹

194. Rosenstein, *supra* note 5.

195. U.S. DEP'T OF JUSTICE, *supra* note 126.

196. Interview by Laura Jacobus, *supra* note 182.

197. LOUIS RAMOS ET AL, NEW FCPA ENFORCEMENT POLICY PRESUMES DECLINATION FOR COMPANIES THAT VOLUNTARILY DISCLOSE, COOPERATE, AND REMEDIATE 1 (Nov. 30, 2017).

198. *See Kokesh v. SEC*, 137 S. Ct. 1635, 1639–41 (2017).

199. *Id.* *Kokesh* represented the second time in recent years in which the Supreme Court unanimously rejected the SEC's statute of limitations position. In the 2013 case of *Gabelli v. SEC*, the Supreme Court also unanimously rejected the SEC's expansive interpretation of 28 U.S.C. § 2462 in cases involving civil penalties. *See Gabelli v. SEC*, 568 U.S. 442, 449, 454 (2013). Specifically, the Supreme Court rejected the SEC's argument that a discovery rule should be read into § 2462 under which accrual is delayed until a plaintiff has "discovered" the cause of action. *Id.* (citing *Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010)). The Supreme

Although *Kokesh* did not involve an SEC FCPA enforcement action, the case was FCPA relevant because the disgorgement remedy at issue in *Kokesh* is the same disgorgement remedy the SEC frequently seeks in corporate FCPA enforcement actions. For instance, in the 2012 FCPA Guidance, the DOJ/SEC boldly proclaimed: “The five-year limitations period [applicable to the FCPA] applies to SEC actions seeking civil penalties, but it does not prevent SEC from seeking equitable remedies, such as an injunction or the disgorgement of ill-gotten gains, for conduct pre-dating the five-year period.”²⁰⁰ Indeed, since the SEC first sought a disgorgement remedy in a 2004 FCPA enforcement action, disgorgement has become the dominant remedy sought by the SEC in corporate FCPA enforcement actions including for conduct seemingly beyond the five-year limitations period.²⁰¹ Accordingly, *Kokesh* should impact SEC FCPA enforcement against issuers. However, statute of limitations issues are meaningless when, as often occurs, issuers under FCPA scrutiny waive statute of limitations defenses or agree to toll the statute of limitations.²⁰² Thus, whether *Kokesh* will impact SEC FCPA enforcement depends on whether issuers will continue to roll over and play dead when under FCPA scrutiny or actually mount a defense.

As stated by an FCPA practitioner (and former SEC Enforcement Division attorney and DOJ Fraud Section prosecutor):

At bottom, acceding to an SEC request for a tolling agreement is often a one-way bargain—the SEC can continue its investigation at a languid pace, and the individual or entity is not given any *real* benefit,

Court stated that a discovery rule has merit where the plaintiff is a defrauded victim seeking recompense, but that a discovery rule does not have merit when the plaintiff is the SEC in an enforcement action seeking civil penalties. *See id.* at 449–52.

200. CRIMINAL DIV. OF THE U.S. DEP’T OF JUSTICE & THE ENF’T DIV. OF THE U.S. SECURITIES AND EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 35 (2012).

201. *See* Koehler, *supra* note 160.

202. *See generally* Newmont Mining Corp., Quarterly Report (Form 10-K) (March 31, 2017) (“We are conducting an investigation, with the assistance of outside counsel, relating to certain business activities of the Company and its affiliates and contractors in countries outside the U.S. The investigation includes a review of compliance with the requirements of the U.S. Foreign Corrupt Practices Act and other applicable laws and regulations. The Company has been working with the U.S. Securities and Exchange Commission (“SEC”) and the U.S. Department of Justice with respect to the investigation. In March 2016, the Company entered into a one-year agreement with the U.S. SEC tolling the statute of limitations relating to the investigation, and in April 2016, entered into a similar agreement with the U.S. Department of Justice. Both of the initial tolling agreements were effective through October 29, 2016. In September 2016, the Company agreed to extend its tolling agreement with the Department of Justice through April 2017, and agreed to a similar extension with the SEC in October 2016.”).

except the continued specter of living under a lengthy investigation, the timing of which is solely in the hands of the government. Often lost on the enforcers is the personal or operational toll that living under the uncertainty of a lengthy government investigation causes[—]a toll that statutes of limitations were partly designed to alleviate. While the assumed benefit to a tolling agreement is that the SEC will not preemptively charge in order to avoid forfeiting its ability to later do so, that suggests that absent agreeing to a tolling agreement, the SEC would prematurely charge a half-baked case. That seems a bluff worthy of calling.

Corporations, more so than individuals, traditionally shy away from truly challenging SEC enforcement actions, especially FCPA actions. In the forty years of FCPA enforcement, no corporation has ever fully litigated the FCPA and taken the Commission to trial. Although every inquiry is fact dependent, there is an established pattern of corporations proving their cooperation to reach a settlement, and that often involves one or more tolling agreements. However, *Kokesh* and *Gabelli* should at least alter the calculus that goes into making that decision. Those with a valid statute of limitations defense to some or all of the potential claims against them should zealously guard that defense and press the SEC as to how it will prevail on violations occurring outside the five-year window.²⁰³

Since the Supreme Court's June 2017 decision in *Kokesh*, the SEC has brought three corporate actions (Halliburton, Telia and Alere) and every enforcement action included a disgorgement remedy based on conduct seemingly beyond any conceivable statute of limitations.²⁰⁴ Thus, at least based on publicly-available resolution documents, *Kokesh* seems not to have had an impact on SEC FCPA enforcement. What impact *Kokesh* may be having on non-public SEC deliberations is more difficult to access, but in

203. Mike Koehler, *Statute of Limitations Tolling in SEC Enforcement Actions Post-Kokesh—An Offer You Can Refuse*, FCPA PROFESSOR (Dec. 21, 2018), <http://fcpaprofessor.com/statute-limitations-tolling-sec-enforcement-actions-post-kokesh-offer-can-refuse>.

204. See Mike Koehler, *FCPA and Then Some as Alere Resolves SEC Enforcement Action*, FCPA PROFESSOR (Sept. 29, 2017) (citing *Alere, Inc.*, *supra* note 44), <http://fcpaprofessor.com/fcpa-alere-resolves-sec-enforcement-action>; Mike Koehler, *Issues to Consider from the Halliburton Enforcement Action*, FCPA PROFESSOR (Aug. 2, 2017), <http://fcpaprofessor.com/issues-consider-halliburton-enforcement-action>; Mike Koehler, *Issues to Consider from the Telia Enforcement Action*, FCPA PROFESSOR (Sept. 25, 2017), <http://fcpaprofessor.com/issues-consider-telia-enforcement-action>.

November 2017 Steven Peikin (Co-Director of the SEC's Enforcement Division) stated:

Kokesh is a very significant decision that has already had an impact across many parts of our enforcement program. I expect it will have particular significance for our FCPA matters, where disgorgement is among the remedies typically sought.

While the ultimate impact of *Kokesh* on SEC enforcement as a whole[—]and FCPA enforcement specifically[—]remains to be seen, we have no choice but to respond by redoubling our efforts to bring cases as quickly as possible. Even irrespective of *Kokesh*, this approach makes sense because our cases have the highest impact, and our litigation efforts are most effective, when we bring our cases close in time to the alleged wrongful conduct.”²⁰⁵

Given that 4.5 years was the median length of time business organizations that resolved FCPA enforcement actions in 2017 were under scrutiny,²⁰⁶ anything that causes the FCPA enforcement agencies to bring “cases close in time to the alleged wrongful conduct” represents a public policy victory including for business organizations subject to the FCPA.

In short, the Supreme Court's unanimous decision in *Kokesh* should impact SEC FCPA enforcement, but whether it will impact FCPA enforcement remains to be seen. On this score and more broadly, it was hard to ignore the following footnote in *Kokesh*:

Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.²⁰⁷

205. Steven R. Peikin, Co-Dir., U.S. Sec. & Exch. Comm'n Enf't Div., Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act (Nov. 9, 2017) (transcript available at <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>).

206. Mike Koehler, *The Gray Cloud of FCPA Scrutiny Lasted Too Long in 2017*, FCPA PROFESSOR (Jan. 4, 2018), <http://fcpaprofessor.com/gray-cloud-fcpa-scrutiny-last-ed-long-2017>.

207. *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017).

During oral argument in *Kokesh*, several justices across the ideological spectrum seemed concerned about the lack of a specific statutory basis for SEC disgorgement. For instance, Justice Ginsberg stated:

Certainly disgorgement was not in the days of the common law what it is today. Yet the SEC has been asking for this kind of relief now for, what, over 30 years?

Has there been any effort, any activity in Congress to make this clear, one way or another, whether disgorgement fits with forfeiture?²⁰⁸

Justice Alito noted:

Well, this case puts us in a rather strange position, because we have to decide whether this is a penalty or a forfeiture. But in order to decide whether this thing is a penalty or a forfeiture, we need to understand what this thing is. And in order to understand what it is, it would certainly be helpful and maybe essential to know what the authority for it is.

So how do we get out of that—out of that situation? How do we decide whether it is a penalty or a forfeiture without fully understanding what this form of this remedy or this, whatever it is, where it comes from and—and its exact nature?”²⁰⁹

Justice Sotomayor asked: “Could Congress pass a statute giving the SEC the authority to bring these actions for however long a period Congress chooses?”²¹⁰ Justice Kagan directed the following question to the SEC attorney and thereafter commented:

Ms. Goldenberg . . . has the SEC or has the Justice Department ever set down in writing what the guidelines are for how the SEC is going to use disgorgement and what’s going to happen to the monies collected?

208. Transcript of Oral Argument at 7, *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

209. *Id.* at 13.

210. *Id.* at 25.

....

I must say I find it unusual that the SEC has not given some guidance to its enforcement department or—or that the Department of Justice hasn't become involved in some way; that—that everything is just sort of up to the particular person at the SEC who decides to bring such a case.²¹¹

Chief Justice Roberts stated:

One reason we have this problem is that the SEC devised this remedy or relied on this remedy without any support from Congress. If Congress had provided, here's a disgorgement remedy, you would expect them, as they typically do, to say, here's a statute of limitations that goes with it. And including, as your friend says, usually a statute of limitations and an accompanying statute of repose.

Now, it was a concern—you know, Chief Justice Marshall said it was utterly repugnant to the genius of our laws to have a penalty remedy without limit. Those were the days when you could write something like that and it's about a statute of limitations. It's utterly repugnant.

And it—the concern, it seems to me, is multiplied when it's not only no limitation, but it's something that the government kind of devised on its own. I mean, I think—doesn't that cause concern?

....

... But it does seem to me that we kind of have a special obligation to be concerned about how far back the government can go when it's something that Congress did not address because it did not specify the remedy.²¹²

If the *Kokesh* footnote was indeed inviting a future case that squarely addresses the statutory basis for the SEC seeking a disgorgement remedy, such a case could have an even bigger impact on the SEC's FCPA enforcement program.

211. *Id.* at 29–30.

212. *Id.* at 31–33.

C. The FCPA Turns 40

The detailed analysis of 2017 FCPA enforcement and related developments in this article would be deficient without at least mentioning that the FCPA turned forty years old in 2017²¹³—a development bound to occur regardless of who won the 2016 Presidential election and regardless of the enforcement theories advanced and resolution vehicles used in FCPA enforcement actions. Upon the 40th anniversary of the FCPA, it is appropriate to ask the salient question of whether the FCPA been successful in achieving its objectives? Of course, to answer this question success in the FCPA context must first be defined and admittedly, this is no easy task as there are various plausible meanings of success in the FCPA context—from “hard” enforcement metrics (such as the number of actual FCPA enforcement actions as well as outcomes in actual FCPA actions when government enforcement agencies are put to their burden of proof) to “soft” enforcement metrics (such as deterrence and voluntary compliance with the FCPA’s provisions), to “modeling” dynamics (namely whether the pioneering FCPA law motivated other countries to enact similar laws).

Completely analyzing the question of whether the FCPA has been successful in achieving its objectives is beyond the scope of this Article and deserving of its own separate article. Yet, as relevant to 2017 FCPA enforcement consider that three of the thirteen corporate enforcement actions (approximately 25%) involved repeat offenders.²¹⁴ Specifically, in addition to resolving FCPA enforcement actions in 2017:

- In 2012, Biomet resolved a \$22.68 million FCPA enforcement action involving alleged conduct in Brazil, Argentina, and China.²¹⁵

213. See Mike Koehler, *The FCPA Turns 40*, FCPA PROFESSOR (Dec. 20, 2017), <http://fcpaprofessor.com/fcpa-turns-40>.

214. See Mike Koehler, *Corporate FCPA Repeat Offenders*, FCPA PROFESSOR (Aug. 3, 2017), <http://fcpaprofessor.com/corporate-fcpa-repeat-offenders>.

215. See Press Release, U.S. Dep’t of Justice, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), <https://www.justice.gov/opa/pr/third-medical-device-company-resolves-foreign-corrupt-practices-act-investigation>; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), <https://www.sec.gov/news/press-release/2012-2012-50htm>.

- In 2012, Orthofix International resolved a \$7.4 million FCPA enforcement action involving alleged conduct in Mexico.²¹⁶
- In 2009, Halliburton Company, KBR Inc. (a wholly-owned subsidiary of Halliburton during the relevant time period) and Kellogg, Brown & Root, LLC (a wholly-owned subsidiary of KBR) resolved a \$579 million enforcement involving alleged conduct in Nigeria.²¹⁷

For many years, the DOJ has advanced the policy position that resolution vehicles typically used to resolve corporate FCPA enforcement actions “have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe,”²¹⁸ and that companies subject to such resolution vehicles “have often undergone dramatic changes.”²¹⁹ However, what do these three examples of FCPA repeat offenders in a relatively short time period say about the success of the FCPA and its enforcement? More broadly, what does it say about the success of the FCPA when there has been more enforcement (not less) as the FCPA has matured? Granted, politicians have been known to make aspirational statements, but when enacting the FCPA members of Congress stated:

“The legislation before the committee . . . would end corporate bribery. . . .”²²⁰

“[T]he goal [of the FCPA] is the elimination of foreign bribery.”²²¹

These aspirational goals clearly have not been met, but perhaps they were unrealistic to begin with. In any event, whether it’s the several examples of

216. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Orthofix International with FCPA Violations (July 10, 2012), <https://www.sec.gov/news/press-release/2012-2012-133.htm>.

217. Press Release, U.S. Dep’t of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), <https://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million>; Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges KBR and Halliburton for FCPA Violations (last updated Feb. 17, 2009), <https://www.sec.gov/news/press/2009/2009-23.htm>.

218. Lanny A. Breuer, Assistant Attorney General, Remarks to the New York City Bar Association (last updated Sept. 17, 2014).

219. U. S. FOLLOW-UP TO THE PHASE 3 REPORT AND RECOMMENDATIONS 10 (2012).

220. 122 CONG. REC. 12,099 (1976) (statement of Sen. William Proxmire).

221. H.R. REP NO. 95-640, at 19–20 (1977).

FCPA repeat offenders in 2017 or the broader topic highlighted above, readers are encouraged to contemplate the salient question of whether the FCPA, at its 40th anniversary, has been successful in achieving its objectives.

III. CONCLUSION

In many respects, 2017 was a transition year, but in the FCPA space it was a year of continuity. As highlighted in this Article, despite “doom and gloom” predictions about the FCPA and its enforcement in the new Trump administration, 2017 witnessed a continuation of robust FCPA enforcement involving the same enforcement theories and same resolution vehicles used in prior administrations as well as a continuation of certain concerning enforcement practices.

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