Live Member Webinar

Welcome!

The webinar will begin momentarily…

Billy Jacobson and Anne Murray Orrick,

Herrington & Sutcliffe LLP

12 December 2017

TRACE TASA/Member Webinar

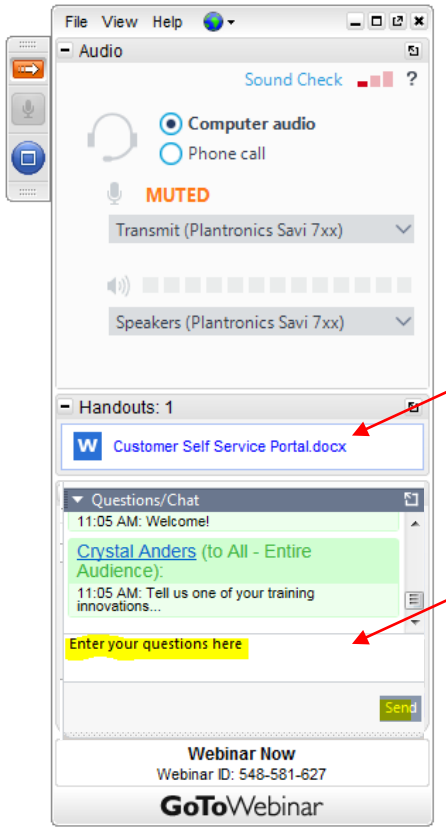
FCPA Year-in-Review

Billy Jacobson and Anne Murray Orrick,

Herrington & Sutcliffe LLP

12 December 2017

Live Member Webinar



Handouts:

You may download a copy of today's slides from the "Handouts" panel

Questions/Chat:

- Submit questions via the "Questions/Chat" panel.

Note: Today's presentation is being recorded and will be available on the TRACE Resource Center later this week.

FCPA Year-in-Review

December 12, 2017

Presented by Billy Jacobson and Anne Murray
Orrick, Herrington & Sutcliffe LLP
wjacobson@orrick.com; (202) 339-8541
amurray@orrick.com; (202) 339-8528

Agenda

- Multi-Company Investigations: Operation Car Wash and Unaoil
- 2017 Corporate Enforcement Actions
- 2017 Individual Actions
- FCPA Corporate Enforcement Policy and Self-Disclosure
- The Yates Memorandum
- SEC’s Focus on Internal Controls
- Looking Ahead to 2018

Operation Car Wash (Lava Jato)

orrick

Operation Car Wash (Lava Jato)

Overview

- Operation “Car Wash” is the investigation by Brazilian prosecutors of a corruption scheme revolving, to a large extent, around Petrobrás, Brazil’s state-owned oil company.
- The scandal began in 2014 as an investigation into a money laundering scheme involving a gas station with a car wash – hence “Operation Care Wash.”
- The investigation has evolved into Brazil’s largest-ever corruption probe, resulting in the prosecution and investigation of high-level politicians (including two former presidents) and multinational companies and businesspeople.
- Indictments and warrants issue in “phases.” In the 47 phases to date, over 100 individuals have been convicted and 10 companies have entered leniency agreements.
- Operation Car Wash has involved, and will continue to see, a high degree of international cooperation. To date Brazil has sent 201 MLA requests to 41 countries and received 139 MLA requests from 31 countries.

Operation Car Wash (Lava Jato)

Notable Enforcement Actions

- Odebrecht/Braskem: In December 2016 Odebrecht, a Brazilian construction conglomerate, and Braskem, a Brazilian petrochemical company, pleaded guilty to FCPA offenses and agreed to pay at least $3.5 billion in a global settlement with Brazil, the U.S., and Switzerland.
- At least 4 other Brazilian construction conglomerates pleaded guilty to Brazilian anti-corruption law offenses and made settlement payments, including Andrade Gutierrez ($300 million) and Camargo Corrêa ($200 million).
- Both the Rolls-Royce and SBM Offshore settlements resolved Lava Jato allegations.
- Former Brazilian president Luiz Inácio Lula da Silva was convicted of corruption for involvement in the Odebrecht scheme and sentenced to 9.5 years in prison (currently on appeal).
- Former Brazilian president Dilma Rousseff is currently under investigation for involvement in the Odebrecht and JBS schemes (see next slide).

Operation Car Wash (Lava Jato)

Notable Enforcement Actions

- JBS
  - In April 2017, the holding company for Brazilian meat processing company JBS entered into a leniency agreement with the MPF, Brazil's equivalent of the DOJ, for JBS' violations of Brazilian anti-corruption laws. In September, Brazil's Attorney General rescinded the agreement, accusing JBS executives of obstructing its investigation.
  - Brazilian media outlets report that the holding company and the Attorney General are discussing the status and terms of the leniency agreement. The original agreement required the holding company to pay approximately $3 billion.
  - The Attorney General twice requested (and was twice denied) impeachment of President Michel Temer for his involvement with JBS. Evidence included an audio recording in which Temer appeared to condone hush money payments to an imprisoned politician.

Operation Car Wash (Lava Jato)

Companies Publicly Under Investigation

- Non-Brazilian companies
  - Skanska (Swiss construction company)
  - Maersk Group (Denmark shipping company)
  - Sembcorp Marine Ltd (Singaporean engineering firm)
  - Apolo Tubulars (50% owned by U.S. Steel)
  - Tenaris SA (energy services firm based in Luxembourg)
  - Vallourec SA (French pipemaking company)
- Brazilian construction companies:
  - OAS
  - UTC Engenharia
  - Galvão Engenharia

Unaoil Investigation

orrick

Unaoil: Background

- Unaoil is a privately held oil and gas firm based in Monaco. The company is run by Ata Ahsani, with key positions held by sons Saman and Cyrus Ahsani.
- The DOJ, SFO, and Australian Federal Police are investigating allegations that Unaoil facilitated extensive corruption and bribery in the oil and gas industry.
  - Companies that have announced ongoing Unaoil-related investigations include ABB Ltd., KBR, FMC Technologies, Amec Foster Wheeler, John Wood Group plc, and Petrofac.
  - Two multinational companies, Rolls-Royce plc and SBM Offshore, have entered into large settlements for Unaoil-related conduct.
  - One company, Core Laboratories, has announced that it received a declination letter from the DOJ for Unaoil-related conduct.
- In November, the SFO brought its first charges against individuals in the Unaoil investigation.

Unaoil: Key Events

- **March 2016**
  - The Huffington Post and The Age (Fairfax Media) published the results of an investigation that alleges widespread bribery by Unaoil on behalf of several oil and gas companies.
    - The reporters obtained hundreds of thousands of leaked internal emails and documents.
  - The SFO opened its investigation into Unaoil.
  - Monaco police raided the Unaoil offices following an urgent request from the SFO.
- **May 2016**
  - KBR, Core Laboratories, and FMC Technologies announced that they had been contacted by the DOJ about their dealings with Unaoil.

Unaoil: Key Events

- **January 2017**
  - Rolls-Royce agreed to $800 million bribery settlement with the DOJ, SFO, and Brazilian regulators
- **February 2017**
  - ABB Ltd., Swiss-based engineering conglomerate, announced that it self-disclosed improper payments made as part of its dealings with Unaoil to the SEC, DOJ, and SFO
- **May 2017**
  - SFO announced that it is investigating Petrofrac, a London-based oil services form, for suspected bribery, corruption, and money laundering
    - Petrofrac suspended its COO in response to the investigation

Unaoil: Key Events

- **October 2017**
  - Core Laboratories, Amsterdam-based oil services company, announced that it received a declination letter from the DOJ for Unaoil-related conduct
    - An SEC investigation referenced in a previous Core Labs' filing may still be pending
- **November 2017**
  - SBM Offshore agrees to pay $238 million to settle U.S. allegations it participated in a bribery scheme in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq
    - According to SBM, the settlement resolved the DOJ's investigation into its relationship with Unaoil
  - SFO charges four individuals in connection with a bribery scheme to help SBM Offshore

Unaoil: SFO Individual Charges

- In November 2017, the SFO charged four individuals in connection with a bribery scheme to help SBM Offshore, Unaoil's client, obtain contracts in Iraq.
  - On November 16, the SFO charged Ziad Akle, Unaoil's territory manager for Iraq, and Al Jarah, Unaoil's "Iraq partner."
    - The SFO also announced that Saman Ahsani, Unaoil's Commercial Director and son of founder Ata Ahsani, is subject to an extradition request on related charges.
  - On November 30, the SFO charged Paul Bond, former senior sales manager for SBM, and Stephen Whitely, former VP with SBM.
    - Whitely also served as a manager at Unaoil, according to the SFO.

Corporate Enforcement Actions

Corporate Actions: December 2016

- **Odebrecht/Braskem**
- Odebrecht, a Brazilian construction conglomerate, and Braskem, a Brazilian petrochemical company, pleaded guilty and agreed to pay at least $3.5 billion in a global settlement with the U.S., Brazil, and Switzerland.
  - The enforcement action was a result of Operation Car Wash, an investigation by Brazilian prosecutors into Petrobras, Brazil's state-owned oil company.
- Odebrecht agreed to pay a criminal fine of $2.6 billion to U.S., Brazil, and Switzerland authorities.
- Braskem agreed to pay a criminal penalty of $632 million plus disgorgement of $325 million.
- Both Odebrecht and Braskem agreed to retain independent compliance monitors for three years.

Corporate Actions: January 2017

Rolls-Royce plc

- Rolls-Royce, a U.K.-based manufacturer and distributor, agreed to pay $800 million to resolve parallel investigations by U.S., U.K., and Brazilian authorities.
  - This investigation was related, in part, to the ongoing investigation into Unaoil by the DOJ, SEC, and SFO.
- Under the DPA with the DOJ, Rolls-Royce admitted that between 2000 and 2013, it conspired to violate the FCPA by paying more than $35 million in bribes through third parties to foreign officials.
  - Bribes were paid in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq.
- The settlement involved the U.S. DOJ, the U.K. SFO, and Brazil's Ministerio Publico Federal. $170 million was paid to the DOJ, $599 million to the SFO, and $25.5 million to the MPF in Brazil.
- Five individuals were prosecuted in the U.S. in connection with the case.

Individual Actions

Rolls-Royce plc Individuals

- The DOJ charged five individuals for their participation in a bribery scheme to help Rolls-Royce and its U.S. subsidiary win an equipment contract on a gas pipeline from Kazakhstan to China.
  - The charges follow the $800 million global resolution of investigations by the DOJ, U.K. SFO, and Brazil Ministerio Publico Federal.
- Of the five individuals, four pleaded guilty to FCPA charges while one has been indicted.
  - Of the four that pleaded guilty, two were former Rolls-Royce executives (James Finley and Keith Barnett); one was a former energy sales employee (Aloysius Joannes Jozep Zuurhout); and one was an executive at an international engineering consulting firm (Andreas Kohler).
  - The individual indicted, Petros Contoguris, was the former CEO of a Rolls-Royce intermediary. He is believed to be outside the United States.
- The DOJ's announcement noted the "significant cooperation and assistance" from the UK SFO and Brazil law enforcement.

Corporate Actions: January 2017

Las Vegas Sands Corp.

- Las Vegas Sands, a Nevada-based gaming and resort company, entered into an NPA with the DOJ to resolve allegations that it made payments to a business consultant "without any discernable legitimate business purpose" in promoting the business in China and in Macau.
- The company agreed to pay a $6.96 million criminal penalty.
- While the company did not receive credit for voluntary disclosure, the company received a 25% reduction off the bottom of the U.S. Sentencing Guidelines ("USSG") due to cooperation and remediation.
- In 2016, the company previously settled with the SEC, paying $9 million in disgorgement.
  - As part of the SEC settlement, the company agreed to retain an independent compliance consultant for two years.

Corporate Actions: January 2017

United States v. Sociedad Química y Minera de Chile (SQM)

- Chilean chemicals and mining company SQM agreed to pay more than $30 million to resolve matters with the DOJ and SEC related to violations of the FCPA's accounting provisions.
- SQM made donations to dozens of foundations controlled by or closely tied to Chilean politicians. The Company admitted to failing to implement internal controls and falsifying its books and records to conceal payments.
- The Company entered into a DPA and agreed to pay a $15.5 million criminal penalty.
  - SQM received a 25% reduction off the bottom of the USSG due to cooperation and remediation.
- The Company agreed to retain an independent monitor for a term of two years, with a third year of self-reporting after.
- SQM agreed to pay a $15 million civil penalty to settle the SEC's charges.

Corporate Actions: January 2017

Mondelēz International

- Mondelēz International agreed to pay $13 million in civil penalties to resolve SEC charges that Mondelēz and its subsidiary, Cadbury Limited, violated the books and records and internal controls provisions.
- The charges related to Cadbury's payments to a local agent to obtain government licenses and approvals for a chocolate factory in India.
- The SEC cease-and-desist order stated that Cadbury India failed to conduct proper due diligence on the agent and failed to receive adequate documentary support from the agent. The order stated that Mondelēz, as the acquirer of Cadbury, was also responsible for Cadbury's violations.
  - The order cited Mondelēz's cooperation with the investigation and remediation efforts.
- Mondelēz settled without admitting or denying the charges.

Corporate Actions: January 2017

Orthofix International

- Orthofix International, a Texas-based medical devices company, agreed to pay $6 million in civil penalties and disgorgement to resolve charges that its subsidiary in Brazil made improper payments to doctors at government-owned hospitals.
- The Company admitted wrongdoing and agreed to retain an independent compliance consultant for one year to review and test its FCPA compliance program.
- The SEC brought a separate administrative action against Orthofix based on the Company's improper booking of revenues. The accounting violations included those covering the FCPA charges.
  - The Company agreed to pay $8.25 million to resolve the accounting charges.

Corporate Actions: July 2017

Halliburton

- Halliburton agreed to pay $29.2 million in civil penalties to resolve allegations that it violated the books and records and internal controls provisions in connection with transactions in Angola. The SEC order states that Halliburton entered into contracts with a local Angolan company for the purpose of meeting local content requirements, rather than for the stated scope of work set forth in each contract.
  - Halliburton agreed to pay $15.2 million in disgorgement and interest and a $14 million penalty, and agreed to retain an independent compliance consultant for 18 months to review its anti-corruption policies and procedures in Africa.
- Halliburton settled without admitting or denying the charges.
- A former Halliburton VP involved in the deal, Jeannot Lorenz, agreed to pay a $75,000 penalty, without admitting or denying the allegations.

Corporate Actions: September 2017

Telia Company AB

- Telia, a Swedish telecom company, and its subsidiary, Coscom, agreed to pay a combined penalty of more than $965 million after admitting to paying $331 million in bribes to a government official in Uzbekistan. The case was a coordinated resolution with authorities in the U.S. and the Netherlands.
- The settlement included a $508 million criminal fine and $457 million in disgorgement to the SEC – the largest ever disgorgement in an FCPA case.
- The criminal penalty reflects a 25% reduction off the bottom of the USSG range, based on the Company's cooperation and remediation.
  - The DPA said that no monitor was needed because of Telia's remediation, including firing all individuals involved in the misconduct.
- However, the DOJ press release notes: "the companies did not receive more significant mitigation credit . . . because [they] did not disclose their misconduct to the Department."

Corporate Actions: September 2017

Alere Inc.

- Alere, a Massachusetts-based diagnostic testing firm, agreed to pay more than $13 million to resolve SEC charges that: (1) its subsidiaries in India and Colombia bribed officials; and (2) its South Korean subsidiary committed accounting fraud.
- The SEC order charges Alere with books and records and internal controls violations in connection with improper payments made in India and Colombia between 2011 and 2013.
  - The order separately charges Alere with an improper revenue recognition scheme by its South Korean subsidiary between 2011 and 2016.
- Alere agreed to disgorge $3.3 million plus interest of about $495,000, and pay a penalty of $9.2 million.
- Alere settled without admitting or denying the charges.

Corporate Actions: November 2017

SBM Offshore NV

- SBM Offshore, a Dutch-based oil drill manufacturer, agreed to pay a $238 million criminal penalty to resolve FCPA offenses in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq.
  - In a press release, SBM stated that the U.S. settlement resolved the investigation into the company's "legacy issues" as well as the company's relationship with Unaoil.
- SBM admitted that that from 1996 through 2012, the company paid more than $180 million to intermediaries for the purpose of bribing government officials.
- The company entered into a three-year DPA with the DOJ. A U.S. subsidiary pleaded guilty to an FCPA conspiracy charge.
- The resolution comes weeks after the guilty pleas of two former DPM executives, who admitted to participating illicit conduct in Brazil, Angola, and Equatorial Guinea.

Individual Actions

SBM Offshore Individuals

- In November 2017, two former executives at SBM Offshore, Anthony Mace and Robert Zubiate, pleaded guilty for their roles in a bribery scheme in Brazil, Angola, and Equatorial Guinea.
  - The guilty pleas were accepted a few weeks before the announcement of SBM's $238 million settlement with the DOJ.
- Anthony Mace served as the CEO from 2008 at 2011. He admitted that he joined an ongoing company bribery scheme at SBM (which began in 1996) and furthered the scheme by "deliberately avoiding" learning the truth about the bribes and their recipients.
- Robert Zubiate was a U.S. based marketing executive. He admitted that between 1996 and 2012, he and co-conspirators used a third-party sales agent to pay bribes to foreign officials at Petrobras in exchange for favorable bids.

2017 Pilot Program Declinations

Linde North America Inc. and Linde Gas North America LLC (June 2017)

- The DOJ issued a declination letter for two American subsidiaries of Germany's Linde Group. The declination concerned potential FCPA violations that occurred between November 2006 and December 2009 in the Republic of Georgia.
  - The DOJ found that executives at Spectra Gases Inc., a New Jersey Company that Linde acquired in 2006, bribed officials at the Georgian state-owned National High Technology Center in order to obtain equipment and assets used to produce boron gas.
- Linde paid the DOJ $11.2 million to resolve the case.
  - The payment included disgorgement of $7.8 million, and forfeiture of $3.4 million that Linde owed the state-owned entity but withheld upon discovery of the misconduct.
- The declination letter cited Linde's voluntary self-disclosure, comprehensive investigation, full cooperation, compliance program enhancements, and remediation.

2017 Pilot Program Declinations

CDM Smith (June 2017)

- CDM Smith, a privately held engineering and construction firm, entered into a declination with disgorgement to resolve allegations that it violated the FCPA in India.
  - The DOJ found that CDM Smith's India subsidiary paid approximately $1.18 million in bribes to government officials in India in exchange for a highway construction contract and a water project contract.
- CDM Smith agreed to disgorge the $4 million in profits it made from the conduct.
- The DOJ said it closed the investigation because CDM Smith: (1) made a timely voluntary self-disclosure; (2) did a comprehensive investigation; (3) gave full cooperation; (4) disgorged all profits; (5) enhanced its compliance program; and (6) fired all executives and employees involved in the FCPA offenses.

Individual Charges and Resolutions

Individual Actions

PDVSA Individuals

- In 2017, three U.S.-based energy executives – Juan Jose Hernandez Comerma (Hernandez), Charles Quintard Beech III (Beech), and Fernando Ardila Rueda (Ardila) – pleaded guilty to FCPA charges for their role in paying bribes to PDVSA.
- The defendants conspired with U.S.-based businessmen to pay bribes and other things of value to PDVSA employees so that their companies were placed on PDVSA bidding panels.
  - Sentencing is pending for all three defendants.
- The defendants' pleas are part of a larger, ongoing investigation by the DOJ into bribery at PDVSA. Thus far, the DOJ has announced a total of 10 individuals that have pleaded guilty in connection with the investigation.

Individual Actions

Och-Ziff Individuals

- In January 2017, the SEC charged two former executives at Och-Ziff Capital Management, Vanja Baros and Michael L. Cohen, with being the “driving forces” behind a corruption scheme in various African countries.
  - They allegedly caused “tens of millions of dollars in bribes to be paid to high-level government officials.”
  - In 2016, Och-Ziff settled with the SEC and ZOJ for related conduct. Och-Ziff paid $412 million in criminal and civil penalties, in one of the largest FCPA actions ever.
- In May 2017, another individual, Samuel Mebiane, was sentenced to 24 months in prison after pleading guilty to an FCPA conspiracy charge. Mebiane worked as a “fixer” for an Och-Ziff JV, paying bribes to government officials in Niger, Chad, and Guinea.

Individual Actions

United States v. Joseph Baptiste

- A retired U.S. Army Colonel was charged for his alleged role in a foreign bribery and money laundering scheme in connection with a planned $84 million port development project in Haiti.
  - On October 4, 2017, Joseph Baptiste was charged with one count of conspiracy to violate the FCPA and the Travel Act, one count of violating the Travel Act, and one count of conspiracy to commit money laundering.
- The indictment alleges that Baptiste solicited bribes from undercover FBI agents in Boston who posed as potential investors in connection with the proposed development project.
  - Baptiste allegedly told the agents that he would funnel the payments to Haitian officials through a non-profit entity that he controlled —purported to help impoverished residents of Haiti — in order to secure government approval of the project.

Individual Actions

Chi Ping Patrick Ho and Cheikh Gadio

- On November 20, 2017, the DOJ unsealed a criminal complaint charging a former Senegalese foreign minister and the head of a Hong Kong and Virginia-based NGO with bribing high-level officials in Chad and Uganda to help a Chinese energy company obtain business.
  - Cheikh Gadio, the former Senegalese minister, and Chi Ping Patrick Ho, the NGO head, were charged with FCPA and international money laundering offenses.
- The Chinese energy company is unnamed but is widely believed to be CEFC China Energy, a Shanghai-based private conglomerate.
  - The complaint alleges that Ho, with Gadio's assistance, caused the energy company to offer a $2 million bribe to the President of Chad in exchange for securing oil rights.
  - The complaint further alleges that Ho paid a $500,000 bribe through New York to an account designated by the minister of foreign affairs of Uganda.

FCPA Corporate Enforcement Policy and Voluntary Self-Disclosure

FCPA Pilot Program

- On April 5, 2016, DOJ introduced a year-long “Pilot Program” to guide the conduct of FCPA investigations and prosecutions.
- The goal of the program is to promote greater accountability for individuals and companies engaged in corporate crime by motivating them to:
  - Self-disclose FCPA-related misconduct;
  - Fully cooperate with the Fraud Section; and
  - Remediate flaws in their controls and compliance programs.
- By fulfilling these requirements, an organization can receive additional credit above and beyond any fine reduction provided for under the USSG.
- In March 2017, the DOJ temporarily extended the Pilot Program beyond the year-long pilot period.
- The Pilot Program has been made permanent, with some enhancements, through the newly-adopted FCPA Corporate Enforcement Policy.

FCPA Corporate Enforcement Policy

- On November, 29, 2017, the DOJ announced a new FCPA Corporate Enforcement Policy that partially adopts the Pilot Program.
  - The new Policy is incorporated into the United States Attorneys' Manual (USAM).
- The Policy includes a "presumption" that the DOJ will issue declinations when a company has voluntarily disclosed misconduct, fully cooperated, and remediated absent aggravating circumstances.
  - This is an expansion of the Pilot Program, which previously said the DOJ would "consider" a declination.
- The new Policy states that for companies that voluntary disclose, fully cooperate and remediate, prosecutors "will" agree to a 50 percent reduction off the minimum USSG fine.
  - The Pilot Program previously stated that the government "may" agree to such a discount.

Credit under FCPA Corporate Enforcement Policy

- Organizations following the requirements of voluntary self-disclosure, cooperation, and remediation may be eligible for penalty reductions and other benefits.
- Voluntary Self-Disclosure + Full Cooperation + Timely and Appropriate Remediation =
  - 50% reduction off the low end of the USSG fine range;
  - No appointment of a monitor, provided the company has implemented an effective compliance program; and
  - Presumption of a declination absent “aggravating circumstances.”
- Full Cooperation + Timely and Appropriate Remediation + No Voluntary Self-Disclosure =
  - Maximum 25% reduction off the low end of the USSG fine range.

FCPA Corporate Enforcement Policy: De-confliction

- In order to achieve full cooperation credit under the FCPA, companies must "de-conflict" their internal investigations upon request by DOJ.
  - De-confliction is a term used when DOJ asks a company to refrain from interviewing employees during an internal investigation until DOJ has had a chance to interview them.
- The FCPA Corporate Enforcement Policy states that such requests will be for "a limited period of time and will be narrowly tailored to a legitimate investigative purpose," such as "to prevent the impeding of a specified aspect of the Department's investigation."
  - Further, "[o]nce the justification dissipates, the Department will notify the company that the Department is lifting its request."
- Requests to de-conflict have been on the rise since the inception of the Pilot Program, but the policy remains controversial. De-confliction can prevent companies from advancing their own internal investigations and thus impede their ability to identify misconduct and remove the employees responsible.

Voluntary Disclosure

- The chief aim of both the Pilot Program and the new Corporate Enforcement Policy is to encourage companies to voluntarily disclose violations by bringing greater certainty to what will happen following the disclosure.
- Failure to voluntarily self-disclose can affect both the form of resolution and the penalty a company receives.
  - Several recent DPAs and plea agreements note the company's failure to self-disclose as a factor affecting the form of resolution (i.e., DPA or plea agreement vs. declination).
  - Discounts on the fine amount in the absence of self-disclosure have ranged from 20-25%, as opposed to the 50% promised under the Pilot Program for full disclosure, cooperation, and remediation.

Takeaways

- Voluntary self-disclosure has greatly benefited companies even before the introduction of the Pilot Program. However, the Pilot Program made these benefits more transparent and uniform.
- The new FCPA Corporate Enforcement Policy is intended to encourage voluntary disclosures by providing more transparency and certainty for companies contemplating self-disclosure.
- Recent enforcement actions demonstrate that voluntary self-disclosure will greatly increase the likelihood that a company will achieve desired outcomes, including declinations and steep fine reductions.
- However, a discounted penalty and lenient settlement is worse than no penalty and no settlement, so companies should still think long and hard prior to disclosure.

The Yates Memorandum: Update

The Yates Memorandum: Background

- In September 2015, Deputy Attorney General Sally Yates issued a directive to all federal prosecutors setting forth DOJ's policy and practices regarding the prosecution of individual misconduct.

Key Steps to Achieving DOJ's Goal

- A company cannot receive any cooperation credit unless the company discloses to DOJ all relevant facts about individual misconduct.
- Criminal and civil corporate investigations should focus on investigating individuals "from the inception of an investigation."
- Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
- Absent extraordinary circumstances, the DOJ will not agree to a corporate resolution that provides immunity to culpable individuals.
- DOJ should have a clear plan to resolve open investigations of individuals when the case against the corporation is resolved.
- Civil attorneys should consistently focus on individuals and take into account issues such as accountability and deterrence, not just ability to pay, when deciding whether to bring suit.

The Yates Memorandum: Corporations v. Individuals

- Historically, much of DOJ's FCPA focus has been on corporations as opposed to individuals, though that has changed in the last several years.
  - Since 2012, 53 corporations and 66 individuals have been the subject of DOJ enforcement actions.
  - In 2015 there were 2 corporate cases and 14 individual cases (five of which were unsealed in 2016).
  - In 2016 there were 15 corporate cases and 12 individual cases.
  - In 2017 there have been 6 corporate cases and 13 individual cases.
- Why? Evidence is often difficult to gather, and corporations are more willing to compromise with the government than individuals.
- The Yates Memo likely will result in more individual prosecutions over time.

SEC’s Focus on Internal Controls

SEC's Focus on Internal Controls

- SEC's focus on internal controls has been intense and possibly beyond the bounds of the law.
- The FCPA's internal controls provision requires that issuers:
  - "devise and maintain a system of ***internal accounting controls*** sufficient to provide ***reasonable assurances*** that:
    - (1) transactions are executed in accordance with management's general or specific authorization;
    - (2) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
    - (3) access to assets is permitted only in accordance with management's general or specific authorization; and
    - (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences."

Notable SEC Enforcement Actions

- Recent SEC enforcement has pushed the internal controls provision far beyond "accounting controls" and "reasonable assurance."
  - ***Halliburton*** (July 2017): SEC found that when bidding on oil company contracts, Halliburton partnered with a local Angolan company owned by a friend and neighbor of the Sonangol official who would approve the award of the contracts. Halliburton paid $3.705 million to the local firm, yet failed to conduct competitive bidding, circumvented the Company's committee approval structure for such contracts, and "back[ed] into a list of contract services rather than first determining the services and then seeking an appropriate supplier."
  - ***Orthofix*** (Jan. 2017): Internal accounting controls were deficient because Orthofix lacked policies and processes to standardize or centrally approve and monitor commissions and discounts. SEC was also critical of the "decentralized nature of Orthofix's business in Brazil" and its indirect reporting structure, which "created gaps in supervision that provided the opportunity to orchestrate and execute the bribery schemes without detection."
  - ***General Cable*** (Dec. 2016): SEC cited General Cable's failure to adequately train its subsidiaries' employees on anti-corruption risks, failure to contractually require third parties to comply with the FCPA, and failure to perform anti-corruption due diligence on third parties as evidence of internal controls violations.

Notable SEC Enforcement Actions

- ***Teva Pharmaceuticals*** (Dec. 2016): Internal controls deficiencies included Teva's failure to publicize or enforce its Code of Conduct.
  - SEC notes that employees were not familiar with the Code of Conduct's prohibitions and were not trained on the FCPA.
  - SEC was also critical of the delay in implementing and training employees on the Company's global anti-corruption policy.
- ***JP Morgan*** (Nov. 2016): Internal controls were deficient because the protections that were put in place to mitigate FCPA risk associated with hiring client referrals were ignored or circumvented.
  - For instance, referral hires required approval by Legal and Compliance, but in practice approval was always granted.

Notable SEC Enforcement Actions

- ***Och-Ziff*** (Sept. 2016): Och Ziff failed to conduct sufficient due diligence on business partners, and failed to exert its legal rights against business partners involved in corrupt activity (such as by terminating transactions, foreclosing on collateral, or bringing legal action against such partners).
- ***LAN Airlines S.A.*** (July 2016): SEC cited LAN's failure to implement a comprehensive company-wide corporate compliance program, failure to offer robust compliance training, and failure to require due diligence on third parties as evidence of insufficient internal controls.
- ***Novartis*** (Mar. 2016): Internal controls deficiencies included failure to conduct sufficient training of sales staff and managers and failure to conduct proper due diligence on vendors.

Notable SEC Enforcement Actions

- ***Qualcomm*** (Mar. 2016): Internal controls violations included management's failure to recognize FCPA risks related to the provision of hospitality, the company's failure to provide regular FCPA training to employees of its subsidiaries, and the fact that business functions such as HR and hospitality planning were not considered in the company's compliance program.
  - SEC noted that these problems were intensified by the company's lack of a company-wide CCO and compliance officer in China.
- ***SAP SE*** (Feb. 2016): SEC criticized SAP's internal reporting structure, which required employees to report to various supervisors employed by subsidiaries in other regions.
  - The indirect reporting structure "created gaps in supervising [the employee involved in the misconduct] that provided him the opportunity to . . . implement the bribery scheme."

Notable SEC Enforcement Actions

- ***BHP Billiton*** (2015): SEC charged BHP in connection with hospitality offered to government officials and others during the 2008 Beijing Olympics.
  - BHP established an "Olympic Sponsorship Steering Committee" to oversee and implement Olympic invitations, the Chair of which also chaired the company's Ethics Panel and reported directly to the CEO. Invitations had to be approved by the relevant business unit and country leader
  - The SEC faulted BHP for:
    - Failing to have lawyers outside of the relevant business units review the invite applications;
    - Applications missing information; and
    - Failure to update applications as conditions changed.

Notable SEC Enforcement Actions

- ***BNY Mellon*** (2015): In a settlement over the provision of internships to relatives of employees of a M.E. sovereign wealth fund, the SEC alleged that BNY failed to maintain a sufficient "system of internal accounting controls around its *hiring practices* sufficient to provide reasonable assurances that its employees were not bribing foreign officials in contravention of company policy "
  - HR was not trained to flag potentially problematic hires and sales and client relationship managers had wide discretion in hiring.
  - BNY provided FCPA training, but did not ensure that all employees took the training or understood BNY's policies.
- ***PBS&J*** (2015): SEC focused heavily on the lack of due diligence performed upon local company used to pay bribes and on the lack of FCPA training taken by some employees.

Notable SEC Enforcement Actions

- ***Bristol-Meyers Squibb*** (2015): SEC charged BMS with failure to design and maintain effected internal controls relating to health-care providers in China. The alleged inadequacies included:
  - The failure to timely remediate discovered deficiencies;
  - Basing the compliance officer for Asia-Pacific in the U.S. and that person only going to China "rarely;"
  - Failure to ensure that all employees completed FCPA training by the required date
- ***Smith & Wesson*** (2014): SEC charged S&W with failing to "implement a reasonable system of controls to effectuate . . . the company's policy prohibiting the payment of bribes."
- ***Bruker*** (2014): SEC identified weaknesses in the company's FCPA compliance system such as the failure to translate training materials and code of conduct into local languages and relying on managers in China to ensure that local employees understood compliance requirements

SEC's Focus on Internal Controls: Takeaways

- These enforcement actions make clear:
  - The SEC considers all aspects of FCPA compliance programs to be "accounting controls," despite how far removed many of them seem to be from accounting.
  - Any and all slip-ups demonstrate that the controls were not sufficient to "reasonably assure" the accuracy and disposition of assets at management's direction.
  - SEC has essentially read out of the statute the words "accounting" and "reasonably assure."

Looking Ahead to 2018

Looking Ahead to 2018

- In November, Walmart announced in an SEC filing that it had set aside $283 million for a possible resolution with the DOJ and SEC.
  - A settlement would bring an end to a long-running investigation into potential FCPA violations in Mexico, Brazil, China, and India.
- Further cases related to Operation Car Wash and Unaoil will be resolved
- We will look to see how the new FCPA Corporate Enforcement Policy is implemented.

Billy Jacobson

Partner

Washington D.C.

T (202) 339-8541

E wjacobson@orrick.com

Education

- B.A., Tufts University, 1990
- J.D., Georgetown University Law Center, 1993

Practice Areas

- White Collar
- Corporate Investigations

Billy Jacobson, a partner in the Washington D.C. office, is a highly experienced white collar lawyer and first chair trial litigator having tried many cases, including complex white collar matters.

Mr. Jacobson has served as general counsel, chief compliance officer, federal prosecutor and government-appointed monitor. His experience serving in different capacities for the Department of Justice (DOJ), particularly the Fraud Section's Foreign Corrupt Practices Act (FCPA) enforcement unit, allows him to provide clients significant insight into the processes and decision making of the DOJ. Mr. Jacobson is also considered a thought leader in the industry having spoken extensively on compliance and investigative topics.

Mr. Jacobson served for five and a half years as Senior Vice President, Co-General Counsel and Chief Compliance Officer of Weatherford International Ltd., one of the world's largest multinational oil and natural gas service companies. While there, Mr. Jacobson aided the company in establishing what is widely recognized as a best-in-class compliance program.

Mr. Jacobson has served as Assistant Chief for FCPA Enforcement in the Fraud Section of the U.S. DOJ Criminal Division and was a Trial Attorney in the Fraud Section, investigating and prosecuting a variety of white collar crimes. He has designed, led and/or managed hundreds of internal investigations related to publicly-traded and private companies across a broad spectrum of areas including FCPA, fraud, antitrust, health care fraud, securities fraud, health and safety, environmental and trade sanctions.

Admissions

District of Columbia

New York

Anne Murray

Partner

Washington D.C.

T (202) 339-8528

E amurray@orrick.com

Education

- J.D., American University, Washington College of Law
- B.A., International Studies, Middlebury College, Cum Laude

Practice Areas

- Government Investigations and Enforcement Actions
- Ethics & Compliance
- White Collar

Anne Murray, Partner in the Washington, D.C., office, is a member of the White Collar & Corporate Investigations practice group. She focuses her practice on defending companies and individuals in government investigations involving white collar and regulatory matters.

Anne frequently represents companies and individuals in matters before the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC). She regularly conducts internal investigations and risk assessments; performs pre-acquisition anti-corruption diligence; counsels companies about compliance issues; and develops corporate compliance programs, policies, procedures and training models.

Anne has extensive experience in anti-corruption matters involving the Foreign Corrupt Practices Act (FCPA). She has represented multinational corporations across the aerospace, communications, defense, financial services, health care, hospitality and tourism, mining, oil and gas, technology, security, and shipping industries. She also has led investigations and compliance reviews throughout the Americas, Europe, Asia, Africa and Australia with on-the-ground experience in more than 14 countries including Brazil, China and Mexico.

Prior to joining Orrick, Anne was an attorney in the Washington, D.C., office of Norton Rose Fulbright where she was a member of the white collar and government investigations group. She also previously worked for White & Case LLP as an attorney in the white collar and commercial litigation groups. While there, she represented a number of companies and foreign sovereigns in complex civil litigation involving fraud, tort and contract claims.

Admissions

District of Columbia

Massachusetts

TRACE Member Webinar and TASA Course
For information on TASA:
Anne-Marie Zell, Director of TASA
TASA@TRACEinternational.org

For information on member webinars and TRACE membership
membership@TRACEinternational.org

TRACE Anti-Bribery Compliance Solutions

Visit us online at
www.TRACEinternational.org

facebook.com/TRACEinternational

twitter.com/TRACE_inc

youtube.com/TRACEinternational

linkedin.com/company/TRACE-international-inc-