

# What's ahead for the FCPA in 2019?

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MARCH 15, 2019

Enacted over four decades ago, the Foreign Corrupt Practices Act of 1977 has experienced an enforcement boom that started around 2001. Since then, at the start of every year, FCPA specialists are faced with the same question: What is going to happen now?

The concern is logical because the FCPA poses substantial risks for companies doing business around the globe. It contains broad prohibitions, imposes harsh penalties, is broadly interpreted, and is aggressively applied by the law's dual enforcers: the Department of Justice and the Securities and Exchange Commission.

So, what is ahead for the FCPA in 2019? Predictions are tough because many factors coalesce to shape enforcement patterns, and each year produces its own surprises. Nonetheless, certain data points enable the identification of trends that are likely to come to the fore in 2019.

## ENFORCEMENT IS NOT EXPECTED TO DECREASE

Do not expect major changes in FCPA enforcement levels.

Over approximately the last 10 years, the DOJ and SEC have brought a somewhat consistent number of FCPA enforcement actions. With a combined total of 38 enforcement actions against 17 corporations and 21 individuals, 2018 was no exception.

Notably, last year was the second-highest year for assessed penalties, including two of the six largest FCPA penalties of all time.

In one, Brazilian state-owned oil company Petrobras agreed to pay \$853.2 million as part of a nonprosecution agreement with the DOJ to resolve allegations that members of the Petrobras executive board helped facilitate millions of dollars in corrupt payments to politicians and political parties in Brazil and that members of Petrobras's board of directors were also involved in facilitating bribes that a major Petrobras contractor was paying to Brazilian politicians.

Only 20 percent of the \$853.2 million penalty will be collected by U.S. authorities. The remaining money will be paid to the Brazilian Federal Prosecutor's Office.

In the other case, French investment bank Societe Generale agreed to a penalty of \$585 million after entering into a deferred prosecution agreement with the DOJ to resolve charges that the

company paid bribes through a Libyan "broker" related to 14 investments made by Libyan state-owned financial institutions. *United States v. Societe Generale SA*, No. 18-cr-253, *deferred prosecution agreement filed* (E.D.N.Y. June 5, 2018).

And significant resources were devoted in 2018 to improve the government's efforts to uncover corruption. As discussed further below, the DOJ announced new policies and programs that directly affect FCPA enforcement (e.g., the "no piling on" policy, the China initiative, additional guidance on the selection of corporate monitors, and changes to the individual accountability policy).

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In addition, a greater number of federal prosecutors were involved in FCPA cases. Prosecutors from the DOJ's Money Laundering and Asset Recovery Section have been increasingly teaming up with its FCPA Unit prosecutors to bring FCPA-related money laundering charges. These efforts show an interest in maintaining or increasing enforcement levels.

## CONTINUED EMPHASIS ON COOPERATION-BASED ENFORCEMENT

Building on a 2016 pilot program, the DOJ permanently added a new FCPA corporate enforcement policy in November 2017 to its Justice Manual. The policy contains three requirements: voluntary self-disclosure, full cooperation, and timely and appropriate remediation (including implementation of a compliance program and proper discipline of employees).

If the three conditions are met (and aggravating circumstances do not exist), it is presumed that the DOJ will decline to charge if a company pays all disgorgement, forfeiture and/or restitution.

The FCPA corporate enforcement policy reflects the belief that cooperation is the best way to achieve FCPA enforcement goals. These goals primarily are meant to identify and prosecute the responsible individuals (i.e., bad actors who caused the FCPA violations) while trying to preserve a company's viability and ease the government's investigative burden.

Last year, the DOJ issued four public declination letters in favor of U.S. data and analytics company Dun & Bradstreet, U.K. seismology company Guralp Systems, Barbadian insurance company ICBL, and California-based telecommunications provider Polycam.

Somewhat surprisingly, the agency does not regularly publish declinations in other enforcement areas, but it does in the FCPA space. These declinations, coupled with the relatively new FCPA corporate enforcement policy, are strong indicators that this enforcement approach will continue.

### **POLICIES ARE UNLIKELY TO CHANGE, BUT MIGHT BE TESTED**

The DOJ announced additional policy changes in 2018 that affect FCPA enforcement. These include:

- The May policy on coordination of corporate resolution penalties, which instructs prosecutors to coordinate internally and with other domestic and foreign enforcement agencies to avoid disproportionate penalties against a company for the same conduct.
- An October memorandum on the selection of monitors in criminal division matters, which provides that a monitor will not be necessary in certain matters, especially when a company has made meaningful efforts to remediate problems and to invest in compliance.
- Deputy Attorney General Rod Rosenstein's November announced modification to the individual accountability policy of the Yates memo, replacing the requirement that a company identify all individuals with any involvement in misconduct with the new requirement that the company merely identify those "substantially involved" in order to qualify for cooperation credit.

We do not expect additional major changes in 2019 because of what 2018 brought. As often happens after introducing significant reforms, the DOJ will likely see 2019 as a year to test the new policies and their effectiveness.

FCPA enforcement theories, however, might be tested in the courts with a number of FCPA trials scheduled this year. The DOJ and SEC have long submitted that the FCPA has great reach, arguing that minimum contacts with the U.S., such as bank wires or emails just passing through the country, are sufficient to trigger jurisdiction.

Some of these aggressive theories are likely to be examined in 2019 trials. One trial to watch is one arising from *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). This decision by the 2nd U.S. Circuit Court of Appeals last year held that

the government cannot evade the requirement that foreign nationals must have acted "while in the territory of the United States" by charging Hoskins with conspiring with persons located in the U.S.

The court, however, left the door open for the government to try the defendant for acting as an agent of a U.S. company. It is thus possible that the DOJ may push a broad agency liability theory reaching foreigners who acted entirely outside the United States.

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### **INCREASED COOPERATION WITH FOREIGN AUTHORITIES**

Perhaps the most important FCPA enforcement trend in recent years has been increased cooperation with foreign regulatory and law enforcement authorities. We predict international cooperation will continue to grow in 2019.

There was a time when the FCPA was an outlier. Those days are long past; similar laws have been adopted around the world. And many countries (including Argentina, India, Israel, Malaysia, Mexico, Russia, Italy, Saudi Arabia and Thailand) are expected to ramp up their involvement in the anti-corruption fight this year with new or amended anti-corruption laws enacted in 2018.

As part of the rise in international cooperation, 2018 brought many coordinated resolutions and global settlements with foreign powers. U.S. authorities appear eager for partners to take a lead role in this global fight.

In the Petrobras case, the Brazilian government will receive 80 percent of the penalty. And in the U.S. enforcement action against Societe Generale, the DOJ did not require a monitor partly because of the monitoring by French authorities.

### **CONCLUSION**

The federal government has aggressively enforced the FCPA for over a decade. And there is no evidence that will change any time soon. Companies doing international business must continue to protect against FCPA scrutiny with robust compliance programs and quick action if an allegation arises.

*This article first appeared in the March 15, 2019, edition of Westlaw Journal White Collar Crime.*

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