AGENDA
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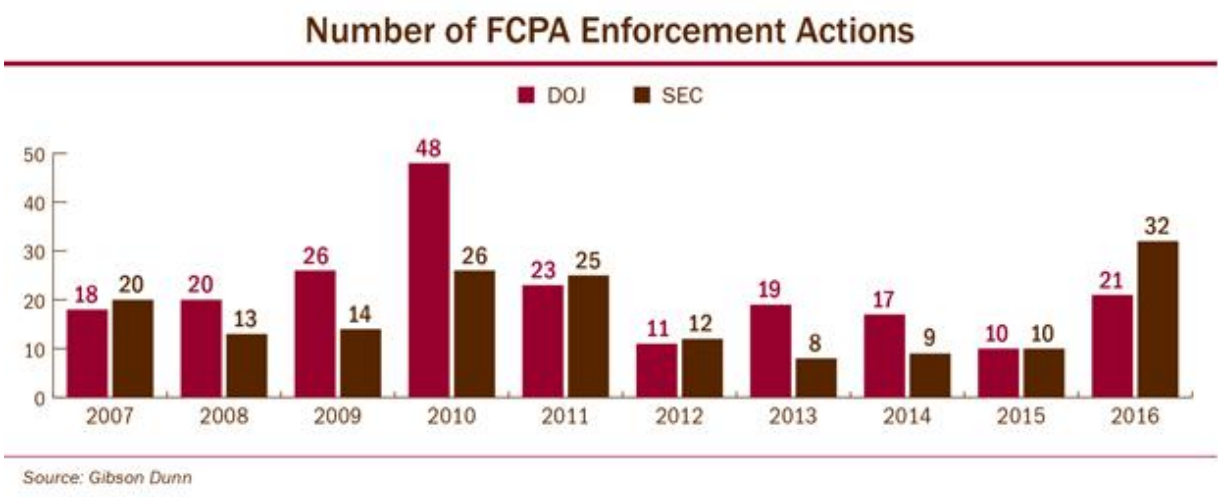
SEC, DOJ to Trim FCPA Enforcement in 2017

By Melissa J. Anderson January 17, 2017

After a record year in Foreign Corrupt Practices Act enforcement in 2016, new leadership at the **SEC** and **DOJ** this year will likely scale back enforcement under the anti-bribery and corruption law, experts say.

However, that's no reason for boards to scale back their anti-bribery and corruption oversight efforts in equal measure. Boards could see new incentives for maintaining rigorous oversight of FCPA compliance under new agency leadership, sources say.

"I do think there are good signals that there could be more reasonableness [in enforcement] for companies that actually can document and demonstrate that they have excellent processes and procedures for training, monitoring and detection," says **Sharie Brown** , partner in **Troutman Sanders** 's white-collar and government investigations practice group.



But while experts expect a decrease in the number of garden-variety FCPA cases being pursued by corporate bribery watchdogs, the agencies are expected to continue to pursue blockbuster enforcement actions such as the $397.6 million **VimpelCom** resolution announced in February and the $419.8 million combined resolution for **Odebrecht** and **Braskem** announced in December.

Additionally, agency leaders under the "pro-business" Trump administration will be looking for examples to show they are not soft on corporate crime.

“I don’t think boards or companies’ management should be more relaxed about the FCPA, because it may be that the new attorney general and the new chair of the SEC might decide that they want to make a point — to use some company at some point to show they haven’t relaxed on this,” says Brown, a former federal prosecutor and former ethics and compliance officer in **Mobil Oil** ’s office of the general counsel.

“You don’t want to be the guinea pig,” she says.

Record Year

The SEC and DOJ levied more than $2 billion in FCPA fines and penalties from corporations in 2016, blowing all previous years out of the water in terms of monetary charges. Similarly, with a total of 53 corporate enforcement actions, 2016 saw the second-highest number of FCPA enforcement actions ever, behind 2010.

Experts say the two agencies are due for changes moving forward. For example, **Jay Clayton** , the nominee for SEC chair, is an M&A attorney who chaired a **New York City Bar Association** committee that issued a critical report on the FCPA’s impact on cross-border transactions. Under Clayton, the SEC would be likely to scale back the “broken windows” approach to enforcement that it has adopted under current chair **Mary Jo White** ’s leadership.

Meanwhile, **Jeff Sessions** , the nominee for attorney general, is viewed as a “prosecute or don’t prosecute kind of guy,” says **David Simon** , FCPA partner at law firm **Foley & Lardner** . Under Sessions’s leadership, the DOJ could take a more black-and-white approach to the FCPA, issuing fewer deferred and non-prosecution agreements over gray-area cases, he says.

Corporate Settlement Amounts Involving FCPA

2007	$149 million
2008	$885 million
2009	$645 million
2010	$1.4 billion
2011	$503 million
2012	$260 million
2013	$720 million
2014	$1.6 billion
2015	$139 million
2016	$2.4 billion

Source: FCPAProfessor.com

Attorneys suggest the new leadership at the DOJ and SEC may offer companies more leeway in cases such as these. The bulk of the cases making up the 2016 enforcement tally dealt with improper gifts or lavish travel and entertainment expenses paid by subsidiary employees to gain business advantages with local officials. Many of these cases were self-reported by the parent company and fines were relatively low, accompanied by a standard DPA or NPA.

“You can almost write the script on these types of enforcement actions,” says **Mike Koehler** , professor at the **Southern Illinois University** School of Law and author of the FCPA Professor blog. In the majority of these cases, he says, the parent company ultimately charged with FCPA violations had anti-

bribery controls and procedures in place, but local staff did not institute official compliance policies correctly.

In fact, Koehler suggests, it may be time to question the efficacy of the FCPA at rooting out bribery and corruption altogether.

“I don’t think of a law as being successful when nearly 40 years after its passage, we get a record-breaking year,” he says.

“People who have actual FCPA experience and are well versed on some of the foreign business competition that companies face have seen the outrageous amount of money that well-intentioned companies are spending on good-faith efforts to comply with the FCPA,” Koehler says. “There does need to be some rethinking of what we’re doing here.”

Koehler noted that regulators in coming years could take up a 2011 **Chamber of Commerce** proposal that the agencies establish an FCPA “compliance defense” that would enable companies with legitimate anti-bribery and corruption compliance programs to have FCPA charges dropped. Other countries’ anti-bribery laws offer a similar compliance defense, he says.

Indeed, Brown says a compliance defense would be consistent with the Department of Justice’s 2015 Yates memo, which directed DOJ investigators to focus on bringing charges against specific executives engaged in wrongdoing, and to require companies to name names of executives responsible for misdeeds in order to get credit for cooperating with an investigation.

Meanwhile, it’s unclear whether the DOJ’s FCPA pilot program, established in 2016, will continue under the new administration. The program offers penalty discounts and other incentives to companies that self-disclose, self-remediate and cooperate with investigations involving FCPA matters.

“My optimistic side says if the new administration is trying to make this more of a pro-business paradigm, they’ll actually take it further and build more certainty in,” says Simon.

Global Enforcement

Clayton’s NYC Bar report criticized the FCPA for, among other things, putting U.S.-listed companies at a disadvantage, since, at the time it was published in 2011, the U.S. was largely the only country pursuing aggressive enforcement against international bribery and corruption.

Today, however, Brazil, China, the U.K. and other countries have adopted their own anti-corruption legislation and begun enforcing it. Similarly, U.S. enforcement has also gone global. The SEC and DOJ regularly cite efforts by international authorities in their resolutions when bringing bribery charges against companies. For example, U.S. investigators relied heavily on Brazilian authorities in the Odebrecht/Braskem case, according to Deputy Assistant Attorney General **Sung-Hee Suh** of the Justice Department’s Criminal Division.

During a media call on the case, in which investigators uncovered an entire business unit within Odebrecht dedicated to paying bribes, Suh said Brazilian law enforcement was “critical” to the resolution, which involved an “extraordinary amount of coordination and collaboration” with foreign officials. Odebrecht and Braskem have agreed to pay at least $3.5 billion to Brazilian, Swiss and U.S. enforcement agencies, and the two companies may face additional charges in other countries.

According to Simon, the Odebrecht/Braskem and VimpelCom cases, as well as many other cases resolved this year with international cooperation, show that enforcement of the FCPA has been globalized.

“This suggests the U.S. is part of something much bigger in terms of global anti-corruption and bribery enforcement, and I don’t think it’s going to be possible to dramatically change that,” he says.

“The idea that other countries are getting more comfortable with and aggressive on enforcement suggests from the compliance perspective and the board perspective that you still have to really prioritize anti-bribery and corruption compliance. It would be foolhardy not to,” Simon says.