THE FCPA IS HERE TO STAY

RONAK D. DESAI

The author is an international investigations attorney and India practice vice-chair at a prominent international law firm.

Since its enactment more than 40 years ago, the Foreign Corrupt Practices Act (FCPA) has evolved into a formidable mechanism to combat global corruption. Following nearly two decades of relative dormancy, enforcement activity under the landmark anticorruption statute has experienced a steady but dramatic rise over the past 20 years.

In 2016, FCPA enforcement appeared to reach its apex after U.S. regulators brought more than 60 corporate and individual enforcement actions for alleged FCPA violations, the highest number to date. For the first time in FCPA enforcement history, the aggregate dollar value of monetary fines and other related sanctions imposed by the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) topped $2.4 billion. These record-breaking figures represented a powerful testament to just how potent the FCPA had grown since its passage during the Carter administration.

Donald Trump’s election to the American presidency in November 2016, however, prompted speculation regarding the level of the new administration’s commitment to FCPA enforcement. In the past, President Trump and other individuals currently in key leadership positions within the DOJ and SEC had expressed some degree of skepticism toward white-collar prerogatives generally and the FCPA specifically. As a result, many wondered whether FCPA enforcement would suffer a sharp decline under the new government after years of robust activity.

To address these concerns, key officials in the Trump administration, including Attorney General Jeff Sessions and SEC Chairman Jay Clayton, reaffirmed their respective agencies’ commitment to continue vigorously enforcing the FCPA. The new administration even cited anticorruption enforcement in its National Security Strategy, noting that anticorruption measures and enforcement actions represented “important parts of [the] broader strategies to deter, coerce, and constrain adversaries.”

An examination of the Trump administration’s FCPA enforcement record during its first year demonstrates that these pronouncements are not mere rhetoric. On the contrary, since taking office, the Trump administration has taken more than two dozen enforcement actions against corporations and individuals for FCPA violations. In 2017 alone, cumulative penalties and related fines imposed on companies by American regulators and paid to the U.S. coffers exceeded $1.3 billion.

More importantly, recent FCPA activity has seen the emergence and continuation of several key trends stemming from enforcement, among them the willingness of U.S. regulators to bring cases absent proof of bribery or recidivist behavior, and a continued focus on culpable individuals consistent with the guidelines memorialized in the Yates memo. But one trend is particularly instructive for FCPA practitioners confronting an increasingly aggressive enforcement landscape: the continuing rise of coordinated multijurisdictional enforcement actions and the unprecedented monetary sanctions (often split among different international enforcement authorities) that inevitably accompany them.

In 2016, for example, the VimpelCom case resulted in a $795 million settlement with U.S. and Dutch authorities, while the Odebrecht/Braskem matter resulted in a $3.5 billion resolution involving U.S., Swiss, and Brazilian regulators.

These cases are not outliers. Last year witnessed three record-breaking, multijurisdictional enforcement actions involving some of the most prominent companies in the world. In January 2017, Rolls-Royce agreed to pay $800 million in fines for engaging in a global conspiracy...
to violate the FCPA that spanned half a dozen countries over three different continents. U.S. authorities received about $170 million of the final settlement, while Brazil and the United Kingdom received the remainder.

In September 2017, Swedish telecom giant Telia AB agreed to pay more than $965 million to authorities in the U.S., Sweden, and the Netherlands for bribes it paid to Uzbek government officials in exchange for better market access in the central Asian country.

In December 2017, Singaporean company Keppel Offshore & Marine Ltd. agreed to pay more than $422 million to authorities in the U.S., Singapore, and Brazil in connection with allegations that it had paid $55 million in bribes to Brazilian government officials, including officials at the country’s state-owned oil company, Petrobras. U.S. regulators received roughly $106 million of the penalty while the remainder was received by state treasuries in Singapore and Brazil. Cumulative penalties for the Rolls-Royce, Telia, and Keppel matters alone reached $2 billion.

Beyond these three examples, foreign enforcement authorities have continued under the Trump administration to demonstrate a growing willingness to provide evidence and other assistance to their U.S. colleagues in FCPA cases, including those in which they do not themselves pursue enforcement action or participate in the settlement agreement. In 2017, the DOJ and SEC acknowledged receiving cooperation or some form of assistance from counterparts in at least 20 different countries toward resolving FCPA matters that year.

In addition to the continued swell of prosecutions, there has been a rising number of FCPA actions involving foreign companies under the Trump administration. Since its inception, the FCPA has been vulnerable to accusations that the law puts American businesses at a profound disadvantage compared with non-U.S. companies. But recent figures are revealing, and they cast some doubt on the validity of this assertion. Last year, U.S. regulators brought more actions against foreign companies (six) than they did against U.S. companies (five) for the first time in nearly a decade.

The growing number of foreign companies targeted by the FCPA has resulted in a chorus of voices abroad alleging that the Trump administration is deploying the anticorruption statute as a mechanism to advance its “America First” agenda. However, the more likely explanation is that U.S. regulators have become more willing to rely on the anticorruption statute’s broad extraterritorial reach to exercise jurisdiction over foreign companies and individuals. The FCPA’s aggressive jurisdictional provisions have allowed American enforcement authorities to combat anticorruption around the world regardless of the violator’s nationality or location. As a result, the increase in non-U.S. companies and individuals subject to FCPA enforcement activity will inevitably continue—both a symptom and a cause of the rise in multijurisdictional enforcement worldwide.

In a globalized world, combating corruption has become a globalized endeavor.

Despite any doubts—or hopes—to the contrary, FCPA enforcement is here to stay. Enforcement levels under the Trump administration are so far generally consistent with those of previous administrations. The scope and nature of recent anticorruption settlements offer important lessons for both U.S. and foreign companies conducting cross business at home or abroad. Among the most important is that American regulators have succeeded in building the foundation of a multilateral network of enforcement authorities aimed at fostering greater cooperation to combat international bribery. In a globalized world, combating corruption has become a globalized endeavor.