



GLOBAL INVESTIGATIONS AND COMPLIANCE

FCPA Q4 2017 — QUARTERLY REPORT

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I. FCPA Q4 2017 REPORT

The fourth quarter of 2017 was marked by Department of Justice (DOJ) policy change announcements, robust international cooperation, and a challenge to the conventional wisdom that Foreign Corrupt Practices Act (FCPA) enforcement will be diminished under the current administration.

In late November, the DOJ announced a significant policy change with the release of its FCPA Corporate Enforcement Policy, which modified the FCPA Pilot Program and made it permanent as part of the U.S. Attorneys' Manual. The new policy created a presumption of a declination if a company self-discloses, cooperates, and remediates.

Although the fourth quarter of 2017 was relatively slow in terms of the number of FCPA cases resolved by the government, when compared to other quarters, the two cases filed by the DOJ (SBM Offshore and Keppel Offshore & Marine) were both global settlements in which more than \$650 million in penalties were allocated between the DOJ and foreign law enforcement. For example, in the SBM case, the DOJ, in calculating its fine, credited SBM's payment in 2014 to Dutch authorities over related conduct and also credited penalties likely to be paid to Brazil authorities in a future action. This crediting of penalties for the same conduct was not possible just several years ago and reflects closer international collaboration and a determination by the U.S. authorities to avoid "piling on."

The U.S. Securities and Exchange Commission (SEC) did not file any FCPA cases in the fourth quarter, but that should not be viewed as any indication that enforcement of the FCPA may be on the decline. To the contrary, leaders from both the DOJ and SEC made public statements this quarter reaffirming their commitment to robust enforcement of the FCPA.

II. WHAT THE ENFORCERS ARE SAYING

Officials from the DOJ and SEC reflected on the past, present, and future of the FCPA and the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention, as the FCPA reached its 40th anniversary and the OECD Anti-Bribery Convention its 20th anniversary. Those milestones are significant in the global fight against corruption, but may have been overshadowed a bit by Deputy Attorney General Rod Rosenstein's announcement of a newly revised FCPA Corporate Enforcement Policy.



A. FCPA Corporate Enforcement Policy

On Oct. 6, 2017, Rosenstein hinted that a change in corporate enforcement policy might be on the way. During his “Keynote Address on Corporate Enforcement Policy,” at the New York University Program on Corporate Compliance & Enforcement,¹ Rosenstein stated that the DOJ was “working on a project to collect outstanding department policy memoranda and to incorporate them, where appropriate, into the [U.S. Attorneys’] Manual.” He also indicated that the Yates Memo was one of the policy memos under review. Rosenstein said that any policy adjustments, in addition to providing more clarity, would reflect DOJ’s “resolve to hold individuals accountable for corporate wrongdoing” and would “affirm that the government should not use criminal authority unfairly to extract civil payments.”

On Nov. 29, 2017, Rosenstein followed up with the announcement of a revised FCPA Corporate Enforcement Policy. During his remarks at the 34th International Conference on the Foreign Corrupt Practices Act,² Rosenstein said, “[w]e 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. ... We want corporate officers and board members to better understand the costs and benefits of cooperation. The policy therefore specifies what we mean by voluntary disclosure, full cooperation, and timely and appropriate remediation.” The new policy changed the Pilot Program policy so that now when a company makes a voluntary self-disclosure, fully cooperates, and timely and appropriately remediates, there is a presumption that the case will be resolved through a declination. This presumption is not absolute, however, and can be overcome if there are “aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist.” Even when aggravating circumstances are present, if the other requirements are satisfied, DOJ will recommend a 50 percent reduction off the low end of the Sentencing Guidelines fine range. Rosenstein said “we expect that these adjustments, along with adding the FCPA

Corporate Enforcement Policy to the U.S. Attorneys’ Manual, will incentivize responsible corporate behavior and reduce cynicism about enforcement.” Whether the new policy results in more self-reporting and less cynicism remains to be seen and the question remains just how DOJ will be determining what might be considered an “aggravating circumstance” and whether aggravating circumstances will change over time.

B. FCPA at 40 and OECD Anti-Bribery Convention at 20

On Nov. 9, 2017, the DOJ, SEC, and OECD held an event hosted at the NYU Law School to reflect on the 40th anniversary of the FCPA and the 20th anniversary of the OECD Anti-Bribery Convention. In separate remarks, Acting Assistant Attorney General Kenneth A. Blanco and SEC Enforcement Division Co-Director Steve Peikin confirmed that FCPA enforcement under the Trump administration is not going to wane. Blanco said, “[w]e at the Department of Justice will continue, as we have for years, to push forward against corruption wherever our laws permit.”³ Peikin said, “[w]hat does the future hold for FCPA enforcement at the SEC? Will the SEC continue to be committed to robust FCPA enforcement? My answer to that question is simple: Yes.”⁴ Both men also spoke about the significant role that the OECD has played in opposing corruption around the world. Blanco highlighted that 43 nations have signed the OECD Anti-Bribery Convention and that each one has passed laws that criminalize bribery of foreign officials. “This international approach has dramatically advanced our collective efforts to uncover, punish, and deter foreign corruption.” Peikin said that “collaboration and coordination is integral to the Division of Enforcement’s efforts to combat bribery through the enforcement of the FCPA, and the OECD has played a pivotal role in fostering global efforts against bribery and corruption.” Both Blanco and Peikin pointed to the recent global resolutions Odebrecht/Braskem, Telia, Rolls-Royce, and VimpelCom as examples of the outstanding international cooperation that is continuing to flourish. Peikin also remarked about the recent *Kokesh v. SEC* Supreme Court decision regarding the application of the five-year statute of

1. Deputy Attorney General Rod Rosenstein, “Keynote Address on Corporate Enforcement Policy,” NYU Program on Corporate Compliance & Enforcement, New York, N.Y., Oct. 6, 2017, https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/.

2. “Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act,” Oxon Hill, Md., Nov. 29, 2017, <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

3. “Acting Assistant Attorney General Kenneth A. Blanco Delivers Remarks at Foreign Corrupt Practices Act/Organization for Economic Cooperation and Development Anniversary Conference at the NYU School of Law,” New York, N.Y., Nov. 9, 2017, <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-delivers-remarks-foreign-corrupt>.

4. Steven R. Peikin, Co-Director, SEC Enforcement Division, “Reflections on the Past, Present, and Future of the SEC’s Enforcement of the Foreign Corrupt Practices Act,” NYU School of Law, New York, N.Y., Nov. 9, 2017, <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

limitations to disgorgement. “I expect [*Kokesh*] 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.”

III. ENFORCEMENT ACTIVITY IN Q4 2017

A. SBM Offshore N.V.

On Nov. 29, 2017, a Dutch oil services company, SBM Offshore N.V. (SBM), agreed to pay a criminal penalty of \$238 million to the DOJ for violating the FCPA by bribing foreign officials in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq. SBM also entered into a three-year deferred prosecution agreement (DPA). From 1996 to at least 2012, SBM paid more than \$180 million in commissions to intermediaries, and knew that these commissions would be used to bribe foreign officials. SBM used the payments to gain an improper advantage and obtain or retain approximately \$2.8 billion in contracts with state-owned oil companies. Two former SBM executives, Anthony Mace and Robert Zubiate, also pleaded guilty to counts of conspiracy to violate the FCPA and are awaiting sentencing.

In 2014, SBM settled bribery offenses with the Dutch public prosecutor’s office, Openbaar Ministerie, over related conduct and paid a total of \$200 million in disgorged profits and a \$40 million fine. The DOJ credited SBM’s payment to the Openbaar Ministerie, as well as estimated penalties to Brazil’s Ministério Público Federal, when it calculated its fine in this matter.⁵ SBM also qualified for a 25 percent reduction off the bottom of the U.S. Sentencing Guidelines range because it fully cooperated and conducted significant remedial measures.

B. Keppel Offshore & Marine

On Dec. 22, 2017, Keppel Offshore & Marine Ltd. (KOM), a Singapore-based company that operates shipyards, and repairs and upgrades shipping vessels, and Keppel Offshore & Marine USA Inc. (KOM USA), a wholly owned U.S. subsidiary, agreed to pay a penalty of more than \$422 million to resolve corruption charges with the Ministério Público Federal of Brazil, Attorney-General’s Chambers of Singapore, and the DOJ. KOM will pay \$211 million to Brazil authorities, \$105 million to Singapore authorities, and \$105 million to the DOJ. The U.S. credited the fines paid to the Brazil and Singapore authorities when calculating its fine. It also gave credit to KOM and KOM USA for cooperation with the investigation, and for taking extensive remedial measures. KOM paid approximately \$55 million in bribes to officials in Brazil during a decadelong scheme that resulted in over \$350 million in business. Beginning in 2001 and continuing until 2014, KOM paid officials at the Brazil state-owned oil company, Petrobras, and to the then-governing political party in Brazil, The Workers’ Party, to win 13 contracts with Petrobras and another Brazilian entity. KOM concealed the bribes by paying oversized commissions disguised as legitimate consulting payments to an intermediary who then made payments to the officials and political party members. KOM utilized a series of shell companies to conceal the source and disbursement of bribes. In addition to the fines, KOM entered into a three-year DPA related to its violation of the anti-bribery provisions of the FCPA. As part of the DPA, KOM will implement rigorous internal controls, and cooperate fully with the DOJ’s ongoing investigation. In addition, the DOJ unsealed charges against a former senior member of KOM’s legal department who pleaded guilty to one count of conspiracy to violate the FCPA. The former employee is still awaiting sentencing.⁶ The \$422 million fine against KOM is the seventh-largest FCPA financial penalty.

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5. U.S. Department of Justice Press Release, “SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries,” Nov. 29, 2017, <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>.

6. U.S. Department of Justice Press Release, “Keppel Offshore & Marine Ltd. And U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case,” Dec. 22, 2017, <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties>.

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