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RISK & COMPLIANCE JOURNAL.

The FCPA in 2016: Analyzing the Numbers

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(This is a quarterly analysis of trends in anti-bribery enforcement by The Foreign Corrupt Practices Act Clearinghouse, a database operated by Stanford Law School. The views presented here are those of the author alone, not those of Dow Jones or the Wall Street Journal.)

By KRISTEN SAVELLE

In 2016, the Securities and Exchange Commission and Department of Justice dramatically increased enforcement of the Foreign Corrupt Practices Act, resulting in some of the largest monetary sanctions in FCPA history. China remained in the regulatory cross hairs, but shared the spotlight with several Latin American countries. Last year also witnessed the launch of an FCPA pilot program and the DOJ's deployment of a new category of FCPA resolution. The 2016 Roundup provides an overview of some of the more notable trends and statistics to emerge from last year's FCPA enforcement activity.

Enforcement Statistics

2016 witnessed a dramatic upsurge in FCPA enforcement activity.

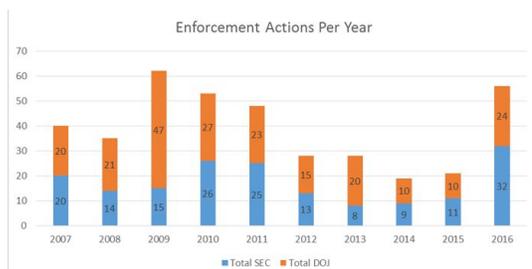


PHOTO: FCPA CLEARINGHOUSE

Collectively, the SEC and DOJ initiated 56 FCPA enforcement actions, representing a 167% increase over 2015. The SEC brought more FCPA enforcement actions last year than in any previous calendar year. Criminal FCPA prosecutions reached their highest level since 2010.

Entity and Individual Defendants

Entity groups (or groups of affiliated entities, such as parents and their subsidiaries and joint ventures) comprised more than two-thirds of all FCPA defendants last year. The 32 enforcement actions initiated by the SEC in 2016 involved 24 entity groups and eight individual defendants, while the DOJ's 24 enforcement actions included 14 entity groups and 10 individual defendants.

Notwithstanding the Yates Memo and the DOJ's stated focus on individual accountability, to date only two (or 14%) of the 14 corporate groups subject to criminal FCPA enforcement last year have involved a related criminal prosecution of company employees or agents. That means that 86% of corporate prosecutions initiated in 2016 have involved no related criminal action against the employees or agents who caused or facilitated the FCPA violations. Some of the individuals responsible for these misdeeds may yet be prosecuted in the coming months or years.

Sanctions

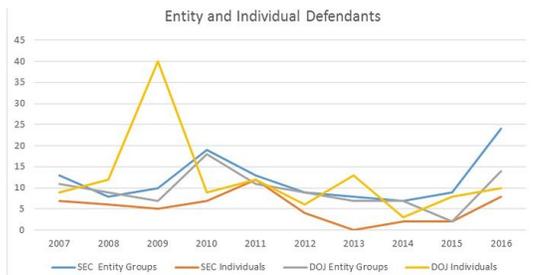


PHOTO: FCPA CLEARINGHOUSE

With last year’s rise in FCPA enforcement activity came a rise in sanctions imposed on entities and individuals.

Monetary sanctions imposed in FCPA enforcement actions initiated in 2016 totaled more than \$2.6 billion, with a per-action average of just under \$90 million. Both total and average sanctions reached their highest level since 2008 (the year of the \$800 million Siemensnction) and their second highest level since enactment of the FCPA. Sanctions imposed last year on four entity groups–Teva Pharmaceuticals, Odebrecht/Braskem, Och-Ziff, and VimpelCom–mark four of

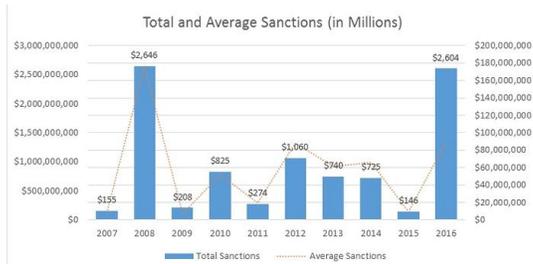


PHOTO: FCPA CLEARINGHOUSE

the top 10 highest monetary settlements in FCPA history.

Geography

China bore the brunt of last year’s FCPA-related enforcement activity.

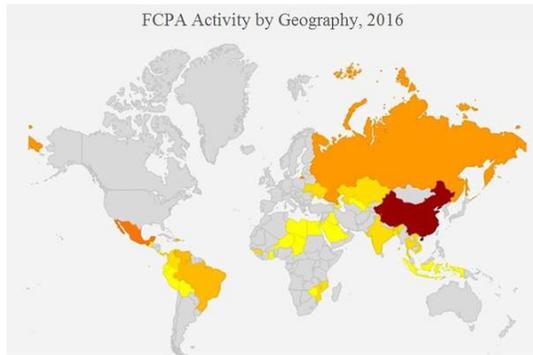


PHOTO: FCPA CLEARINGHOUSE

When grouped by common bribery scheme, just over half of all FCPA-related matters initiated in 2016 involved allegations of misconduct in China. Mexico, Russia, Angola, Brazil, Dominican Republic, Argentina, and Venezuela round out the top eight countries implicated in last year’s FCPA enforcement activity. The prevalence of state-owned and state-controlled enterprises in

many sectors of the Chinese and Latin American economies continues to pose a risk to companies doing business in those regions.

Investigation Closures

Fifteen companies publicly disclosed in 2016 that the SEC, the DOJ, or both agencies had closed an FCPA-related investigation without taking further action. At least seven of the companies that the DOJ investigated but declined to prosecute in 2016 were ultimately sued for FCPA offenses in standalone SEC actions. The DOJ’s decision not to prosecute these companies may reflect a conscious decision to forgo enforcement in certain low-value cases that can be adequately redressed through regulatory action. In fact, several of the standalone SEC actions initiated in 2016 involved relatively small monetary settlements, particularly as compared to the mammoth Teva (\$519 million), Odebrecht/Braskem (\$420 million), VimpelCom (\$398 million), Embraer (\$206 million) and J.P. Morgan (\$203 million) actions in which the DOJ did participate.

The Pilot Program and Declinations with Disgorgement

On April 5, 2016, the DOJ announced the launch of a new FCPA pilot program designed to promote individual accountability and to increase transparency in charging decisions. Under the terms of the pilot program, companies that voluntarily disclose

FCPA-related misconduct, cooperate fully in the government's investigation, undertake appropriate remedial measures, and disgorge all profits earned from the illegal conduct may be eligible for a declination of prosecution or a discount off the bottom of the fine range applicable under the U.S. Sentencing Guidelines.

To date, the DOJ has publicly disclosed five declination letters attributable to the pilot program. The first three letters contain relatively barebones factual assertions and were issued in connection with parallel SEC enforcement actions that included a disgorgement payment to the Commission. The remaining two declination letters are significantly more noteworthy. They include detailed recitations of the government's findings with regard to the alleged bribery, are counter-signed by company representatives and require the companies to disgorge to the DOJ all ill-gotten profits. These "declinations with disgorgement" appear to be a new category of FCPA resolution, and they are counted as enforcement actions for purposes of these statistics.

In practice, DWDs appear to be substantively similar to non-prosecution agreements, which have long been used to resolve criminal (and more recently civil) FCPA actions. Neither the NPA nor the DWD is filed in court. Under both agreements, the company is required to consent to the facts and conditions imposed by the government, although the company's ongoing obligations under a DWD have so far been less onerous. Although the government can prosecute a defendant for breach of an NPA, it reserves its right in a DWD to reopen its inquiry if it learns information that changes its assessment of the facts.

One of the more significant distinctions between the two forms of resolution may involve the tax consequences of a disgorgement payment. Companies receiving a DWD are prohibited from seeking a tax deduction for the disgorged amounts. By contrast, companies have typically treated disgorgement payments made in FCPA enforcement actions as tax deductible. Even this distinction may prove illusory, as the IRS recently issued a non-binding memorandum concluding that, at least in some circumstances, a taxpayer could not claim a deduction for disgorgement payments made to the SEC for FCPA violations.

Looking Ahead

With the dawning of the new year comes a new administration, new leadership at the SEC and DOJ, and considerable uncertainty as to the direction and intensity of future FCPA enforcement. Both President Donald Trump and Jay Clayton, a big law attorney and Trump's nominee for SEC chair, have expressed disapproval of the FCPA. In a 2012 interview, Trump called the FCPA a "horrible law" that "should be changed." In 2011, Clayton co-wrote a paper that concluded the FCPA puts U.S. companies at a disadvantage in international transactions and called for a reevaluation of the country's strategy for fighting foreign corruption. While these statements may presage the twilight of zealous FCPA enforcement, they may just as readily represent the views of a businessman and a lawyer prior to their political debut. Stay tuned.

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The Foreign Corrupt Practices Act Clearinghouse (FCPAC) is a free public database. The FCPAC was developed by researchers at Stanford Law School in collaboration with attorneys at Sullivan & Cromwell LLP. The database is available at <http://fcpa.stanford.edu>.

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