

40 Years Of FCPA: Cross-Border Efforts And Growing Risk

By **Patrick Stokes and Zachariah Lloyd**

December 12, 2017, 2:45 PM EST

Leading up to the 40th anniversary of the Foreign Corrupt Practices Act on Dec. 19, this Expert Analysis series features reflections from attorneys who have played a role in the evolution of FCPA enforcement, defense and compliance.

Enacted in 1977 in the wake of Watergate and congressional findings that numerous U.S. companies paid millions of dollars to foreign officials to secure business, the Foreign Corrupt Practices Act showed only hints of its potential over the next two decades.^[1] The 2000s, however, saw this pioneering statute begin to reveal its expansive possibilities, as U.S. Department of Justice and U.S. Securities and Exchange Commission enforcement actions ramped up. At 40, the FCPA packs a punch that even lawmakers likely did not envision decades ago. There are numerous factors that have led to the expanded reach and impact of the FCPA over the past four decades. Perhaps none has been, or will prove to be, more consequential than the increasing collaboration between U.S. and foreign anti-corruption authorities.

The DOJ, the SEC and their domestic law enforcement partners have worked for decades to forge stronger relationships with their overseas counterparts. These relationships are increasingly proving their value. In the last two years alone, the DOJ and the SEC worked closely with foreign law enforcement to achieve record-breaking settlements with multiple multinationals. These collaborative efforts bolster the U.S. agencies' track record of bringing bigger, harder-hitting cases alongside foreign authorities. See the chart below.



Patrick Stokes



Zachariah Lloyd

| Company | U.S. Resolution | Total Resolution | Countries Involved |
|--|----------------------------|------------------|--|
| VimpelCom Ltd. (February 2016) | \$397,600,000 | \$795,300,000 | In resolutions with DOJ, the SEC and the Public Prosecution Service of the Netherlands, VimpelCom acknowledged paying over \$114 million in bribes to a government official in Uzbekistan between 2006 and 2012 to win lucrative telecommunications licenses. The United States and the Netherlands coordinated their investigations, with assistance from regulators in Belgium, France, Ireland, Latvia, Luxembourg, Norway, Sweden, Switzerland, and the United Kingdom. |
| Embraer SA (October 2016) | \$185,000,000 | \$205,000,000 | After long-running corruption probes by the United States and Brazil , Embraer resolved coordinated investigations by DOJ, the SEC, and Brazilian authorities in connection with a scheme to pay at least \$11.7 million in bribes to government officials in the Dominican Republic, Mozambique, and Saudi Arabia. Brazilian prosecutors also charged eleven individuals, and Saudi authorities charged two more. The United States also credited authorities in the Dominican Republic and South Africa for their assistance. |
| Odebrecht S.A. & Braskem S.A. (December 2016) | \$419,800,000 ⁱ | \$3,500,000,000 | A global investigation by Brazilian , Swiss , and U.S. authorities resulted in the largest foreign bribery settlement to date, as Odebrecht and Braskem admitted to paying at least \$788 million in bribes, dating back to 2001, to government officials and political parties in many countries to win lucrative construction contracts. |
| Rolls-Royce Plc (January 2017) | \$170,000,000 | \$800,000,000 | To resolve a large bribery case with U.K. , U.S. , and Brazilian authorities, Rolls-Royce admitted to paying more than \$35 million in bribes to foreign officials between 2000 and 2013 in exchange for contracts in at least six countries. The United States recently announced an indictment against one individual and plea agreements with four others in connection with the underlying conduct. Regulators from Austria, Germany, the Netherlands, Singapore, and Turkey contributed to the enforcement actions. |
| Telia Company AB (September 2017) | \$482,500,000 | \$965,000,000 | Most recently, Telia resolved a long-standing investigation into corrupt payments to a government official in Uzbekistan to win lucrative telecommunications contracts. Telia entered into resolutions with DOJ and the SEC , as well as Swedish and Dutch prosecutors. The U.S., Swedish, and Dutch authorities acknowledged investigative assistance from Austria, Belgium, Cyprus, France, Ireland, the Isle of Man, Latvia, Luxembourg, Norway, Switzerland, and the United Kingdom. |
| SBM Offshore N.V. (November 2017) | \$238,000,000 | \$475,000,000 | Most recently, Dutch oil services company SBM Offshore resolved bribery charges in the US by agreeing to pay a criminal penalty of \$238 million related to conduct in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq. DOJ's announcement noted that "SBM has paid a combined worldwide total in criminal penalties in excess of \$475 million"—first by settling with Dutch prosecutors in 2014 (disgorging \$200 million in profits and paying a \$40 million fine) and then in 2016 reaching a settlement with Brazilian authorities and Petrobras (agreeing to pay Petrobras \$342 million by a cash penalty and discounts on future work). DOJ's press release acknowledged the assistance of prosecutors from Brazil, the Netherlands and Switzerland in conducting the investigation. |

ⁱ In April 2017, DOJ agreed to reduce Odebrecht's portion of the U.S. fine from \$260 million to \$93 million due to its inability to pay the full fine.

These resolutions reflect a growing trend: The largest FCPA settlements frequently involve multijurisdictional, coordinated investigative and enforcement efforts. Of course, parallel cross-border investigations and resolutions are not new. For example, nearly a decade ago, German and U.S. authorities resolved a landmark corruption case with Siemens AG in which employees and foreign subsidiaries paid bribes in connection with transactions around the world. German and U.S. authorities split evenly a then-record \$1.6 billion in penalties. Nevertheless, recent resolutions by major multinational companies like Odebrecht SA, VimpelCom Ltd., Rolls-Royce PLC and Telia Company AB signal an escalation in coordinated enforcement activities.

Take Rolls-Royce, for instance. It agreed to pay \$800 million to Brazilian, U.K. and U.S. authorities to resolve charges that it, “[f]or more than a decade, [] repeatedly resorted to bribes to secure contracts and get a competitive edge in countries throughout the world.”^[2] Rolls-Royce admitted to bribing government officials in Angola, Azerbaijan, Brazil, China, India, Indonesia, Iraq, Kazakhstan, Malaysia, Nigeria, Russia and Thailand.^[3] And enforcement authorities in these three countries did not act alone. The DOJ announced that five other countries aided the investigation, including officials from Austria, Germany, the Netherlands, Singapore and Turkey.^[4]

Not surprisingly, the U.S. agencies’ increasing coordination with their foreign partners has led to more potent investigations — in terms of both their scope and settlement cost. Three primary factors have contributed to this collaborative impact:

First, years of relationship-building among international law enforcement are bearing more fruit. After decades of outreach, the DOJ and the SEC, along with their domestic investigative partners, have well-established relationships with law enforcement and regulators fighting corruption in other countries. These long-cultivated relationships have facilitated recent investigations, allowing them to run more smoothly and efficiently. Further, U.S. participation in multilateral fora like the Organization for Economic Cooperation and Development’s Working Group on Bribery^[5] has significantly helped advance the anti-corruption agenda across the globe, as well as multiplied and solidified the links among U.S. and foreign law enforcement, regulators and policymakers, through quarterly meetings focused on the member nations’ progress in implementing and enforcing anti-bribery laws, training those who enforce them, and sharing investigatory tips.

Second, cross-border connections have improved information sharing. Traditionally, overseas evidence is obtained through formal channels (e.g., mutual legal assistance treaties, letters rogatory, and memoranda of understanding between foreign financial regulators). These channels often prove to be cumbersome, protracted methods of securing even basic evidence. But as law enforcement officials develop working relationships across borders and become accustomed to cooperating on an informal basis — i.e., sharing information (including investigative leads, theories, witness identities, details from cooperating defendants, noncourt-authenticated documents, and other evidence obtained through local law-enforcement efforts) outside official mechanisms directly with each other — this sharing speeds up the investigative process and helps countries develop stronger cases, particularly as some investigative tools might be more readily available in one jurisdiction than in another.

Third, more and more foreign authorities have become actively involved in anti-corruption enforcement. Responding to increasing media, political and citizen pressures to combat corruption, more governments have dedicated resources to enforcement and also have enacted legislation to address gaps in domestic and foreign bribery laws, empower regulators to impose corporate liability, and increase enforcement powers. Countries also have responded to pressure from multilateral fora (like the

OECD), while reacting to the competitive nature of international enforcement efforts. Indeed, high-profile bribery investigations continue to spur increased citizen demand for enforcement (e.g., the FIFA investigation and Brazil's Operation Car Wash (Lava Jato)). Numerous countries have enacted legislative reforms in the past five years to strengthen the anti-corruption tools available to prosecutors and regulators, including perhaps most significantly in the United Kingdom, Brazil, Colombia, France and Mexico. While legislative developments are no guarantee that countries will increase enforcement efforts, these legislative reforms provide key building blocks for the type of international collaboration U.S. authorities have been pursuing.

Collaboration Between Governments Likely to Continue to Increase

U.S. authorities' efforts to encourage foreign cooperation is nothing new, and we should not expect it to diminish anytime soon. In the past year, DOJ officials have continued to emphasize their interest in global anti-corruption efforts and, in particular, cooperation with foreign law enforcement. In an April 24, 2017, speech at a compliance conference, Attorney General Jeff Sessions stated that the DOJ "will continue to strongly enforce the FCPA and other anti-corruption laws," "emphasize the importance of holding individuals accountable for corporate misconduct" and "work closely with [its] law enforcement partners, both here and abroad, to bring these persons to justice."^[6] Deputy Attorney General Rod Rosenstein reinforced that "it is not enough to collect and share information internally; we must also share it with other nations" and "cooperate across borders to obtain necessary evidence."^[7] Steven Peikin, co-director of the SEC's Division of Enforcement, recently emphasized that "in an increasingly international enforcement environment, the U.S. authorities cannot — and should not — go it alone in fighting corruption."^[8] The commitment to forging closer relationships with foreign regulators and law enforcement is, perhaps, best exemplified by the DOJ's detailing an anti-corruption prosecutor to the U.K.'s Financial Conduct Authority and Serious Fraud Office.^[9]

Collaboration Between Regulators Improves Anti-Corruption Enforcement and Increases Risks for Companies

The U.S. and an expanding roster of foreign governments have become increasingly accustomed to sharing information and coordinating their corruption investigations and prosecutions. Why? Because they see the results: broader, more effective investigations, better access to evidence, increased prosecution of individuals involved, and harder-hitting resolutions.

Expanded Investigations

More robust collaboration enables prosecutors to bring bigger, more comprehensive cases. In its recent Rolls-Royce and Telia press releases, the DOJ identified at least 16 countries that provided "significant cooperation and assistance" in the investigations.^[10] This cooperation includes public and nonpublic assistance, including likely sharing of evidence,^[11] facilitating asset forfeiture (e.g., a Dutch court, at the request of U.S. authorities, ordered the seizure of approximately \$135 million in assets from a local company used as a front), and participating in myriad behind-the-scenes ways.

Individual Prosecutions

U.S. and foreign prosecutors cooperate not only on corporate prosecutions, but also on individual actions. Indeed, in October 2016, former Attorney General Loretta Lynch touted that since 2009 the DOJ "has brought more than 65 individual criminal cases ... in connection with foreign bribery charges — many of them in coordination with our foreign law-enforcement partners."^[12] For example, in

conjunction with the Embraer SA resolution — and with the assistance of U.S. officials — Brazilian authorities brought charges against 11 individuals “for their alleged involvement in Embraer’s misconduct.”[13] As U.S. authorities continue to push for individual prosecutions, they have made clear that this includes helping foreign prosecutors build and bring criminal cases against foreigners who were involved in corrupt acts. This cooperation expands the prosecutorial web, thereby increasing the risks for foreign employees and executives who may otherwise have felt insulated from a U.S. investigation. And, of course, the United States continues to work with its foreign partners to bring charges domestically against individuals, as it did recently in the Rolls-Royce case. Notably, foreign officials may have the ability to gather evidence using investigative tools not readily available to U.S. authorities and can then share that evidence to assist U.S. investigations.

Multijurisdictional Settlements

In addition to record-setting monetary penalties in the United States, several of the top FCPA resolutions included significant fines paid to non-U.S. enforcers relating to the same conduct. VimpelCom’s \$795 million resolution with Dutch and U.S. authorities in February 2016 was shared equally between the regulators. So, too, for Telia, which will offset up to 50 percent of the \$965 million owed to U.S. authorities with payments to Sweden and the Netherlands.

As foreign governments play a more substantial role in investigations, it is natural to expect their split of coordinated resolutions to reflect that. For instance, in the December 2016 Odebrecht/Braskem global resolutions, Brazilian, Swiss and U.S. authorities agreed that Brazil would receive the lion’s share of combined penalties, with the Swiss and U.S. splitting the remainder.[14] This arrangement reflected the significance of the case to Brazil and the substantial investigative work it did without U.S. contribution. It also suggests a trend to watch for: more countries taking a leading role in building corruption cases while the United States takes on an important but narrower one (e.g., guiding corporate investigations and resolutions, an area with which most countries still have very limited experience).

Conclusion

Decades of international outreach and cooperation have played a crucial part in the expansion of FCPA enforcement. Multijurisdictional collaboration brings significant benefits to prosecutors’ and regulators’ fight against international corruption. U.S. authorities have developed the global connections and capabilities to more effectively target far-flung bribery schemes. And yet the global legal landscape in which the FCPA now exists is much more complex than it was 40 years ago, particularly for companies caught up in multijurisdictional investigations. While the FCPA’s success story is in large part due to the increase in international cooperation, how the DOJ and the SEC, along with their foreign counterparts, maximize the investigative advantages and reduce the complexities and uncertainties companies face when trying to cooperate with multiple countries will help define the success of anti-corruption enforcement over the coming years. In the meantime, both companies and their employees who run afoul of anti-corruption laws should expect to face steeper penalties and hear more accents at the negotiating table.

Patrick F. Stokes is a partner in the Washington, D.C., office of Gibson, Dunn & Crutcher LLP. Prior to joining the firm, he spent nearly 18 years with the U.S. Department of Justice, and headed the FCPA Unit from 2014 to 2016.

Zachariah J. Lloyd is an associate in the firm’s Orange County, California, office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 15 U.S.C. §§ 78m, 78dd-1, et seq. (West 2012).

[2] Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017), available at <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

[3] Id.

[4] Id.

[5] Established in 1994, the OECD Working Group on Bribery in International Business Transactions is responsible for monitoring the implementation and enforcement of the OECD Anti-Bribery Convention. OECD Working Group on Bribery in International Business Transactions, available at <http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/oecdworkinggroupbriberyininternationalbusinesstransactions.htm>.

[6] Jeff Sessions, U.S. Attorney General, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017), available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>.

[7] Rod Rosenstein, Deputy Attorney General, Remarks to the Interpol 2017 General Assembly (Sept. 26, 2017), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-roSENSTEIN-delivers-remarks-interpol-2017-general-assembly>.

[8] 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, (Nov. 9, 2017), available at <https://www.sec.gov/news/speech/speech-peikin-2017-11-09>.

[9] Trevor N. McFadden, former Acting Principal Deputy Assistant Attorney General (now U.S. District Court Judge), Remarks at American Conference Institute's 7th Brazil Summit on Anti-Corruption (May 24, 2017), available at <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american>.

[10] Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017), available at <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

[11] See McFadden remarks, supra, note 11 ("The United States and countries around the world also share evidence and information with one another pursuant to the principle of reciprocity, or through various informal mechanisms.").

[12] Loretta Lynch, Former Attorney General, Remarks on Department of Justice Efforts in the Fight Against International Fraud and Corruption (Oct. 20, 2016), available at <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-department>

justice-efforts-fight.

[13] Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016), available at <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>.

[14] See note 3, *supra*.