

March 15, 2019

## **DOJ, FBI, and CFTC Announce FCPA Policy Revisions and Initiatives**

The Department of Justice announced last week several revisions to its Foreign Corrupt Practices Act (“FCPA”) Corporate Enforcement Policy, which includes relaxing prior guidance on how companies should deal with employees’ use of disappearing messaging services such as WhatsApp. In addition, the Federal Bureau of Investigation announced the creation of a dedicated international corruption squad based in its Miami Field Office to focus on corruption and anti-money laundering issues in Latin American countries. Finally, the Commodity Futures Trading Commission announced that it would investigate cases involving foreign corruption in violation of the Commodity Exchange Act, and will coordinate with other law enforcement agencies in doing so. Below we explain these developments and assess their implications.

### **DOJ Revises the FCPA Corporate Enforcement Policy to Reflect Prosecution Practices**

On March 8, 2019, the DOJ announced several revisions to the FCPA Corporate Enforcement Policy.<sup>1</sup> A new revision removes the policy’s requirement that companies prohibit employees from using self-destructing messaging services such as WhatsApp. Under the new policy, companies must “implement[] appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company’s ability to appropriately retain business records or communications.”<sup>2</sup>

Some of the other revisions are codification of changes previously announced in speeches, such as extending the policy’s presumption of a declination to companies that, through timely due diligence during a mergers and acquisitions process, uncover corrupt conduct, voluntarily disclose such conduct, and provide full cooperation in an ensuing investigation. This revision codifies the existing guidance provided in a speech last year by Deputy Assistant Attorney General Matthew S. Miner that the DOJ will decline to take action where a successor company self-discloses and cooperates with enforcement agencies.<sup>3</sup> Under the revised policy, a successor company may be eligible for a declination even if the entity it acquired presented aggravating circumstances, such as when the acquired entity’s past leadership was complicit in corruption but the successor company removed that leadership.<sup>4</sup> According to Assistant Attorney General Benczkowski, the revisions set forth updated, practical definitions, with the expectation that the revised

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<sup>1</sup> See Dep’t of Justice, Justice Manual, § 9-47.120 (revised Nov. 2018) (*hereinafter*, “Justice Manual”), available [here](#).

<sup>2</sup> Justice Manual, § 9-47.120(3)(c).

<sup>3</sup> Matthew S. Miner, Dep’t of Justice Deputy Assistant Attorney General, *Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets* (July 25, 2018), available [here](#); see also Dep’t of Justice & Sec. Exch. Comm’n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act 28–33* (Nov. 14, 2012), available [here](#).

<sup>4</sup> See Brian A. Benczkowski, Dep’t of Justice Assistant Attorney General, *Remarks at the 33rd Annual ABA National Institute on White Collar Crime Conference* (Mar. 8, 2019), available [here](#).

policy will “bring it in line with current practice” at the DOJ and “avoid[] chilling acquisition activity by law-abiding companies, who might otherwise walk away from worthwhile investments due to the risk of FCPA enforcement.”<sup>5</sup>

Similarly, the revised policy codifies remarks made by Deputy Attorney General Rod Rosenstein in a speech last year to relax a key component of the so-called “Yates Memo”: DOJ will no longer require companies seeking to qualify for voluntary disclosure credit to provide information on *all* employees tied to the misconduct, which was described as “not practical.”<sup>6</sup> The revised policy now requires that companies simply disclose information about “all individuals substantially involved” in the misconduct.<sup>7</sup>

Relatedly, on March 7, 2019, Rosenstein delivered one of his final speeches in a keynote address on FCPA enforcement developments.<sup>8</sup> According to Rosenstein, the DOJ continues to “focus [its] limited resources on individuals, and on companies that fail to take compliance obligations seriously,”<sup>9</sup> reaffirming the DOJ’s commitment to prioritizing prosecutions of individuals.<sup>10</sup> Referring to the DOJ’s recent “no piling-on” policy, he said that companies are more likely to cooperate with enforcement agencies when finality can be guaranteed, and that resolving cases expeditiously “allows government agencies to uncover and address new schemes” rather than established violations.<sup>11</sup> Rosenstein also encouraged companies to foster a “culture of compliance” to ensure their compliance programs work in practice.<sup>12</sup>

### **FBI Announces Creation of Miami International Corruption Squad**

On March 5, 2019, the FBI announced the creation of a dedicated International Corruption Squad based in its Miami Field Office.<sup>13</sup> There are already three such squads based in the FBI’s field offices in Los Angeles, New York, and Washington, D.C. The International Corruption Squads have played a major role investigating FCPA violations that have resulted in significant penalties, including investigations against

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<sup>5</sup> See Benczkowski Remarks, *supra* note 13.

<sup>6</sup> See Rod J. Rosenstein, Dep’t of Justice Deputy Attorney General, *Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018), available [here](#).

<sup>7</sup> Justice Manual, § 9-47.120(3)(a).

<sup>8</sup> See Rod J. Rosenstein, Dep’t of Justice Deputy Attorney General, *Keynote Address on FCPA Enforcement Developments* (Mar. 7, 2019), available [here](#).

<sup>9</sup> *Id.*

<sup>10</sup> See Rosenstein Remarks, *supra* note 6; Paul, Weiss Client Memorandum, “FCPA Enforcement and Anti-Corruption Developments: 2018 Year in Review” (Jan. 17, 2019), available [here](#).

<sup>11</sup> Rosenstein Keynote Address, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> Press Release, Fed. Bureau of Investigations, *FBI Announces New International Corruption Squad in Miami Field Office* (Mar. 5, 2019), available [here](#).

Petrobras that resulted in a total of \$853.2 million in penalties,<sup>14</sup> against Rolls-Royce plc that resulted in an \$800 million global resolution,<sup>15</sup> and against SBM Offshore N.V. that resulted in a \$238 million penalty.<sup>16</sup>

The Miami International Corruption Squad will investigate suspected violations of the FCPA in Miami and South America, where the DOJ and SEC have resolved significant corruption actions against Brazilian companies such as Petrobras, Odebrecht, and Braskem,<sup>17</sup> and are continuing to bring prosecutions related to PetroEcuador and Venezuela's PDVSA.<sup>18</sup> The Miami squad will comprise six agents, a forensic accountant, and a supervisor, who will work with the DOJ's Fraud Section and Money Laundering Asset Forfeiture Section, the U.S. Attorney's Office for the Southern District of Florida, and the SEC, including the experienced FCPA enforcement attorneys in its Miami Regional Office.

### **CFTC's Foreign Corrupt Practices Initiative**

On March 6, 2019, CFTC Director of Enforcement James M. McDonald announced for the first time the CFTC's commitment to investigating cases involving foreign corrupt practices in violation of the Commodity Exchange Act ("CEA"), and the CFTC published a new Enforcement Advisory that provides leniency for companies and individuals who cooperate and self-report foreign corrupt practices.<sup>19</sup> McDonald also disclosed that the CFTC already has open investigations involving corruption in commodities markets.<sup>20</sup>

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<sup>14</sup> Press Release, Dep't of Justice, *Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than \$850 Million for FCPA Violations* (Sept. 27, 2018), available [here](#); Paul, Weiss Client Memorandum, "Behind Petrobras \$1.8 Billion FCPA Settlement, An Interesting Accounting" (Oct. 2, 2018), available [here](#).

<sup>15</sup> Press Release, Dep't of Justice, *Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case* (Jan. 17, 2017), available [here](#); Paul, Weiss Client Memorandum, "FCPA Enforcement and Anti-Corruption Developments: 2017 Year In Review" (Jan. 19, 2018), available [here](#).

<sup>16</sup> Press Release, Dep't of Justice, *SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries* (Nov. 29, 2017), available [here](#); Paul, Weiss Client Memorandum, "FCPA Enforcement and Anti-Corruption Developments: 2017 Year In Review" (Jan. 19, 2018), available [here](#).

<sup>17</sup> See *supra* note 14; see also Michael Balsamo & Eric Tucker, *FBI Adds an Anti-Bribery Squad Focusing on South America*, WASH. POST (Mar. 5, 2019), available [here](#); Press Release, Dep't of Justice, *Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History* (Dec. 21, 2016), available [here](#); Paul, Weiss Client Memorandum, "FCPA Enforcement and Anti-Corruption Developments: 2016 Year In Review" (Jan. 20, 2017), available [here](#).

<sup>18</sup> See Press Release, Dep't of Justice, *Financial Advisor Pleads Guilty to Money Laundering Charge in Connection With Bribery Scheme Involving Ecuadorian Officials* (Sept. 11, 2018), available [here](#); U.S. DEP'T OF JUSTICE CRIM. DIV. FRAUD SECTION, FRAUD SECTION YEAR IN REVIEW 2018 7–8 (Jan. 2019), available [here](#); Paul, Weiss Client Memorandum, "FCPA Enforcement and Anti-Corruption Developments: 2017 Year In Review," at 19–20 (Jan. 19, 2018), available [here](#).

<sup>19</sup> James M. McDonald, Commodity Futures Trading Commission Director of Enforcement, *Remarks at the American Bar Association's National Institute on White Collar Crime* (Mar. 6, 2019), available [here](#).

<sup>20</sup> *Id.*

The announcements characterized the CFTC’s involvement in foreign bribery investigations as part of a continued effort among U.S. agencies to coordinate the investigation of foreign corrupt practices and the imposition of corporate penalties to avoid “piling on,” though at the same time it marks the CFTC’s programmatic effort to address foreign bribery in the commodities markets. In remarks at the American Bar Association’s National Institute on White Collar Crime, McDonald emphasized coordination efforts among the CFTC, DOJ, and the Securities and Exchange Commission (“SEC”), noting that the CFTC is working closely with these enforcement agencies “to avoid duplicative investigative steps.” McDonald said that the CFTC will not “pile onto” other existing investigations, and it will provide dollar-for-dollar credit for disgorgement or restitution payments in related actions when it imposes monetary penalties.<sup>21</sup> He added that the CFTC Whistleblower Program, established in 2011 under the Dodd-Frank Act, will apply to CEA violations involving foreign corruption. To date, the CFTC has granted nine whistleblower awards totaling more than \$87 million, with 2018 seeing a record number of whistleblowers and awards.<sup>22</sup>

Although the CEA does not penalize corruption, McDonald—a former Assistant U.S. Attorney in the Public Corruption Unit for the Southern District of New York—identified several examples of corrupt practices that “might constitute fraud, manipulation, false reporting, or a number of other types of violations under the CEA,”<sup>23</sup> including:

- Bribes to secure business in connection with regulated activities like trading, advising, or dealing in swaps or derivatives;
- Corrupt practices used to manipulate benchmarks that serve as the basis for related derivatives contracts;
- Prices that are the product of corruption and are falsely reported to benchmarks; or
- Corrupt practices that alter the prices in commodity markets that drive U.S. derivatives prices.

The CFTC’s commitment to investigating foreign corrupt practices is not entirely new, but arises out of the agency’s efforts to charge cases in parallel with FCPA investigations.<sup>24</sup> For instance, on June 4, 2018, the DOJ announced an FCPA resolution involving Société Générale S.A., a Paris-based financial services company, which agreed to pay over \$860 million in penalties to resolve criminal charges in France and the U.S. in connection with charges of bribery and interest rate manipulation.<sup>25</sup> On the same day, the CFTC

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<sup>21</sup> *Id.*

<sup>22</sup> See Commodity Futures Trading Commission, *2018 Annual Report on the Division of Enforcement* at 14 (Nov. 2018), available [here](#).

<sup>23</sup> *Id.*

<sup>24</sup> See Commodity Futures Trading Commission, *2018 Annual Report on the Division of Enforcement* at 12–13 (Nov. 2018), available [here](#).

<sup>25</sup> See Deferred Prosecution Agreement, *U.S. v. Société Générale S.A.*, No. 18-CR-253 (E.D.N.Y. June 5, 2018); Press Release, Dep’t of Justice, *Société Générale S.A. Agrees to Pay \$860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate* (June 4, 2018), available [here](#); see also Paul, Weiss Client Memorandum, “Société

accepted a settlement offer ordering Société Générale to pay \$475 million in regulatory penalties and disgorgement in connection with similar interest rate manipulation charges.<sup>26</sup>

The CFTC's related Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices ("Advisory") provides incentives to report CEA violations involving foreign corrupt practices.<sup>27</sup> Absent aggravating circumstances, the Advisory provides a presumption that the CFTC Enforcement Division ("Division") will recommend a resolution with no civil monetary penalty if a company or individual that is not registered with the CFTC timely and voluntarily self-discloses, fully cooperates, and appropriately remediates. Aggravating circumstances that may negate the presumption include, but are not limited to, involvement by executive management of the company in the misconduct, the pervasiveness of the misconduct within the company, and recidivism. In all instances, the Division will "still require payment of all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue."<sup>28</sup>

Due to independent reporting obligations, futures professionals registered with the CFTC are ineligible for a resolution with no civil monetary penalty, but registrants that timely and voluntarily self-disclose, fully cooperate, and appropriately remediate will receive a recommended "substantial reduction in the civil monetary penalty."

Brian Benzckowski, Assistant Attorney General of the DOJ's Criminal Division, said that the Advisory, which mirrors the DOJ's FCPA Corporate Enforcement Policy, "will make clear to companies the significant benefits" of voluntary disclosure and cooperation.<sup>29</sup> Highlighting the coordination and cross-departmental nature of foreign corruption investigations, Benzckowski added that the DOJ "look[s] forward to working in parallel with the CFTC in cases involving foreign corrupt practices."

## Conclusion

This flurry of policy revisions and announcements demonstrates that aggressive enforcement of FCPA and other laws to curb international corruption remains a vital component of U.S. authorities' activities. The announcements also perhaps reveal DOJ's view that its recent adoption of, and clarifications to, the FCPA Enforcement Policy have been helpful in encouraging self-reporting and cooperation, and that it is worth the DOJ's time to further fine-tune and publish its policy goals and incentives. The expansion of the FBI's International Corruption Squad to Miami reflects the reality that there are significant and on-going corruption and anti-money laundering investigations involving Florida and South America, and more may be to come. Lastly, the CFTC's announcements reveal the appeal of foreign bribery matters to regulatory

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Générale and Legg Mason to Pay Nearly \$650 Million to Resolve DOJ Investigation of Libyan Bribery Scheme" (June 7, 2018), available [here](#).

<sup>26</sup> *In re Société Générale S.A.*, CFTC No. 18-14, 2018 WL 2761752 (June 4, 2018) (consent order) (benchmark manipulation).

<sup>27</sup> Commodity Futures Trading Commission, *Advisory on Self Reporting and Cooperation for CEA Violations Involving Foreign Corrupt Practices* (Mar. 6, 2019), available [here](#).

<sup>28</sup> *Id.*

<sup>29</sup> See McDonald Remarks, *supra* note 13; Paul, Weiss Client Memorandum, "DOJ Issues New FCPA Corporate Enforcement Policy" (Nov. 30, 2017), available [here](#).

and law enforcement agencies in the U.S., and at the same time an effort to increase collaboration among law enforcement agencies that target corrupt practices that impact financial and commodities markets.

We will watch these developments with interest and look forward to providing you with further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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