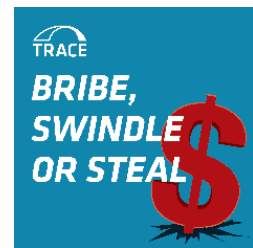


BRIBE, SWINDLE OR STEAL



2017 FCPA Year in Review – Billy Jacobson

[00:00:06] Welcome back to Bribe, Swindle or Steal. I'm Alexandra Wrage, and today's guest is a veteran of the Department of Justice, where he was the assistant chief of the FCPA Enforcement Unit. He later served as senior vice president, co-general counsel and chief compliance officer at oil and gas giant Weatherford International, shepherding them through their FCPA investigation and settlement and establishing a robust and widely recognized compliance program. Now he's a partner at Orrick, Herrington & Sutcliffe, where he practices in the firm's FCPA team, and he's the DOJ-appointed compliance monitor for a major petrochemical company. Billy Jacobson, thank you for joining me.

[00:00:46] Thank you. Thank you for having me. Happy New Year.

[00:00:48] Happy New Year to you. This is our FCPA Year in Review for 2017. Why don't you start by walking us through the significant enforcement actions?

[00:00:59] Sure, happy to. Very interesting year in FCPA enforcement action. I think many of the most significant actions, at least from a corporate perspective, stemmed from two large investigations, multi-jurisdictional and multi-company investigations, those being the Lava Jato investigation, primarily in Brazil, and the Unaoil investigation. Let me explain what those are broadly, and then we'll talk about some of the specific cases that fall under those umbrellas. The Lava Jato, or Operation Car Wash, investigation began in 2014 with a money laundering investigation concerning a gas station that had a car wash facility prominently attached to it - hence the name Operation Car Wash, or Lava Jato in Portuguese - and that investigation has grown into perhaps the largest scandal in Brazilian political and business history. The focus of Lava Jato has been on the interaction that several companies had with Brazil's large national oil company, Petrobras, but extended beyond Petrobras as well. All in all, Brazilian prosecutors have estimated that there have been about US\$5 billion in corrupt payments that they've uncovered in the course of this investigation. The other large multi-jurisdictional, multi-company investigation is that regarding Unaoil. Unaoil is, or perhaps it's more accurate to say "was," a consulting company based in Monaco that worked for many companies in the oil and gas sector, providing mostly agency-type services, but also having its own apparent services arm providing more hands-on, actual physical services, as well as agency type services. It's probably fair to compare the Unaoil case to that of the Panalpina series of cases from several years ago, as prosecutors started looking at Unaoil and then many of the clients that Unaoil was servicing. The case began in March 2016 with a series of articles in The Huffington Post and The Age, an Australian newspaper. Someone had apparently leaked Unaoil emails to the press, many of which were printed on The Huffington Post or on The Age website, and led to the investigations being conducted, most actively right now by the DOJ and the SFO in the U.K. So

prosecutions related to Lava Jato and Unaoil began in late 2016, so I'm going to cheat a little bit and link back into 2016, as opposed to starting at January of 2017. These prosecutions began with the plea agreements entered into by two large and affiliated companies in Brazil: Odebrecht, a large Brazilian conglomerate, and its affiliated petrochemical company, Braskem. Both of them wrapped up in the Lava Jato investigation. Both companies pleaded guilty to FCPA offences in December of 2016 with a global settlement totaling approximately US\$3.5 billion, payable to the Brazilian government, the U.S. government and the Swiss government, with the bulk of that amount go into the Brazilian government. The fines were later reduced somewhat by a US court, but still a multibillion dollar investigation. As a result of the enforcement action, both Odebrecht and Braskem were required to retain independent compliance monitors. Next, in January of 2017, Rolls-Royce entered into an enforcement agreement with DOJ, the SEC, the SFO in the U.K. and the Brazilian authorities, the Brazilian MPF, in a case that had both Lava Jato and Unaoil-related conduct. Rolls-Royce agreed to pay US\$800 million in total fines to the various governments. No monitor was required in that case, based on what the DOJ described as the current state of the company's compliance program. Five individuals were charged in the U.S. and the Southern District of Ohio in connection with the Rolls-Royce conduct, and four of those individuals pled guilty, so both corporate resolution and individual prosecutions in that case. Similarly, the company SBM Offshore, in November of 2017, agreed to pay US\$238 million to resolve corruption of allegations related, again, to both Lava Jato and Unaoil investigations. Separate agreements were reached between SBM and both Dutch and Brazilian authorities prior to the U.S. resolution, and those Dutch and Brazilian resolutions totaled over US\$500 million. As with Rolls-Royce, charges were brought against individuals related to SBM. Two former executives pled guilty in November of 2017. Then just before year-end, on December 22nd, a company called Keppel Offshore agreed to pay US\$422 million to resolve charges in the US, Brazil and Singapore, having admitted to having paid US\$55 million in bribes in Brazil. No monitor was imposed, which is interesting in that case, despite the lack of a voluntary disclosure and despite the fact that it is a Singapore-based company, but the U.S. government did not require a monitor to be imposed. And as with SBM and Rolls-Royce, there was one individual prosecution, at least thus far, in that case. An in-house lawyer pled guilty in late 2017 in relation to that case. Several other companies have announced Lava Jato and or Unaoil-related investigations, which remain pending, so perhaps they will be the focus of next year's Year in Review, if they are resolved this current year.

[00:06:41] Let me stop you for just a second with a question that we get a lot from compliance professionals outside the United States. You've listed SBM and Rolls-Royce and Keppel and the Lava Jato case. The FCPA Blog very carefully tracks the top 10 fines in the history of the FCPA, and after this year, eight of those 10 fines were imposed against companies headquartered outside the United States. How do you respond when people ask the question, "Is this just being used for a competitive advantage?" I obviously have strong feelings about this but, is the U.S. government using the FCPA to bludgeon non-American companies?

[00:07:27] Well, that has been the result, for sure. As you said, many of the large fines that have been levied have been levied against non-US companies, but I don't think that's the intent by any means. I think DOJ prosecutors go where the evidence leads them, and if it leads them to U.S. companies - as it did in the early days of the statute, continuing really up – until a large part – up through maybe 2010 or so, where many of the large fines that were issued, the top 10 were against U.S. companies, or at least many greater percentage of them were against U.S. companies than they are today. But now the evidence may be leading more toward non-U.S. companies, foreign issuers in the United States who, quite frankly, may not yet be as savvy to the compliance requirements of the United States, despite the fact that there are issuers in the United States, whereas many U.S. companies understand the compliance requirements that the U.S. government has and don't find themselves as often tripped up by the FCPA.

[00:08:30] I can't imagine there's some great over-arching vision about which companies to go after, even though we do see trends over time.

[00:08:39] There really isn't. Even if people get jaundiced in that regard because they hear political leaders who might have some theoretical authority over the Department of Justice or over the criminal division, spouting nonsense about foreign companies or foreign countries, quite frankly. The career prosecutors at DOJ, I'm happy to say, do not share that sort of mindset and really do tend to go where the evidence leads them.

[00:09:05] Moving on from there, what were the surprises? What did you think came out of 2017 that, heading into the year, you weren't expecting?

[00:09:15] Before we get to surprises, if you don't mind, let me talk about the key takeaway from 2017. At least in terms of corporate enforcement actions, I think is the astounding degree to which the United States is cooperating with international prosecutors. It's not entirely a surprise, but it is really notable, and it's something that we should really keep watch on as we head into 2018 and beyond. The cooperation with foreign authorities in these cases, I think it's fair to say, began in earnest with the 2009 coordinated settlement with the Munich prosecutor's office in the Siemens case. It continued but in fits and starts until 2017, and the cases that I've just gone through - SBM, Rolls-Royce, Braskem, Odebrecht and the Telia case, which I have not discussed in detail, but also involved a multi-jurisdictional settlement and a coordinated settlement - really show that the DOJ and the SEC seem to be willing to coordinate their investigations and their enforcement actions with foreign prosecutors when it is practical to do so. Companies that once had only to be concerned with the U.S. and foreign bribery cases and then started to have to think about countries, like Germany and the U.K., now really have to think about a host of countries, including Italy, Switzerland, Brazil, the Netherlands, France and other countries who are now actively enforcing their foreign and domestic bribery laws against corporations. That's a dramatic sea change over the last, say, eight years, but one which we saw in great earnest in 2017.

[00:10:58] That's an excellent point. We were getting used to the idea of co-operation between Department of Justice and the U.K. Serious Fraud Office and the German authorities, but a number of new countries have come online over the last few years.

[00:11:13] Which is a great story in terms of the international tide against corruption. It's a great story, I think, in large part the OECD can pat itself on the back. The OECD working group on bribery can pat itself on the back as having a job well done. It's also a result of the U.S. DOJ at the OECD and other international bodies pushing to, as we often say, we often use the cliché "level the playing field." But it's a truism, and we see the results of that. So back to your question about surprises: One thing that surprised me in 2017 was that we did not yet see a resolution to a long-running case. A well-publicized case against Wal-Mart that seems to be in the offing - front page New York Times article and all that several years ago. That said, while there has been no settlement, in November, the company did announce a US\$283 million reserve, indicating that the contours of a settlement have, in fact, been reached. I would be surprised if we don't see a settlement with Wal-Mart in the next couple of months.

[00:12:21] I think people have been looking for that for a little while, and I imagine that people expected something in the last couple of weeks of the year for tax purposes or other planning purposes. We often see these cleared out at the end of December. I think a number of people following that case shared your surprise.

[00:12:40] Yeah.

[00:12:41] That's actually an interesting segue to the current administration. It was the Wal-Mart case, of course, that prompted the interview of Donald Trump that got into his opinion about the FCPA where he called it "a horrible law." Let's fast forward now. There is a great deal of debate in the compliance and legal community about we really should expect from this administration with respect to the FCPA. I'm not one of the great believers in just tracking numbers because, of course, these cases are not smooth. They take years to bring to conclusion, and they're lumpy across time. Where do you come out on the debate about this administration's commitment to FCPA enforcement?

[00:13:33] I don't see much of a shift so far, which tells me that, at least so far, the professional career prosecutors of the fraud section and the SEC are being allowed to do their job, despite Trump's rhetoric regarding the FCPA. There is clearly a continued focus on prosecuting individuals as, in my opinion, there should be, given that it's actually individuals who commit these crimes. In 2017, 12 individuals either pled guilty or were convicted. Seven others were indicted. Those are pretty big numbers relative to previous years. The number of corporate cases, which I think was six - brought by the DOJ at least - is low by recent standards, but includes several major cases, long-running, gigantic fines in these cases. We know that the fraud section's inventory is quite robust with corporate cases. While some may have thought that the Trump administration will go easy on companies, the new FCPA corporate enforcement policy - while somewhat helpful to companies - could have been a whole lot more helpful, frankly, to companies, if the administration wanted to go in that direction and was

putting pressure on the Justice Department to go even easier on companies. So it's helpful and I'm happy to talk about that for a few moments as well.

[00:14:48] If you would, but let's just stay with the administration's approach to regulation for a moment longer. It's difficult when all we've got to measure is the output of the pipeline. Do you have any sense of whether cases are being initiated at the same pace, or is it just not something we get insight into?

[00:15:09] It's hard to gain real insight into it. I've not gone through public filings to make that determination, and not all companies A, are public companies and B, not all companies feel the need to disclose an investigation in their public filings for various reasons. So it's hard. It's really anecdotal, and working in this field just a few blocks from the fraud section and having several cases over there, one gets a feeling as to whether the section is busy with FCPA cases or not. My feeling - and this is entirely anecdotal - but my feeling is that they are quite busy. There are new cases. They are opening new cases. It makes sense to me, given that the people who are doing the day-to-day work are the career people. They're the same people who were there in December of 2016, before the inauguration, in large part. So it makes sense to me that these prosecutions and investigations are continuing in the same manner in which they were under President Obama.

[00:16:11] We'll have to wait and see. The president's position on business regulation, generally, is very emphatically that he'd like to see less business regulation, less regulation in the banking sector, less environmental regulation. I'm not extrapolating. He's been very clear on that. I guess it remains to be seen whether this will fall under that general heading of "less regulation" or if it falls into the "tough on crime" language. International bribery, more generally, now is seen across borders as a real global scourge.

[00:16:49] Right. I agree.

[00:16:51] The revised FCPA corporate enforcement policy, announced by Deputy Attorney General Rod Rosenstein in November: Can you summarize the probable impact of that for us and your thoughts on it?

[00:17:04] Sure. I think that the new FCPA corporate enforcement policy will have some degree of impact, although perhaps not as much as DOJ would like. I do think that the policy will probably cause more companies to voluntarily disclose FCPA problems than the pilot program, and certainly before the pilot program. However, I think the DOJ could have, and frankly should have, done more to bring greater certainty to what companies would face if they voluntarily disclose, which would in turn cause, I think, more companies to voluntarily disclose. The most important aspect of the new policy in my opinion is the fact that the policy now says that there will be a presumption that, when companies voluntarily self-disclose, cooperate and remediate, they will receive a declination. But - and this is a very large but - that presumption will not apply if there are aggravating circumstances present. Aggravating circumstances, according to the policy, include but are not limited to the following four things: involvement by executive

management, significant profit by the company, pervasiveness of the misconduct and criminal recidivism. These aggravating circumstances may well mean - especially when looking at involvement by executive management and significant profit by the company - it may well mean that most of the larger cases that would be voluntarily disclosed will not receive declinations, though perhaps several smaller ones, maybe less significant ones, will receive declinations. The "including but not limited to" language, where the DOJ is allowing that those four are not the only aggravating circumstances that they might find present, mean that there could be others that some prosecutors decide on their own to be an aggravating circumstance and to be a justification to not issue a declination. The skeleton is there for DOJ to decline more cases. They will have the justification if they want to. But the converse is also true, that there is enough outs in the language, and the language that the policy is still fuzzy enough - as was the language of the pilot program - that nothing is guaranteed, and while there is slightly more certainty than there was under the pilot program, in my view there's not a material amount of certainty that's been added to the picture. I'm still concerned that there will not be as much voluntary disclosure as perhaps the DOJ wants, and frankly, I am disappointed in that because I've thought for several years that there's more DOJ can do to achieve this certainty while also, not only not hurting, but furthering its goal of preventing crime. In my view what DOJ should have done was say, that if you voluntarily disclose, cooperate and remediate, and you had a robust compliance program at the time of the violation - not at the time of settlement, but the time of the violation - and if the very senior leadership of the company was not involved in the corruption, then DOJ would issue a declination. I would have put it in terms much more stronger than the current policy does. I think if DOJ had done that or if they ever do that, they'll achieve their goals of preventing crime by requiring the compliance program be existing at the time the corruption and enabling prosecution of culpable individuals, which really should be their focus, via the company's cooperation.

[00:20:44] How do you advise companies that are feeling a bit tentative, given the uncertainty that you describe about stepping forward and disclosing misconduct and fearing that they may fall into one of these exceptions?

[00:21:02] Unless you have a situation where you know that one of the aggravating circumstances is simply not present, it still, to me, comes down to the question of, "How likely is it that the government is going to find out about the problem if you don't disclose?" If the answer is quite unlikely that the government's going to find out, then my advice is usually to investigate thoroughly, remediate thoroughly and then hope for the best in terms of the government not finding out. Now to be fair, given the technology and the focus on corruption that we have in the world today, it is more and more likely that the government will find out through social media, a more robust press focus, et cetera. But even still, there is plenty of stuff that goes on in the world, in various remote regions of the world, that the U.S. government simply never finds out about. My strong assumption, having traveled the world for a fair number of years, is that the government finds out about a distinct minority of the corruption that goes on. It's still a bit of a gamble, quite frankly, and playing the odds in advising

companies to disclose or not to disclose, based on whether we think there's a decent chance of the government finding out or not.

[00:22:22] That possibility of finding out, the calculation on that has changed with the Unaoil emails that were produced to a reporter and then the Panama Papers and Paradise papers. There's just a whole lot more information floating around now.

[00:22:38] Absolutely.

[00:22:39] Thank you so much for your time on all of this, Billy. As we head into 2018, any advice for the compliance professionals listening?

[00:22:49] I would say just keep on doing what you're doing. There is sometimes an inclination to take your foot off the gas pedal, and perhaps more often, your company has an inclination to take your foot off the gas pedal. I would recommend that you resist that as much as possible. Continue to stress to your company and the employees that you are counseling, that compliance really is an ever-present mission. When I was working in-house at an oil and gas company, we equated it to safety. You can never get lax about safety because that's when the accidents happen, and I feel the same way toward compliance. The moment you get lax or the moment your company gets lax is the moment that you will have problems. So I would just say keep on keeping on.

[00:23:35] Thank you so much. You bring a great perspective to this because you've been at the Department of Justice, you've been in-house and you're at a law firm now, so you've seen it from all sides. Thank you so much for your time today, Billy.

[00:23:47] Thank you.