

# The Gavel

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## THE LATEST ON THE FCPA

Companies need to maintain vigilance in weeding out bribery and corruption in order to stay compliant with The Foreign Corrupt Practices Act of 1977, as amended (hereinafter “FCPA”), and there is a high price to pay if caught between the FCPA’s crosshairs. What follows below is an illustration of how aggressively the federal government enforces FCPA violations and how the U.S. Department of Justice has continuously sought to broaden the FCPA’s reach to include every conceivable type of bribery and/or corruption enforcement action.

By way of background, the FCPA was “enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.”<sup>1</sup> Under the anti-bribery provisions of the FCPA, the following are specifically prohibited:

[W]illful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.<sup>2</sup>

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<sup>1</sup> *Foreign Corrupt Practices Act: An Overview*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (last visited Jan. 18, 2018).

<sup>2</sup> *Id.*

Since the enactment of the Act, the anti-bribery provisions have applied to all U.S. persons and some foreign issuers of securities.<sup>3</sup> After the Act was amended in 1998, the provisions also applied to foreign companies, as well as foreign persons who “cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.”<sup>4</sup> The FCPA also requires companies to meet its accounting provisions, if the company’s securities are listed in the United States.<sup>5</sup>

Since 2010, the FCPA has been a high priority area for the U.S. Securities and Exchange Commission.<sup>6</sup> In 2010, the SEC’s enforcement division created a new specialized unit to further enhance its enforcement of the FCPA.<sup>7</sup> In 2017, there were 6 FCPA enforcement actions by the SEC, down from 26 enforcement actions from the previous year.<sup>8</sup>

### **Telia Company AB**

On September 21, 2017, Sweden-based telecommunications provider Telia Company AB (hereinafter “Telia”) agreed to pay \$965 million in a global settlement with the SEC, Department of Justice (hereinafter “DOJ”), and Dutch and Swedish law enforcement for bribery in Uzbekistan.<sup>9</sup> Telia was accused of entering the Uzbek telecommunications market by offering and paying over \$330 million in bribes to a shell corporation under the pretense of paying for lobbying and consulting services that never actually took place.<sup>10</sup> The shell company was under the control of an Uzbek government official who was capable of exerting significant influence over other Uzbek officials by virtue of being a family member of the Uzbekistan President.<sup>11</sup> Among other things, he was able to coerce other officials into making decisions and taking actions that benefited Telia’s business in Uzbekistan.<sup>12</sup> The SEC’s order requires Telia to pay \$457 million in disgorgement and a criminal fine of over \$508 million, imposed by the DOJ.<sup>13</sup>

### **Halliburton Company**

On July 27, 2017, the SEC charged Halliburton Company with violating the books and records and internal accounting controls provisions of the FCPA in Angola.<sup>14</sup> Halliburton had also obtained lucrative oilfield services contracts by making payments to a local company in Angola, through which it profited by approximately \$14 million.<sup>15</sup> The company agreed to pay \$29.2 million to settle the case, and Halliburton’s former vice president Jeannot Lorenz also agreed to pay a \$75,000 penalty for the company’s various violations.<sup>16</sup> The SEC order claimed that Halliburton management was told in 2008 by officials at Angola’s state oil company that it had to partner with more local Angolan-owned businesses in order to satisfy local content regulations for foreign companies in Angola.<sup>17</sup> Lorenz, placed in charge of the bidding of the companies, began multiple attempts to retain a local company owned by a

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Jan. 18, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Telecommunications Company Paying \$965 Million For FCPA Violations*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/news/press-release/2017-171> (last visited Jan. 18, 2018).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.*

<sup>14</sup> *Halliburton Paying \$29.2 Million to Settle FCPA Violations*, U.S. SEC. AND EXCH. COMM’N, <https://www.sec.gov/news/press-release/2017-133> (last visited Jan. 18, 2018).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

former Halliburton employee, who was also neighbour of the official who would ultimately approve the awarding of the contracts.<sup>18</sup> The SEC order also found that Halliburton entered into contracts with the local company that were intended to meet local content requirements as opposed to the stated scope of work.<sup>19</sup> In selecting these contracts, Lorenz was supposed to first determine the services and then select an appropriate supplier.<sup>20</sup> Instead, he chose the Angolan company then backed into a list of contract services, thus violating Halliburton's internal accounting controls, in addition to failing to conduct competitive bidding.<sup>21</sup> The local Angolan company eventually earned over \$3.705 million from contracts paid by Halliburton.<sup>22</sup> The \$29.2 million fine levied on Halliburton consists of \$14 million in disgorgement, \$1.2 million in prejudgment interest, and a \$14 million penalty.<sup>23</sup>

### **Och-Ziff Capital Management Group**

On January 26, 2017, two former executives of Och-Ziff Capital Management Group were charged with being the primary driving forces behind the company's FCPA violations.<sup>24</sup> The company and two other executives had previously settled charges in September 2016.<sup>25</sup> Under the 2016 settlement, Och-Ziff agreed to pay almost \$200 million to settle civil charges for violating the FCPA.<sup>26</sup> The SEC's investigation into the company revealed that the fund had been using intermediaries, agents, and business partners to bribe high-level government officials in Africa.<sup>27</sup> In turn, the bribes elicited investments from the Libyan Investment Authority sovereign wealth fund into the company.<sup>28</sup> Further, bribes were also paid to secure mining rights and to illegally influence officials in Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo.<sup>29</sup>

### **Top Ten FCPA Enforcements**

As of 2017, the following are the top ten FCPA enforcement actions of all time based on assessed penalties:

1. Telia Company AB (Sweden): \$965 million in 2017.
2. Siemens (Germany): \$800 million in 2008.
3. VimpelCom (Holland): \$795 million in 2016.
4. Alstom (France): \$772 million in 2014.
5. KBR / Halliburton (United States): \$579 million in 2009.
6. Teva Pharmaceutical (Israel): \$519 million in 2016.
7. Keppel Offshore & Marine Ltd.(Singapore): \$422 million in 2017.
8. Och-Ziff (United States): \$412 million in 2016.
9. BAE (UK): \$400 million in 2010.
10. Total SA (France) \$398 million in 2013.<sup>30</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

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

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

<sup>22</sup> *Id.*

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

<sup>24</sup> *SEC Charges Two Former Och-Ziff Executives with FCPA Violations*, U.S. SEC. AND EXCH. COMM'N, <https://www.sec.gov/news/pressrelease/2017-34.html> (last visited Jan. 18, 2018).

<sup>25</sup> *Och-Ziff Hedge Fund Settles FCPA Charges*, U.S. SEC. AND EXCH. COMM'N, <https://www.sec.gov/news/pressrelease/2016-203.html> (last visited Jan. 18, 2018).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.*

<sup>30</sup> Richard L. Cassin, *Keppel Offshore lands seventh on our Top Ten List*, THE FCPA BLOG, Dec. 26, 2017 (8:28 AM), <http://www.fcablog.com/blog/2017/12/26/keppel-offshore-lands-seventh-on-our-top-ten-list.html>.