

Speech

Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act

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Nov. 9, 2017

Good afternoon, and thank you for inviting me to speak today. Before I begin, let me give the required disclaimer that the views I express here today are my own and do not necessarily represent the views of the Commission or its staff. [1]

I am honored to be here to mark with you the 40th anniversary of the enactment of the Foreign Corrupt Practices Act (FCPA) and the 20th year of the OECD anti-bribery convention. I want to thank New York University's Program on Corporate Compliance and Enforcement for hosting this event. Programs like this one provide important forums for dialogue on critical enforcement issues, and I am pleased that this gathering has assembled so many familiar and distinguished practitioners in FCPA enforcement, our colleagues in domestic and international law enforcement, and academics who are interested in this space. Collaboration and coordination is integral to the Division of Enforcement's efforts to combat bribery through the enforcement of the FCPA, and the OECD has played a pivotal role in fostering global efforts against bribery and corruption.

On a personal level, I am excited to have had the opportunity to return to government service, joining Stephanie Avakian in heading up the SEC's Enforcement Division. Although I have worked closely with the SEC staff for nearly 20 years – first as an Assistant U.S. Attorney in the Southern District of New York and then as a defense lawyer – this is the first time I have ever worked at the SEC. These past few months have reinforced my perception of how dedicated the SEC staff is to the SEC's mission. This is true for all of our Enforcement staff, and no more so than in the work our staff does in the FCPA space.

Since we are here to mark the FCPA's 40th anniversary, I thought I would use these brief remarks to reflect on the past, present, and future of SEC enforcement of the FCPA.

So, let me briefly start with the past. The SEC played a leading role in the investigations in the mid-1970s that prompted the enactment of the FCPA.[2] Former SEC Chairman Roderick Hills and Judge Stanley Sporkin, then Director of the SEC's Enforcement Division, were instrumental in helping to enact the statute.[3] Their influence was particularly felt on the provision requiring public issuers to maintain accurate books and records, a provision which remains a key tool in the SEC's FCPA enforcement arsenal today.[4]

Over the last 40 years, enforcement of the FCPA has been a fundamental part of the SEC's enforcement mission. Recognizing the increasingly specialized nature of FCPA practice, in 2010, the Enforcement Division formed a specialized Unit devoted to investigating potential violations of the FCPA.[5] Today, the FCPA Unit has approximately three dozen attorneys and forensic accountants in various of the SEC's offices around the country. The FCPA Unit has developed substantial expertise, built long-lasting relationships with our domestic and international law enforcement

colleagues in the foreign bribery space, and developed a series of compelling cases exposing widespread corruption across many industries.

This dedicated focus on FCPA enforcement has yielded significant results. Since the creation of the FCPA Unit in 2010, the Commission has brought 106 FCPA-related actions against 101 entities and 38 individuals.^[6] Many of these cases involved well-known issuers both domestic and foreign in diverse industries such as natural resources, healthcare, and financial services.^[7] But our successes over the past seven years go beyond case-related ones. The unit approach has yielded a more uniform and predictable approach to FCPA enforcement, which is perhaps best manifested in the Resource Guide to the *U.S. Foreign Corrupt Practices Act* that we co-authored in 2012 along with the Department of Justice (DOJ).^[8] The unit approach also has, I believe, enhanced domestic and international partnerships in the fight against corruption.

Against that backdrop, what does the future hold for FCPA enforcement at the SEC? Will the SEC continue to be committed to robust FCPA enforcement? My answer to that question is simple: Yes.

As Chairman Clayton noted during his confirmation hearing, bribery and corruption have no place in society.^[9] They often go hand-in-hand with many other societal ills, including instability, inequality, and poverty, and have anti-competitive effects, including putting honest businesses at a disadvantage.^[10] Bribery and corruption undermine and distort the marketplace and ultimately harm investors.^[11] Combatting corruption therefore remains an important government mission, including at the SEC's Enforcement Division.

As you undoubtedly know, Charles Cain was just last week appointed as Chief of the FCPA Unit.^[12] Charles has devoted much of his career to FCPA enforcement matters, has handled some of the Commission's most significant cases and, prior to his appointment, served as Deputy Chief and Acting Chief of the Unit. And so, under Charles' leadership, you can expect our efforts in this area to continue apace.

But, in my view, in an increasingly international enforcement environment, the U.S. authorities cannot – and should not – go it alone in fighting corruption. As global markets become more interconnected and complex, no one country or agency can effectively fight bribery and corruption by itself. Anti-corruption enforcement is a team effort. The Enforcement Division's fight against corruption is much more effective when our international colleagues join us in a shared commitment to eradicating corruption and bribery and leveling the playing field for businesses everywhere.

Fortunately, I have observed that the level of cooperation and coordination among regulators and law enforcement worldwide is on a sharply upward trajectory, particularly in matters involving corruption. In fact, in the past fiscal year alone, the Commission has publicly acknowledged assistance from 19 different jurisdictions in FCPA matters.^[13] And, one need look no further than two recent, substantial cases that were resolved globally: (i) a settlement that we, the U.S. Department of Justice, and authorities in the Netherlands and Sweden reached with Teliasonera, and (ii) the coordinated Brazilian-Swiss-U.S. resolutions with Braskem.^[14]

I believe this sort of international coordination and cooperation in fighting corruption yields significant benefits. First, it sends strong messages of deterrence to companies and individuals who might otherwise see bribery and corruption as a way of maximizing their commercial advantage. Second, it allows for the more efficient investigation and resolution of cases. Internationally coordinated cases can often lead to coordinated global outcomes for companies that want to resolve issues they face. I fully expect the trend of the Enforcement Division working closely with foreign law enforcement and regulators in anti-bribery actions to continue its upward trajectory in the coming years.

Of course, companies cannot engage in bribery without the actions of culpable individuals. The Enforcement Division is broadly committed to holding individuals accountable when the facts and the law support doing so. As Chairman Clayton observed at his confirmation hearing, individual accountability drives behavior more than corporate accountability,^[15] a point which is supported by both logic and experience. The Division of Enforcement considers individual liability in every case it investigates; it is a core principle of our enforcement program.

Recent cases reflect that this approach applies with equal force in FCPA cases. One need look no further than the Commission's recent charges against former Vice-President of Halliburton with causing Halliburton's FCPA violations, circumventing internal accounting controls, and falsifying books and records while selecting and making payments to a local company in Angola in the course of winning lucrative oilfield services contracts.^[16] And, in April, the Commission

reached strong settlements, after filing a contested action in 2011, with three former executives of Magyar Telekom that included penalties and officer-and-director bars.[17]

FCPA cases can present particular challenges in our efforts to hold individuals accountable. In many cases, the individuals most directly involved in and responsible for the wrongdoing are foreign nationals who reside overseas. And even when we charge foreign nationals, they often have limited or no assets in the U.S., limiting our options for enforcing any monetary judgments we may obtain. Nevertheless, the effort to hold individuals accountable is critical to achieving the Enforcement Division's goals of deterrence, incapacitation, and just punishment. I expect that we will continue to have intense focus on the question of individual responsibility in every FCPA investigation.

Finally, no discussion about the future of FCPA enforcement would be complete if I did not address one of the other principal challenges we face; namely, the interplay between the length of time it takes to conduct an FCPA investigation and the statute of limitations.

In many instances, by the time a foreign corruption matter hits our radar, the relevant conduct may already be aged. And because of their complexity and the need to collect evidence from abroad, FCPA investigations are often the cases that take the longest to develop. In contrast to the Department of Justice, the statute of limitations is not tolled for us while our foreign evidence requests are outstanding.[18]

These limitations issues have only grown in the wake of the U.S. Supreme Court's recent decision in *Kokesh v. SEC*, in which the Court held that Commission claims for disgorgement are subject to the general five-year statute of limitations.[19] *Kokesh* is a very significant decision that has already had an impact across many parts of our enforcement program. I expect it will have particular significance for our FCPA matters, where disgorgement is among the remedies typically sought.

While the ultimate impact of *Kokesh* on SEC enforcement as a whole – and FCPA enforcement specifically – remains to be seen, we have no choice but to respond by redoubling our efforts to bring cases as quickly as possible. Even irrespective of *Kokesh*, this approach makes sense because our cases have the highest impact, and our litigation efforts are most effective, when we bring our cases close in time to the alleged wrongful conduct.

Let me conclude my remarks here. I appreciate the opportunity to speak to all of you about the Division's anti-bribery and anti-corruption efforts. The FCPA has been and remains an increasingly important tool in the ongoing fight against corruption worldwide. The statute has provided us with a potent tool in the worldwide fight against corruption and, we have been very successful in bringing FCPA actions. And, the OECD and like-minded organizations have played a pivotal role in the worldwide battle against bribery. I am optimistic that the next 40 years of the FCPA, and the next 20 of the OECD, will be equally – if not more – successful. Thank you, and enjoy the rest of the conference.

[1] The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues on the staff of the Commission.

[2] See generally U.S. Sec. & Exch. Comm'n, *Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices* (1976), reprinted in *Special Supplement*, Sec. Reg. & L. Rep. (BNA) No. 353 (May 19, 1976), available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1976_0512_SECQuestionable.pdf.

[3] See generally *Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities and Econ. in Gov't of the Joint Econ. Comm.*, 94th Cong. (1976), available at [https://www.jec.senate.gov/reports/94th%20Congress/Hearings/Abuses%20of%20Corporate%20Power%20\(815\).pdf](https://www.jec.senate.gov/reports/94th%20Congress/Hearings/Abuses%20of%20Corporate%20Power%20(815).pdf).

[4] *Id.*

[5] Press Release 2010-5, *SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence* (Jan. 13, 2010), available at <https://www.sec.gov/news/press/2010/2010-5.htm>.

[6] See generally U.S. Sec. & Exch. Comm'n, *SEC Enforcement Actions: FCPA Cases*, available at <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.

[7] *Id.*

[8] U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 12, 2012), available at <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

[9] *Nomination of Jay Clayton: Hearing Before the S. Comm. On Banking, Housing and Urban Affairs*, 115th Cong. 99 (2017) (Responses to Written Questions of Sen. Tester from Jay Clayton) (*Clayton Nomination Hearing*).

[10] *Id.*

[11] *Id.*

[12] Press Release 2017-206, *Charles Cain Named Chief of Foreign Corrupt Practices Unit* (Nov. 2, 2017), available at <https://www.sec.gov/news/press-release/2017-206>.

[13] See Press Release 2017-171, *Telecommunications Company Paying \$965 Million For FCPA Violations* (Sept. 21, 2017), available at <https://www.sec.gov/news/press-release/2017-171> (acknowledging assistance of Dutch Openbaar Ministerie, National Authority for Investigation and Prosecution of Economic and Environmental Crime in Norway, Swedish Prosecution Authority, Office of the Attorney General in Switzerland, Corruption Prevention and Combating Bureau in Latvia, regulators and law enforcement in France, Spain, and Hong Kong, U.K. Financial Conduct Authority, British Virgin Islands Financial Services Commission, Cayman Islands Monetary Authority, Bermuda Monetary Authority, Cyprus Securities and Exchange Commission, and Central Bank of Ireland); Press Release 2017-34, *SEC Charges Two Former Och-Ziff Executives With FCPA Violations* (Jan. 26, 2017), available at <https://www.sec.gov/news/pressrelease/2017-34.html> (acknowledging assistance of U.K.'s Financial Conduct Authority, Guernsey Financial Services Commission, Jersey Financial Services Commission, Malta Financial Services Authority, Cyprus Securities and Exchange Commission, Gibraltar Financial Services Commission, and Swiss Ministry of Justice); Press Release 2017-18, *Medical Device Company Charged With Accounting Failures and FCPA Violations* (Jan. 18, 2017), available at <https://www.sec.gov/news/pressrelease/2017-18.html> (acknowledging assistance of Comissão de Valores Mobiliários in Brazil).

[14] Press Release 2017-171, *Telecommunications Company Paying \$965 Million for FCPA Violations* (Sept. 21, 2017), available at <https://www.sec.gov/news/press-release/2017-171>; Press Release 2016-271, *Petrochemical Manufacturer Braskem S.A. to Pay \$957 Million to Settle FCPA Charges* (Dec. 21, 2016), available at <https://www.sec.gov/news/pressrelease/2016-271.html>; Press Release 2016-224, *Embraer Paying \$205 Million to Settle FCPA Charges* (Oct. 24, 2016), available at <https://www.sec.gov/news/pressrelease/2016-224.html>.

[15] *Clayton Nomination Hearing*, *supra* note 5, at 17.

[16] Press Release 2017-133, *Halliburton Paying \$29.2 Million to Settle FCPA Violations* (July 27, 2017), available at <https://www.sec.gov/news/press-release/2017-133>.

[17] Press Release 2017-81, *Telecom Executives Agree to Pay Penalties for FCPA Violations* (Apr. 24, 2017), available at <https://www.sec.gov/news/press-release/2017-81>.

[18] See 18 U.S.C. § 3292 (permitting federal prosecutors to apply, *ex parte*, to the district court before which grand jury is impaneled, for suspension of statute of limitations for up to three years while awaiting evidence that reasonably appears to be located in foreign country while official request of relevant foreign government for such evidence is pending).

[19] *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017).

