

## Potential New FCPA Enforcement Targets Come Into Focus

By **David Chaiken and Kurt Wolfe** (February 26, 2019, 4:04 PM EST)

Recent revelations of a Foreign Corrupt Practices Act investigation into Major League Baseball, as well as statements from FCPA enforcement authorities, indicate that the U.S. Department of Justice and the U.S. Securities and Exchange Commission are employing a flexible, outside-the-box approach to FCPA enforcement, increasingly focusing on nontraditional targets and industries.

Indeed, in remarks at a November 2018 conference, the chief of the SEC's FCPA enforcement unit suggested that the agency is scrutinizing industries that are not traditional FCPA enforcement targets, noting that "you are seeing some additional industries come to the front as far as getting enforcement action," and "[t]here are other industries that perhaps haven't gotten as close of a look in the past as they will in the future."<sup>[1]</sup>

The increasing focus on nontraditional targets and industries will have important implications for organizations that conduct business abroad, operate in foreign countries, or otherwise interact with foreign governments — particularly organizations that have not traditionally emphasized FCPA and anti-corruption compliance, such as sporting bodies and university systems.

This article explores this emerging trend in FCPA investigations and enforcement in an effort to help organizations anticipate what may lie ahead, and to take proactive steps to address potential business and compliance vulnerabilities.

### Potential New Targets

The anti-bribery provisions of the FCPA prohibit certain persons (defined to include individuals and entities based in or operating in the U.S. and companies that list or trade stock on U.S. exchanges) from paying bribes or offering anything of value to foreign government officials to obtain or retain business or to secure an improper business advantage.<sup>[2]</sup> The FCPA's accounting provisions require issuers of U.S.-listed securities to: (1) maintain accurate books, records and accounts that fairly reflect business expenses; and (2) develop and maintain internal accounting controls designed to prevent and detect possible FCPA violations. Enforcement actions alleging FCPA violations may result in significant civil and criminal penalties, investigative expenses, business disruption, and reputational harm.

Within this framework, for years, the story of FCPA enforcement has largely been one of consistency. Year after year, the total number of FCPA actions tends to fall within a certain range, many of the schemes bear similar characteristics, and the companies whose bribery scandals spill onto newspapers tend to pool in a few predictable industries or sectors — like oil



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and gas, manufacturing, life sciences or pharma.

But there have been signals that FCPA enforcement is moving into uncharted waters, and therefore we expect to see a more varied body of FCPA enforcement matters in the future. The DOJ and SEC seem likely to cast a broader net, investigating or bringing actions involving nontraditional targets and industries. The reasons for this apparent shift are unknown, but it could be due to the maturation of FCPA compliance programs in certain higher risk industries, where increased enforcement activity and awareness have led companies to adopt more robust compliance measures in recent years.

Regardless of the reasons, organizations that conduct business abroad, operate in foreign countries, interact with foreign governments, or are considering business combinations with foreign companies or business units should note this change on the horizon — FCPA scrutiny is no longer a concern only for industries with characteristically high-risk profiles. Indeed, the financial services sector is a good example: Only four years ago the SEC brought its first FCPA action against a financial services firm. Each year since, however, there have been actions involving financial services firms or employees of financial services firms.

We believe the following industries or areas may increasingly attract attention from FCPA enforcement authorities. Organizations that operate in these spaces would be well advised to batten down the hatches before the storm arrives.

### ***Sporting Bodies***

Sports teams, leagues and sporting bodies have drawn increasing regulatory scrutiny in recent years, and may become more frequent FCPA enforcement targets. These organizations often operate or recruit in high-risk jurisdictions, are subject to minimal regulatory oversight, and many have not traditionally focused on bribery and corruption risks. Sports teams, leagues and sporting bodies also garner intense media and public interest, making them extremely attractive to federal prosecutors and SEC enforcement attorneys given the potentially high deterrent value.

By way of example, Yahoo! Sports recently reported that a federal grand jury is investigating Major League Baseball for possible FCPA violations relating to teams' dealings with immigration officials in the Caribbean and Latin America.[3] An anonymous former MLB executive explained that the investigation may involve allegations that teams "brib[ed] [foreign] clerks or immigration officials to change dates of birth on identification documents, or to fabricate false identity documents.[4] The reports indicate that the DOJ's FCPA Unit is conducting the investigation with the Federal Bureau of Investigation, and that grand jury subpoenas have been issued to team officials.

Along these lines, while it did not involve FCPA charges, the corruption scandal involving soccer's international governing body, FIFA, may also be a harbinger of FCPA enforcement actions to come. Fourteen individuals, including seven former FIFA executives, were indicted in 2015 for a variety of racketeering, money laundering, and wire fraud offenses in connection with "decades of bribery totaling more than \$150 million." [5] Prosecutors alleged a scheme to "buy" votes for countries that hoped to host the 2018 and 2022 FIFA World Cup Championships, soccer's highest-profile tournament; FIFA World Cup qualifying events; FIFA elections; sports clothing sponsorships; and other matters.[6]

Similarly, in January 2018, the New York Times reported that a federal grand jury is investigating the United States Olympic Committee, the International Olympic Committee, the International Association of Athletics Federations, and FIFA in connection with possible illicit payments or improper influence in connection with the selection of host cities for various world championship events.[7]

### ***Consulting and Professional Services Firms***

Although consulting and professional services firms often help companies develop and implement best practices to minimize bribery and corruption risks, they too may find

themselves subject to FCPA enforcement scrutiny if they advise or seek business from foreign governments or government agencies.

Investigative journalists recently profiled global consulting firm McKinsey & Co.'s hiring of relatives of several high-ranking Saudi Arabian government officials at a time when the firm was advising Saudi Arabia's government on economic transformation issues. The journalists intimated that McKinsey's hiring practices may have run afoul of the FCPA.[8] While there is no indication that the DOJ or SEC is actively investigating McKinsey in connection with those hires, the journalists noted that the firm's practices resemble those of several financial services firms that offered jobs to relatives of high-ranking officials at sovereign wealth funds and other state-owned financial institutions in order to obtain or retain business, which resulted in FCPA enforcement proceedings commonly known as the "princeling" cases.[9]

### ***Colleges and Universities***

U.S. colleges and universities often have extensive interactions with foreign governments and foreign schools, students, and faculties through exchange, visiting professor, and dual-degree programs; conferences and symposia; research efforts; grants; the development of foreign campuses; and other endeavors. Yet, U.S. colleges and universities often lack mature compliance structures,[10] and may underemphasize FCPA compliance risks in their policies and procedures.

Interactions with foreign education ministries or foreign public universities, administrators, and faculty could implicate the FCPA if gifts or hospitality (e.g., travel expenses or conference fees) are provided to foreign education officials.[11] Similarly, facilitating admissions or scholarships for relatives of foreign officials in such countries could draw FCPA enforcement scrutiny.[12]

Donations and endowments also present bribery and corruption risks for colleges and universities, and the DOJ and SEC previously investigated a for-profit university system, Laureate Education Inc., for potential FCPA violations relating to an \$18 million donation by a Turkish affiliate to a charitable foundation.[13] U.S. colleges and universities that operate abroad or interact with foreign officials without implementing strong anti-corruption policies and procedures relating to travel and entertainment, gifts, procurement, and donations may face bribery and corruption risks.

### ***Manufacturers and New Entrants***

The sale of industrial or commercial goods to foreign governments or agencies is a perennial subject of FCPA scrutiny. But the manufacturing industries or sectors that have become the focus of such investigations are a diverse and ever-changing lot.

For example, in recent years the SEC has brought FCPA charges against a chicken processor,[14] a manufacturer of metal packaging for food and beverages,[15] a manufacturer of steel pipe products,[16] an ATM manufacturer,[17] a firearms manufacturer,[18] an infant formula manufacturer,[19] and a wire and cable manufacturer,[20] among others. While there is FCPA enforcement risk for nearly any U.S. company that manufactures or sells goods abroad — particularly to government customers — smaller, privately held manufacturers with less robust compliance programs or even larger publicly traded companies with robust policies, procedures and internal controls in areas other than FCPA compliance, face acute FCPA risks.

For example, U.S. companies opening or acquiring manufacturing facilities in Asia or Latin America that have not previously operated abroad may neglect FCPA compliance as they contend with a multitude of fees, permits, licenses and other requirements that necessitate interaction with foreign government officials, often through an intermediary or agent. Recent FCPA charges against technology company Cognizant, its president and its chief legal officer over payments relating to the construction of its corporate campus in Chennai, India, serve as a reminder of the perils of such permitting and approval processes in high risk countries.[21]

### **A Look at What Lies Ahead**

As anti-corruption compliance efforts continue to mature at traditional FCPA targets like multinational publicly traded companies and companies in highly regulated industries, we expect the mix of organizations, industries, and business practices that face FCPA scrutiny to continue to grow and to diversify.

Looking ahead, there is no indication that FCPA enforcement will slow. On the contrary, the DOJ's FCPA Unit continues to grow,[22] and both the DOJ and SEC continue to prioritize identifying and prosecuting FCPA violations in coordination with their foreign counterparts. Therefore, nontraditional FCPA targets such as sports teams, leagues and sporting bodies, colleges and universities, consulting and professional services firms, and other organizations that interact with foreign government officials or whose business operations are expanding to foreign countries would be well-advised to take a hard look at their anti-corruption programs.

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[1] C. Ryan Barber, "SEC Foreign Bribery Chief Says 'Additional Industries' Are Drawing Enforcement Attention," National Law Review (November 2, 2018), available at <https://www.law.com/nationallawjournal/2018/11/02/sec-foreign-bribery-chief-says-additional-industries-are-drawing-enforcement-attention/?LikelyCookieIssue=true>.

[2] U.S. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq.

[3] Jeff Passan, "Sources: A federal grand jury is investigating MLB's international dealings, and officials on all sides are worried," Yahoo! Sports (September 28, 2018), available at <https://sports.yahoo.com/sources-federal-grand-jury-investigating-mlbs-international-dealings-officials-sides-worried-055827471.html>; see also Jon Wertheim, "Exclusive: The Evidence That Persuaded U.S. Department of Justice to Investigate MLB Recruitment of Foreign Players," Sports Illustrated (October 2, 2018), available at <https://www.si.com/mlb/2018/10/02/fbi-investigation-mlb-atlanta-braves-los-angeles-dodgers>.

[4] Mike Koehler, "Major League Baseball Reportedly Under FCPA Scrutiny," FCPA Professor (October 1, 2018), available at <http://fcpaproffessor.com/major-league-baseball-reportedly-fcpa-scrutiny/>.

[5] History.com Editors, "Sepp Blatter Announces Resignation Amidst FIFA Corruption Scandal" (September 7, 2018), available at <https://www.history.com/this-day-in-history/sepp-blatter-announces-resignation-fifa-corruption>; see also Jack Rollin, "The FIFA Corruption Scandal," Encyclopaedia Britannica, Inc. (October 17, 2016), available at <https://www.britannica.com/topic/FIFA-Corruption-Scandal-The-2076091>.

[6] See Mike Koehler, "The FIFA-Related Action Is Not An FCPA Enforcement Action – But Could Potentially Lead To Exposure For Certain Companies," FCPA Professor (June 1, 2015), available at <http://fcpaproffessor.com/the-fifa-related-action-is-not-an-fcpa-enforcement-action-but-could-potentially-lead-to-exposure-for-certain-companies/>.

[7] Rebecca R. Ruiz, "Justice Dept. Escalates Inquiry on Global Sports Corruption," The New York Times (January 31, 2018), available at <https://www.nytimes.com/2018/01/31/sports/fifa-ioc-usoc-iaaf.html>.

[8] Justin Scheck, Bradley Hope and Summer Said, "In Growing Saudi Business, McKinsey

Hired Officials' Children," The Wall Street Journal (November 10, 2017), available at <https://www.wsj.com/articles/in-growing-saudi-business-mckinsey-hired-officials-children-1510254527>.

[9] See, eg., "JPMorgan Chase Paying \$264 Million to Settle FCPA Charges," SEC Press Release No. 2016-241 (November 17, 2016), available at <https://www.sec.gov/news/pressrelease/2016-241.html>.

[10] Kristen Rasmussen "Following Scandal, Georgia Tech Expands General Counsel Role to Include Ethics, Compliance Titles," Law.com (Feb. 14, 2019), available at <https://www.law.com/corpcounsel/2019/02/14/following-scandal-georgia-tech-expands-general-counsel-role-to-include-ethics-compliance-titles/>; Associated Press, "Michigan State blasted in federal report for failure to stop Larry Nassar," NBCNews.com (Jan. 31, 2019), available at <https://www.nbcnews.com/news/us-news/michigan-state-blasted-federal-report-failure-stop-larry-nassar-n965216>.

[11] Benjaimin P. Fishburne, III, "Are U.S. colleges and universities complying with the FCPA?" The FCPA Blog (November 26, 2018), available at <http://www.fcpcbog.com/blog/2018/11/26/are-us-colleges-and-universities-complying-with-the-fcpa.html>.

[12] Id.

[13] Roger Hamilton-Martin, "Laureate Education taps new legal chief amid foreign bribery probe," Global Investigations Review (Sept. 11 2017).

[14] "SEC Charges Tyson Foods with FCPA Violations," SEC Press Release No. 2011-42 (February 10, 2011) (Tyson Foods charged with making illicit payments to two Mexican government veterinarians responsible for certifying its Mexican subsidiary's chicken products for export sales), available at <https://www.sec.gov/news/press/2011/2011-42.htm>.

[15] In the Matter of Ball Corporation, Exchange Act Release No. 64123 (March 24, 2011) (Ball Corporation allegedly made improper payments Argentine officials to import prohibited used machinery and export raw materials at reduced tariffs), available at <https://www.sec.gov/litigation/admin/2011/34-64123.pdf>.

[16] "Tenaris to Pay \$5.4 Million in SEC's First-Ever Deferred Prosecution Agreement," SEC Press Release No. 2011-112 (May 17, 2011) (Tenaris allegedly bribed Uzbekistan government officials during a bidding process to supply pipelines for transporting oil and natural gas), available at <https://www.sec.gov/news/press/2011/2011-112.htm>.

[17] "SEC Charges Diebold With FCPA Violations," SEC Press Release No. 2013-225 (October 22, 2013) (Diebold allegedly bribed senior officials at government-owned banks with travel, entertainment, and other improper gifts in order to win business), available at <https://www.sec.gov/news/press-release/2013-225>.

[18] "SEC Charges Smith & Wesson With FCPA Violations," SEC Press Release No. 2014-148 (July 28, 2014) (Smith & Wesson charged with making improper payments to foreign officials while trying to win contracts to supply firearm products to military and law enforcement overseas), available at <https://www.sec.gov/news/press-release/2014-148>.

[19] "SEC Charges Mead Johnson Nutrition With FCPA Violations," SEC Press Release No. 2015-154 (July 28, 2015) (Mead Johnson Nutrition Company settles charges that its Chinese subsidiary made improper payments to health care professionals at government-owned hospitals to recommend the company's infant formula to patients), available at <https://www.sec.gov/news/pressrelease/2015-154.html>.

[20] "Wire and Cable Manufacturer Settles FCPA and Accounting Charges," SEC Press Release No. 2016-283 (December 29, 2016) (Kentucky-based General Cable Corporation settled charges that its overseas subsidiaries made improper payments to foreign government officials to obtain or retain business in Angola, Bangladesh, China, Egypt, Indonesia, and Thailand),

available at <https://www.sec.gov/news/pressrelease/2016-283.html>.

[21] "SEC Charges Cognizant and Two Former Executives With FCPA Violations," SEC Presse Release No. 2019-12 (Feb. 15, 2019), available at <https://www.sec.gov/news/press-release/2019-12>.

[22] "Fraud Section Year in Review 2018," U.S. Department of Justice, Criminal Division, Fraud Section (2018), available at <https://www.justice.gov/criminal-fraud/file/1123566/download>.

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