

Litigation and White Collar Crime

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The Long Arm of U.S. Regulators Extends to Israel

The passage of the Foreign Corrupt Practices Act (FCPA) in 1977, and 40 years of aggressive law enforcement have, as many have noted, imposed an American definition of corruption on the entire world. As such, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) are continuing to vigorously pursue non-U.S. companies operating outside the United States, as well as U.S. and foreign companies with a close connection to U.S. commerce.

Indeed, 2016 was a record year for FCPA enforcement, with the U.S. government bringing six major enforcement cases and collecting US\$1.8 billion in FCPA fines. The DOJ and SEC brought a combined 44 enforcement actions last year. U.S. agencies are also bringing actions under anti-money laundering (AML) regulations and economic and trade actions relating to the jurisdiction of the Office of Foreign Assets Control (OFAC) with increasing frequency. These trends show every sign of continuing.

Of particular relevance to Israeli companies and their ownership and management teams is the DOJ's continued aggressive international application of the FCPA. Even minimal contacts with U.S. markets can expose conduct that might otherwise be legal in Israel as corrupt practices under U.S. law, leading to massive fines and criminal sanctions

As is widely recognized, the Israeli economy has become increasingly sophisticated and outwardly focused over the last several decades. Israel has transformed itself into an international economic powerhouse, with Israeli companies increasingly completing international transactions and attracting huge amounts of foreign capital—over US\$285 billion in 2015 according to a recent Bloomberg article. In addition, dozens of Israeli companies have opted to register on U.S. exchanges with the total number of companies registered on the NASDAQ alone currently standing at 94.

Israeli companies and management personnel have, therefore, become increasingly exposed to U.S. regulatory and prosecutorial oversight. The Israeli authorities have continued to cooperate fully with the U.S. in these and other efforts. Israel regularly extradites its own citizens to the U.S. where the conduct at issue is a crime under the laws of both countries. Under the 1998 Mutual Legal Assistance Treaty (MLAT) between the two nations, Israel has an obligation to take testimony, procure evidence, locate persons, execute searches and seizures and perform other criminal legal assistance in aid of U.S. criminal investigations. In recent

years, this cooperation has manifested itself in the Israeli Tax Authority turning over detailed information to the U.S. Internal Revenue Service (IRS) in connection with thousands of U.S.-related bank accounts pursuant to the U.S. Foreign Account Tax Compliance Act (FATCA).

The FCPA: America's International Bribery Standard

Of particular relevance to Israeli companies and their ownership and management teams is the DOJ's continued aggressive international application of the FCPA. Even minimal contacts with U.S. markets can expose conduct that might otherwise be legal in Israel as corrupt practices under U.S. law, leading to massive fines and criminal sanctions. The FCPA is an international anti-bribery statute that generally prohibits companies from providing "anything of value" to foreign officials in exchange for business interests. The statute has been interpreted by the courts to apply to an extremely wide range of conduct and provides the DOJ with jurisdiction over actions that appear to have little or nothing to do with the United States. For instance, the term "foreign officials" includes foreign and domestic officials at any level of government, candidates for office and representatives of state-controlled organizations. Similarly, as the phrase implies, "anything of value" has an extraordinarily expansive definition that includes, for example, meals, use of equipment and even charitable donations.

Weak Ties to the U.S. Can be Sufficient for Prosecution

U.S. regulatory and enforcement actions often do not require extensive ties between foreign business and U.S. markets. A recent high-profile example of an Israeli company subject to prosecution through an expansive application of the FCPA is the ongoing investigation of an Israeli entity conducting Africa-based mining activities, which has reportedly led to a guilty plea from one of the company's alleged agents. Many of OFAC's recent enforcement actions have been against non-U.S. companies with limited contact with the U.S. For instance, OFAC and the DOJ recently announced a US\$787.3 million penalty against French company Credit Agricole Corporate and Investment Bank for moving money through U.S. financial institutions, which violated U.S. and international sanctions related to Sudan, among other nations.

The stepped-up enforcement also impacts Israeli banks. In 2014, Bank Leumi pled guilty to assisting U.S. taxpayers with hiding assets from the IRS and paid US\$270 million in fines to the DOJ and another US\$130 million to New York state authorities. Other Israeli financial institutions are reportedly also under investigation by the DOJ Tax Division.

In what is often a surprise to non-U.S. executives, the FCPA's jurisdictional parameters are easy for U.S. authorities to meet and are increasingly applied at its farthest reaches. Simply being listed on a U.S. exchange, having a U.S.-based office or filing reports with a U.S. agency can expose an Israeli company to liability, even for actions that occur abroad with respect to non-U.S. government officials.

The Yates Memorandum: Growing Focus on Prosecuting Corporate Executives

An important backdrop to the long reach of the U.S. criminal law is the added focus on pursuing criminal charges against corporate executives and other individuals as part of regulatory actions against their companies. On September 9, 2015, then-Deputy Attorney General Sally Yates issued a seven-page DOJ policy memorandum detailing a renewed emphasis on holding individuals accountable for corporate wrongdoing. The "Yates Memorandum" explained that "[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing." In that vein, the Yates Memorandum set forth a requirement that for companies to obtain credit for cooperation with federal officials,

they must provide the government with all relevant facts relating to individual misconduct. The DOJ has stated it will refrain from resolving individual investigations when settling with corporate entities, and recent settlements with certain Israeli companies have been followed by continued pursuit of individuals who worked for those institutions. It is expected this renewed focus on individual prosecutions for white-collar crime and regulatory offenses will continue.

The Growing Specter of FATCA

Another potential area of exposure for high-net-worth individuals and complex international businesses with operations in the United States is the increasing reach of American tax enforcement. The DOJ and IRS have prioritized cracking down on offshore tax shelters, including those in Israel. In *Republicans Abroad in Israel v. Government of Israel*, No. 8886/15, the Israeli Supreme Court rejected a constitutional challenge to the effect of the FATCA in Israel. The effect of the ruling is that, starting on November 30, 2016, Israeli financial institutions began reporting the detailed information of accounts, and account holders with U.S. connections and tax obligations, to the IRS.

This development could lead to significant exposure for Israelis with either dual Israeli-American citizenship or Israeli citizens with earnings that are otherwise taxable by the IRS. The failure to self-report taxable earnings that fall under FATCA's disclosure requirements can result in tens of thousands of dollars in fines, a 40% penalty on any understatement of tax attributable to an undisclosed asset and harsher penalties still if the violation is deemed willful by U.S. tax authorities. The stepped-up enforcement also impacts Israeli banks. In 2014, Bank Leumi pled guilty to assisting U.S. taxpayers with hiding assets from the IRS and paid US\$270 million in fines to the DOJ and another US\$130 million to New York state authorities. Other Israeli financial institutions are reportedly also under investigation by the DOJ Tax Division.

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Conclusion

Israeli companies and law firms should be aware the U.S. government is continuing to step up criminal and regulatory enforcement efforts against foreign companies and nationals who avail themselves of U.S. markets. Business conduct that intuitively seems as if it does not touch on U.S. law—such as payments made by a Chilean Chemical and Mining company to Chilean officials that was recently the subject of an FCPA prosecution and settlement—could attract the attention of U.S. government regulators and prosecutors. As Israeli companies grow in geographic reach and financial might, it is critical for their leaders and counsel to have a thorough understanding of U.S. international regulatory and enforcement priorities and efforts.



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Kobre & Kim is a conflict-free global law firm focused on disputes and investigations, often involving fraud and misconduct.

We are the only law firm to have a former U.S. Department of Justice (DOJ) prosecutor permanently based in Israel. With a full-time presence in Tel Aviv, our firm offers local experience and native language skills to help clients navigate complex matters involving Israel and the U.S., while maintaining particular sensitivity to cultural nuances, local business practices and relevant legal systems.

We regularly handle sensitive investigations related to bribery, corruption, money laundering and accounting and securities fraud. We focus on the core of the problem and provide clients with strategies and solutions aimed at mitigating risk and protecting business interests.

Our global, integrated team includes more than a dozen former U.S. federal prosecutors and government lawyers who have held leadership positions at the DOJ and the U.S. Securities and Exchange Commission. Our cross-disciplinary team is qualified in multiple jurisdictions across the U.S., EMEA, Asia and the Caribbean.

Robert Henoch represents Israel- and Europe-based companies in internal investigations, regulatory and criminal enforcement matters and complex international disputes. Robert, a former DOJ prosecutor, advises companies, boards of directors and senior executives in cross-border U.S. government investigations led by the DOJ, the U.S. Internal Revenue Service, the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission. Robert, who is fluent in Hebrew, practices in Kobre & Kim's Tel Aviv office.

Steven Kobre is the co-founder of Kobre & Kim. A seasoned litigator, he has served as lead counsel in numerous government enforcement defense matters and high-value financial arbitrations and litigations among commercial entities, Fortune 500 companies and other large institutions.

Steven has represented clients before the U.S. Commodity Futures Trading Commission, the U.S. Securities and Exchange Commission, the DOJ, the New York County District Attorney's Office and the New York State Attorney General. Prior to founding Kobre & Kim, Steven was a prosecutor at the U.S. Department of Justice and at the New York County District Attorney's Office.

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