

JUST ANTI-CORRUPTION

Is South Africa the new Brazil?

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Jenner & Block's David Lachman and Nicholas Barnaby

Reports of public corruption have dominated headlines in the South African press over the past year, leading local and foreign authorities to open investigations. The public scrutiny only intensified with the February resignation of President Jacob Zuma and the subsequent decision by South African authorities to prosecute him for corruption. These developments increase the likelihood that companies with exposure to South Africa – especially those dealing with state-owned enterprises – may face Foreign Corrupt Practices Act investigations.

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The focus on South African corruption results from allegations about Zuma's relationship with three prominent Indian-born businessmen, brothers Ajay, Atul and Rajesh Gupta. Zuma and the Guptas have all repeatedly denied wrongdoing. According to news reports, the Gupta brothers allegedly used their relationship with Zuma and other South African officials to steer business and other opportunities to companies they own. Further, the Guptas are reported to have leveraged their close relationship with those in power to solicit improper payments from companies in return for their assistance in helping secure lucrative contracts with state-owned enterprises.

Beginning in 2016, and with increased intensity throughout 2017, the South African press and law enforcement questioned the Zuma-Gupta relationship. Under pressure from his own party before he resigned, the governing African National Congress, Zuma approved a judicial inquiry into the allegations in January 2018.

Cyril Ramaphosa, sworn in as South Africa's new president on 15 February, has vowed to carry out and expand the probe. In his first major speech since taking office, Ramaphosa promised to "turn the tide of corruption in our public institutions". As an indication of what may come, just hours before Ramaphosa formally took the reins, South Africa's elite police investigative unit, the Hawks, launched a series of raids targeting the Guptas and their associates. Since Ramaphosa took office, corruption enforcement activities have continued. On 16 March, the National Prosecuting Authority charged former President Zuma with corruption, fraud, racketeering and money laundering for his alleged role in an earlier corruption scandal involving a 1999 arms deal. Zuma contests the charges.

Foreign authorities have noted the reported corruption. According to public reports, US authorities are investigating whether companies doing business with state-owned enterprises in South Africa may have violated the Foreign Corrupt Practices Act. German software company SAP, for example, announced that it had voluntarily disclosed potential FCPA violations arising out of its South African operations to the DOJ and SEC in July 2017. SAP's alleged misconduct relates to payments to Gupta-linked businesses in exchange for their role in securing contracts with Eskom, a public electricity utility, and Transnet, a state-owned transport company. Along with the Guptas, Eskom and officials implicated by the allegations have denied wrongdoing.

These and other revelations have reportedly led the FBI to open an investigation into possible corruption involving the Guptas. UK authorities have announced they are investigating possible money laundering by UK banks in connection with the investigation. South African prosecutors have confirmed their willingness to cooperate with these inquiries.

FCPA enforcement often comes in waves as law enforcement focuses its limited resources on a geographic region or industry. In the past few years, for example, a significant number of cases have related to misconduct in Brazil, as that country's long-running investigation into corruption surrounding its oil sector has embroiled several multinational companies. The probe led to Brazilian construction conglomerate Odebrecht's 2016 guilty plea for conspiracy to violate the FCPA's anti-bribery provisions, which resulted in a record \$4.5 billion fine (reduced to \$2.6 billion on account of the company's inability to pay).

Moreover, six of the 13 resolutions of FCPA enforcement actions against corporations in 2017 included alleged corrupt payments to Brazilian officials.

There are some parallels between Brazil and South Africa. Like Brazil, South Africa has a large, sophisticated economy. As in Brazil, the alleged corruption in South Africa is concentrated in a way that allows for a clear narrative – in Brazil, kickback and bribery schemes involving a corrupt oil company; in South Africa, alleged corruption by a powerful family. And, as was the case in Brazil, anti-corruption investigations by South African

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authorities will likely add fuel to the fire. In Brazil, the sustained efforts of local law enforcement, and their close cooperation with US authorities, ensures that the United States had the facts and leads needed to pursue FCPA cases. Actions by South African law enforcement, such as the investigation promised by President Ramaphosa and the cooperation the Hawks have publicly signalled, could lead to similar cooperation with US prosecutors.

Importantly, increased FCPA scrutiny of the South African economy could extend beyond US companies to South African companies with US ties. Odebrecht, the company that resolved the multi-billion dollar FCPA case in 2016, is a Brazilian company. Likewise, in 2017, the SEC settled an FCPA matter with the Chilean mining company Sociedad Química y Minera de Chile for alleged corrupt payments made to Chilean officials. Both companies issued American depositary receipts, which provided the jurisdictional hook for the FCPA actions. Foreign companies that do business in South Africa and issue shares trading on a US exchange are also susceptible to FCPA enforcement. In 2015, for example, the Japanese conglomerate Hitachi paid \$19 million, without admitting the charges, to settle SEC allegations that it inaccurately recorded improper payments to a local South African business partner affiliated with the African National Congress for its role in helping to secure government contracts.

South African and other foreign companies may also be subject to the FCPA if they commit any act in furtherance of a corrupt payment to a foreign official (which can include state-owned enterprises) in the United States. Connections to the United States as insubstantial as sending an email through a US server, or making an electronic payment in US dollars that is routed through a US bank, could be sufficient to establish jurisdiction for an FCPA prosecution if that act relates to the alleged corruption.

All of this underscores the potential that anti-corruption scrutiny will follow in South Africa in 2018 and beyond. It is too soon now to know the eventual scope of local and international enforcement activity. Two critical factors will help shape the ultimate outcome. First, so far, South African prosecutors have focused largely on Zuma and the Gupta brothers. Second, South African prosecutors have indicated that they will cooperate with foreign enforcement authorities, including the DOJ. Observers should focus on whether South Africa expands the inquiry into other implicated actors and whether there are further signs of multinational cooperation.