

FCPA

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MCC INTERVIEW: Paul Butler / Akin Gump Strauss Hauer & Feld LLP

The ~~\$64,000~~ \$64 Million Question

How will President Trump influence international bribery enforcement?

A partner at Akin Gump, Paul Butler began his career as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York, where he prosecuted terrorism, organized crime and white collar fraud cases. He went on to serve in several senior positions at the U.S. Department of Defense, including as the special assistant to Secretary of Defense Donald Rumsfeld. His remarks have been edited for length and style

MCC: How has FCPA enforcement evolved over the years?

Butler: It's grown exponentially, probably beginning with the tenure of Mark Mendelsohn as the head of the DOJ's FCPA unit [2004-2010]. Its growth is also due to international anti-corruption enforcement following the signing of conventions like the Organisation for Economic Co-operation and Development Anti-bribery Convention, as well as the passage and enforcement of foreign laws like the UK Bribery Act. These developments have led to more globally coordinated enforcement actions, resulting in larger settlements, and an increased flow of information, leading to expanded resources for both the DOJ and SEC FCPA units.

MCC: Asking you to dust off your crystal ball, do you foresee changes under the Trump administration in this area?

Butler: Of course it's very difficult to predict, but everyone has been pointing to the quotes from then-businessman Donald Trump and veteran Wall Street lawyer Jay Clayton, now nominated to be chairman of the SEC. Both have pointed out that, in their opinion, enforcement of the FCPA had been overreaching and was not accomplishing what it sought to do, which was to create a level playing field for U.S. businesses. Those are important comments. I think they, to some extent, seem to be consistent with the pro-U.S. business policies of the incoming administration, which is working on ways to lighten the regulatory and enforcement burden on U.S. business.

On the other hand, there's a lot left to be done in terms of filling important positions in this area, like the head of the criminal division at the DOJ and the director of enforcement at the SEC. Of course, Jay Clayton also needs to be confirmed

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as SEC chairman, which is highly likely. And, as you know, in now-U.S. Attorney General Sessions' answers to follow-up questions after his confirmation hearing, he committed to enforcing all U.S. laws, including the FCPA specifically. I could see some change in the scope and direction of enforcement under the FCPA in the next four years, but we will need to wait and see how personnel appointments unfold to fully understand how drastic any changes may be.

MCC: You bring up old quotes from Donald Trump. This was way before he was a candidate for president, or maybe even a serious candidate for political office. How much stock should we put in old quotes from the man who is now president?

Butler: To be sure, there is a difference between speaking to your personal and/or business interests and acting on behalf of the American people. I do think President Trump's prior comments reflect a policy position that perhaps U.S. business has been disadvantaged by overregulation and overenforcement. On the other hand, the DOJ and the SEC now receive a tremendous amount of information on potential FCPA violations, including from voluntary disclosures, whistleblowers and/or actions taken by competitors. And our clients have already seen that the professionals within the DOJ Fraud Section and/or the SEC Division of Enforcement will pursue investigations if information comes to their attention that warrants opening a case. The increased flow of information has provided important tools for the DOJ and the SEC to enforce the law. They have a certain momentum of their own, and I'm not sure that there's going to be a closing of the spigot, so to speak. But I do think that you could see a change in enforcement priorities and in the scope of enforcement over the next four years.

What we might see is a different approach to the resolution of those matters. We might see less rigorous terms on things like monitorships, the requirements of guilty pleas and/or the size of fines. We might also see a change in the direction of the Yates memo in terms of the amount and type of cooperation that companies are expected to provide in order to resolve cases.

There is, of course, a policy debate about whether the entire enforcement landscape levels the playing field for U.S. companies by trying to cut back on international bribery. There is a very strong argument to be made that that is the case. However, if this administration feels that U.S. businesses are being disadvantaged by increased enforcement, what we might see is a shift in enforcement from U.S. businesses to foreign businesses that the government believes are competing unfairly. That could take the administration to any number of countries where they feel as if the playing field isn't level. That's pure political speculation, but it's not beyond the realm of possibility.