

Up in the Air

Where will FCPA enforcement go from here?

By J. Patrick Rowan & Ryan Bonistalli / McGuireWoods LLP

“**W**e tax and regulate and restrict our companies to death ... it is time to declare our economic independence once again.”

Through campaign-trail comments like that, President Donald Trump announced his desire to reduce regulatory burdens on U.S. businesses. His pro-business agenda, combined with past criticisms of the U.S. Foreign Corrupt Practices Act (FCPA), has led some to question whether the Trump administration may reduce FCPA enforcement. Practitioners in this area are watching for clues and awaiting a more definitive statement from the U.S. Department of Justice

Is Past Criticism of the FCPA a Signal for the Future?

Trump was once skeptical about the efforts of the U.S. to combat bribery and corruption overseas. In a 2012 CNBC interview, he said that the U.S. is “absolutely crazy” to prosecute alleged FCPA violations in China, Mexico and elsewhere, calling the FCPA a “horrible law that should be changed” because it disadvantages American businesses. But Trump made the comments over four years ago, when he supported Mitt Romney for president and was presumably focused on his businesses, not a race of his own. He didn’t revisit the FCPA issue in last year’s campaign.

Others have criticized the law and its effect on American business. The U.S. Chamber of Commerce led a 2011 effort to persuade Congress to clarify the law by seeking to limit the broad meaning of “foreign official” and to adopt an affirmative compliance defense. Lisa Rickard, president of the Chamber’s Institute for Legal Reform, wrote that FCPA enforcement cases “have brought attention to the need to reform an outdated law that many believe is hurting American businesses’ ability to compete fairly in the global market.”

Trump has said, “We are in a competition with the world, and I want America to win.” But it’s unclear whether his views mean that corruption enforcement will diminish.

Recent DOJ Initiatives Will Continue to Shape Enforcement

Don’t expect dramatic near-term reductions in FCPA enforcement. Many investigations are already in the prosecution pipeline. By one count, 81 companies are under DOJ and/or Securities and Exchange Commission investigation, and another 107 are suspected to be under investigation (but can’t be confirmed). These investigations take time; the DOJ and the SEC need to establish the facts of each matter before resolving it. A change in enforcement may affect the outcomes, but it won’t quickly reduce the number of investigations.



J. Patrick Rowan is a partner in the Washington, D.C., office of McGuireWoods LLP. He advises corporate clients on FCPA compliance. He served as assistant attorney general for national security under President George W. Bush. com. A member of McGuireWoods’ government investigations and white-collar litigation department, He can be reached at prowan@mcguirewoods.com.

Also, the substantial anti-corruption infrastructure at the DOJ and the SEC will continue to open investigations and continue to charge cases.

Last April, the DOJ’s Fraud Section announced a yearlong FCPA pilot program encouraging “companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section and, where appropriate, remediate flaws in their controls and compliance programs.” It aims to increase transparency about the benefits that a company could receive by disclosing potential FCPA violations, possibly including significant reductions in penalties or even a declination from the DOJ.

Recent cases underscore the DOJ’s focus on individual liability. In January, the department announced that eight people had pleaded guilty in an FCPA investigation related to Venezuela’s state-controlled energy company, Petroleos de Venezuela S.A.

The pilot program concludes next month. The DOJ is expected to announce then whether to extend, modify or scrap it. Much hinges on whether more self-disclosures and greater cooperation resulted. Given favorable outcomes, career FCPA prosecutors will likely seek its renewal. The DOJ’s final decision may also foreshadow what Trump-era FCPA enforcement will look like. FCPA practitioners will watch and analyze the DOJ’s decision closely. A renewal doesn’t preclude diminishing enforcement over time, but would suggest that no radical revisions are imminent.

Changes in DOJ Leadership and the Potential Impact on Enforcement

Last November, then-Deputy Assistant Attorney General Sally Yates predicted that FCPA enforcement as we know it would continue under the new president. “Individual accountability isn’t a Democratic principle or a Republican principle, but is instead a core value of our criminal justice system that perseveres regardless of which party is in power,” she said.

New Attorney General Jeff Sessions, a former federal prosecutor, has indicated his belief in holding individuals responsible. At his confirmation hearing, Sen. Maz Hirono (D-Hawaii) asked Sessions whether he would hold individual corporate officeholders accountable. “Sometimes it seems to me ... that the corporate officers who caused a problem should be subjected to more severe punishment than stockholders of the company who didn’t know anything about it,” he replied. And, in written responses to Sen. Sheldon Whitehouse’s questions, Sessions pledged to “enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998.”

Do FCPA enforcement and America winning go together for Trump’s DOJ? Only time will tell.



Ryan Bonistalli is a senior associate based in the firm’s Richmond, Virginia, office and focuses on FCPA matters. A member of McGuireWoods’ government investigations and white-collar litigation department. He can be reached at rbonistalli@mcguirewoods.com.

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