

ARTICLE

FCPA Expectations Under President Trump

BY RODERICK L. THOMAS AND COLIN CLOHERTY*Law360*

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Since the election, most commentators have suggested that the Trump Administration will relax enforcement of the Foreign Corrupt Practices Act (FCPA). With Attorney General-nominee Jeff Sessions's confirmation likely and Jay Clayton's nomination to chair the SEC, the FCPA regulatory environment is coming into better focus. We remain skeptical that FCPA enforcement will wane and encourage continued robust compliance procedures for parties subject to the FCPA. Before discussing our skepticism or the Trump Administration's likely changes in FCPA enforcement, the case for reduced FCPA enforcement merits examination.

The Narrative: Reduced FCPA Enforcement Under the Trump Administration

President Donald Trump is on record as opposing the FCPA. The narrative of reduced FCPA enforcement is based on President Trump's 2012 appearance on CNBC's "SquawkBox" where he decried the FCPA as an "outrageous" law. Mr. Trump said that he is "fine" with foreign countries enforcing anti-corruption laws in their own country, but found it "ridiculous" that the United States would criminalize bribes that occur abroad. Mr. Trump's opinions in the interview, that the United States was no longer a leader in the world and that regulations are hurting American businesses and workers, can be viewed as a precursor to many of the themes of his presidential campaign.

The nomination of Jay Clayton as chairman of the SEC reinforced this narrative.

Authors

Roderick L. Thomas
Partner

202.719.7035
rthomas@wiley.law

Colin J. Cloherty
Partner

202.719.3564
ccloherty@wiley.law

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President Trump reinforced the narrative that he will reduce FCPA enforcement with the nomination of Sullivan & Cromwell partner Jay Clayton as SEC Chairman. Mr. Clayton has never held public office or been a prosecutor. While in private practice, Mr. Clayton represented large financial companies in New York, including Goldman Sachs, Bear Stearns, and Och-Ziff. Just last year, Och-Ziff became the first hedge fund subject to FCPA enforcement and paid \$412 million to the SEC and DOJ to settle its FCPA violations.[1] In addition, Mr. Clayton chaired a New York Bar committee that published a 2011 report criticizing FCPA enforcement.

As President, Mr. Trump has the power to limit FCPA enforcement. He could work with a regulation-adverse Republican Congress to limit funding for the FCPA enforcement shops at the DOJ and SEC. Also, Mr. Trump's nominees Jeff Sessions and Jay Clayton will be able to exert their influence to limit FCPA enforcement as leaders of the DOJ and SEC.

The Reality: Companies Should Continue Robust FCPA Compliance Procedures

The reality of the FCPA regulatory environment, including incentives for voluntary disclosure and global enforcement of anti-bribery/anti-corruption statutes, should act as an impediment to changed FCPA enforcement priorities at all but the margins.

The benefits of voluntary disclosure ensure FCPA enforcement actions will continue.

Unlike most statutes, many FCPA enforcement actions are the result of voluntary disclosure. Voluntary disclosure can provide significant benefits to a party that violated the FCPA. Both the DOJ and SEC offer reductions to criminal and civil penalties depending on a party's level of cooperation. The importance of cooperation is unlikely to diminish in light of Attorney General-nominee Jeff Sessions's record as a U.S. Attorney in Alabama and comments on corporate waiver of attorney-client privilege in the wake of the then-effective 2007 McNulty memorandum.[2]

When considering whether to voluntarily disclose FCPA violations, companies should consider that the lifespan of an FCPA enforcement action, from violation to settlement, is three to five years on average. The length of FCPA cases means that there are already enough FCPA enforcement actions to keep the DOJ and SEC occupied for several years. In addition, the length of FCPA cases should lead prudent companies contemplating voluntary disclosure to consider heightened FCPA enforcement policies of a potential Democratic president in 2020. Thus, any notional decision by the Trump Administration to limit FCPA enforcement may not terminate voluntary disclosures and subsequent investigations.

The FCPA protects American businesses around the world.

The FCPA functions to protect American businesses. According to FCPAblog.com, seven of the 10 largest FCPA enforcement actions in 2016,[3] and eight of the 10 largest FCPA enforcement actions in history,[4] were against foreign companies. In recent years, the FCPA is not the millstone for American business that Mr. Trump described in the 2012 CNBC interview.

Moreover, the FCPA is only a part (albeit an important part) of the global anti-corruption legal environment. The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), first signed in 1997, demonstrates the global support for anti-bribery and anti-corruption efforts. The convention established standards to criminalize bribery of foreign public officials and has 41 signatories. Many countries have their own versions of the FCPA that companies must consider when implementing compliance policies or voluntarily disclosing violations.

For example, Brazilian company Odebrecht entered into a plea agreement in December 2016 for conspiracy to violate the FCPA's anti-bribery provisions.[5] The United States, Brazil, and Switzerland will share the \$2.6 billion recovery. Law enforcement agencies in Brazil, Switzerland, and the United States collaborated on the investigation. The Trump Administration will also confront the preference of American law enforcement agencies to lead similar international corruption investigations.

FCPA enforcement may even increase should President Trump find the FCPA a useful tool to protect American business rather than a bureaucratic hindrance.

Signs of Change: Monitoring the FCPA Regulatory Environment for Changes

We are monitoring the transition for three signs that the Trump Administration will enact changes in FCPA enforcement. These signs would signal wholesale changes in enforcement priorities from the Obama Administration to the Trump Administration.

Shaping FCPA enforcement within the DOJ and SEC.

President Trump has the executive power to limit FCPA enforcement by reshaping the leadership of the DOJ and SEC. Trump's nominations to head these agencies will influence the enforcement of the FCPA. For example, Mr. Clayton will be able to replace the four departing SEC division directors, including the director of the SEC's enforcement division Andrew Ceresney.

Creating a compliance defense to FCPA violations.

The Trump Administration could advocate for the creation of a compliance defense to limit party's exposure to FCPA liability. This defense would allow any American firm charged with violating the FCPA to show that it had compliance procedures in place to prevent a violation, and if the procedures are deemed sufficient, the firm would avoid liability. The Administration's support for the "Adequate Procedures" defense to FCPA violations, for which the Chamber of Commerce has been lobbying for years, would signal significant changes to FCPA enforcement. Several OECD Convention countries established legal defenses to their corruption laws based on compliance similar to the "Adequate Procedures" defense, including United Kingdom, Australia, Chile, Germany, Hungary, Italy, Japan, Korea, Poland, Portugal, Spain, Sweden, and Switzerland.

Revising the Yates memo.

The Trump DOJ could decline to prosecute individuals for FCPA violations. A decision to reverse the Obama Administration's policy to prosecute individuals under the FCPA, as outlined in the Yates memo, would signal a more limited approach to FCPA enforcement. The Yates memo outlined the Obama Administration's stated policy to pursue individual employees or directors of companies for FCPA violations. In 2016, DOJ charged or obtained guilty pleas from 17 individuals.[6] Similarly, the SEC charged or found that eight individuals violated the FCPA.[7]

Every Administration puts its own stamp on the prosecution of corporate officers. Replacing the Yates memo could demonstrate a more limited approach to the prosecution of corporate executives and other individuals for FCPA violations. Attorney General-nominee Jeff Sessions, however, spoke out in favor of prosecuting executives and directors as a senator. Should the Trump Administration make the policy decision to decline prosecutions of individuals, it would likely have to overcome Sessions's policy preferences. Because Mr. Sessions's confirmation as Attorney General is likely, this policy decision would signal that a policy of limited FCPA enforcement is likely coming from the White House.

The Takeaway: Compliance, Compliance, Compliance

Unless and until these changes occur, regulatory continuity, rather than change, will be the reality for both individuals and companies subject to FCPA regulation.

The requirements of FCPA compliance and the issues related to voluntary disclosure are complicated to maneuver, but could have a significant impact on corporations and directors alike.

Wiley Rein associate Colin Cloherty co-authored this article.

[1] Mr. Clayton's representation of Och-Ziff occurred in the 2000s.

[2] The Filip memorandum replaced the McNulty memorandum on August 28, 2008. The same day, the Second Circuit released its opinion that federal prosecutors' conduct in compliance with the McNulty memo violated defendants 6th Amendment right to counsel in *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

[3] Richard L. Cassin, *The one thing President Trump needs to know about the FCPA*, FCPAblog.com (Nov. 22, 2016), <http://www.fcpablog.com/blog/2016/11/22/the-one-thing-president-trump-needs-to-know-about-the-fcpa.html>.

[4] Richard L. Cassin, *Here's our new Top Ten list, with Vimpelcom Landing Sixth*, FCPAblog.com (Feb. 19, 2016), <http://www.fcpablog.com/blog/2016/2/19/heres-our-new-top-ten-list-with-vimpelcom-landing-sixth.html>.

[5] U.S. Dep't of Justice, Criminal Division, Fraud Section Year in Review, 4 (2016).

[6] U.S. Dep't of Justice, Criminal Division, Fraud Section Year in Review, 4 (2016).

[7] Professor Mike Koehler, *A Focus On SEC Individual Actions*, FCPAProfessor (Jan. 23, 2017), <http://fcpprofessor.com/focus-sec-individual-actions/>.