FCPA ENFORCEMENT UNDER TRUMP: DON'T CALL OFF THE CAVALRY JUST YET

Date: 6 January 2017

FCPA Alert

Despite President-elect Donald Trump's past negative comments about the Foreign Corrupt Practices Act ("FCPA"), companies should continue to take FCPA compliance seriously and employ best practices. Indeed, ethical business practices at home and abroad should continue to be the norm. Though it is difficult to predict in which direction Trump's administration may take FCPA enforcement, it is also hard to imagine that it will shape a policy soft on corruption. Thus, it seems likely to remain the case that companies that employ robust anticorruption compliance programs are more likely to avoid entanglement with the FCPA, other anticorruption laws, and enforcement agencies. And, in the event of a corruption issue, those companies with compliance programs are more likely to reap the benefits and credit typically doled out by anticorruption enforcement authorities when a violation does occur.

A. PAST CRITICISM OF THE FCPA BY THE PRESIDENT-ELECT SHOULD NOT BE READ TO SIGNAL A SOFTENING OF ENFORCEMENT EFFORTS

In 2012, when questioned about the investigation of a major retailer, Mr. Trump stated that the FCPA is "a horrible law and it should be changed."[1] Mr. Trump also noted that the FCPA put U.S. companies at a "huge disadvantage."[2] While Mr. Trump's past statements might be read to signal an easing of FCPA enforcement during his presidency, one should keep in mind that Mr. Trump made these remarks over four years ago — when he was focused strictly on advancing his business interests and was not the soon-to-be leader of the free world.

Despite speculation from various legal commentators and practitioners to the contrary, there is reason to believe that the Trump administration and the U.S. enforcement authorities — the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") — will continue to enforce vigorously the FCPA. Even if FCPA enforcement efforts in the United States slacken, foreign jurisdictions are adopting and enhancing their own anticorruption laws, as well as stepping up enforcement activities.[3] Additionally, enforcement authorities around the world are collaborating with greater frequency and cooperating on investigations and enforcement actions, increasingly holding corporations and individuals accountable for corruption wherever they may be.

B. FCPA ENFORCEMENT AS AN EQUALIZER THAT BENEFITS U.S. COMPANIES

It seems likely that the Trump administration will be motivated to make sure that the DOJ and SEC continue FCPA enforcement activities consistent with efforts dating back at least to the second term of George W. Bush's administration. Though it is no secret that Mr. Trump favors big business, he also touted his intent to help U.S. companies during his campaign.[4] Aggressive but sensible FCPA enforcement does not necessarily

©2005-2026 K&L Gates LLP. All Rights Reserved.

disadvantage U.S. companies. Instead, it may benefit companies operating with business integrity by holding companies that engage in improper practices accountable for acts of corruption. Such FCPA enforcement helps to level the commercial playing field globally and motivate other countries to enact and enforce their own anticorruption laws — consequently rewarding the vast majority of companies that play fairly and operate with sound business ethics.

Contrary to Mr. Trump's assertions in 2012, robust enforcement of the FCPA has had an enormous effect on foreign companies. In fact, seven of the 10 largest FCPA-related penalties have been levied against non-U.S. companies — a fact that illustrates the long arm of the U.S. law and the many touch points for FCPA enforcement.[5] Indeed, evidence suggests that the FCPA may help to equalize certain business conditions around the world; each year more and more non-U.S. companies appear to adopt or enhance existing anticorruption compliance programs.

There is also reason to anticipate that the Trump administration will not want to appear soft on corruption. Enforcement of the FCPA dramatically increased during the George W. Bush administration, and robust enforcement continued under the Obama administration.[6] It is doubtful that Mr. Trump or the Republican Congress will want to be viewed as even softening the current enforcement environment.[7] Mr. Trump has been adamant about rooting out corruption and helping U.S. businesses thrive.[8] An FCPA enforcement regime consistent with those of Mr. Trump's predecessors would accomplish both of those objectives.[9]

On a related note, given that corruption can be a "root cause" of terrorist activity, the FCPA has become a key component in the international fight against terrorism.[10] Mr. Trump has been very clear with respect to making that a priority of his administration.

C. PROGRAMMATIC BENEFITS — PROACTIVE COOPERATION, EFFICIENCY, AND HIGH FINES — MAY FUEL THE CONTINUATION OF FCPA ENFORCEMENT

To be sure, there will likely be significant changes to the overall enforcement agenda, priorities, and personnel under the Trump administration. But there is no indication that the DOJ or the SEC will drastically reduce corruption enforcement efforts — especially when the current enforcement model is so efficient, inexpensive, and profitable for the U.S. government. In the recent past, the DOJ modified its approach to enforcing the FCPA by focusing on internal investigations and individual accountability pursuant to the Yates Memo.[11] The DOJ also adopted the so-called "Pilot Program."[12] Under the Pilot Program, a company may receive a reduction in penalties for FCPA violations if it self-reports, engages in a high level of proactive cooperation with the government, and employs certain remedial efforts — including implementation of an effective compliance and ethics program.

At the recent national FCPA conference, Deputy Assistant Attorney General Sally Yates assured attendees that the DOJ's current FCPA enforcement approach is working and that companies continue to cooperate and provide information about bad actors allowing prosecutors to "build cases against individuals and to ensure that the companies are being properly credited for their cooperation at the end of the investigation."[13] According to Yates, holding individuals accountable is a "core value of our criminal justice system … regardless of which party is in power."[14] It appears that Yates believes the DOJ's focus of holding individuals accountable for corporate wrongdoing will likely persist under the Trump administration.[15]

©2005-2026 K&L Gates LLP. All Rights Reserved.

It is also unlikely that there will be drastic changes to FCPA enforcement given the efficiency and effectiveness of the current model, which relies heavily on corporate self-reporting and internal investigations. This model encourages companies to do the hard work of conducting internal investigations and handing the findings over to the government.[16] Accordingly, the private sector, not the government, bears a significant portion of FCPA enforcement costs.

Robust FCPA enforcement also has bestowed financial benefits to the U.S. government. Companies have paid huge fines to the U.S. government for FCPA violations. During the first quarter of 2016, eight companies paid a total of US$497.6 million to resolve FCPA violations.[17] Over the last decade, though the reported numbers have fluctuated from year to year, the U.S. government has received billions of dollars from numerous companies to resolve FCPA enforcement actions.[18]

In fact, the DOJ shows no signs of slowing its FCPA enforcement efforts. It recently added more resources to help battle foreign corruption. In mid-November, the DOJ hired two more prosecutors for its FCPA unit, Sarah Edwards and Nikhila Raj.[19] This brings the total of FCPA prosecutors at the DOJ to 31.[20] Even if the new attorney general and/or the new Chairman of the SEC decide to focus on new or different priorities, career prosecutors handle most FCPA investigations and prosecutions; so, routine violations of law are unlikely to be affected.[21]

D. ANTICORRUPTION ENFORCEMENT EFFORTS BY OTHER COUNTRIES SEEM UNLIKELY TO DIMINISH

Furthermore, even if FCPA enforcement efforts are decreased, most companies are subject to other anticorruption and related laws in other jurisdictions. Indeed, the fight against international corruption is waged by authorities around the world. Accordingly, having a robust anticorruption compliance program will help companies avoid entanglement with non-U.S. anticorruption laws.

There are now over 40 signatory countries to the Organisation for Economic Co-operation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and more countries are implementing and enforcing strong anticorruption laws like the FCPA and imposing similar enforcement tactics.[22] For example, France's National Assembly adopted Loi Sapin II on November 8, 2016, which is intended to improve France's fight against corruption and respond to recommendations from the OECD's Working Group on Bribery.[23] This new law aims to close holes in France's anticorruption regime by, among other things, allowing for broader assertion of jurisdiction by French authorities to prosecute offenses committed abroad and creating a new anticorruption agency.[24] By way of further example, Brazil's Clean Companies Act, which imposes sanctions on legal entities that bribe domestic or foreign public officials, along with its Improbity Laws,[25] have been enforced quite aggressively in the wide-ranging investigation known as "Operation Car Wash."[26] Like other non-U.S. anticorruption laws, Brazil's Clean Companies Act gives credit to companies that self-report and implement strong compliance programs.[27] Though these are just two examples of countries that have started to tackle foreign corruption more aggressively, more countries are adopting and enforcing their own anticorruption laws.

Foreign enforcement authorities are also collaborating with respect to investigating and penalizing corruption.[28] Given this recent trend, we anticipate more far-reaching and complex corruption investigations

©2005-2026 K&L Gates LLP. All Rights Reserved.

and enforcement actions. Not only have foreign enforcement authorities started to increase the lines of communication and share information, but some seem to have developed an increased appetite to secure U.S. enforcement-sized penalties.[29] Thus, even if U.S. authorities reduce their anticorruption enforcement efforts, companies still need to consider the potential implications of anticorruption laws and enforcement activities beyond U.S. borders.

E. THE ROAD AHEAD — A NEED FOR CONTINUED VIGILANCE

One could speculate that FCPA enforcement may slacken in a Trump administration; however, the best strategy for any company operating abroad is to maintain (or adopt as the case may be) a robust anticorruption compliance program and employ best practices when enforcing its compliance policies and procedures. Indeed, given the domestic and foreign enforcement trends, companies need to make anticorruption compliance a top priority. Companies that decide to roll the dice by ignoring or even toning down their anticorruption compliance efforts could wind up paying millions at home and abroad for corruption-related offenses.

As we look ahead to the Trump administration, anticorruption compliance continues to makes good business sense. It helps to protect profits, results in a reputation for integrity, and generates positive brand and name recognition — all of which redound to the benefit of the company's stakeholders.[30] On the other hand, bribery and corruption are elements of a bad business strategy — hurting the people in the societies where it occurs, creating delay and uncertainty, preventing the sharing of wealth, and undermining confidence in those markets.[31] Robust and effective anticorruption compliance programs remain a necessary means of penalty mitigation, if not avoidance.

NOTES:

[1] Thomas R. Fox, *FCPA Enforcement Going Forward in the Trump Administration*, FCPA Compliance Report (Nov. 13, 2016), http://fcpacompliancereport.com/2016/11/fcpa-enforcement-going-forward-in-the-trump-administration.

[2] *Id.*

[3] *See infra* notes 21–26 and accompanying text.

[4] *See, e.g.*, *Trump wants to help U.S. businesses by lifting slew of regulations: CNBC*, Reuters (May 5, 2016, 10:16 AM), http://www.reuters.com/article/us-usa-election-trump-idUSKCN0XW13G.

[5] These seven companies are: Siemens (Germany); Alstom (France); Teva Pharmaceutical (Israel); BAE (United Kingdom); Total SA (France); VimpelCom (Holland); Snamprogetti (Netherlands)/B.V./ENI S.p.A. (Holland/Italy). *See* Richard L. Cassin, *Teva announces $519 million FCPA settlement*, FCPA Blog (Dec. 22, 2016, 9:48 AM), http://www.fcpablog.com/blog/2016/12/22/teva-announces-519-million-fcpa-settlement.html; Richard L. Cassin, *Och-Ziff takes fourth spot on our new Top Ten list*, FCPA Blog (Dec. 22, 2016, 8:28 AM), http://www.fcpablog.com/blog/2016/10/4/och-ziff-takes-fourth-spot-on-our-new-top-ten-list.html. Teva Pharmaceutical only very recently made this list after settling with the DOJ and SEC for US$519 million in December of 2016. *See* Carmen Germaine, *Teva Pharmaceutical To Pay $519M To Settle FCPA Charges*, Law 360 (Dec. 22, 2016, 11:03 AM), http://www.law360.com/articles/876021/teva-pharmaceutical-to-pay-519m-to-settle-fcpa-charges.

©2005-2026 K&L Gates LLP. All Rights Reserved.

Peter J. Henning, *How Trump's Presidency Will Change the Justice Dept. and S.E.C.*, NY Times (Nov. 9, 2016), http://www.nytimes.com/2016/11/10/business/dealbook/how-trumps-presidency-will-change-the-justice-dept-and-sec.html.

[6] *See* Michael Volkov, *A New Administration: A New FCPA Enforcement Regime?*, JD Supra (Nov. 14, 2016), http://www.jdsupra.com/legalnews/a-new-administration-a-new-fcpa-81523/.

[7] Henning, *supra* note 5.

[8] *See* Gromer Jeffers Jr., *Trump wraps up campaign with promise to take apart corrupt political system*, Dallas News (Nov. 7, 2016), http://www.dallasnews.com/news/2016-presidential-election/2016/11/07/trump-closes-campaign-promise-take-apart-corrupt-political-system.

[9] *See, e.g.*, *Why the Foreign Corrupt Practices Act is GOOD for Business*, ICAR, http://icar.ngo/analysis/why-the-foreign-corrupt-practices-act-is-good-for-business/ (last visited Dec. 21, 2016).

[10] *See* Richard L. Cassin, *John Kerry: Corruption is 'root cause' of terrorism*, FCPA Blog (Aug. 25, 2016, 9:28 AM), http://www.fcpablog.com/blog/2016/8/25/john-kerry-corruption-is-root-cause-of-terrorism.html; Tom Fox, *The FCPA and the fight against terrorism*, Compliance Week (Oct. 4, 2016), https://www.complianceweek.com/blogs/tom-fox-tom-fox/the-fcpa-and-the-fight-against-terrorism.

[11] *See* Sally Q. Yates, Deputy Attorney General, Memorandum, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download [hereinafter Yates Memo].

[12] *See Criminal Division Launches New FCPA Pilot Program*, Dep't of Justice (Apr. 5, 2016), https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

[13] Sally Q. Yates, Deputy Attorney General, "Remarks at the 33rd Annual International Conference on Foreign Corrupt Practices Act" (Nov. 30, 2016), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-33rd-annual-international.

[14] *Id.*

[15] *Id.*

[16] *See* Yates Memo, *supra* note 11.

[17] *See* Richard L. Cassin, *FCPA enforcement report for Q1 2016*, FCPA Blog (Apr. 1, 2016), http://www.fcpablog.com/blog/2016/4/1/fcpa-enforcement-report-for-q1-2016.html.

[18] *See* Richard L. Cassin, *The 2015 FCPA Enforcement Index*, FCPA Blog (Jan 4, 2016, 7:28 AM), http://www.fcpablog.com/blog/2016/1/4/the-2015-fcpa-enforcement-index.html.

[19] *See* Adam Dobrik, *DOJ boosts FCPA unit with two more prosecutors*, Global Investigations Review (Nov. 18, 2016), http://globalinvestigationsreview.com/article/1076429/doj-boosts-fcpa-unit-with-two-more-prosecutors.

[20] *See id.*

[21] President-elect Trump has announced that he will nominate Senator Jeff Sessions (R-AL) to be the new Attorney General and Jay Clayton, a partner at Sullivan & Cromwell LLP, to be the new chair of the SEC. *See* Jody Godoy, *Trump Taps Jeff Sessions To Be Attorney General*, Law 360 (Nov. 18, 2016, 11:37 AM), http://www.law360.com/articles/864154/trump-taps-jeff-sessions-to-be-attorney-general; Carmen Germaine,

©2005-2026 K&L Gates LLP. All Rights Reserved.

Trump Picks Sullivan & Cromwell Partner To Head SEC, Law 360 (Jan. 4, 2017, 10:56 AM), http://www.law360.com/whitecollar/articles/877204/breaking-trump-picks-sullivan-cromwell-partner-to-head-sec. Messrs. Sessions and Clayton have given no formal indications regarding their FCPA enforcement priorities since the announcements of their upcoming nominations. Until they are confirmed, one can only speculate as to how they might change the current FCPA enforcement paradigm once in their official capacities.

[22] *See* OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, http://www.oecd.org/corruption/oecdantibriberyconvention.htm.

[23] *See Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique,* (last update Dec. 12, 2016), https://www.senat.fr/espace_presse/actualites/201606/le_senat_examine_la_loi_sapin_2.html.

[24] *See id.*

[25] Brazil's administrative improbity law seeks the punishment of the illicit enrichment of public officials and of damages caused to the public coffers, as well as the restitution, to the public administration, of such damages. It applies to anyone who induces or contributes for the act of improbity, or who in any way directly or indirectly benefits from such act. *See* Brazilian Federal Law n. 8429, Article 3 (June 2, 1992), http://www.planalto.gov.br/ccivil_03/Leis/L8429.htm [Portuguese].

[26] *See* GAN, Brazilian Clean Company Act, http://www.business-anti-corruption.com/anti-corruption-legislation/brazil (last visited Dec. 19, 2016); *Washing away – 'carwash' scandal in Brazil*, Financier Worldwide (Dec. 2015), https://www.financierworldwide.com/washing-away-carwash-scandal-in-brazil/.

[27] *Id.*

[28] *See* Roger Hamilton-Martin, *The top 5 FCPA developments of 2016*, GIR (Dec. 16, 2016), http://globalinvestigationsreview.com/article/1079022/the-top-5-fcpa-developments-of-2016.

[29] *See, e.g.*, Jody Godoy, *Odebrecht, Braskem To Pay $3.6B In Record FCPA Case*, Law 360 (Dec. 21, 2016, 11:18 AM), http://www.law360.com/articles/875299/odebrecht-braskem-to-pay-3-6b-in-record-fcpa-case.

[30] *See* ICAR, *supra* note 9.

[31] *See* Thomas Fox, *Why FCPA Compliance Makes America Great*, JD Supra (Nov. 18, 2016), http://www.jdsupra.com/legalnews/why-fcpa-compliance-makes-america-great-80772; Samuel Rubenfeld, *Some Experts Predict FCPA Enforcement Drop Under Trump*, Wall. St. J. (Nov. 11, 2016, 12:58 PM), http://blogs.wsj.com/riskandcompliance/2016/11/11/some-experts-predict-fcpa-enforcement-drop-under-trump/.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.