15 May 2017

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The New Faces of FCPA Enforcement: The Transition to a Sessions-Clayton Enforcement Regime Is Unlikely to Result in Drastic Changes

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Introduction

Now that the Trump administration has passed its first 100 days, some additional insights are available with respect to how the administration plans to enforce anti-corruption laws, including the Foreign Corrupt Practices Act ("FCPA" or the "Act"). Moreover, all signs from the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), including recent statements by recently appointed Attorney General Jeff Sessions and SEC Chair Jay Clayton, indicate that both will continue to investigate and prosecute violations of the FCPA in a manner similar to that of their predecessors. Accordingly, companies subject to the Act should continue to prioritize robust compliance procedures and a proactive compliance mindset.

The DOJ's Enforcement of the FCPA Under the Trump Administration

In connection with their confirmation processes, both the Attorney General and SEC Chair have confirmed their intentions to enforce the FCPA in generally the same manner as their respective predecessors. Specifically, Attorney General Sessions spoke recently at the Ethics and Compliance Initiative Annual Conference ("EIC Conference"), where he emphasized the importance of fair competition both at home and abroad. Sessions stated that "corruption harms free competition, distorts prices [and] often leads to substandard products and services coming into this country[,] . . . increases the cost of doing business, and hurts honest companies that don't pay these bribes."[1] Accordingly, because the DOJ "wants to create an even playing field for law-abiding companies," Sessions stressed that the DOJ will "continue to strongly enforce the FCPA and other anti-corruption laws."[2]

Sessions's recent statements match his hawkish past positions on corporate wrongdoing. For example, while questioning James Cole during Cole's confirmation hearing for Deputy Attorney General in 2010, then-Senator Sessions asked him about his thoughts on charging corporations for misconduct. Cole replied that prosecutors need to be nuanced in bringing corporate charges and should consider the thousands of innocent shareholders who own corporate stock and would be harmed by a prosecution.[3] Sessions replied that he recognized the reality of Cole's position but noted that it comes close to "picking and

[1] *See* Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference, DOJ (Apr. 24, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual.

[2] *Id.*

[3] *See* Transcript of the Hearing before the Senate Judiciary Committee, Nomination of James Michael Cole, Nominee to be Deputy Attorney General, GPO, https://www.gpo.gov/fdsys/pkg/CHRG-111shrg64377/html/CHRG-111shrg64377.htm (last visited Feb. 7, 2017).

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choosing winners," which Sessions cautioned to be "a dangerous philosophy."[4] He added, "I was taught if they violated a law, you charge them. If they didn't violate the law, you don't charge them."[5] Similarly, in a hearing in 2011, Sessions questioned then-Acting Associate Attorney General Tony West regarding the use of non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs") and whether they "undermine the rule of law by depriving the [DOJ's] legal arguments of meaningful testing in a judicial forum."[6] More generally, Sessions said in 2002, regarding his prosecutions of savings and loans institutions as a U.S. attorney in the 1980s, that "harsh sentencing does deter."[7]

As Attorney General, Sessions has also expressed a willingness to focus on individual liability. In response to a question regarding prosecuting cases against corporations for fraudulent sales practices during his recent confirmation hearing, Sessions replied, "it seems to me . . . that the corporate officers who caused the problem should be subjected to more severe punishment than the stockholders of the company who didn't know anything about it."[8] Similarly, at the EIC Conference, he said that "[t]he Department of Justice will continue to emphasize the importance of holding individuals accountable for corporate misconduct. It is not merely companies, but specific individuals, who break the law."[9]

Overall, it seems most likely that Attorney General Sessions will seek to enforce anti-corruption laws as written, prosecuting corporations in cases where corporate misconduct is clear. His comments during Deputy Attorney General Cole's 2010 confirmation hearing indicate that Sessions would be unlikely to stop short of prosecution simply because the potential corporate defendant seems too big to fail. At the same time, Sessions's more recent comments in speeches and his confirmation hearing seem to point toward a greater willingness to carry on the DOJ's practice of focusing on individual criminality under the so-called Yates' Memorandum, likely in tandem with parallel corporate prosecutions.

One further point to keep in mind is that, under an informal tradition, the task of crafting and implementing corporate prosecution policies has fallen mostly to the Deputy Attorney General.[10] Accordingly, though Attorney General Sessions is sure to influence the DOJ's

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[4] *Id.*

[5] *Id.*

[6] *See* Jodi Avergun et al., *White Collar Crime Law Enforcement in a Trump Justice Department – 8 Predictions*, JD SUPRA (Nov. 30, 2016), http://www.jdsupra.com/legalnews/white-collar-crime-law-enforcement-in-a-33770/. During that same hearing, then-Senator Sessions also asked whether the DOJ's aggressive FCPA enforcement overseas negatively impacts "the competitiveness of American business overseas relative to that of other countries." *Id.* To the extent it can be taken as an indication of then-Senator Sessions's view, in isolation, this question might been seen to reflect an attitude hesitant to enforce the FCPA. But in the context of Sessions's other, more-recent statements, this question seems to be an aberration or designed to elicit a response with which he would have taken issue. In any case, as with Chair Clayton's NYCBA Paper, Session's remarks during his confirmation process should be afforded more weight, given the seriousness of the Senate's vetting and confirmation process.

[7] *See* Dennis Kelleher, *AG-designate Sessions has been tough on financial crime*, THE HILL (Jan. 9, 2017, 6:00 PM), http://thehill.com/blogs/pundits-blog/finance/313362-ag-designate-sessions-has-been-tough-on-financial-crime.

[8] *See* Jody Godoy, *Sessions Hints Yates Memo, Fraud To Stay On DOJ Radar*, LAW 360 (Jan. 11, 2017, 8:51 PM), https://www.law360.com/articles/879816/sessions-hints-yates-memo-fraud-to-stay-on-doj-radar.

[9] *See* DOJ, *supra* note 1. Sessions does not, however, appear to hold this position absolutely. *See* Matt Zapotosky, *Sessions: Focus on violent crime doesn't mean lax enforcement for white-collar offenses*, WASH. POST (Apr. 24, 2017), https://www.washingtonpost.com/world/national-security/sessions-focus-on-violent-crime-doesnt-mean-lax-enforcement-for-white-collar-offenses/2017/04/24/d36d4034-2906-11e7-be51-b3fc6ff7faee_story.html (noting that Sessions also remarked that charging individuals, rather than companies, is "'not always possible' and that lawyers would take into account companies' cooperation and self-disclosure when making charging decisions").

[10] For example, some of the previous Deputy Attorneys General — Eric Holder, Larry Thompson, Paul McNulty, Mark Filip, and Sally Yates — issued policy memoranda regarding factors the DOJ considered in criminally charging corporations. The most recent iteration of that memorandum, the so-called Yates Memorandum, emphasized the DOJ's

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high-level enforcement priorities and tactics, case-specific enforcement decisions (including whether to resolve a matter through a DPA or NPA) is likely to fall more squarely on the shoulders of Sessions's second-in-command, Rod Rosenstein, former U.S. Attorney for the District of Maryland. Rosenstein has generally affirmed his commitment to prosecuting FCPA violations where appropriate.[11] Nonetheless, companies subject to the FCPA should recognize that if prosecution patterns do change under the Trump administration, they are perhaps likely to shift in one direction — toward a greater number of prosecutions and fewer NPAs and DPAs.[12]

In late 2016, DOJ imposed massive penalties in a few FCPA enforcement actions and appears to be carrying that momentum into 2017, initiating five new actions in January alone.[13] Moreover, the DOJ announced that the Pilot Program — under which companies that voluntarily self-report violations, cooperate with the government, and remediate a violation may receive reduced penalties — would not automatically expire in April but will continue in force as DOJ officials determine the program's effectiveness and whether it can be improved.[14] Together, these signs indicate that the DOJ is generally planning on continuing FCPA enforcement along the same lines as the past few years.

The SEC's Enforcement of the FCPA Under the Trump Administration

With regard to the SEC, in response to questions from Senator Sherrod Brown propounded during Chair Clayton's confirmation process, Clayton stated that "combatting corruption is an important governmental mission."[15] Chair Clayton also emphasized that he believes in the effectiveness of "international anti-corruption efforts," and he plans to work "with [his] fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws."[16]

On the other hand, in 2011, Mr. Clayton chaired a committee of the New York City Bar Association ("NYCBA") that published a paper (the "NYCBA Paper") on the international effect of the FCPA on U.S. businesses and generally concluded that the FCPA needed reformation to be fully effective.[17] The NYCBA Paper does not address directly NPAs or

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focus on individual prosecutions in corporate criminal investigations. *See* Michael D. Riccuiti et al., *New DOJ Guidance Sharpens the Focus on Prosecuting and Suing Individuals in Corporate Criminal Investigations*, K&L GATES (Sept. 10, 2015), http://www.klgates.com/new-doj-guidance-sharpens-the-focus-on-prosecuting-and-suing-individuals-in-corporate-criminal-investigations-09-10-2015/.

[11] *See* Questions for the Record by Senator Leahy, https://www.judiciary.senate.gov/imo/media/doc/Rosenstein%20Responses%20to%20Leahy%20QFRs.pdf (last visited May 1, 2017).

[12] *See* Jody Godoy, *Trump DOJ Expected To Cut Down On Deferred Prosecution*, LAW 360 (Jan. 20, 2017, 9:06 PM), https://www.law360.com/articles/882690/trump-doj-expected-to-cut-down-on-deferred-prosecution.

[13] *See* Richard L. Cassin, *The 2016 FCPA Enforcement Index*, FCPA BLOG (Jan. 3, 2017, 8:08AM), http://www.fcpablog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html; Related Enforcement Actions: 2017, DOJ, https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2017 (last visited May 5, 2017); Foreign Corrupt Practices Act Clearinghouse, Stan. L. Sch., http://fcpa.stanford.edu/statistics-heat-maps.html (last visited May 5, 2017).

[14] *See* Jody Godoy, *DOJ To Continue FCPA Pilot Program While Reviewing Results*, LAW 360 (Mar. 10, 2017, 10:54 AM), https://www.law360.com/whitecollar/articles/900564/breaking-doj-extends-fcpa-cooperation-pilot.

[15] *See* Questions for the Nomination of Mr. Jay Clayton to be a Member of the Securities and Exchange Commission, from Ranking Member Sherrod Brown, http://src.bna.com/nBm (last visited May 1, 2017).

[16] *Id.*

[17] Specifically, the NYCBA Paper concluded that "(1) the United States has pursued, and is currently pursuing, a virtually stand-alone approach to deterring foreign corruption (at least in terms of enforcement activity and the significance of fines and other sanctions), (2) this approach places significant costs on companies that are subject to the FCPA as compared to their competitors that are not — i.e., there is a significant asymmetry in regulation and enforcement — and (3) if these circumstances are unlikely to change (e.g., through a substantial portion of other relevant countries adopting similar

DPAs, but observes that FCPA enforcement is generally unchecked, without much oversight (judicial or otherwise) because the use of NPAs and DPAs keeps enforcement discretion within sealed, private agreements.[18] This view, to the extent it can even be attributed to Chair Clayton, appears to align generally with then-Senator Sessions's question to Tony West from the same year. And to the extent Chair Clayton's views seem to have shifted over time, his more recent comments affirming his commitment to enforce the FCPA should be given more weight, particularly considering the gravity of the confirmation process.

Conclusion

Based on their recent comments and the fact that new DOJ and SEC appointees have generally continued from where their predecessors left off, early indications suggest that the Sessions-Clayton enforcement regime will look a lot like those of the previous few administrations.[19] NPAs and DPAs have become integral tools for FCPA enforcement. Accordingly, it seems unlikely that the administration will significantly pare back its use of such agreements or decrease FCPA enforcement efforts. Moreover, if Sessions stays true to his words and the DOJ carries on the policy discussed in the so-called Yates Memorandum, individual prosecutions for corporate misconduct could become more common.

Insofar as businesses subject to the FCPA are concerned, absent some unpredictable and unlikely sea change in how the government interprets and enforces the FCPA, robust and effective compliance policies and procedures are still the best method for penalty avoidance and/or mitigation of penalties under the Trump administration. Further, thorough compliance training will continue to be a critical tool for companies subject to the FCPA to avoid or mitigate FCPA investigations and prosecutions. The DOJ credits such compliance measures, among other things, in considering whether and how to prosecute potential violations; proactive companies can save themselves headaches — and potentially money — in the future with preventative measures now.[20]

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enforcement postures), the United States should reevaluate its approach to the problem of foreign corruption." *See* Committee on International Business Transactions, The FCPA and its Impact on International Business Transactions — Should Anything be Done to Minimize the Consequences of the U.S.'s Unique Position on Combatting Offshore Corruption?, NYCBA (Dec. 2011), http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf.

[18] *See Jay Clayton Leads Committee That Authors Article on FCPA and Its Impact on International Business Transactions*, SULLIVAN & CROMWELL (Dec. 2011), https://www.sullcrom.com/Publication-Clayton-FCPA-Impact-International-Business.

[19] For example, Andrew Weissmann, before he became the Chief of the DOJ's Criminal Division's Fraud Section in the latter years of the Obama administration, authored a paper proposing significant amendments to the FCPA. *See* Andrew Weissmann & Alixandra Smith, *Restoring Balance*, INSTITUTE FOR LEGAL REFORM, http://www.instituteforlegalreform.com/uploads/sites/1/restoringbalance_fcpa.pdf. While serving with the DOJ, Wiessmann's biggest contribution was to spearhead the DOJ's FCPA Pilot Program. *See The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, DOJ (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download.

[20] *See The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, DOJ (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download (summarizing the general facets of the DOJ's Pilot Program: "[w]hen a company has voluntarily self-disclosed misconduct in an FCPA matter in accordance with [DOJ] standards[;] . . . has fully cooperated in a manner consistent with the DAG Memo on Individual Accountability and the USAM Principles; has met the additional stringent requirements of the pilot program; and has timely and appropriately remediated, the company qualifies for the full range of potential mitigation credit").

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