

Client Alert

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Senior Justice Department Official Reaffirms Yates Memorandum, Will “Reevaluate” FCPA Declination Program

Since the 2016 presidential election, law firms and their corporate clients have speculated about how the Trump administration might alter the landscape of corporate compliance and white collar enforcement. Statements by then-candidate Trump have raised questions about whether a Trump Department of Justice will roll back its aggressive enforcement of the Foreign Corrupt Practices Act.

On Thursday, February 16, newly appointed Deputy Assistant Attorney General Trevor McFadden provided the first public insights into the anticorruption enforcement priorities of the Trump administration. Speaking at an event sponsored by Global Investigations Review (GIR), Mr. McFadden provided two guideposts for white collar enforcement under the Trump administration. First, Mr. McFadden indicated that the Department of Justice would continue to prioritize individual accountability in corporate investigations. He then indicated that incoming DOJ officials would “reevaluate” the FCPA declination policy announced last year by Assistant Attorney General Leslie Caldwell.

I. The Yates Memo

In September 2015, then-Deputy Attorney General Sally Yates issued a memorandum, “Individual Accountability for Corporate Wrongdoing” (the Yates Memo). The Yates Memo highlighted the importance of punishing the individuals responsible for corporate wrongdoing, and required companies seeking cooperation credit under the United States Sentencing Guidelines (USSG) to fully disclose the facts surrounding individual misconduct.

While Mr. McFadden did not directly mention the Yates Memo in his GIR remarks, he indicated that the department will continue to aggressively pursue individual wrongdoers in corporate investigations. His words suggest that the Yates Memo remains Department of Justice policy. Companies should therefore anticipate that the Department of Justice will continue to condition cooperation credit in corporate investigations on full disclosure of the wrongful conduct of individual officers, employees and agents.

II. FCPA Enforcement

Mr. McFadden also discussed the Department of Justice’s FCPA enforcement history and the pilot program launched in April 2016. The pilot program offered the possibility of significant mitigation credit up to and including potential declination of prosecution for companies that (1) voluntarily disclose possible FCPA violations; (2) cooperate fully with the Department of Justice in investigating the potential wrongdoing, including disclosing facts about individual misconduct; and (3) implement comprehensive remedial measures.

Mr. McFadden indicated that the pilot program would come up for review in April 2017, and he suggested that the Department of Justice would consider modifications. Mr. McFadden specifically highlighted the opportunity for companies that participate in the pilot program to receive a “complete declination” of criminal charges. This suggests that while the department may revisit the specific terms of the pilot program, prosecutors will continue to prioritize voluntary self-disclosure. His remarks also suggest that the

department may continue to offer declinations to companies willing to pursue the three guideposts of the current policy — disclosure, restitution and remediation.

Conclusion

Mr. McFadden's address at the GIR event suggests that, at least for now, FCPA enforcement remains a significant priority for the Criminal Division of the Department of Justice. There is no evidence to date that the Trump administration will significantly reduce the burden of FCPA compliance. Those hoping for a sea change in the FCPA enforcement landscape are therefore likely to be disappointed, at least for the foreseeable future. Companies falling within the reach of the FCPA must remain vigilant about corruption risks, particularly when conducting businesses in high-risk markets. Companies must also ensure that their anticorruption compliance program tracks the best practices set forth in the FCPA Resource Guide, published by the Department of Justice and the Securities and Exchange Commission. Finally, companies must ensure that their directors, officers, employees and agents are thoroughly trained in anticorruption procedures, and conduct careful due diligence before finalizing cross-border mergers or acquisitions.

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