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A Trump Appointed AG May Not Translate to Less Aggressive Enforcement

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Forecasting the enforcement priorities of the Department of Justice (DOJ) under the Trump administration is difficult at best. Previous statements from both President Donald Trump and his nominee for attorney general, U.S. Sen. Jeff Sessions, R-Ala., shed some light as to their views. While some priorities, such as emphasizing individual culpability, seem likely to continue unchanged, economic realities, changing global dynamics and the promise of deregulation could all impact key areas of enforcement, such as Foreign Corrupt Practices Act (FCPA) prosecutions and criminal and civil cases against financial institutions.

Individual Culpability

The prosecution of corporate officers and employees involved in misconduct—a key DOJ priority under former Attorney General Loretta Lynch—is unlikely to change with the new administration. The DOJ's focus on individual accountability was formally emphasized in then-Deputy Attorney General Sally Yates' September 2015 memorandum outlining a series of department steps to ensure that corporate officers and employees engaged in wrongdoing, and not just corporate entities, are held accountable. In a late November 2016 speech, Yates indicated that the DOJ viewed these efforts as successful to date. She suggested that corporations have made efforts to provide the DOJ with information on individual wrongdoers and that prosecutors have focused on individuals at earlier stages of investigations since the publication of the Yates memorandum.

As Yates noted in that speech, whether the DOJ will continue the policies outlined in her memorandum remains to be seen. But the focus on individual accountability in criminal cases is long-standing, particularly because corporate liability always has been predicated on violations of law by individual corporate actors. And as Yates pointed out, the emphasis on individual accountability is not ideological, and other key DOJ policies—such as the factors considered in evaluating whether a corporation should be criminally charged—have endured despite changes in administrations. Sen. Sessions' prior statements may foreshadow his current views on the issue. At a 2002 Senate Judiciary Committee hearing, he spoke favorably about the deterrent value of incarceration in bank fraud prosecutions he supervised as U.S. Attorney for the Southern District of Alabama during the savings and loan crisis of the 1980s. In the same hearing, Sen. Sessions also opposed sentencing leniency for white collar offenses, equating sentences for such crimes with those for bank robbery. Given his comments, it would seem that Sen. Sessions agrees that

holding individuals accountable for white collar crime has law enforcement value. In the absence of a compelling reason to reverse these policies, the department is expected to stay the course.

FCPA Prosecutions

Whether the DOJ will continue its focus on new FCPA prosecutions is less certain. The statute was a department priority in the George W. Bush administration, and the Obama administration pursued FCPA prosecutions aggressively thereafter. President Trump's 2012 comments strongly criticizing the statute have been widely reported: At the time, he contended that official corruption should be prosecuted by the authorities in the country in which it occurred, and he asserted that the statute disadvantaged U.S. companies—presumably by prosecuting them for conduct that non-U.S. companies routinely engaged in as a cost of doing business.

While such statements could suggest that the DOJ may de-emphasize FCPA prosecutions in the new administration, it is unclear whether President Trump still holds these views five years later, particularly in light of the changing landscape. Since 2012, some countries, including China, Brazil and the U.K., have strengthened their anti-corruption laws and more aggressively prosecuted companies for corruption offenses. Non-U.S. authorities also increasingly initiate and lead such prosecutions against both U.S. and non-U.S. entities, arguably leveling the playing field. Furthermore, a number of the DOJ's recent prosecutions have targeted non-U.S. companies as well as U.S. companies, for conduct that primarily occurs overseas.

The DOJ has invested significantly in the FCPA Unit, where it has a group of dedicated prosecutors and law enforcement agents. The department requires U.S. Attorneys' offices handling FCPA cases to coordinate with the Criminal Division of the DOJ in Washington, D.C.; such coordination is not required in the majority of other types of cases. The increase in prosecution resources to date seems commensurate with the hefty criminal fines imposed in FCPA cases. In 2016, FCPA prosecutions generated a total of $2.48 billion in monetary resolutions obtained by the DOJ and the Securities and Exchange Commission. For example, it obtained a $230 million penalty in February 2016 from Amsterdam-based VimpelCom and its subsidiary Unitel for conspiracy to bribe government officials in Uzbekistan and continued, through the end of the year, to resolve a number of foreign bribery investigations with substantial criminal fines and penalties.

The DOJ also has explored policies to encourage corporate voluntary disclosures and resolve its FCPA prosecutions more quickly and efficiently, including a one-year pilot program announced in April 2016 that seeks to quantify benefits from voluntary self-disclosure of corruption-related conduct, full cooperation with the DOJ and remediation. If the program continues to generate voluntary disclosures and cooperation, the DOJ largely could rely on companies' own investigations while conserving its own resources and still collect significant penalties. (The program will be evaluated in April 2017.) Given this combination of factors, it is entirely plausible that the department will not shift its priorities away from FCPA enforcement in the new administration.

Prosecution of Financial Institutions

Another key question concerning the DOJ's approach to white collar criminal enforcement is whether the DOJ will continue its aggressive approach to prosecutions of financial institutions.

Over the last several years, it has investigated multiple global financial institutions and resolved these cases in an increasingly harsh manner, with escalating fines. For example, the DOJ resolved many of its investigations of Libor manipulation with non-prosecution and deferred-prosecution agreements or by the guilty plea of a global financial institution's foreign subsidiary, with fine amounts ranging from approximately $50 million to approximately $625 million between October 2013 and March 2015. The department resolved subsequent investigations of manipulation of foreign exchange rates with greater demands: guilty pleas at the parent level of five global financial institutions and criminal fines ranging from $203 million to $925 million. More recently, the DOJ imposed even higher penalties—in the billions—on a number of major financial institutions involved in the sale of residential mortgage-backed securities, collecting or reaching agreements to collect over $18 billion in civil penalties and consumer relief payments in such cases in 2016, with civil penalties ranging from $2.48 billion to $3.1 billion and consumer relief payments ranging from $2.8 billion to $4.1 billion.

Whether the DOJ continues to pursue financial institutions involved in misconduct under the new administration as aggressively as it has in the recent past remains to be seen. President Trump has stated that U.S. businesses, including financial institutions, are overregulated. He has expressed his intent to repeal all or some of the Dodd-Frank Act (see "The Trump Impact: Key Issues in Financial Services Reform for 2017") and adopt a general deregulatory policy agenda. However, these efforts may not affect the DOJ's pursuit of substantial civil and criminal penalties against financial institutions. The authorities the DOJ has employed in the majority of its financial institution prosecutions to date—including mail and wire fraud statutes; the Financial Institutions Reform, Recovery and Enforcement Act of 1989; and securities and antitrust laws—will surely remain viable, notwithstanding any regulatory overhaul.

Accordingly, it would be prudent for businesses and their officers to prepare for more of the same aggressive enforcement from the DOJ under the Trump administration.