

Biden Administration Signals Its Intention To Be Tougher on Corporate Crime

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This article is from Skadden's *2021 Insights*.

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Forecasting the enforcement priorities of the Department of Justice (DOJ) under a new administration is difficult at best. However, the Biden administration is widely expected to be tougher on corporate crime than its predecessor, consistent with the approach of prior Democratic administrations. If that is the case, the DOJ's policies and priorities over the past four years that have emphasized individual culpability while incentivizing robust corporate compliance programs presumably will continue unchanged. However, Trump administration policies that arguably reflect a more business-friendly approach to corporate prosecutions will likely be revised or abandoned by the new administration, which is expected to more closely scrutinize and aggressively pursue corporate misconduct, including on the part of financial institutions. In addition, Foreign Corrupt Practices Act (FCPA) investigations, a key enforcement area in the Obama and Trump administrations, are expected to remain a focus, while changing economic realities — including the aftermath of the COVID-19 pandemic — are likely to shape the DOJ's enforcement priorities, at least for the next year.

Emphasis on Individual Culpability

The DOJ's focus on individual culpability in corporate prosecutions was formally announced in September 2015 in the so-called Yates Memorandum, issued by then-Deputy Attorney General Sally Yates. Rod Rosenstein, Yates' successor, stated in late 2018 that pursuing culpable individuals remained a "top priority in every corporate investigation," a claim supported by the annual reports of the DOJ's Fraud Section, which principally prosecutes FCPA, health care fraud and securities fraud cases. The reports show an increase in the number of individuals charged during each year of the Trump administration, from 300 in 2016, the year before he took office, to 478 in 2019. Although 2020 tallies are not yet available, there is no indication that the DOJ's priorities shifted over the past year; for example, the DOJ announced

charges against 345 individuals for health care fraud offenses in September 2020. (See "[Biden Administration's Expected Impact on Health Care and Life Sciences Enforcement](#).") There is every reason to believe that the DOJ will continue to prioritize charging individual actors, including culpable corporate officers and employees, in the coming year.

Corporate Prosecutions

With respect to corporate prosecutions, the DOJ's revisions to its policies over the past four years did not constitute a radical shift but rather evidenced a more institution-friendly approach than that of the Obama administration, which more actively prosecuted global financial institutions and in some cases obtained significant penalties. For example, November 2018 revisions to the Yates Memorandum limited the amount and nature of information corporations were

required to provide about culpable individuals involved in misconduct in order to receive cooperation credit. A company unable to identify all relevant individuals or provide complete factual information could still obtain cooperation credit if it acted in good faith. A May 2018 policy against “piling on” sought to limit multiagency investigations and fines levied on a company for the same underlying misconduct and directed DOJ prosecutors to consider fines and penalties paid to other enforcement authorities — including foreign authorities — in determining an appropriate penalty. An October 2018 policy concerning the selection of monitors strongly suggested that the DOJ had begun to narrow the set of circumstances requiring a monitor and to limit the role of appointed monitors, particularly with respect to corporate entities with substantial compliance programs and internal controls that appeared sufficient to prevent and remediate misconduct. Recent resolutions of investigations of FCPA and federal fraud statute violations resulting in significant financial penalties did not involve the imposition of monitors, and some of the DOJ’s public statements made clear that, in light of companies’ enhancements to their compliance programs and internal controls, as well as heightened reporting requirements, monitors were deemed unnecessary.

While the above-referenced revisions to its policies leave the DOJ with substantial flexibility to grant or decline cooperation credit, require a monitor and define its role, and impose appropriate penalties in multiagency investigations, financial institutions and other companies should expect the new department leadership under Attorney General nominee Merrick Garland to closely review these policies and potentially revise them. In light of the new administration’s anticipated approach to corporate enforcement, the DOJ may choose to increase the demands on cooperating institutions in providing information about potentially culpable individuals and with regard to requiring monitors with a broad mandate and greater frequency.

The DOJ also may deem more substantial penalties to be warranted in multiagency (and multinational) investigations.

Self-Reporting, Cooperating and Remediating

Relatedly, the DOJ issued and clarified policies over the past four years that increased incentives for corporations to voluntarily self-report, fully cooperate and timely remediate. In late 2017, the DOJ updated and codified its April 2016 pilot program, applicable to FCPA investigations, providing a presumption that the DOJ will decline to prosecute any company that takes these steps. Where an enforcement action is warranted despite voluntary self-disclosure — *e.g.*, for pervasive misconduct, executive management involvement or significant resulting profits — the DOJ committed to recommend a 50% reduction in the otherwise applicable fine and generally not to require the appointment of a monitor if the company has an effective compliance program. In early 2018, the DOJ clarified that this policy would serve as nonbinding guidance for all criminal cases. In 2019, the DOJ announced further changes to the policy, relaxing to some extent the requirements that a company must meet in order to receive cooperation credit. The DOJ has highlighted declinations and resolutions consistent with these policies over the past four years, and the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) similarly have emphasized the benefits of full cooperation, including declinations, indicating that these agencies may have relied increasingly on self-disclosure over the past four years as a way to efficiently settle enforcement actions.

In the Biden administration, the DOJ, SEC and CFTC, whether acting alone or in coordination, are likely to take a more aggressive enforcement approach toward major banks and corporations and to devote additional resources to the initiation and pursuit of investigations, complementing the voluntary self-disclosure and cooperation policies that are currently in place.

Compliance Programs

Other Trump-era DOJ policies — issued in February 2017, April 2019 and June 2020 — encouraged companies to develop more robust compliance programs. These policies sought to provide enhanced transparency with respect to the DOJ’s expectations and evaluation of such programs — a key factor in its determination of whether to prosecute a business organization, the form of any resolution and the amount of any monetary penalty — and to give companies an incentive and opportunity to improve their programs before otherwise seeking aggressive or outsized corporate penalties. Each iteration of the compliance-related guidance arguably raised the bar with respect to the DOJ’s expectations of corporate compliance programs. Most recently, in its June 2020 update to its guidance, “Evaluation of Corporate Compliance Programs,” the DOJ strongly encouraged prosecutors to assess the efficacy of compliance regimes by considering whether companies have identified and directed their resources to the highest risk areas, tested the effectiveness of their systems by timely and effectively monitoring relevant data sources, and continuously revised and improved their systems in light of “lessons learned.” This guidance seems likely to remain in place. In anticipation of a new administration that may redouble its corporate enforcement efforts, companies would do well to familiarize themselves with this guidance, assess their compliance programs in light of it and make any necessary improvements.

Enforcement Priorities



COVID-19

With respect to substantive enforcement priorities, the DOJ is expected to continue to pursue FCPA investigations in the coming year, the source of some of the largest criminal penalties assessed by the DOJ during the Trump administration and, as noted above, a priority of the Obama administration as well. The DOJ almost certainly will continue to police pandemic-related fraud, which it has aggressively pursued since March 2020. Prosecutions arising out of this effort include

bank fraud and money laundering cases concerning abuse of the Paycheck Protection Program (PPP) and other Coronavirus Aid, Relief and Economic Security Act (CARES Act) funds. Particularly in light of the recently enacted additional COVID-19 relief legislation, which includes an extension of the PPP, this area should remain a priority. To

date, prosecutions have focused on fraud by recipients of such funds, but the Biden Justice Department may expand its focus to include financial institution lenders as well, given its anticipated continuation of several Obama-era priorities. COVID-19 and its aftermath, including its economic impact, may well influence the DOJ's priorities in the coming years.