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On Tuesday, April 18, 2017, Acting Principal Deputy Assistant Attorney General Trevor McFadden (the P-DAAG) spoke at the 10th Anti-Corruption, Export Controls & Sanctions Compliance Summit in Washington, D.C. After much speculation about what would become of enforcement of the Foreign Corrupt Practices Act (FCPA) in the Trump administration, Acting Principal Deputy Assistant Attorney General McFadden's remarks strongly suggest that the Department of Justice (DOJ) intends to continue to actively enforce the FCPA with respect to entities and individuals.

The P-DAAG's Speech

In unambiguous language, the P-DAAG stated: “[T]he department remains committed to enforcing the FCPA and to prosecuting fraud and corruption more generally.”¹ However, the P-DAAG did imply that there may potentially be less emphasis on procuring large fines and lengthy prison sentences, stating, “The Criminal Division’s aims are not to prosecute every company we can, nor to break our own records for the largest fines or longest prison sentences.”² The P-DAAG’s speech also emphasized the importance of pursuing FCPA prosecutions against individuals, which would continue prior policies underlying the Yates memo.³ The P-DAAG also highlighted the importance of compliance and voluntary disclosures, noting that in the past year, the DOJ had declined to prosecute a number of companies where criminal cases would have been brought but for the companies’ voluntary self-disclosure and cooperation.

FCPA Enforcement in the Trump Era

Past criticisms of the FCPA by President Donald Trump and Securities and Exchange Commission (SEC) Chair nominee Jay Clayton fueled speculation that enforcement of the FCPA would be deprioritized by the new administration. For example, in 2012 comments that have been well-reported, President Trump said of the FCPA, “It’s a horrible law and it should be changed. I mean, we’re like the policeman for the world; it’s ridiculous.”⁴ In 2011, SEC Chair nominee Clayton authored a paper published by the New York City Bar Association that called into question the role of the United States in combating foreign bribery. While this paper did not reject the FCPA’s goal of preventing global corruption, it questioned both “the ability of the United States to achieve that goal unilaterally” and the “costs of continuing such an effort.” The paper concluded by calling for a “realignment of the U.S. position in the global anti-bribery enforcement regime.”⁵

¹ Trevor McFadden, Acting Principal Deputy Assistant Attorney General, United States Department of Justice, Address at 10th Anti-Corruption, Export Controls & Sanctions Compliance Summit (Apr. 18, 2017) *available at* <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti>.

² *Id.*

³ The 2015 memorandum by former Deputy Attorney General Sally Yates (the Yates memo) outlined guidance for DOJ investigations of corporate wrongdoing. The Yates memo identified transparency as a prerequisite for cooperation credit and emphasized the importance of individual accountability. The memo stated that corporate resolutions should not provide individuals with protection from liability and that corporate resolutions should not be made without a plan to resolve individual cases. Memorandum regarding Individual Accountability for Corporate Wrongdoing, Sally Yates, Deputy Attorney General, U.S. Department of Justice (Sept. 9, 2015) *available at* <https://www.justice.gov/archives/dag/file/769036/download>.

⁴ *Squawk Box* (CNBC broadcast May 15, 2012), *available at* <http://video.cnbc.com/gallery/?video=3000089630&play=1>.

⁵ New York City Bar 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 Combating Offshore Corruption? (December 1, 2011) *available at* <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-fcpa-and-its-impact-on-international-business-transactions-should-anything-be-done-to-minimize-the-consequences-of-the-uss-unique-position-on-combating-offshore-corruption>.

The FCPA Lives On

Notwithstanding President Trump's commentary and SEC Chair nominee Clayton's critique of the FCPA, the P-DAAG's speech conveyed continued commitment to FCPA enforcement. Criminal penalties will continue to be driven by the United States Sentencing Guidelines and by the facts of any particular case. Indeed, it seems unlikely that cases with aggravated fact patterns yielding high sentencing guidelines calculations will no longer result in heavy penalties, even if there is some greater negotiating flexibility from the DOJ.

It also does not appear that the DOJ plans to veer away from seeking to obtain voluntary disclosures of potential FCPA violations. In April 2016, the DOJ launched a one-year FCPA pilot program to encourage voluntary disclosure through greater transparency. Prior to the P-DAAG's speech, the DOJ had already indicated that it planned to keep the pilot program in place notwithstanding the completion of the year, while it considered

whether to continue or make changes to the program. In his speech, the P-DAAG emphasized the continuing importance of voluntary disclosures.

Nor does there appear to be much comfort to be taken from the change in administration by individuals who violate the FCPA. The P-DAAG now has made clear that prosecution of individuals will remain a high priority as was called for by the Yates memo.

Conclusion

It appears that aggressive FCPA enforcement will endure under the Trump administration and that any changes likely will be in tone rather than deep substance. Only time will tell if this is true, but companies would be well advised to continue building and implementing robust compliance programs in order to minimize the risk of FCPA-related exposure in the face of a government that presents itself as committed to continued enforcement.

Associate **Alex B. Marlin** assisted in the preparation of this memorandum.