

# Is President Trump changing how US foreign bribery law is enforced?

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## Introduction

After the election of President Donald Trump, many observers wondered whether the US Department of Justice (DOJ) would change the way in which it enforces the Foreign Corrupt Practices Act. In a 2012 interview, Trump famously called the Foreign Corrupt Practices Act a "horrible law" and argued that it is "absolutely ridiculous" that the DOJ brings criminal charges against companies and individuals for alleged Foreign Corrupt Practices Act violations. Once Trump's political appointees in the DOJ were confirmed in the Senate, would they act on his public statements?

The answer, so far, is no. As the halfway point of Trump's first term in office approaches, the DOJ has not made any dramatic changes to the enforcement philosophy followed during prior administrations. The DOJ continues to use the same basic playbook to prosecute foreign bribery. It is:

- building relationships with foreign authorities;
- emphasising the prosecution of individuals;
- creating incentives to encourage corporations and individuals to self-report potential violations;
- bringing significant enforcement actions against corporations (particularly non-US corporations); and
- promising more transparency in prosecution decisions.

## DOJ's actions

The DOJ's enforcement actions tell the story. It is bringing the same types of case that would have been brought in any previous administration. For instance:

- in June 2018 it entered into a deferred prosecution agreement with Société Générale, imposing a \$860 million criminal penalty because of Libor manipulation and foreign bribery issues;
- in July 2018 it reached a \$47 million non-prosecution agreement with a subsidiary of Credit Suisse that hired relatives and friends of Chinese officials in its efforts to obtain business; and
- in September 2018 it agreed to a non-prosecution agreement with Brazilian state-owned company Petrobras, demanding a \$853.2 million criminal penalty for improper payments, false books and records, and inadequate internal controls.

Of course, there is an irony in the DOJ's emphasis on building relationships with other governments. While Trump is arguing that US allies are not contributing enough to trade deals, military spending or border walls, the DOJ has taken the opposite approach. It agreed to credit 80% of the \$853.2 million penalty paid by Petrobras to the Brazilian government and 50% of the \$585 million criminal penalty

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for Foreign Corrupt Practices Act violations paid by Société Générale to the French government. The DOJ's willingness to share credit – and penalties – with other governments is likely to extend its influence and jurisdictional reach.

## **DOJ's public statements**

The DOJ's public statements tell a similar tale, and do not reflect any hostility towards Foreign Corrupt Practices Act enforcement. For instance, in a recent speech in Brazil, Principal Deputy Assistant Attorney General John Cronan stated: "we believe that our emphasis on individual accountability has the greatest impact on preventing and deterring corruption." Cronan also commented on the government's hopes that companies will engage in "greater reporting of misconduct, increased cooperation with law enforcement, and stronger compliance programs and internal controls". These same sentiments have been echoed – almost word-for-word – through the years in speeches by DOJ officials in Republican and Democratic administrations alike.

The DOJ has made some changes and reforms during the Trump administration, but these changes only refine the same general law enforcement philosophies that the DOJ has traditionally used:

- In November 2017 the DOJ formalised a pilot programme created during the Obama administration and issued the Foreign Corrupt Practices Act Corporate Enforcement Policy. Under this policy, the DOJ gave a formal roadmap to companies showing the benefits they could receive for voluntary self-disclosures, full cooperation and timely remediation. This roadmap slightly adjusted incentives that had been previously offered.
- In May 2018 Deputy Attorney General Rod Rosenstein announced a policy against the piling on of penalties in parallel or joint investigations or proceedings arising from the same misconduct. This announcement helped to pave the way for the sharing of penalties with foreign governments.
- In October 2018 Assistant Attorney General Brian Benczkowski, who leads the DOJ's Criminal Division, issued guidelines that will make the appointment of monitors – always a controversial topic for companies – somewhat more difficult in the future.
- At the same time, Benczkowski also announced that the DOJ would not hire anyone to replace Hui Chen, a compliance expert whose industry expertise helped the DOJ to distinguish between 'real' and 'paper' compliance programmes. Benczkowski argued that the DOJ will expect each prosecutor to gain the types of compliance expertise that Chen had previously supplied.

## **Comment**

These reforms are merely continuations of what the DOJ might have considered during the Obama administration, the Bush administration or nearly any other presidential administration. The Trump administration may have changed many things, but it has not altered the DOJ's prosecutions of foreign bribery. At least not yet.

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