

# The Next Four Years of FCPA Enforcement: What to Expect From the Biden Administration

Article By:

J. Scott Maberry

Reid Whitten

Scott F. Roybal

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Contrary to some expectations, the Trump Administration Department of Justice imposed record penalties under the U.S. Foreign Corrupt Practices Act from 2017 through 2020. But in each of those years, fewer and fewer new FCPA investigations were initiated. We expect the Biden Administration to continue the trend of increasing FCPA enforcement settlement values, while also increasing the pace of initiating new FCPA investigations. Anticorruption matters present some of the most severe threats to a company's organizational integrity. Understanding the changing enforcement culture is an important component to addressing those threats.

**Record FCPA penalties 2017-2020, despite a personal anti-FCPA view at the top.** Analysis of historical [enforcement data](#) shows that FCPA settlements did not slow down under the Trump Administration, when looking at dollar value. By our count, six of the [top 10](#) FCPA settlements in history were completed on President Trump's watch, accounting for over \$7 billion in fines, penalties, and disgorgements. And 2020 [just became](#) the biggest year in FCPA history, measured by penalties.

This record stands somewhat in contrast to the personal views voiced by President Trump regarding the law. The President [reportedly](#) criticized the FCPA in 2017, speculating about the negative effect the law has on U.S. companies. And White House Economic Advisor Larry Kudlow [reportedly said](#) in January 2020 that the administration was "looking at" making changes to the law because of complaints from the U.S. business community about antibribery enforcement.

**The Trump DOJ and SEC initiated fewer cases than previous administrations.** We do not expect the Trump Administration to engineer any substantive change to the FCPA before January 20, 2021. But by one very important measure, the Trump Administration's DOJ and Securities and Exchange Commission did slow down FCPA enforcement: each year since 2016, fewer FCPA investigations were initiated than in the year before. We have no information on whether the slowdown was an actual reflection of the President's personal skepticism of the law, or mere coincidence.

**5 reasons the Biden Administration will step up FCPA enforcement**

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## 1. The new playbook is the old playbook

The playbook for prosecutors, [formerly known as](#) the U.S. Attorneys' Manual, got a makeover in the Trump Administration. It is now known as the [Justice Manual](#).

The most famous page of that playbook is the 2015 [Yates Memorandum](#) which, in 2015, essentially required that corporations identify all individuals involved in any aspect of alleged misconduct, regardless of their status or seniority, in order for the corporation to receive any credit for its cooperation with the government. At one time, President Trump's then-Deputy Attorney General Rod Rosenstein [suggested](#) that the DOJ might change the approach outlined in the Yates memo. But the principles and procedures favoring individual prosecutions [remain materially unchanged](#) in the current Justice Manual. This means that the focus on individual prosecution is still DOJ policy, and we expect it to remain so in the Biden Administration.

## 2. Re-populating the rank and file

The Trump Administration was many things, but a magnet for lawyers it was not. According to one [study](#), DOJ ranked 15th out of 16 cabinet departments in filling critical personnel positions, with only 45% of "key positions" filled as of November 2020, roughly 9/10 of the way through the term.

The Biden Administration is likely to act aggressively to reverse that trend. The President-Elect's [transition teams](#) are bristling with DC legal talent. We expect strong moves to re-populate key DOJ offices such as the Criminal Division's Fraud Section, which has exclusive authority over FCPA cases.

## 3. Young prosecutors see the FCPA as good hunting

The Fraud Section has always attracted smart, professional, ambitious prosecutors. The culture of the Section, in our experience, has always tended that way. And a major FCPA settlement is a very good way to make a mark. With a new crop of FCPA prosecutors occupying the [Bond Building](#), we expect a new round of mark-making.

## 4. Economic downturn

The [COVID-19 recession](#) is a perfect storm of misfortune. Any economic downturn creates multiple incentives for fraud. FCPA cases [spiked](#) in 2001 and 2007-2009, correlating with the two most recent recessions. And we expect the trend to be magnified in the current one. International trade flows are disrupted, profit targets are under pressure, industries are consolidating, and corrupt officials always have a hand outstretched for a bribe.

## 5. Sector sweeps

Back in the Obama days, DOJ and SEC were known for the concept of "[industry sweeps](#)," in which an FCPA investigation of one company would lead to series of cases in the same industry sector and then to adjacent sectors. Some former Fraud Section attorneys have [downplayed](#) the concept of

industry sweeps as a strategy. But there are good reasons for pursuing corruption sector-by-sector, even if it is unintentional. As prosecutors learn about a new industry they tend to learn the common patterns of bribery and other wrongdoing. And settlements have clustered by industry year after year as a result. We are arguably in the middle of sector sweeps of healthcare, aerospace and defense, and financial services now. We expect those trends to continue.

### **Get ready for the enforcement surge.**

For all these reasons, we consider 2021 to be likely to be another record year for FCPA enforcement, and we expect the trends toward greater enforcement to accelerate. Steps organizations can take now to address the threat of corruption include the following:

1. Assess the changing culture of enforcement in the DOJ and the Securities and Exchange Commission
2. Pressure test your compliance procedures by performing a [legal pre-mortem](#)
3. Consider upgrades to your risk-based compliance program
4. Update your training
5. Make sure your internal [investigations](#) teams are ready

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