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Why Your Company Still Needs to Care About the Foreign Corrupt Practices Act (and the Foreign Extortion Protection Act)

Artie McConnell, Carlos F. Ortiz, Jonathan R. Barr, Jonathan B. New, and Rachel H. Ofori*

In this article, the authors explain that companies—especially those based outside the United States—should continue prioritizing the Foreign Corrupt Practices Act as part of their broader compliance program.

U.S. Attorney General (AG) Pam Bondi has issued a memorandum[1] directing the Department of Justice's (DOJ) Foreign Corrupt Practices Act (FCPA) Unit to prioritize cases that target cartels and other transnational criminal organizations (TCOs) over traditional corporate enforcement.

This was followed soon thereafter by President Donald Trump's executive order (EO),[2] which for the first time halted FCPA enforcement for 180 days, during which time the DOJ must review existing FCPA matters and issue updated guidance on future enforcement to align with the administration's national security agenda. Trump premised the EO upon his concerns about the FCPA's unfairness to U.S. companies.

While this will almost certainly result in a change in both criminal and civil FCPA enforcement, companies—especially those based outside the United States—should continue prioritizing the FCPA as part of their broader compliance program.

The AG Memo and the Executive Order

This shift in FCPA enforcement priorities is the latest move by the administration in its all-out war against cartels and TCOs that pose a threat to U.S. national security and its stated America First agenda.

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Additionally, the executive order cites "overexpansive and unpredictable FCPA enforcement against American citizens and businesses" as harming "American economic competitiveness and, therefore, national security."

While, of course, most companies do not do business with cartels or TCOs in the traditional sense of these terms, what is yet to unfold is how the DOJ will use the FCPA (or its new companion statute, the Foreign Extortion Protection Act (FEPA)) to prosecute any companies or individuals that law enforcement determines are facilitating or assisting these organizations in any part of their international operations. Indeed, it is not uncommon for these groups to engage in legitimate business operations either to launder funds or to conceal their illicit activities. Companies that partner with these entities wittingly or unwittingly may find themselves in the crosshairs of a refocused and very determined DOJ. It is also quite possible that FCPA enforcement might be stepped up in the future against companies based in other countries, which have benefited from the prior FCPA enforcement framework, according to President Trump.

While AG Bondi's directive prioritizes matters that impact "the criminal operations of Cartels and TCOs" and "shift[s] focus away from investigations and cases that do not involve such a connection," the executive order goes further, effectively pausing intake of new FCPA investigations, mandating a review of pending FCPA prosecutions, and revising the DOJ's FCPA enforcement policy over the next 180 days. The EO also permits AG Bondi to extend the review period for an additional 180 days, as she deems appropriate.

More generally, the 180-day review period is designed to allow law enforcement to better leverage the FCPA to further the administration's national security and foreign policy goals. This suggests that DOJ will still aggressively use extraterritorial enforcement of the FCPA—albeit differently than in the past—rather than abandon it.

Why the FCPA Still Matters to U.S. and Foreign Businesses

While the "fundamental change" announced by AG Bondi promises to significantly alter the FCPA landscape, this does not mean that businesses should deprioritize FCPA compliance.

- *Foreign and Regulatory Anticorruption Regimes Remain Unaffected*. Foreign anticorruption architecture and FCPA analogs in the United Kingdom, the European Union, and other major economies remain in place. The executive order also does not impact the Securities and Exchange Commission's FCPA civil enforcement programs, which include a robust and successful whistleblower program. Companies will still be subject to these laws and regulations.
- *Bribery Impacts the Bottom Line*. Bribery often causes companies to lose money through slush funds and other undocumented expenditures that cannot be internally tracked or audited. Indeed, prior FCPA cases, such as the recent trial in *United States v. Aguilar* in the U.S. District Court for the Eastern District of New York, show that executives may embezzle money in tandem with bribery schemes.
- *FCPA Enforcement Will Be Decentralized*. AG Bondi's memorandum lessens the gatekeeping function over FCPA cases related to cartels and TCOs and gives more autonomy to United States Attorney's Offices (USAOs) around the country, which might undermine prior goals of consistency. While the character of FCPA cases may change, this reduced DOJ oversight and new independence for USAOs could increase overall FCPA enforcement. However, it could also lead to more inconsistent and less predictable enforcement, requiring businesses to maintain comprehensive and flexible FCPA compliance policies—especially with respect to prosecution of companies/individuals that could be considered to be aiding or transacting with cartels or TCOs as described above.
- *Other Statutes Remain Applicable*. Statutes for crimes such as wire fraud and money laundering can be used in traditional FCPA fact patterns and support criminal enforcement. The False Claims Act can be used similarly in civil cases.
- *DOJ May Revisit Past Conduct*. After the review period mentioned in the executive order, the AG is authorized to "determine whether additional actions, including remedial measures with respect to inappropriate past FCPA investigations and enforcement actions, are warranted" and to "take any such appropriate actions." This leaves the door open for a reexamination of past FCPA-related investigations or

> conduct. Companies that relax their FCPA compliance policies may find themselves vulnerable to later enforcement actions. This may be especially so with foreign companies, given President Trump's comments about the unfair impact to date on U.S. entities.

Indeed, closer scrutiny of the FCPA and recent enforcement actions may change the administration's apparent view of the act's utility. The majority of the biggest FCPA resolutions have been with foreign companies, not U.S. businesses, and slowing or stopping FCPA enforcement could embolden foreign actors to the detriment of U.S. interests. These settlements and resolutions with foreign businesses have added billions of dollars to U.S. coffers, including to the DOJ's Crime Victims Fund, an initiative that dovetails with the administration's focus on curbing violent crime.

Regardless, the current suspension and review period is relatively brief considering the FCPA's five-year statute of limitations and the fact that most FCPA investigations last more than two years. Even if FCPA enforcement does not continue apace following the AG's review, it could return in force after the next election.

Notes

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