

The Trump Administration Calls for a Pause on New FCPA Enforcement, but Don't Abandon Compliance Programs Just Yet

Client Alerts

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In an executive order issued on February 10, 2025 (Executive Order), and a memorandum issued by Attorney General Pam Bondi regarding cartels and transnational criminal organizations on February 5, 2025 (Cartel Memo), the Trump Administration has begun making its mark on enforcement of the Foreign Corrupt Practices Act (FCPA).¹ The Executive Order, entitled “Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security,”² establishes a 180-day pause on new FCPA enforcement activity, subject to exceptions made by the Attorney General. It also directs the Attorney General to develop new guidelines for future enforcement consistent with “the President’s Article II authority to conduct foreign affairs,” the “prioritiz[ation of] American interests,” “American economic competitiveness with respect to other nations,” and “efficient use of Federal law enforcement resources.”³ The Cartel Memo, in turn, orders federal prosecutors to prioritize FCPA enforcement involving cartels and Transnational Criminal Organizations (TCOs) and eliminates the Criminal Division Fraud Section’s exclusive jurisdiction over FCPA matters in those cases.

While the Executive Order and Cartel Memo may foretell a new era of FCPA enforcement, companies should resist efforts to immediately overhaul their policies on bribery and corruption or slow their FCPA compliance efforts. It is unlikely that the Executive Order and Cartel Memo are the final word on the Trump Administration’s and Department of Justice’s (DOJ) positions on FCPA enforcement. And the FCPA’s five- and six-year statutes of limitations for substantive violations and violations of the accounting provisions, respectively, as well as the Securities and Exchange Commission’s (SEC) parallel jurisdiction, should be front of mind as companies consider high-risk business activities. This client alert discusses the Executive Order and Cartel Memo in more detail and highlights important considerations for companies operating across the globe.

The FCPA

The FCPA has two primary prongs: the anti-bribery provisions and accounting provisions.⁴ The anti-bribery provisions generally prohibit companies and individuals from corruptly giving or offering anything of value to foreign officials to improperly influence them for the purpose of “obtaining or retaining business.” The anti-bribery provisions apply not only to American companies and individuals but also to companies whose securities are listed in the United States, as well as foreign companies and individuals whose conduct implicates the FCPA’s jurisdictional provisions. The accounting provisions—which apply only to companies whose securities are listed in the United States—require “issuers” to maintain accurate records and internal accounting controls.

Over the nearly 50 years since the FCPA was enacted in the post-Watergate era, Congress and prior administrations have emphasized the value of FCPA enforcement in combatting global corruption, restoring public confidence in the integrity of the free market, and ensuring a level field for companies that follow the rules. FCPA enforcement trends have varied, but in recent years, DOJ has brought enforcement actions against large American and foreign companies alike—and, also in recent years, foreign critics have accused the United States of using the FCPA as a protectionist cudgel against foreign competitors.⁵

Jenner & Block has published comprehensive reviews of the FCPA and recent FCPA enforcement trends.

The Executive Order

The Executive Order directs a 180-day period following February 10, 2025 during which DOJ must cease initiation of any new FCPA investigations or enforcement actions unless the attorney general approves an exception.⁶ During that 180-day period—which the Attorney General is authorized to extend—the DOJ is directed to (1) reevaluate “all existing FCPA investigations or enforcement actions” and “take appropriate action with respect to such matters”; and (2) develop new policies and guidelines that prioritize American foreign policy and economic interests as described above.⁷

The Cartel Memo

The Cartel Memo, which was issued five days prior to the Executive Order, also directs a shift in DOJ’s FCPA enforcement priorities. Among other initiatives aimed at strengthening enforcement against drug cartels and other TCOs, the Cartel Memo enlists the Criminal Division’s FCPA Unit in those efforts.⁸ For the next 90 days—or longer if the Attorney General so determines—it directs the FCPA Unit to “prioritize” investigations into foreign bribery that “facilitate[] the criminal operations of Cartels and TCOs,” such as drug and gun trafficking and human smuggling, in lieu of other FCPA investigations.⁹ The memo also eliminates the FCPA Unit’s exclusive authority to investigate and prosecute all FCPA cases, permitting US Attorney’s Offices across the country to bring FCPA cases involving cartels and TCOs without involvement by or approval from the FCPA Unit.¹⁰

What These Changes Mean

Just weeks into the second Trump Administration, it remains too early to assess the longer-term implications of the Executive Order and the Cartel Memo for FCPA enforcement over the next four years. It is evident that the order and the memo will have some short-term implications, as DOJ and the courts grapple with whether and to what extent the directives impact ongoing FCPA cases. For example, the US district court judge supervising the FCPA prosecution of Cognizant Technology Solutions Corporation executives accused of bribing an Indian official recently ordered DOJ to articulate whether the Executive Order impacts the upcoming March 3 trial date.¹¹

Longer-term implications, however, are less clear. Although the six-month “pause,” direction that new cases should explicitly promote American economic interests, and prioritization of cartel and TCO cases certainly provide reason for most American companies to expect less vigorous scrutiny under the FCPA, there are also plenty of reasons for companies—both American and foreign—to take a more cautious approach. Most importantly, absent an act of Congress, the FCPA remains the law, and the administration’s current enforcement approach does not immunize violative conduct or guarantee that priorities will not change or that exceptions to the pause will not be made. Both foreign and domestic companies should thus ensure that their FCPA compliance programs do not take a similar “pause”—and in some areas, they should enhance their programs in response to these recent announcements.

First, as noted above, neither the Executive Order nor the Cartel Memo extinguishes ongoing FCPA investigations. Given that many such investigations last years before resolution, companies currently under FCPA scrutiny may well remain that way for months or even years. Although the Executive Order imposes a six-month pause on *new* matters, it does not by its terms prevent *current* investigations from proceeding or prevent matters currently under investigation from being charged (or resolved in another way) beginning in August 2025; instead, it calls for a review of ongoing matters consistent with the principles behind the Executive Order. Moreover, the Executive Order also permits DOJ to initiate new investigations and enforcement actions during the six-month pause, so long as the Attorney General approves. And the Cartel Memo does not by its terms preclude *any* type of FCPA enforcement, directing only that the FCPA Unit prioritize certain types of matters for at least the next three months.

Given that FCPA enforcement has not historically featured much in the way of cartel and TCO matters, that focus may still leave the FCPA Unit with plenty of time to pursue other matters as well. Thus, nothing in either the Executive Order or the Cartel Memo offers any type of guarantee that DOJ will not initiate a traditional FCPA investigation or announce a traditional FCPA resolution in the near term.

Second, the changes announced thus far are, of course, only policy changes that are not binding on future administrations, or even on this administration should its priorities or composition change. For example, in the Biden Administration, Deputy Attorney General Lisa Monaco announced a return

to previous Obama-era guidance regarding corporate enforcement, rejecting the 2018 Trump Administration directive that limited the information a corporation was required to disclose in order to obtain cooperation credit. Given that the FCPA's statute of limitations is five or six years depending on the implicated provisions (and can be extended in certain circumstances), these policy announcements are far from a complete liability shield. Even within the next four years, it is important to bear in mind that DOJ under the prior Trump Administration actively prosecuted FCPA cases and reached some of the largest-ever FCPA settlements with US and foreign companies alike.¹²

Third, in some cases, the recent announcements portend greater enforcement. Most straightforwardly, the Cartel Memo directs the prioritization of matters involving certain types of criminal organizations. Those fact patterns may not be relevant to most corporations, but it should be noted that DOJ has in recent years prosecuted corporations for terrorism and narcotics offenses.¹³ And, of course, the Executive Order suggests that DOJ's revised FCPA guidelines may encourage prosecutions that support American interests—which is how certain foreign critics currently describe DOJ's motivation in prosecuting foreign companies under the FCPA. Companies that operate in high-risk environments dominated by organized criminal activity or associated with drug trafficking, or companies that may be perceived as competing with American economic or foreign policy interests, may thus be *more* likely than before to find themselves in DOJ's crosshairs.

Finally, nothing in the Executive Order or the Cartel Memo purports to affect the jurisdiction or focus of the SEC, which has parallel jurisdiction over FCPA enforcement. Nor has the SEC thus far announced any changes to its own FCPA enforcement program or priorities, although the Commission's incoming leadership may well do so. Relatedly, foreign countries such as the UK, Brazil, Switzerland, and Canada have recently brought their own anti-bribery prosecutions. Any DOJ FCPA guidelines that are perceived as targeting foreign companies to benefit American ones may draw the attention of enforcement authorities in countries where American companies do business. And recent years have also seen increased cooperation among international law enforcement agencies to combat corporate corruption and bribery that spans multiple jurisdictions as well as third-party litigation, meaning that the current "pause" on FCPA enforcement may not ultimately impact corporate liability for conduct that would otherwise be subject to prosecution under the FCPA.

In sum, although the new announcements mark a significant shift from prior policy and practice, corporations should not let down their guard or relax their efforts to build and maintain effective anti-corruption compliance programs. Compliance programs built to comply with an array of laws and regulations, not just the FCPA, are still critical for reducing risk and promoting corporate values. Jenner & Block stands ready to assist clients in assessing and enhancing their FCPA compliance programs to navigate this shifting landscape.

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Footnotes

[1] For more information on the Trump Administration's approach to national security enforcement, please see the Jenner & Block Client Alert discussing the administration's directive to DOJ's National Security Division.

[2] See also the White House Fact Sheet with additional details about the Executive Order.

[3] See Exec. Order, "Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security," Sec. 2(iii) (Feb. 10, 2025).

[4] See 15 U.S.C. §§ 78dd-1, et seq.

[5] See e.g., "Jailed French executive who felt force of US bribery law" for the BBC's summary of foreign criticism of the FCPA prosecution of Alstom S.A., a French power and transportation company, and Frédéric Pierucci, one of the company's former executives. The French media has also widely critiqued the U.S. approach to prosecuting foreign corruption. See, e.g., Radio France's critique in "Guerre économique."

[6] Exec. Order, "Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security," Sec. 2 (Feb. 10, 2025).

[7] *Id.*

[8] Att'y Gen., "Total Elimination of Cartels and Transnational Criminal Organizations," Sec. II at

[9] *Id.* at 2-4.

[10] *Id.* at 4. See also DOJ Justice Manual § 9-47.000.

[11] The judge's order requires DOJ to state its position by February 18, 2025.

[12] For more information on the prior Trump Administration's approach to the FCPA, please see Jenner & Block's Update to Anti-Corruption Enforcement from 2018-2019 and 2019-2020, and Anti-Corruption Enforcement 2020 Year in Review.

[13] See, e.g., DOJ Lafarge S.A. Settlement Press Release (Oct. 18, 2022); DOJ McKinsey Settlement Press Release (Dec. 13, 2024).

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