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Client Alert

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Long Live the FCPA?

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The Trump administration has taken significant action this week to overhaul the executive branch's long-standing policy toward the prosecution of white collar offenses. First, a memo issued by newly confirmed U.S. Attorney General Pam Bondi (the 2/5 Memo) announced a reprioritization of Foreign Corrupt Practices Act (FCPA) enforcement within the Department of Justice (DOJ). The 2/5 Memo was followed by President Donald Trump's February 10 executive order (the 2/10 Order) pausing all FCPA actions for at least 180 days and restricting future enforcement against U.S. companies. Taken together, these actions have major ramifications for the enforcement of white collar offenses.

The FCPA prohibits U.S. companies, issuers of securities trading on a U.S. exchange, U.S. persons, and persons acting within the territory of the U.S. from making or promising to make corrupt payments to foreign government officials in order to obtain or retain business. The FCPA was originally enacted in 1977 in the aftermath of Watergate, and its enforcement has exploded in the past 20 years; most recently this has included an emphasis on voluntary disclosures by companies and the addition of a whistleblower program. That seemingly inexorable growth in FCPA enforcement appears poised to shift dramatically under Trump and Bondi.

The 2/5 Memo provides guidance meant to implement Trump's day one executive order designating international cartels as terrorist organizations and declaring a national emergency in response to the threats they pose. As to FCPA enforcement, most significantly, the 2/5 Memo directs DOJ's FCPA Unit and Money Laundering and Asset Recovery Section to prioritize investigations of cartels and transnational criminal organizations (TCOs). The 2/5 Memo highlights bribery intended to "facilitate human smuggling and the trafficking of narcotics and firearms" as examples of cases that should be prioritized. Crucially, however, the 2/5 Memo's prioritization of cartel-related investigations also comes with a directive to "shift focus away from" cases lacking a cartel or TCO connection—as nearly every FCPA prosecution to date and other run-of-the-mill white collar offenses are.

Additionally, the 2/5 Memo suspends internal approval requirements for multiple drug trafficking-related charges to remove "[b]ureaucratic [i]mpediments." This includes a suspension of the traditional authorization requirement for U.S. Attorney's Offices to conduct FCPA investigations and prosecutions. Before the issuance of the 2/5 Memo, the FCPA Unit had exclusive jurisdiction within DOJ to bring FCPA charges. Now, *any* U.S. Attorney's Office nationwide can bring such charges, with only 24 hours' notice to the DOJ Criminal Division, so long as the charges are associated with cartels or TCOs. The 2/5 Memo's directives will be in effect for at least 90 days and may be renewed or made permanent thereafter.

The 2/10 Order goes even further than the 2/5 Memo, broadly declaring that FCPA enforcement harms the interests of the United States, defined generally as the "global economic competitiveness of American companies" and more specifically in the context of "critical minerals, deep-water ports, [and] other key infrastructure or assets." In aid of those interests, the 2/10 Order pauses all FCPA new enforcement for a renewable period of 180 days and orders a "review" of all current FCPA investigations or enforcement actions. It also directs the Attorney General to create guidelines for future FCPA enforcement that "prioritize American interests [and] American economic competitiveness with respect to other nations." In addition, any new FCPA enforcement actions taken up after the pause must be authorized by the Attorney General. The 2/10 Order appears to place a pause even on the increased cartel/TCO-related FCPA enforcement envisioned in the 2/5 Memo, at least for now.

The 2/5 Memo and the 2/10 Order dramatically shift DOJ's focus for FCPA enforcement. Previously, DOJ has used the FCPA as a tool to target corruption across a broad range of companies and industries, regardless of their corporate domicile or potential touchpoints with organized criminal activity. Now, the 2/5 Memo and 2/10 Order signal a determination to strongly curtail that tool by de-emphasizing its traditionally broad applicability away from U.S. companies and focusing on cartel- and TCO-related activity.

This new approach, while markedly different from the first Trump administration's approach to FCPA enforcement, is in keeping with Trump's personal feelings on—and political assessment of—the FCPA. In a 2012 *CNBC* segment, then-private citizen Trump denounced the FCPA as a "horrible law," arguing that the United States was "absolutely crazy" to prosecute "people for going over to China and Mexico and other countries and getting business and creating jobs in [the United States]." Trump's "America first" ethos appears to guide this new enforcement approach; the 2/10 Order describes FCPA enforcement against American companies as a harmful and "excessive barrier[] to American commerce abroad."

We must note a few considerations for corporations that may benefit from this adjustment in the Trump administration's FCPA priorities. First, the directives to "shift focus away from" U.S. companies and non-cartel/TCO-related investigations do not entirely preclude DOJ from conducting such investigations after the mandated enforcement pause. Certainly, the more obvious the evidence of bribery, the fewer resources DOJ will need to expend to investigate and charge a defendant, regardless of any "shift" in priorities. A "slam dunk" case will always be difficult for a prosecutor to pass up. Similarly, it remains likely that an investigation into non-U.S. companies or cartel/TCO-related activity that turns up evidence of bribery that is attenuated from or unrelated to the targeted activity would still be pursued by DOJ. And because the 2/10 Order specifically highlights a desire to protect American companies' advantages in "critical minerals, deep-water ports, [and] other key infrastructure or assets," companies whose business does not include touchpoints in those areas may retain some risk of FCPA scrutiny.

Second, until the conclusion of the Attorney General's review of ongoing FCPA matters and issuance of updated FCPA guidelines, it remains unclear whether this shift in priorities will affect the status of preexisting investigations not relating to U.S. companies or cartel/TCO-related activities. The directives provide no reason to believe that such investigations will be abandoned altogether. Additionally, given that all U.S. Attorney's Offices will be able to bring cartel/TCO-related FCPA charges with minimal authorization from DOJ, the overall number of FCPA investigations and enforcement actions may actually increase as a result of the 2/5 Memo's policy changes.

Third, depending on specific facts of any potential wrongdoing, statutes of limitations may extend long enough that charges remain viable during a future administration, where the priorities for FCPA enforcement may shift yet again.[1]

Fourth, the 2/5 Memo and the 2/10 Order have no impact on the SEC, which is empowered to investigate and bring civil enforcement actions where the corrupt conduct involves a company whose securities trade on a U.S. exchange.

Thus, corporations must remain cautious in their approach to FCPA compliance, especially in the initial 180-day review period before the 2/10 Order's pause can be renewed or new guidelines may be issued by the Attorney General. Lowenstein Sandler will continue to monitor any changes in the Trump administration's FCPA priorities as well as the real-world effects of the 2/5 Memo and 2/10 Order. If you have questions or would like to discuss these or other FCPA issues, please contact the authors of this alert.

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[1] The statute of limitations for FCPA offenses is five years, but it can be extended to up to eight years where assistance is sought from foreign governments.

Contacts

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