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Client Alert Commentary

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Executive Order Pauses FCPA Enforcement at DOJ: Key Takeaways on Immediate Impact

Insights and open questions for companies seeking to promote anti-corruption compliance in a dynamic regulatory environment.

On February 10, 2025, the Trump administration issued an executive order (the Order) taking aim at the US Foreign Corrupt Practices Act (FCPA). As echoed in the related fact sheet, the Order pauses Department of Justice (DOJ) enforcement of the FCPA for at least 180 days until DOJ "issues revised FCPA enforcement guidance that promotes American competitiveness and efficient use of federal law enforcement resources."

In addition to pausing future DOJ FCPA matters for at least 180 days, the Order states that past and existing FCPA actions will be reviewed, and that future investigations and enforcement actions will be governed by the new guidance and require Attorney General (AG) approval. An overview of the Order is available on Latham's First 100 Days Blog.

In the Order and fact sheet, the administration asserts that "U.S. companies are harmed by FCPA overenforcement because they are prohibited from engaging in practices common among international competitors, creating an uneven playing field." The administration further asserts that "American national security depends in substantial part on the United States and its companies gaining strategic business advantages whether in critical minerals, deep-water ports, or other key infrastructure or assets."

The Order was issued shortly after Attorney General Pam Bondi issued a memorandum on February 5, titled "Total Elimination of Cartels and Transnational Criminal Organizations" (the February 5 Memo), which sets out DOJ's updated stance on FCPA enforcement. The February 5 Memo instructs DOJ's FCPA Unit to "prioritize investigations related to foreign bribery that facilitates the criminal operations of Cartels and TCOs, and shift focus away from investigations and cases that do not involve such a connection." The February 5 Memo states that the changes to FCPA enforcement priorities are effective for 90 days, upon which they may be renewed or made permanent.

Considerable uncertainty remains regarding what the new DOJ guidance will look like, and whether and how it will intersect with the February 5 Memo. There are also questions about the impact the Order (and guidelines to follow) will have on companies and employees committed to promoting and maintaining compliant organizations.

Beyond practical considerations, the Order also raises broader questions about:

- The statements underpinning the policy shift — including the assertion that FCPA enforcement results in an alleged drain on resources (when the FCPA has long been viewed as a significant revenue generator for DOJ and the SEC)
- The assertion that enforcement disadvantages US companies (when the enforcement record shows many significant enforcement actions involving non-US companies and individuals)
- The national security interests purportedly implicated by the FCPA
- Whether the business practices obliquely referenced in the Order are indeed "routine" or "common"

This Client Alert offers initial reactions in terms of the practical, immediate impact of the Order and February 5 Memo and provides key considerations for companies as they navigate the coming months.

Short-Term Pause on FCPA Enforcement (With Exceptions)

The Order pauses the initiation of any new FCPA investigations or enforcement actions in the next 180 days (note that this timeline could be extended by another 180 days). However, the Order does not repeal or eliminate the FCPA, so prosecutions under the statute may still occur. The Order instructs the AG to cease FCPA investigations or enforcement actions "unless the Attorney General determines that an individual exception should be made." In other words, no FCPA actions can be brought in the next six months unless the AG decides to pursue an FCPA enforcement action. Given the language of the Order and February 5 Memo, "exceptional" enforcement of the FCPA is likely higher if the conduct is particularly egregious, the potential penalty/disgorgement would be significant, the target is a non-US company, or the prosecution would align with other administration goals.

Difficult-to-Predict New DOJ Guidelines

DOJ has 180 days (or potentially more) to finalize its new FCPA policies and guidelines, and it is difficult to predict what will ultimately be included or when the guidelines will be issued. This unpredictability was illustrated by the February 5 Memo and Order, which differ greatly in their messaging with respect to FCPA priorities, and were issued less than one week apart.

We note below a few questions regarding the potential direction of the guidelines:

- It is unclear whether the "shift in focus" in the February 5 Memo will be echoed in the updated FCPA guidelines requested by the Order. For example, will DOJ fully stop pursuing traditional FCPA cases, or prioritize the cartel/TCO cases over traditional FCPA enforcement matters? And if so, what will constitute a connection to a cartel or TCO sufficient to warrant priority treatment?
- Will the new DOJ guidelines specifically exclude or deprioritize prosecutions of previously impermissible payments by US companies related to critical minerals, deep-water ports, or other key infrastructure or assets (consistent with the themes in the Order)?
- Will the administration prioritize enforcement cases against non-US entities given the focus in the Order on national security and protecting American business?

Awaiting Updates Regarding SEC Enforcement

The Order does not address Securities and Exchange Commission (SEC) enforcement, as the SEC is an independent agency.

- The SEC has civil enforcement authority and could continue to pursue FCPA enforcement actions notwithstanding the Order. In the past 10 years, the SEC has brought more FCPA enforcement actions than DOJ (189 SEC vs. 154 DOJ). Alternatively, the SEC may be unwilling to approve such enforcement actions in light of the DOJ policy shift.

- The SEC could face challenges pursuing FCPA cases without the benefit of a parallel DOJ investigation. Historically, the SEC has benefited from DOJ investigative efforts (e.g., FBI investigative support, search warrants, close relationships with foreign law enforcement counterparts, etc.). DOJ opting out of FCPA enforcement will therefore impact SEC enforcement.

- The SEC could possibly prioritize foreign (non-US) issuers as part of the so-called national security focus of the administration's FCPA enforcement stance. To conclude the Order, President Trump is quoted: "Every policy must be geared toward that which supports the *American worker, the American family, and businesses, both large and small*, and allows our country to compete with other nations on a very level playing field …"

Other Anti-Corruption Enforcement Risks

Even if DOJ is not currently focused on traditional FCPA enforcement, other anti-corruption enforcement risks remain (and may potentially increase):

- US federal criminal statutes may apply to the conduct (e.g., mail or wire fraud, money laundering, the Travel Act, etc.), as well as state anti-corruption statutes.

- Companies could face enforcement risks under foreign (non-US) anti-corruption laws as foreign law enforcement agencies step up enforcement efforts in the wake of DOJ's withdrawal from this space.

Beyond additional legal exposure, companies may still be obliged to maintain an anti-corruption compliance program to comply with existing contractual requirements; to meet obligations or requirements from other regulatory bodies; and to align with their compliance/ESG-related disclosures.

Engaging With DOJ on Active or Recent FCPA Enforcement Matters

In terms of immediate impact, the Order will impact how companies are thinking about and engaging with DOJ on active and recently resolved FCPA investigations and enforcement matters. Companies should factor these updates into their:

- Voluntary self-disclosure considerations

- Posture in any open or ongoing FCPA matters

- Current status of any FCPA negotiated resolutions (DPAs, NPAs)

Of note, the Order specifically instructs the AG to "review in detail all existing FCPA investigations or enforcement actions and take appropriate action with respect to such matters to restore proper bounds on FCPA enforcement and preserve Presidential foreign policy prerogatives." It also states that after the guidelines are issued, "the Attorney General shall determine whether additional actions, including

remedial measures with respect to inappropriate past FCPA investigations and enforcement actions, are warranted and shall take any such appropriate actions." Companies and counsel should carefully watch how these directives in the Order play out in practice — and incorporate those takeaways into their own strategic decisions.

FCPA Statute of Limitations Considerations

Even if DOJ fully pauses traditional FCPA enforcement until further notice, the FCPA's statute-of-limitations period is quite long. As a result, misconduct today could be the subject of investigation and prosecution under the FCPA beyond the current administration. Potentially relevant statute-of-limitations considerations include:

- Five-year statute of limitations for anti-bribery violations
- Six-year statute of limitations for accounting provision violations
- Potentially a longer look-back for disgorgement calculations
- Potential to extend statute of limitations for conspiracies
- Up to a three-year extension if DOJ is seeking assistance/documents from a foreign government

As a result, companies should continue to comply with the FCPA to mitigate enforcement risks in the future given the potentially lengthy statute-of-limitations period. If enforcement remains light in the next four years, a new administration could have a full FCPA docket on its first day in office.

Corporate and Business Benefits of Compliance

Even with lower risks of DOJ enforcement in the near-term, promoting an ethical/compliant business model continues to be crucially important, as it:

- Mitigates risks in other compliance areas (e.g., AML, sanctions)
- Reduces costs to the business (e.g., avoiding bribe payment costs; detecting fraud, waste, and abuse)
- Offers other commercial benefits (e.g., vendor management, payment controls, spend management, third-party compensation, etc.)
- Promotes fairness in the workplace (e.g., employees are rewarded for their performance, not for engaging in misconduct)

Beyond that, companies still fundamentally care about compliance and integrity — indeed, "integrity" is one of the most common corporate core values. Promoting compliance helps companies live out these core values, which aligns with:

- Shareholder and customer expectations
- Employee pride in the organization (which may improve a company's net promoter score, employee performance, etc.)

As a best practice, companies should stay focused on compliance during this highly volatile time. Given the current environment, these types of commercial/operational and values-based motivators may resonate more with employees and stakeholders than risks of DOJ enforcement.

Potential Near-Term Compliance Program Considerations

Although we cannot predict what the future DOJ guidelines will include, companies may want incorporate the Order and February 5 Memo into their anti-corruption compliance strategy. The following steps may be helpful to getting ahead of these evolving developments:

- **Assess the company's exposure to cartels and TCOs** focusing on:
  - Markets that present heightened risks of cartels and TCOs (several NGOs offer resources to help companies evaluate risks in these areas)
  - Business activities that may present heightened exposure to cartels and TCOs (e.g., physical security, transportation and infrastructure, cross-border logistics, etc.)
  - Activities that may have potential for bribery of foreign officials to facilitate human smuggling and the trafficking of narcotics and firearms (examples of which were cited in the February 5 Memo)
- **Based on the risk assessments above, evaluate potential revisions to the company's risk-based compliance program. Given the unpredictability, companies may want to wait until the new guidance is released before implementing any changes.** Examples of changes could include:
  - Enhance controls in markets/activities that present heightened cartel or TCO risks (e.g., payment-related controls, enhanced diligence, training, monitoring, etc.)
  - Focus compliance efforts (monitoring, training, oversight, etc.) on intersections with critical minerals, deep-water ports, and other key infrastructure or assets
  - Consider updating due diligence questions (e.g., transactional, client intake, third-party diligence) to assess cartel/TCO/national security-related corruption risks
- **Consider updating internal nomenclature around compliance.** Companies may wish to recalibrate language in their contractual terms, policies, and training to focus less on FCPA compliance and to focus more on anti-corruption (broadly), compliance with applicable laws (including the FCPA), and ethics and integrity. Given the enforcement environment, this may resonate better with counterparties and employees.
- **Reiterate commitment to compliance.** Employees and leaders will be learning of these FCPA developments and may inquire about how it impacts the organization and their work. Companies may want to use this moment to reinforce their compliance messaging, highlight key program elements, and emphasize that the company still prioritizes anti-corruption compliance and integrity despite a dynamic regulatory environment.

The Order and February 5 Memo are two of many developments in the first few weeks of the new Trump administration. Latham & Watkins will continue to monitor these developments. Our First 100 Days Blog can help companies ensure their approach to compliance reflects the current enforcement environment.

If you have questions about this Client Alert, please contact a member of our White Collar Defense & Investigations Practice or the Latham lawyer with whom you normally consult.

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