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FCPA Under Review But Anti-Corruption Compliance Remains Critical

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Even though a February 10 Executive Order "paused" FCPA enforcement, the risks for US and foreign companies from bribery of foreign officials has not abated. In fact, for foreign companies doing business in the US, the risks may be higher now. The DOJ has historically been aggressive in prosecuting foreign companies or individuals for FCPA violations. Once the "pause" is over and the DOJ sets new priorities, focus on foreign entities and nationals for FCPA violations may well increase.

As widely reported, on Feb. 10, 2025, the Trump Administration issued an Executive Order instructing the Department of Justice (DOJ) to pause enforcement of the Foreign Corrupt Practices Act (FCPA) for at least 180 days (the FCPA EO).

The FCPA was enacted in 1977 after Watergate, making it illegal for a broad range of entities and individuals to bribe or offer to bribe foreign government officials to obtain business. The FCPA EO states that expansive FCPA enforcement has impeded American companies from gaining "strategic business advantages" and thereby harmed "American economic competitiveness."

The FCPA EO directs the DOJ to revise FCPA enforcement guidance and policies to "promote American competitiveness and efficient use of federal law enforcement resources." Pursuant to the FCPA EO, all FCPA investigations or enforcement actions will be reviewed to "restore the proper bounds on FCPA enforcement and preserve presidential foreign policy prerogatives."

Once the revised policies are implemented, any ongoing or future FCPA investigations will require authorization from the Attorney General.

While it is difficult to know exactly what guidelines and priorities will emerge after this pause, rumors of the death of the FCPA may well turn out to be, as the saying goes, greatly exaggerated. For many reasons, discussed below, corporate anti-corruption policies will remain critically important.

The Executive Order Does Not Require DOJ to Dismiss Pending FCPA Cases

As an initial matter, the Administration has not proposed amending or abolishing the FCPA. It remains the law of the land. Nothing on the face of the FCPA EO necessarily "cancels" pending FCPA criminal cases.

On April 2, 2025, the U.S. Attorney's Office for the District of New Jersey moved to dismiss a long-delayed FCPA case that was headed for trial. It is not clear however if other pending FCPA cases will meet the same fate. It

appears that each pending case will be subject to an independent review and may or may not proceed.

Notably, the case that had been pending in the District of New Jersey, *United States v. Coburn*, 19 Cr. 120 (D. N.J.) involved U.S. executives, while other pending cases involve foreign defendants; it is certainly possible those cases may proceed.

In *Coburn*, two former executives of Cognizant Technology Solutions were charged in 2019 for their alleged involvement with bribes paid in India. *United States v. Coburn*, 19 Cr 120 (D. N.J.).

Since the issuance of the FCPA EO, this case saw head-spinning twists and turns. At the time the FCPA EO was issued, the case had been set for trial on March 5, 2025. Prosecutors in the U.S. Attorney's Office in New Jersey, on Feb. 18, 2025, informed the District Judge that, despite the FCPA EO, they were prepared to proceed.

Then, literally on the eve of jury selection, John Giordano, who had been sworn in as interim U.S. Attorney the day before, requested an adjournment to conduct his own review of the case in light of the FCPA EO. The Judge re-set the trial date to April 7th.

However, on March 24th, President Trump appointed Alina Habba to replace Giordano, who has now moved to dismiss the prosecution.

There are three other pending criminal FCPA cases that, at the time the FCPA EO issued, were headed toward trial. These cases have not been dismissed.

In *U.S. v. Hobson*, 22-cr-00086 (W.D. Pa.), which was set for trial on April 21, 2024, the Judge vacated the trial date and entered an indefinite stay.

In *U.S. v. Zaglin et al*., 23-cr-20454 (S.D. Fla.), the court, on the agreement of the parties, continued the trial date to April 28th. And, in *U.S. v. Donato Bautista et al.*, 24-cr-20343 (S.D. Fla.), on March 25, 2025, the Judge continued all deadlines for 30 days, citing the FCPA EO.

At least two other FCPA cases remain on the docket, although they were not as close to trial at the time the FCPA EO issued. In July 2024, Asante Kwaku Berko, a dual citizen of the United States and Ghana, was extradited to the Eastern District of New York on FCPA and money laundering charges related to bribing Ghanaian government officials to secure a power plant deal and laundering the payments through the U.S. financial system. *U.S. v. Berko,* 1:20-cr-00328 (E.D. N.Y).

In October 2024, the U.S. Attorney for the Eastern District of New York brought FCPA and fraud charges against several foreign citizens alleged to have orchestrated a massive bribery scheme to enable two renewable energy companies to capitalize on a multi-billion-dollar solar energy project the companies had been awarded by the Indian government. *U.S. v. Adani et al.*, 1:24-cr-00433 (E.D. N.Y).

The Accounting Provisions of the FCPA Will Continue to Pose Risks

The accounting provisions of the FCPA require issuers of securities in the U.S. to maintain accurate "books and records" and adequate internal controls. 15 U.S.C. §78m(b)(2)(A)-(B). Under these provisions, issuers must maintain records that accurately and fairly reflect all transactions and dispositions of the assets of the issuer.

Even if the likelihood of prosecution for U.S. companies for bribing foreign officials is diminished, U.S. companies will face legal peril if such payments are not described accurately in their books and records.

The criminal penalties for "books and records" violations are, somewhat surprisingly, actually higher than for violations of the FCPA anti-bribery provisions, carrying a statutory maximum of 20 years' imprisonment (as opposed to 5 years for a violation of the anti-bribery provisions) and potential fines of $5 million per violation.

Even if DOJ is less interested in pursuing such violations following the pause, certainly auditors of public companies will remain focused on the accuracy of public company records. It is hard to imagine that a major U.S. company will not recognize significant risks if its records refer to bribe payments.

Investors will certainly be interested to know if major contracts were procured through bribery and, at the very least, will want to assess how much of a company's business depends on paying bribes.

Increased Enforcement Risk for Multinationals

Historically, DOJ FCPA enforcement has often targeted foreign companies and individuals, including large multinationals that have operations in the U.S. but are primarily foreign. Of the FCPA actions that have resulted in the highest penalties, 9 of the top 10 were against foreign companies.

Given the language of the FCPA EO aimed at protecting U.S. business interests, it would not be surprising if the pause results in a new set of priorities that emphasize prosecution of foreign defendants. For many multinationals, this may only increase the risk of enforcement by the DOJ and make corporate anti-corruption compliance even more critical.

Prosecutors have had little trouble finding a jurisdictional nexus even in circumstances where the connection to the U.S. appears tenuous, such as in cases where the bribery activities occur wholly on foreign soil with foreign participants.

In these situations, the DOJ typically asserts jurisdiction by establishing that the foreign companies utilize the U.S. financial system in some manner. This includes circumstances in which foreign companies issue American Depository Receipts (ADRs) that trade in the U.S. or the alleged corrupt payments are funneled through the U.S. financial system.

For example, in *U.S. v. Gunvor S.A.*, 24-cr-00085-ENV (E.D.N.Y. March 1, 2024), the DOJ established jurisdiction against a Swiss-based energy trading company implicated in a scheme to bribe Ecuadorian government officials through the routing of bribe payments through banks in the United States using foreign shell companies) and in *U.S. v. Corporación Financiera Colombiana S.A. ("Corficolombiana"),* 8:23-cr-00262-PJM, (D. Md. August 1, 2023) the DOJ asserted jurisdiction over a Colombian financial service institution charged with bribing high-ranking officials in Colombia based on ADRs.

Foreign Regulators May Increase Anti-Corruption Enforcement

Even if DOJ enforcement is reduced, anti-corruption enforcement is not the exclusive domain of the U.S. Many countries have anti-bribery/anti-corruption laws in line with the Organization for Economic Cooperation and Development's anti-bribery convention, a binding international agreement among dozens of nations to prohibit the bribery of foreign officials.

Notably, the United Kingdom's Bribery Act has been referred to as the "FCPA on steroids," as it includes exceedingly broad prohibitions (although enforcement by U.K. regulators has generally been viewed as tepid). U.S. companies operating abroad must be cognizant of continued (and potentially increased) risk of foreign prosecution.

Bribery Can Come Under Scrutiny Years Later

The FCPA's anti-bribery provision has a five-year statute of limitations. Prosecutors have consistently taken the position, however, that the limitations period does not start to run until the final payment on a contract that was procured through bribery.

FCPA cases routinely feature conduct that occurred many years before indictment. It is impossible to predict how the Department's approach to foreign bribery will change over time. As a result, major corporations cannot take their foot off the gas when it comes to anti-corruption compliance.

Conclusion

Many companies have devoted significant resources to robust anti-corruption compliance. The FCPA EO is not a reason to abandon those efforts. In fact, as discussed above, some of the risks to major corporations posed by foreign bribery may well increase in the coming years.

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