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White House Changes Guidelines in FCPA Enforcement

On February 10, 2025, President Trump signed an Executive Order pausing enforcement of the Foreign Corrupt Practices Act (“FCPA”), with the stated purpose of “Further[ing] American Economic and National Security.” President Trump has indicated that he wants the FCPA to be applied to transnational criminal organizations and cartels. On February 5, 2025, in anticipation of the Executive Order, Attorney General Pam Bondi issued a memorandum (the “Bondi Memo”) directing the Department of Justice (the “DOJ”) to prioritize FCPA investigations related to these types of organizations and to shift focus away from cases without such a connection. The Bondi Memo also lifts a requirement that the investigation and prosecution of FCPA cases be authorized by the Criminal Division of the DOJ and tried by the Fraud Section of the Criminal Division, so long as they involve cartels and transnational criminal organizations. Consequently, the DOJ has dismissed at least one long-running, non-organized crime, FCPA prosecution. Although it appears that the FCPA will not be enforced for purely economic crimes at this time, those engaging in business that involves engagement with the representatives of foreign governments should remain vigilant to avoid practices that violate the FCPA and local anti-corruption laws.

FCPA Overview

The FCPA outlaws paying bribes to representatives of foreign governments to assist with obtaining or retaining business or other business advantages (the “Anti-Bribery Provision”). There are very few exceptions, including the limited exception of “facilitation payments” made for the purposes of expediting routine nondiscretionary governmental action and the exception of when the payment is expressly legal under the laws of the foreign country. These exceptions are not black and white, and one should exercise due diligence and obtain the advice of counsel before making either type of payment. The FCPA also has a Books and Records Provision, which requires publicly traded companies to maintain accurate books and records and proper internal controls sufficient to, among other things, ensure the integrity of the books and records.

The Executive Order

The issuance of the Executive Order is not entirely unexpected. President Trump has been a longstanding critic of the FCPA, previously describing it as a “ridiculous” and “horrible law” that hinders American companies’ competitiveness overseas by forcing US companies to adhere to standards and practices not adhered to by their competitors from other countries. Consistent with these statements, the Executive Order criticizes the FCPA for being “stretched beyond proper bounds and abused in a manner that harms the interests of the United States.” Significantly, the Executive Order contends that current FCPA enforcement obstructs foreign policy goals, thereby affecting the President’s authority over foreign affairs. It declares that the Trump

Administration's policy is "to preserve Presidential authority to conduct foreign affairs and advance American economic and national security by eliminating excessive barriers to American commerce abroad," and directs the Attorney General to review investigation and enforcement guidelines and policies within a 180-day period. During this time frame, which may be extended by an additional 180 days by the Attorney General, the Attorney General is instructed to: (i) halt the initiation of any new FCPA investigations or enforcement actions unless an individual exception is warranted; (ii) review all existing FCPA investigations or enforcement actions and take necessary steps to ensure proper enforcement limits and safeguard Presidential foreign policy prerogatives; and (iii) issue updated guidelines or policies as needed to support the President's authority to manage foreign affairs and prioritize American interests, American economic competitiveness in comparison to other nations, and the efficient use of Federal law enforcement resources.

The Continued Importance of Compliance

The Executive Order and Bondi Memo suggest that the Trump Administration will back off enforcement of the Anti-Bribery Provision of the FCPA unless it involves cartels or transnational criminal organizations. Despite this, individuals and companies should continue to adhere to previous conduct standards for several reasons.

First, the Trump Administration retains the authority to prosecute FCPA violations regardless of their connection to cartels or transnational criminal organizations, and claims of selective prosecution will not likely be accepted as a defense in court. Additionally, neither the Executive Order nor the Bondi Memo has repealed the FCPA; therefore, barring a Presidential pardon, future administrations could prosecute violations committed during President Trump's term as the statute of limitations is longer than his Presidency. Indeed, it is likely that in three years a new administration will establish a reinvigorated FCPA task force in the DOJ with emphasis on companies that took advantage of the current legal environment and committed FCPA violations.

Second, relaxing practices previously established within a company to avoid FCPA violations may result in a shift in corporate culture and conduct that will be difficult to restore if and when a new administration reinstitutes FCPA prosecution of commercial transactions.

Third, while the United States may be taking a more relaxed approach to commercial bribery and corruption, many foreign governments have adopted anti-corruption regulations and laws with consequences ranging from tough to lethal. Therefore, compliance with local laws in foreign countries remains crucial, particularly since many nations (including the United States) have signed the Anti-Bribery Convention of the Council of the Organization for Economic Co-Operation and Development. This convention mandates that signatories criminalize bribery of foreign public officials, with the United States playing a key role in its formation. In addition to foreign governments, state governments can pursue penalties for bribing foreign officials under their own laws. California has already promised to do so, and the Manhattan District Attorney's office has indicated it will as well.

Thirdly, the United States Securities and Exchange Commission (the "SEC") still holds the capacity to enforce the FCPA. Therefore, publicly traded companies remain vulnerable to legal action if they fail to comply, although the previous Acting SEC Chair, appointed by President Trump, indicated a review of FCPA enforcement processes will be undertaken to ensure consistent application.

Beyond legal risks, bribery negatively impacts company culture and promotes unethical behavior that invades all aspects of a company, even those not related to international transactions with foreign government officials. Further, upholding high compliance standards fosters a culture of ethical business practices, enhancing reputation and shareholder confidence.

Therefore, businesses operating internationally should maintain rigorous internal controls and compliance programs, particularly in regions prone to corruption and bribery. It is essential to know your business partners and avoid ignoring suspicious activities. When uncertain about the legitimacy of a payment, seeking advice from legal counsel versed in current FCPA enforcement updates is recommended.

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