Harvard Law School Forum on Corporate Governance

Takeaways from the Pause on Foreign Corrupt Practices Act Enforcement

Posted by Kyle Clark, Brendan F. Quigley, and Bridget Moore, Baker Botts LLP, on Monday, February 24, 2025

Editor's note: Kyle Clark, Brendan F. Quigley, and Bridget Moore are Partners at Baker Botts LLP. This post is based on a Baker Botts memorandum by Mr. Clark, Mr. Quigley, Ms. Moore, Derek Cohen, and Jennifer Berger.

On February 10, 2025 President Trump issued an executive order titled "Pausing Foreign Corrupt Practice Act Enforcement to Further American Economic and National Security." The order directs the DOJ to halt Foreign Corrupt Practices Act (FCPA) investigations and enforcement actions for a 180-day review period. This is the first pause of FCPA enforcement and investigations since the statute was passed in 1977.

According to the executive order and accompanying fact sheet, this significant policy shift aims to address concerns that "overexpansive and unpredictable" FCPA enforcement creates "an uneven playing field" for U.S. companies that threatens national security. The executive order asserts that "the FCPA has been systematically, and to a steadily increasing degree, stretched beyond proper bounds and abused in a manner that harms the interests of the United States." The order states that current enforcement practices targeting "routine business practices in other nations" waste prosecutorial resources and "actively harm[] American economic competitiveness and, therefore, national security."

In light of these concerns, the Order implements a 180-day pause on FCPA investigations and enforcement actions. During the pause, the DOJ shall (i) review its guidelines and policies on FCPA investigations and enforcement actions; (ii) abstain from initiating any new investigation or enforcement action unless United States Attorney General, Pamela Bondi determines an individual exception is appropriate; (iii) review all existing investigations and enforcement actions issues and "take appropriate action [] to restore proper bounds on FCPA enforcement and preserve Presidential foreign policy prerogatives"; and (iv) issue updated guidelines and policies to "promote the President's [] authority to conduct foreign affairs and prioritize American interests, American economic competitiveness [], and the efficient use of Federal law enforcement resources."

AG Bondi may extend the review for an additional 180 days. After revised guidelines and policies are issued, the order directs AG Bondi to determine whether measures to remedy "inappropriate past FCPA investigation and enforcement actions, are warranted and [to] take any such appropriate actions or, if Presidential action is required, recommend such actions to the President."

Perhaps most significantly, even after the review period concludes, any new investigations and enforcement actions and continued existing investigations and enforcement actions deemed appropriate under the new policies and guidelines "must be specifically authorized by the Attorney General."

The executive order supersedes AG Bondi's February 5, 2025 memo to DOJ employees, which we addressed here. Last week's memo instructed the FCPA Unit at Main Justice to redirect its FCPA enforcement priorities to the fight against drug cartels and transnational criminal organizations. It also empowered local U.S. Attorney's Offices to bring certain FCPA actions without obtaining authorization from the FCPA Unit. The February 10, 2025 executive order removes local offices' short-lived autonomy.

Impact on U.S. Companies and their Employees

For individuals and entities facing existing FCPA investigations, the 180-day review period may present an opportunity for advocacy with the government. Similarly, the Executive Order's requirement that AG Bondi determine whether past FCPA investigations or enforcement actions should be reconsidered, either by DOJ or through Presidential action, presents a pathway to challenge past resolutions. This obligation presents an opportunity for any company or individual previously targeted by FCPA enforcement to seek an audience with DOJ to highlight past overreaches, whether the matter was handled solely by DOJ and thus could be unilaterally rescinded (non-prosecution agreement), or the punishment was imposed by a court and thus may need presidential intervention via pardon, commutation, or other executive action.

That said, even in light of the unprecedented pause of FCPA enforcement, companies with international operations, particularly in areas considered "high risk" for bribery, even if not facing an existing investigation, should keep in mind the following, to avoid the proverbial throwing out the baby with the bathwater:

- The executive order does not affect the Securities and Exchange Commission's authority to bring civil enforcement actions under the FCPA's accounting provisions, which require U.S. issuers to maintain proper records and internal controls to prevent the concealment of illicit payments. U.S. issuers and their officers, directors, employees, or agents may still be subject to civil enforcement actions. Nor does the Order necessarily impact other theories (like money laundering) that DOJ has used to target foreign bribery in the past.
- Criminal and civil violations of the FCPA's anti-bribery provisions have a five-year statute of limitations.1 Criminal violations of the books and records and internal controls provisions have a six-year statute of limitations.2 Thus, misconduct that occurs today may become the focus of an investigation or enforcement action years later, conducted

by a different administration with different priorities. Indeed, FCPA enforcement actions often arise years after the conduct at issue occurred. See, e.g., *United States v. McKinsey* and *Company Africa (PTY) Ltd*. (link) (December 2024 resolution alleging foreign bribery that occurred 8-12 years earlier); *United States v. Glenn Oztemel, et al*. (link) (conduct occurred 5-13 years earlier); *United States v. Trafigura Beheer B.V.* (link) (conduct occurred 10-21 years earlier).

- Companies should review their compliance programs and internal controls to ensure they remain robust and effective, even during the enforcement pause. Strong compliance programs remain important to avoid or minimize the risks of investigations that may not materialize until years later. Beyond future U.S. and current international regulatory accountability, companies still have obligations to shareholders and can face liability for not effectively monitoring and adjusting to external risks.
- Individuals employed by companies with their own codes of conduct that cover acts prohibited by the FCPA are still subject to their employers' codes of conduct.
- While the United States has been the most active in prosecuting foreign bribery, it is no longer the only nation with an anti-bribery regime. Other jurisdictions have passed anti-corruption laws that may touch US individuals and companies. The United Kingdom's Bribery Act 2010 has broad jurisdictional reach and applies: (i) to offenses committed in the UK; (ii) to offenses committed outside the UK where the person committing the offense has a close connection with the UK; and (iii) to any company incorporated in the UK or that "carries on a business or part of a business in" the UK. Pursuant to a European Commission proposal for a directive, the European Parliament and Council of the European Union are negotiating the final version of a directive that would require EU Member States to meet common standards in their anti-corruption legislation, including bribery offenses. As drafted, Member States would have jurisdiction over bribery offenses committed: (i) in whole or in part in the territories of that Member State; (ii) by its national or someone ordinarily resident in its territory; or (iii) for the benefit of a company established in the Member State's territory.
- Boards of directors still must abide by their duties of loyalty and care under Delaware corporate governance law. A pause on FCPA enforcement does not affect directors' oversight responsibilities, which include implementing board-level reporting mechanisms and compliance controls to understand and document significant risks to the business. Failures to do so may give rise to so-called Caremark claims. *See Marchand v. Barnhill, 212 A.3d 805 (Del. 2019); In re Caremark Int'l Inc. Deriv. Litig*., 698 A.2d 959, 970 (Del. Ch. 1996).

Conclusion

The ordered pause of FCPA enforcement represents a significant shift in U.S. anti-corruption policy. While this pause may provide short-term relief for U.S. companies that might otherwise be concerned about hindsight-bias-informed scrutiny of their business decisions, it is crucial to remain vigilant and prepared for the new enforcement guidelines that will follow and the undiminished risk of enforcement by international regulators and future U.S. regulators.

We will continue to monitor developments and provide updates as more information becomes available. For further information or specific legal advice, please contact our office.

---

[1] 18 USC § 3282 (criminal), 28 USC § 2462 (civil).(go back)

[2] 18 USC § 3301; 15 USC § 78ff(a).(go back)