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Back to the Future: Protection of Foreign Affairs Focus for FCPA Enforcement

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Under the guise of protecting the President's authority to conduct foreign affairs, on February 10, 2025, President Donald J. Trump signed an Executive Order pausing enforcement of the U.S. Foreign Corrupt Practices Act ("FCPA"), and directing the Attorney General, Pam Bondi, to conduct a comprehensive review and update of the law's enforcement approach. The order establishes a 180-day pause (which may be extended for an additional 180 days) during which time the Attorney General is to:

1. review all existing FCPA investigations and enforcement actions to "restore proper bounds on FCPA enforcement and preserve Presidential foreign policy prerogatives;" and
2. issue updated guidelines and/or policies relating to future investigations and enforcement.

After the pause, investigations or enforcement actions must be made in line with any forthcoming guidelines or policies and must be approved by the Attorney General. The Executive Order also instructs the Attorney General to assess whether "additional actions, including remedial measures with respect to inappropriate past FCPA investigations and enforcement actions" are warranted.

Viewed alongside a February 5, 2025 Executive Order, which refocused FCPA enforcement on cartels and transnational criminal organizations, President Trump is signaling a significant shift in the U.S.'s approach to investigating and prosecuting international corruption. The administration is framing this as a way to bolster U.S. competitiveness — particularly in geopolitically important areas such as critical minerals, deep-water ports, or other key infrastructure or assets — arguing that (i) U.S. companies are at a disadvantage when foreign competitors — especially from China and Russia, which were cited in his signing ceremony — are not held to the same standards, or (ii) that enforcement has sometimes overstepped its intended goals, thereby affecting legitimate business operations and U.S. foreign policy interests.

For multinational corporations, the FCPA pause risks adding uncertainty into an area where U.S. authorities have sought greater transparency through publications like DOJ policy memoranda or the FCPA Resource Guide. It also risks confusion at the international level, where increased enforcement, cross-border collaboration and coordination have been prioritized and championed in recent years. Despite the temptation, companies are ill-advised to view the pause as a green light for riskier business practices because they would do so at their peril, as there are several considerations to keep in mind that may counsel towards a cautious approach.

- **The U.S. is not the only Enforcer:** The U.S. was never the only country that prosecuted transnational corruption, but for many years it largely seemed that way. This included periods where the U.S. — often to the criticism of European counterparts — pursued non-U.S. companies that maintained a jurisdictional link to the U.S. in high-profile corruption prosecutions. In response to this expansive extraterritorial approach (and criticism for their lax approach), certain countries, such as France and the United Kingdom, strengthened their anticorruption laws and became more active in investigating and prosecuting corruption themselves. It also prompted increased sharing of information — especially within the OECD Working Group on Bribery — about potential corruption offenses with implicated jurisdictions. The close working relationship between U.S. and Brazilian prosecutors during the Operation *Lava Jato* investigation is a case in point.
    - It is unlikely that countries which were criticized for years as not being aggressive enough in enforcing their anticorruption laws will all unanimously decide that a similar “pause” is warranted.
    - Moreover, enhanced antibribery laws passed by other countries — such as the U.K. Bribery Act — are in some cases at least as strict as the FCPA and can also have extraterritorial application, **putting some U.S. multinationals at risk of prosecution by non-U.S. regulators** if they engage in corrupt practices or if non-U.S. regulators take a view that they now need to “level the playing field” with more aggressive enforcement. For companies operating in sensitive geopolitical areas referenced in the Executive Order — critical minerals, deep-sea ports, and infrastructure — there is a risk of particular focus by non-U.S. regulators if they perceive corrupt practices being undertaken by a U.S. multinational to the detriment of their own national enterprises.
- **Multinational Institutions Likely to Keep their Eyes on the Ball:** Multilateral Development Banks (“MDBs”) have increasingly focused on strengthening investigative trends to combat corruption in development projects. They have

developed sophisticated forensic tools, enhanced due diligence mechanisms and engaged highly qualified investigation teams to prevent and detect corruption-related misconduct. Furthermore, MDBs have adopted uniform instruments encompassing sanction mechanisms and promoting cross-border collaboration, sharing intelligence with national enforcement agencies and international bodies (such as the OECD and Interpol). Debarment policies (including potential cross-debarment) and public disclosure of investigation outcomes thus remain as effective instruments to pursue corrupt practices and other types of sanctionable conduct. As with non-U.S. regulators, it is unlikely that MDB enforcement activity will take a similar pause.

- **Beware of a Potential Enforcement Whiplash:** Companies or individuals that believe that "happy days are here again" should remember that actions taken today can have lingering side effects. While FCPA enforcement may be paused for the moment, the law contains a five-year statute of limitations period, which can be paused for up to three years if the DOJ needs to seek evidence abroad. The FCPA pause does not erase legal exposure: companies engaging in questionable conduct today may still face consequences down the line, as investigations and agreements reached to resolve cases of corruption regularly relate to misconduct that occurred many years ago. To cite just two recent examples, corruption-related settlements reached in 2024 in the U.S. with Telefónica and in France with Areva and Orano related to conduct that occurred a decade previously. In addition, companies that decide to relax their compliance standards risk long-lasting degradation in their ethical cultures that can take years to reverse.
- **Prepare for NGO and Private Sector Backlash:** The Executive Order came out one day before the release of Transparency International's 2024 Corruption Perception Index, an annual assessment of the perceived risk of corruption in 180 countries, which saw the U.S.'s score decrease from 2023. While Transparency International highlighted that corruption continues to "grow in scale and complexity", we can anticipate swift criticism of the enforcement pause by NGOs and anti-corruption crusaders, as well as by investigative journalists who work to bring to light corrupt practices around the world. Some jurisdictions, such as France, provide for avenues whereby NGOs can lodge complaints against companies for alleged corrupt (or other) practices. As a result, even if the U.S. pause continues indefinitely, companies can still face significant reputational and/or legal risk arising from corrupt practices.
- **Targeted Enforcement is still Enforcement:** The Executive Order references "American economic competitiveness" and "Presidential foreign policy prerogatives" as key reasons for requiring the pause. By calling out critical minerals, ports and infrastructure projects, the President appears to be highlighting areas that may be of future focus for more selective, targeted enforcement of

FCPA-related offenses against non-U.S. companies who have won projects to the detriment of U.S. competitors. While the February 5 Executive Order specifically targets cartels and transnational criminal organizations, nothing prohibits the administration from using the FCPA to further policy objectives through investigations and enforcement of entities it perceives as doing damage to American economic interests.

The mid- to long-lasting effects of the Executive Order will only be able to be judged with the passage of time and further guidance from the DOJ and therefore only time will tell whether it marks the start of a generational shift away from the U.S.'s central role in combating corrupt practices. Either way, companies should resist the temptation to scale back compliance efforts too quickly and would be wise to proceed cautiously before making wholesale revisions to their practices, programs or conduct. That said, compliance officers and professionals will no doubt be under increased pressure and scrutiny as a result of the published Executive Order and likely the guidance to follow.

Related Professionals

- **Kevin Abikoff**
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- **Bryan Sillaman**
  Partner
- **Sergon Sancar**
  Counsel
- **Santiago Ramirez Reyes**
  Associate
- **Salomée Bohbot**
  Associate
- **Mélinée Aprikian**
  Associate