

## President pauses FCPA enforcement to further American interests

February 11, 2025 | Client Update | 6-minute read

On February 10, President Trump issued an Executive Order and Fact Sheet “pausing” FCPA enforcement for 180 days while Attorney General Bondi determines guidelines for enforcement that “further American economic and national security.” Although it is difficult to predict how the FCPA will be enforced under the new guidelines, there will likely be substantially more favorable treatment for American companies and citizens with an aim of providing them with “a strategic commercial advantage.”

The President’s [Executive Order](#) and related [Fact Sheet](#) come less than a week after AG Bondi released a [memorandum](#) outlining the way in which the Department of Justice (DOJ) will achieve the total elimination of cartels and transnational criminal organizations (TCOs), including that FCPA cases would focus on conduct involving cartels and TCOs. The February 10<sup>th</sup> Executive Order suggests that, in addition to cases involving cartels and TCOs, DOJ would be investigating and enforcing FCPA violations in a way that would “advance American economic and national security by eliminating excessive barriers to American commerce abroad.” During the 180 day “pause,” DOJ will not initiate new investigations or enforcement actions under the FCPA, and existing cases will be reviewed in detail. The President explicitly relied upon his foreign affairs powers under the U.S. Constitution for authority to pause the enforcement of the FCPA.

The Executive Order leaves open a number of unanswered questions addressed below, and it should not be read to suggest that it is advisable for U.S. companies to begin making corrupt payments or to alter their anti-corruption compliance programs. Indeed, the statute of limitations for an FCPA violation (five years) is longer than the remainder of this administration, and there are a range of other enforcement authorities and statutes that prohibit such conduct. At the very least, companies will need to see the guidelines that AG Bondi issues to determine what, if any, steps they should take in response.

### The Executive Order and Fact Sheet

The background section of the Order outlines how the FCPA has been overused against “American citizens and businesses” to “harm[] American economic competitiveness and, therefore, national security.” It states in relevant part that:

- “The President’s foreign policy authority is inextricably linked with the global economic competitiveness of American companies. 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.”
- “But overexpansive and unpredictable FCPA enforcement against American citizens and businesses — by our own Government — for routine business practices in other nations not only wastes limited prosecutorial resources that could be dedicated to preserving American freedoms, but actively harms American economic competitiveness and, therefore, national security.”

The Executive Order instructs that, for a period of 180 days (with the ability to extend an additional 180 days after that if the AG determines appropriate), the AG will “review guidelines and policies governing investigations and enforcement actions under the FCPA,” during which time the AG will not initiate new investigations or enforcement actions. According to the Executive Order, the Department of Justice (DOJ) shall:

- “(i) cease initiation of any new FCPA investigations or enforcement actions, unless the Attorney General determines that an individual exception should be made;
- (ii) 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; and
- (iii) issue updated guidelines or policies, as appropriate, to adequately promote the President’s Article II authority to conduct foreign affairs and prioritize American interests, American economic competitiveness with respect to other nations, and the efficient use of Federal law enforcement resources.”

When FCPA enforcement resumes, the executive order instructs that FCPA investigations and enforcement actions will be governed by these new AG guidelines or policies and “must be specifically authorized by the Attorney General.”

The AG will decide whether any additional actions, “including remedial measures with respect to inappropriate past FCPA investigations and enforcement actions,” are necessary or appropriate.

## Key takeaways

The Executive Order and Fact Sheet are a significant departure from the prior approach to FCPA enforcement across administrations. The approach outlined in the Executive Order suggests a strategic approach to FCPA enforcement more akin to tariffs or sanctions on foreign companies, and more favorable treatment of U.S. companies. Indeed, the Fact Sheet specifically refers to the President’s actions regarding tariffs on Mexico, Canada, and China, deregulation, renegotiated trade deals, and strengthening U.S. leadership in artificial intelligence as other examples, like this initiative, in “putting America first.”

Against that backdrop, there are several noteworthy takeaways from the Executive Order and Fact Sheet:

- The Executive Order (and any corresponding DOJ guidelines) should not be read to suggest that it is advisable for U.S. companies to start making corrupt payments or to alter their anti-corruption compliance programs. The general statute of limitations for an FCPA violation—five years—exceeds the duration of this administration, and that does not even account for DOJ’s ability to use the conspiracy statute and tolling to reach beyond five years. There is also the backdrop of other U.S. federal statutes that prohibit corrupt conduct abroad (such as anti-money laundering statutes, the wire fraud statute, and the Travel Act), state authorities that have the ability to bring foreign corruption cases, as well as foreign enforcement authorities that have increased enforcement over the past decade.
- Given the clear intent as described above, and the focus of the Order on protecting “American citizens” and “American companies” and furthering “American economic competitiveness with respect to other nations,” it seems likely that any guidelines will favor American companies and individuals (either through no enforcement or much more limited and lenient enforcement) and will permit continued enforcement against foreign companies and individuals. This leaves unanswered questions. For example, it is not clear whether the favorable treatment of U.S. companies will take the form of a narrower set of conduct that could be investigated and enforced (e.g., grand corruption and conduct implicating national security interests), more lenient resolution terms, or the elimination of enforcement altogether. Likewise, it is not clear whether the favorable treatment will be extended to foreign companies that have a U.S. presence, foreign companies that are U.S. issuers, and U.S. companies that have foreign subsidiaries that engage in the corrupt acts.
- On its face, the Executive Order instructs that DOJ will cease the “initiation” of “new” FCPA investigations or enforcement actions, but only states that ongoing investigations will be reviewed by the AG. Existing FCPA investigations will almost certainly be impacted by whatever guidelines the AG issues, but we do not yet know whether, and what type of, investigations will be paused in the meantime. Nevertheless, companies with existing FCPA investigations should evaluate whether and how to proceed under the circumstances.
- At least at this stage, there is no clarity on what impact this will have on the U.S. Securities and Exchange Commission, which is responsible for civil enforcement of the FCPA. Although the Executive Order issued a directive to the Attorney General, not the SEC, we would expect new SEC leadership to follow an approach consistent with the Executive Order’s broad statement of administration policy.

- It is likely that the Executive Order will be harmonized with the AG's February 5 memo on cartels and TCOs so that DOJ will continue to investigate and prosecute companies and individuals of any nationality (including U.S. companies) that engage in foreign corruption involving cartels and TCOs.
- Finally, with respect to the “remedial measures” that the AG may take relating to prior enforcement actions, this is unlikely to include the return of payment of fines, penalties, or forfeiture given that there is not a legal mechanism for that to occur. It is, therefore, much more likely that this is referring to pardons and commutations for individuals and companies that have been convicted of an FCPA offense, early termination of resolution and probationary terms, and early termination or canceling of monitorships.

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