PLG
Potomac Law

FCPA ENFORCEMENT SUSPENSION - THINK TWICE BEFORE THROWING CAUTION TO THE WIND

MARCH 27, 2025

The President recently issued an executive order temporarily suspending the Justice Department's enforcement of the FCPA pending further guidance. Nevertheless, companies can still face legal and business risk should they abandon their anti-corruption compliance posture.

For close to 50 years, the Foreign Corrupt Practices Act (FCPA) has been the most enforced anti-bribery law that applies to international business. Although many countries have criminalized corruption in one form or another, they have yet to match the enthusiasm with which the United States pursued FCPA cases. However, on February 10, 2025, U.S. leadership in this area came to a sudden and apparent halt as President Trump signed an executive order (EO) directing the Attorney General (AG) to suspend enforcement of the FCPA for 180 days pending revised and "reasonable" enforcement guidelines. Among other matters, the EO requires the AG to review existing FCPA actions and cease new FCPA investigations and enforcement, unless the AG determines that an individual exception should be made. Future FCPA investigations and enforcement actions may resume subject to the AG's new (but yet-to-be-issued) guidance and her approval.

Contact

Daanish Hamid
Partner
White Collar and International Trade
(202) 827-5614
dhamid@potomaclaw.com
Bio: Daanish Hamid: Potomac Law

Even before the EO was issued, it was not uncommon for businesses to view anti-corruption compliance as a cost center rather than a profit center. The EO itself appears to support that position by suggesting that past FCPA enforcement practices harmed American competitiveness by creating excessive barriers to overseas commerce. Certain businesses (especially those hit hardest by the economic uncertainty triggered by the Trump administration's position on increased tariffs) may be tempted to reduce if not eliminate their anti-corruption compliance commitment in light of the enforcement suspension imposed by the EO. However, this approach can prove to be a costly mistake. Here are some key arguments why responsible businesses would want to continue to maintain active anti-corruption compliance programs notwithstanding the EO:

No Repeal. The FCPA remains the law of the land. Even though the EO has suspended FCPA enforcement, only an act of Congress can repeal the FCPA in its entirety, and there is no strong indication of that occurring at this time. Furthermore, the EO itself only imposes a temporary pause for a period of 180 days and, as we have seen in the context of other regulatory areas such as tariffs, the administration can easily change directions before or after that period.

Statute of Limitations. Like most federal criminal laws, the FCPA has a statute of limitations of five years, which, in certain instances, can be tolled for up to eight years. These periods exceed the four-year term of the current administration, and it may be likely that a subsequent presidential administration

Attorney Advertisement: This document is provided for informational purposes only and does not constitute legal advice.

will restore the Justice Department's commitment to FCPA enforcement irrespective of which party is elected to the White House. FCPA enforcement has traditionally received bi-partisan support and, notwithstanding the views expressed in the EO, has been used as an important national security tool to protect U.S. interests abroad. Also, up and coming prosecutors in the Fraud Section of the Justice Department have relied on FCPA cases against corporate defendants (which are often settled and rarely go to trial) to build successful reputations and careers in government and the private sector. Those government lawyers have strong personal incentives to reinstate FCPA enforcement.

Unpredictable Prosecutorial Discretion. The current administration has already demonstrated that it will exercise discretion in how it will apply U.S. laws, especially against parties that seek to challenge the administration's political and economic agenda. The EO does not completely exempt companies that engage in corruption from exposure to potential enforcement discretion. If anything, the EO expressly strengthens the AG's hand to exercise prosecutorial discretion in this respect because it obligates the AG to cease new FCPA investigations and enforcement, *unless the AG determines that an individual exception should be made*. This qualifying language is quite telling.

Foreign Company Risk. A significant number of FCPA enforcement cases were directed against non-U.S. headquartered companies and non-U.S. individuals. For instance, foreign parties appeared as defendants in the majority of the top 10 FCPA corporate settlements in terms of fines and penalties. There is a possibility that the Justice Department may continue to enforce the FCPA against foreign persons given that it supports the President's ultimate goal of seeking to level the business playing field for U.S. companies.

Contract Representations. It is common for stock purchase, investor rights, grant, loan, and other corporate and financing agreements to include FCPA or more general anti-corruption compliance provisions. Parties that run afoul of those obligations may face termination as well as breach of contract claims even if the Justice Department does not prosecute them for FCPA violations.

Shareholder Action. The FCPA does not provide shareholders with any private right of action against their company or its officers/directors for corruption violations. However, shareholders may bring a derivative lawsuit claiming that the company's officers or directors failed to fulfill their duty-of-care obligations under general corporate law if corruption is harming a company's business. Such a claim may be strengthened if there is evidence that the company's officers or directors failed to investigate or adequately investigate credible allegations of corruption. According to the *In re Caremark* decision, directors may be personally liable if the board fails to ensure that the company has adequate corporate compliance information and reporting systems. Companies that fail to adopt and implement procedures to investigate potential corruption and other criminal violations may find it challenging to fulfill this requirement.

Sarbanes Oxley. U.S. securities laws obligate senior management of publicly-traded companies to provide specific assurances of compliance. Section 302 of the Sarbanes-Oxley Act (SOX) requires CEOs and CFOs of public companies to execute integrity certifications on a quarterly basis and file them with the SEC along with their companies' financial reports. These executives must confirm in their certifications that (i) they have no knowledge of any material misstatements or omissions in their company's financial reports; (ii) the financial statements of the company are accurate in all material respects to the *knowledge* of such

officers; (iii) their company maintains properly designed internal controls; and (iv) the officers have disclosed significant internal control deficiencies to the company's audit committee and auditors. Section 404 of SOX requires that annual company reports contain a conclusion from management as to whether the company maintains effective internal controls with respect to financial reporting. Senior executives risk facing scrutiny if they issue the above SOX assurances while being aware of corruption concerns in their business that have not been subject to proper investigations and remediation.

Foreign Enforcement. The issue of leveling the playing field for U.S. companies competing against corrupt foreign businesses has been raised on more than one occasion in the past. In order to address this concern, for a number of years, the United States encouraged other countries to adopt strong anti-corruption laws to hold their companies accountable. These efforts resulted in a variety of international anti-corruption conventions that have obligated a majority of countries around the world to adopt anti-corruption standards similar to the FCPA (and in some cases going beyond the FCPA). Recent years have seen several countries increase enforcement of those laws. If the United States were to continue to suspend FCPA enforcement, foreign countries may be motivated to increase corruption scrutiny under their laws, especially in cases involving corrupt U.S. companies. For example, countries like China as well as its allies may monitor the corrupt behavior of U.S. companies more aggressively in response to trade restrictions imposed by the United States.

Other Violations. The suspension under the EO is currently limited to the FCPA. However, the same underlying facts that would otherwise support an FCPA violation, may also raise concerns under fraud, sanctions, export controls, money laundering, and U.S. government contracting laws and regulations. The United States has not suspended enforcement in those areas and in some cases an argument could be made that the Trump administration intends to become even more vigilant of such violations. This could especially be the case in the context of transactions involving China and Iran as well as other countries that the Trump administration views as their proxies.

Harm to U.S. Business. Separate from potential legal exposure discussed above, there are compelling business reasons for companies to continue to adhere to anti-corruption compliance standards. Businesses that tolerate corrupt practices may develop a reputation for their willingness to "play the game." This means that government officials who successfully convince a company to make an improper payment in one instance may be more likely to return with their hand extended on subsequent occasions seeking even larger amounts. In addition, officials from other government agencies may feel emboldened to make their own demands. The company's local country budget would then need to be increased to accommodate such costs of doing business. The company would then need to offset those rising costs by increasing prices for its products and services, thereby rendering its business less competitive. Also, the price of bribes is ultimately passed onto U.S. and non-U.S. consumers. This only exacerbates the concern of higher costs resulting from the Trump administration's recent decisions to increase international tariffs. There also remains potential harm to the U.S. securities market. Publicly-traded companies tend to be overvalued if they artificially induce their sales by paying bribes rather than competing based on the merits of their products and services.

* * *