

DOJ'S NEW DIRECTION: PREDICTIONS FOR CORPORATE ENFORCEMENT PRIORITIES IN THE TRUMP ADMINISTRATION

Changes in presidential administrations typically result in changes in corporate criminal enforcement priorities. On February 5, 2025, shortly after her confirmation, Attorney General Pamela Bondi issued over a dozen memoranda regarding the Department of Justice's ("DOJ's") priorities under the Trump administration. The scope and sweep of these memoranda—which address every issue from immigration enforcement to the January 6th prosecutions to national security—are unprecedented. Further, on February 10, 2025, President Trump signed an Executive Order pausing enforcement of the Foreign Corrupt Practices Act ("FCPA"). These developments foreshadow significant changes to the DOJ's corporate criminal priorities. Outlined below are five predictions about the effect of the Trump administration's new policies.

Prediction One: While criminal FCPA investigations are on pause, FCPA enforcement risks are unlikely to go away.

The FCPA is one of the DOJ's most powerful criminal statutes, which effectively prohibits US-headquartered and US-listed corporations from bribing foreign officials to obtain or retain business. As a result, FCPA prosecutions have been a mainstay of DOJ corporate enforcement strategies under both republican and democratic administrations.

Under the first Trump administration, FCPA violations were a major area of focus. Between 2017 and 2020, the Trump administration brought 132 FCPA cases, which resulted in total penalties of over US\$13 billion for corporate entities.¹

¹ Stanford Law School Foreign Corrupt Practices Act Clearinghouse, *Statistics & Analytics*, <https://fcpa.stanford.edu/statistics-analytics.html> (last visited Feb. 8, 2025).

However, both the Attorney General and President Trump have taken steps to curtail proactive enforcement of the FCPA in the immediate future. The Attorney General first signaled that the second Trump administration will focus less attention on FCPA violations in her memorandum regarding the "Total Elimination of Cartels and Transnational Criminal Organizations," which directs the DOJ's FCPA Unit to "prioritize investigations related to foreign bribery that facilitates the criminal operations of Cartels and TCOs, and shift focus away from investigations and cases that do not involve such a connection."² Subsequently, on February 10, 2025, President Trump signed an Executive Order directing the Attorney General to review guidelines and policies regarding the FCPA and to stop the initiation of any new FCPA investigations or enforcement actions for a period of 180 days, unless the Attorney General authorizes an exception.³ The Executive Order further stated that future FCPA investigations may only be initiated when specifically authorized by the Attorney General.

The Bondi memorandum and the Executive Order suggest that the Trump administration is likely to, at a minimum, significantly curtail the frequency of FCPA investigations and enforcement actions, particularly against US-based companies. The text of the Executive Order and an accompanying White House Fact Sheet make clear that the purpose of Trump's action is to "level [the] playing field" by "eliminating excessive barriers to American commerce abroad."⁴ Thus, it is clear that the administration's current focus is on curtailing "excessive" FCPA enforcement against American companies. However, despite this direction, there are several reasons to believe that even if the overall number of FCPA cases decrease, FCPA prosecution will likely remain an enduring risk for corporations.

First, it is important to note that there are temporal limits on both the Executive Order and the Bondi memorandum. As the Trump administration is currently demonstrating, a new presidential administration can quickly reverse its predecessors' policies, as well as redirect its own. However, the new guidance may prove a temporary reprieve rather than a permanent change. Given that the statute of limitations for FCPA violations is five years—which can be extended to eight years with tolling based on requests for foreign evidence—this policy change does little to mitigate long-term FCPA enforcement risks.

Second, corporate criminal investigations often metastasize and shift focus as additional evidence is discovered. As a result, while the Bondi memorandum suggests that FCPA investigations should focus on cases involving "foreign bribery that facilitates the criminal operations of Cartels and TCOs," evidence of corrupt payments may arise in other investigations. For example, an investigation that begins with a focus on immigration fraud or money laundering might reveal evidence of bribery and corruption. As investigators follow these leads, they may uncover complex schemes that violate the FCPA. Consequently, even if the DOJ deprioritizes FCPA cases, the multifaceted nature of corporate investigations

² Office of the Attorney General, *Memorandum on Total Elimination of Cartels and Transnational Criminal Organizations*, U.S. Department of Justice, (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388546/dl?inline>.

³ President Donald J. Trump, *Executive Order: Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security*, The White House, (Feb. 10, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/pausing-foreign-corrupt-practices-act-enforcement-to-further-american-economic-and-national-security/>.

⁴ *Fact Sheet: President Donald J. Trump Restores American Competitiveness and Security in FCPA Enforcement*, The White House, (Feb. 10, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-restores-american-competitiveness-and-security-in-fcpa-enforcement/>.

means that the DOJ will still likely identify (and may ultimately pursue) FCPA violations.

Third, the DOJ has multiple channels of information about potential FCPA violations which are likely to remain active during the Trump administration. The DOJ often receives tips from whistleblowers seeking rewards for reporting misconduct, anti-corruption enforcement authorities in other countries, and other federal agencies. These sources are likely to continue generating tips regardless of the DOJ's stated pause of FCPA enforcement actions.

Fourth, it is important to remember that the DOJ and the U.S. Securities and Exchange Commission ("SEC") both have jurisdiction to enforce the FCPA. The Executive Order does not direct the SEC, as an independent federal regulatory agency, on how to approach FCPA violations through civil enforcement actions. Therefore, while the SEC may revise its own enforcement priorities (which have yet to be seen), the SEC may continue to bring such cases even if the DOJ declines to focus on corporate FCPA violations.

Fifth, the Executive Order and its associated Fact Sheet leave open the door to FCPA enforcement against non-US companies. As noted, the Executive Order is largely aimed at protecting American enterprises operating abroad by ensuring they are not disadvantaged as compared with foreign competitors. Consequently, in the near future FCPA prosecutions will likely predominantly focus on non-US companies.

Prediction Two: There will be fewer corporate prosecutions related to sanctions and export control violations.

In March 2022, then-Deputy Attorney General Lisa Monaco noted that there had been a "sea change" in DOJ enforcement priorities and that sanctions were "the new FCPA." The DOJ subsequently backed Monaco's announcement with concrete actions by restructuring the Counterintelligence and Export Control Section of the National Security Division.⁵ As part of that restructuring, the DOJ hired an additional 25 prosecutors and appointed a Chief Counsel for Corporate Enforcement.⁶

This expansion, however, has already been reversed by Attorney General Bondi. In Bondi's memorandum regarding charging, plea negotiations, and sentencing, she announced that the National Security Division's Corporate Enforcement Unit is being disbanded. As a result, we expect that there are likely to be fewer criminal investigations related to sanctions and export controls. Further, we expect that the criminal investigations and enforcement actions the Trump administration initiates in this area are likely to relate to China, US-designated terrorists, terrorist organizations, transnational criminal organization and narcotics kingpins, and Iran. In addition, OFAC, under the policy direction of Secretary of State Rubio, may intensify its focus on Cuba and Venezuela-related sanctions violations as well as the above-referenced DOJ priorities.

⁵ U.S. Department of Justice, *Deputy Attorney General Lisa O. Monaco Delivers Keynote Remarks at 2022 GIR Live: Women in Investigations*, (June 16, 2022), <https://www.justice.gov/archives/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-keynote-remarks-2022-gir-live-women>.

⁶ U.S. Department of Justice, *Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime*, (Mar. 2, 2023) <https://www.justice.gov/archives/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>.

Prediction Three: Bank Secrecy Act investigations are likely to remain a focus.

The Bondi memoranda emphasize a focus on eliminating cartels and transnational criminal organizations ("TCOs"). To disrupt the financing of these organizations, the DOJ is likely to maintain focus on violations of the Bank Secrecy Act ("BSA"). The BSA requires financial institutions to maintain AML compliance programs and file reports on cash transactions over US\$10,000 and suspicious activities that may indicate money laundering or other financial crimes. It also prohibits structuring transactions to evade these reporting requirements.

The DOJ has previously prosecuted financial institutions for failing to comply with the BSA in connection with money laundering by cartels and TCOs. For example, in October 2024, the DOJ announced that TD Bank, N.A. and its parent TD Bank US Holding Company were pleading guilty to BSA and money laundering conspiracy violations in connection with TD Bank's failure to maintain an adequate anti-money laundering program.⁷ We expect the DOJ to take similar actions under the Trump administration. In addition, financial institutions could run afoul of the BSA by failing to detect corrupt payments by customers, even if the DOJ de-prioritizes FCPA prosecutions targeting such customers.

Prediction Four: Corporate criminal enforcement will move away from novel legal theories.

The Trump administration has indicated that it wants to significantly trim the federal workforce and aggressively cut costs within government. Further, Attorney General Bondi has already directed the DOJ to provide additional resources for the prosecution of cartels and TCOs. Therefore, DOJ white collar prosecutors are likely to enjoy fewer resources. The Department of Government Efficiency initiative aimed at cutting government spending will likely exacerbate this resource crunch. As a result, fewer personnel will be allocated to white collar crime and there is likely to be a greater emphasis on clear-cut cases of fraud (like scams targeting retail investors) rather than those involving sophisticated market participants. This shift suggests that the DOJ will move away from pursuing more aggressive, novel legal theories against corporate entities. By focusing on well-defined instances of fraud, this approach may result in a more conventional white collar enforcement landscape, with less emphasis on pushing the boundaries of legal interpretations to bring new types of cases.

Prediction Five: There will be a change in DOJ's approach to corporate cooperation.

Changes in administrations often result in shifts in DOJ policies regarding corporate cooperation. These changes are often announced through memoranda from the Deputy Attorney General. In the Biden administration, this took the form of the "Monaco memo," which emphasized the importance of corporate cooperation.⁸ Pursuant to that policy, in order to receive any cooperation credit, a

⁷ U.S. Department of Justice, *TD Bank Pleads Guilty to Bank Secrecy Act and Money Laundering Conspiracy Violations*, (Oct. 10, 2024), <https://www.justice.gov/archives/opa/pr/td-bank-pleads-guilty-bank-secrecy-act-and-money-laundering-conspiracy-violations-18b>.

⁸ Office of the Deputy Attorney General, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group*, U.S. Department of Justice, (Sept. 15, 2022), https://www.justice.gov/d9/pages/attachments/2022/09/15/2022.09.15_ccag_memo.pdf.

corporate defendant needed to "provide all information concerning all persons involved in corporate misconduct." This included identifying all participants in the illegal activity "regardless of their position, status, or seniority, and provide to the Department all nonprivileged information relating to that misconduct." In other words, cooperation credit was an "all or nothing" option.

We expect that the DOJ will move away from this stance. While we do not know precisely what this revised position will look like, we believe that the "Rosenstein memo" from the first Trump administration is likely a good guide. Pursuant to that policy, prosecutors were authorized to give partial cooperation credit to companies that made reasonable efforts to cooperate with the DOJ.⁹ Further, the Rosenstein memo required less self-disclosure as companies only needed to identify individuals who were "substantially involved in or responsible for the misconduct." We expect that the second Trump administration will follow a similar path.

⁹ U.S. Department of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act*, (Nov. 29, 2018), <https://www.justice.gov/archives/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

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