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Regulatory Update

New DOJ FCPA Guidelines Target Cases Linked to US Strategic Interests

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I. Introduction

On June 9, U.S. Deputy Attorney General Todd Blanche issued a memorandum entitled "Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (FCPA)," which establishes guidelines to ensure that FCPA investigations and prosecutions align with President Donald Trump's February 10, 2025 Executive Order 14209 and with Attorney General Pamela Bondi's February 5, 2025 memorandum. Specifically, Blanche emphasized the dual aims of "(1) limiting undue burdens on American companies that operate abroad, and (2) targeting enforcement actions against conduct that directly undermines U.S. national interests." Echoing these themes and the "America First" sentiment of the executive order, one day after Blanche's memorandum, on June 10, the Head of the Criminal Division Matthew Galeotti spoke at the American Conference Institute Conference on Global Anti-Corruption, Ethics & Compliance. His comments emphasized that, with this new guidance now in place, "the Criminal Division will enforce the FCPA — firmly but fairly ... without losing sight of the burdens on American companies that operate globally."

Most notably, Blanche outlined four key but nonexclusive factors for prosecutors to evaluate when determining whether to pursue FCPA investigations and enforcement actions: (1) a connection to cartels or transnational criminal organizations (TCOs); (2) the deprivation of fair access for, or economic injury to, U.S. companies or individuals; (3) a connection to U.S. national security-related sectors; and (4) strong indicia of corrupt intent involving serious misconduct. We discuss each of these in the next section.

Pursuant to the president's instruction in the executive order to assess all existing and closed FCPA matters while developing the approach going forward, the U.S. Department of Justice (DOJ) already has applied the new guidelines to existing FCPA cases and closed roughly half of the pending investigations and enforcement actions deemed not to be in alignment. Accordingly, the guidelines indicate that existing settlement obligations for companies and cases already in court will remain unchanged.

Further, the memorandum states that the assistant attorney general for the Criminal Division must approve all new investigations and enforcement actions, which indicates an increased level of supervision of prosecutors in the Fraud Section's FCPA Unit, where criminal enforcement of the FCPA is based. In addition, news reports indicate that the number of FCPA prosecutors had been reduced by approximately 50%.

Blanche's memorandum generally aligns with Galeotti's May speech on DOJ's white-collar enforcement plan, as discussed in our prior client alert.

II. Key Factors Supporting an FCPA Enforcement Action

The four nonexhaustive factors outlined by Blanche for consideration and focus are:

a. Connection to Cartels or TCOs

On January 20, 2025, President Trump issued an executive order prioritizing the total elimination of cartels and TCOs, designating them as foreign terrorist organizations and threats to U.S. national security. In response, Attorney General Bondi directed DOJ to focus FCPA investigations on foreign bribery cases that directly support the criminal activities of these cartels and TCOs. Now, with this new guidance, Blanche instructed prosecutors to assess whether the misconduct "(1) is associated with the criminal operations of a Cartel or TCO; (2) utilizes money launderers or shell companies that engage in money laundering for Cartels or TCOs; or (3) is linked to employees of state-owned entities or other foreign officials who have received bribes from Cartels or TCOs."

b. Deprivation of Fair Access for, or Resulting in Economic Injury to, US Companies or Individuals

In what will be of great interest to non-U.S. companies subject to the FCPA, Blanche's memorandum discusses the importance of safeguarding fair competition for U.S. companies abroad. This memorandum observes that foreign bribery undermines markets and disadvantages law-abiding American businesses, and that such businesses are essential to U.S. national security and economic prosperity. Accordingly, prosecutors are now instructed to consider whether the misconduct "deprived specific and identifiable U.S. entities of fair access to compete and/or resulted in economic injury to specific and identifiable American companies or individuals." While U.S. companies may under certain circumstances unlawfully undercut the ability of law-abiding U.S. companies to compete fairly, non-U.S. companies may face more exacting scrutiny in connection with this guidance that is meant to safeguard U.S. economic interests.

c. Connection to US National Security-Related Sectors

Also of interest to non-U.S. companies, under Blanche's guidance, DOJ will now prioritize FCPA enforcement against bribery schemes that threaten U.S. national security, particularly those involving critical infrastructure, strategic assets or key industries. Therefore, prosecutors are instructed to consider whether the misconduct involved malfeasance by non-U.S. companies in U.S. national security-related sectors, like defense, intelligence and critical infrastructure.

d. Strong Indicia of Corrupt Intent Involving Serious Misconduct

Going forward, FCPA enforcement also will focus on misconduct "that bears strong indicia of corrupt intent tied to particular individuals, such as substantial bribe payments, proven and sophisticated efforts to conceal bribe payments, fraudulent conduct in furtherance of the bribery scheme, and efforts to obstruct justice." Investigations will not target "routine business practices or the type of corporate conduct that involves de minimis or low-dollar, generally accepted business courtesies." In this context, Blanche specifically emphasized the FCPA's exclusion of facilitation payments and bona fide payments that are lawful under the written laws of foreign countries. How exactly these discreet and long-understood provisions of the statute will be interpreted going forward remains to be seen. Additionally, prosecutors are instructed to consider whether foreign authorities are likely to effectively investigate and prosecute the misconduct before pursuing a U.S.-based FCPA enforcement action.

III. Key Takeaways:

Given the inherent flexibility in the articulated factors, together with the ongoing development of policy and framework, a firm understanding of the impact of these developments naturally will have to be borne out in enforcement going forward. However, from the executive order through the various speeches and announcements and Blanche's memorandum, certain key themes and takeaways appear to be emerging:

- **Non-U.S. companies face increased exposure from DOJ.** The memorandum focuses FCPA enforcement actions on cases that protect U.S. interests, companies and entities, amplifying the risk for non-U.S. companies. The memorandum caveats that DOJ will not target "particular individuals or companies on the basis of their nationality," perhaps in an effort to harmonize with Article 5 of the OECD Anti-Bribery Convention. At the same time, a footnote comments that "the most blatant bribery schemes have historically been committed by foreign companies," making clear that DOJ views non-U.S. actors as most likely to be responsible for "disadvantag[ing] law-abiding U.S. companies."

  In addition, Blanche's memorandum, when coupled with the Criminal Division's recent updates to the Corporate Enforcement Policy emphasizing greater opportunities for declinations based on voluntary self-disclosures and full cooperation, may create new opportunities for U.S. companies to mitigate risk. If a U.S. company perceives less risk of prosecution, it may be even more comfortable self-disclosing its own potential FCPA violation. This may be particularly true for publicly traded U.S. companies that are subject to civil FCPA enforcement risk by the Securities and Exchange Commission (SEC) and whose outside auditors remain bound by Section 10A of the Securities and Exchange Act to report to the SEC illegal acts discovered during an audit that have a material impact on the company's financial statements.

- **U.S. companies may face increased exposure from non-U.S. enforcement authorities**. Although historically DOJ has focused much of its enforcement efforts on non-U.S. companies — nine of the ten largest FCPA criminal resolutions involved foreign corporations, after all — the Blanche memorandum supports a conclusion that this focus will shift even further outside of the United States. This, in turn, raises the question of whether authorities outside the United States will return the favor by focusing their enforcement efforts on the activities of U.S. companies. Although leaders of the recently established U.K./French/Swiss International Anti-Corruption Prosecutorial Taskforce expressly rejected a suggestion that it was created as a reaction to executive order 14209, the pressure on these actors may increase depending on DOJ's enforcement activity. It remains to be seen what effect a more U.S. interests-focused approach will have on multijurisdictional investigations and prosecutions: Will a more U.S.-centric approach by the U.S. reduce the appetite of other jurisdictions to enter into coordinated resolutions with the U.S.? It also remains to be seen what the second order effects of Blanche's memorandum will be, but there is certainly the risk that — at the end of the day — U.S. companies may in fact face greater enforcement in more jurisdictions.

- **Non-U.S. companies in strategic markets and industries should take note.** DOJ may also focus on companies in or doing business with third parties in "strategic industries," including critical life sciences, minerals, key infrastructure, defense and intelligence. The memorandum quotes President Trump's Executive Order 14209 in saying that "American national security depends ... on the United States and its companies gaining strategic business advantages." There is also a reference to President Trump's National Security Strategy from 2017 on how strategic competitors to the U.S. often exploit corruption and state weakness to extract resources for themselves. It is clear that the Trump administration as a whole has a policy goal of leveling the playing field for U.S. companies to compete in these markets and industries. Companies involved with or adjacent to the defense, aerospace, artificial intelligence, mining and minerals, life sciences and critical infrastructure industries should pay particular attention to their

heightened FCPA risks. As with the first factor, this emphasis will raise the risks for non-U.S. companies who may be seen as competing (unfairly) with their U.S. counterparts.

- **DOJ will focus on the most serious bribery cases.** Prosecutors will prioritize substantial and serious bribery violations over misconduct involving "routine business practices" or low-value generally accepted courtesies. This does not mark a radical shift in practice, as a review of DOJ's recent corporate FCPA resolutions confirms that the agency has historically declined to prosecute cases involving insignificant misconduct and instead has generally focused on cases involving high-dollar bribes. Further, the Principles of Federal Prosecution require consideration of the nature and seriousness of the offenses, among other factors.

- **DOJ may not bring FCPA cases based on internal controls violations**. The memorandum states that "prosecutors shall focus on cases in which individuals have engaged in misconduct and not attribute nonspecific malfeasance to corporate structures." This statement appears to indicate that DOJ will no longer bring cases that charge only internal controls and books-and-records violations (i.e., internal structures) without bribery charges. For publicly traded companies subject to the FCPA's accounting provisions, this new guidance could be significant in multiple respects. Historically, the ability to bring a criminal internal controls or books-and-records charge has been a powerful tool used by DOJ where bribery charges may not be available for jurisdictional or other reasons. Companies also have been able to leverage potential internal controls and books-and-records charges as a bargained-for alternative to a more serious bribery charge, for example when the company's cooperation warrants a less serious disposition or where a company may face debarment risk in a foreign jurisdiction based on a bribery charge. Under Blanche's guidance, it appears at first blush that such cases are less likely to be brought, which may mean that companies may be more successful advocating for declinations, where appropriate, rather than agreeing to a lesser charge. Here, the SEC, which typically focuses more on the FCPA's accounting violations, might fill the void. SEC Chair Paul Atkins recently told a concerned lawmaker that the agency was not "directly affected" by the pause on FCPA enforcement ordered by executive order 14209. However, how the SEC will proceed given this new guidance is still an open question.

- **All companies that touch cartels and TCOs are at risk.** Given President Trump's and Attorney General Bondi's previous statements about the clear focus on cartels and TCOs, which were designated as Foreign Terrorist Organizations on the first day of this Trump administration, U.S. and non-U.S. companies alike can expect DOJ to investigate and prosecute potential FCPA cases that include any indication of improper payments to a corrupt foreign official working on behalf of a cartel. This will place a premium on the maintenance of the integrity of supply chains and distribution networks of sprawling multinational companies.

- **DOJ will assess collateral consequences on companies throughout the investigation.** Under the Principles of Federal Prosecution of Business Organizations, DOJ already requires prosecutors to consider the potential collateral consequences of a criminal **disposition** on a corporate defendant. Under these new guidelines, prosecutors now must also consider the collateral consequences of an **investigation** in the first instance, such as potential disruption to companies and employees. Consistent with other recent department guidance, prosecutors are specifically instructed to conduct FCPA investigations efficiently.

IV. How Should Companies Respond?

These new guidelines do not meaningfully change our prior advice (see here and here) from earlier this year on what companies should be doing to mitigate their FCPA enforcement risk.

- **Companies should avoid making hasty decisions that significantly reduce their efforts relating to or attention on FCPA risks.** The FCPA generally carries a statute of limitations of

five years (potentially longer), and a future administration may have different views on these FCPA enforcement priorities. Additionally, none of the new pronouncements from the Trump administration, including Blanche's memorandum, changes underlying U.S. law in any way — bribery remains illegal in the United States and around the world. The memorandum does not address FCPA enforcement by the SEC and, as noted above, none of the administration's pronouncements alter the obligation of auditors of public companies under U.S. securities laws to report violations to the extent those violations have a material effect on a company's financial statements. Multinational companies remain subject to anti-corruption laws in other countries, whose enforcement agencies may increase their anti-corruption efforts. A company's existing representations and warranties regarding legal compliance with laws are unaffected and violations of those representations and warranties can lead to civil liability under loan agreements, M&A transaction documents, business partner arrangements and the like. A perceived reduction in attention to corruption risks could result in greater attention from external auditors, financial institutions and others.

- **Companies should maintain robust ethics and compliance programs and consider recalibration as appropriate.** Our advice for clients is to maintain their existing ethics and compliance programs and related internal controls. The culture of compliance and internal controls that many companies have developed over time, with the investment of significant money and effort, should not be cast aside. A robust compliance culture, and accompanying internal controls, are value-adds to companies in numerous ways, including safeguarding against fraud and embezzlement schemes, ensuring financial discipline, fostering a "speak up" culture that supports robust reporting of allegations of misconduct, maintaining high standards within the workforce and meeting contractual commitments to business partners. A diminished culture and control environment cannot be easily reconstituted, a risk that could present even greater significance should the FCPA enforcement environment change again during a future administration.

  While companies should, of course, always continue to evaluate their compliance and enforcement risk profiles in view of the changing regulatory and enforcement landscape and potentially recalibrate their business and compliance program approaches as needed, this guidance should not be interpreted as a green light to undo the critical compliance efforts undertaken over the many years. Companies should take a fresh look at their compliance programs with an eye to the risk areas flagged by DOJ as priorities (e.g., cartels, TCOs, mining and minerals, life sciences, etc.) to assess how these risk areas intersect with other aspects of their compliance programs (e.g., covering sanctions, money laundering schemes, the need for prompt identification and investigation of allegations to get voluntary disclosure credit). After verifying appropriate program coverage, companies then can adjust their ethics and compliance resources in a more targeted and risk-calibrated way.

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