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Changing Currents In FCPA Enforcement:

Insights from the Trump Era.

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Introduction

The Foreign Corrupt Practices Act ("FCPA") has been one of the most significant drivers of global compliance efforts over the past 20 years. Companies with limited or no connection to the United States frequently were advised to include recitations in contracts where they agreed to obey all relevant anti-bribery and corruption laws "including the Foreign Corrupt Practices Act." Many companies included such clauses even when, under U.S. law, the FCPA could not apply to their conduct (it applies solely to statutorily defined U.S. persons) and the companies had little idea what that reference really meant. For many, the term "FCPA" became a sort of global shorthand for the maxim: "Thou shalt not bribe." Not anyone, not anywhere.

Proponents argued that broad enforcement of the FCPA elevated global compliance standards and led a global fight against corruption. According to this school of thought, all boats would rise with broad punishment of corrupt activities to the betterment of governments everywhere. Other nations and international organizations would enact similar legislation so that this important norm would move in the direction of universal application and enforcement. And indeed, after the passage of the U.S. Foreign Corrupt Practices Act (FCPA) in 1977, the OECD enacted the Anti-Bribery Convention adopted in 46 countries; Latin American countries adopted the Inter-American Convention Against Corruption; the UK enacted the Bribery Act of 2010; and similar legislation was enacted in Spain, Switzerland, France, Australia, Singapore and India.

Few would defend the morality of payments to corrupt rulers and their associates, but critics argued that the law put American companies at a competitive disadvantage, particularly vis-à-vis China and Russia, which have anti-corruption statutes on the books but are widely perceived as enforcing them very selectively. The counter to this view is that transparency and anti-corruption standards are universal norms that promote efficiency and governmental integrity. The solution to differing legal regimes is not, in this view, to level the playing field by giving American companies freedom to bribe.

On the other hand, critics can point to enforcement decisions that made FCPA implementation appear petty and not directed to eliminating significant corruption. Most practitioners can tell stories of sitting in federal prosecutors' offices arguing over whether dinner, golf, and tickets to sporting events—all commonly-accepted business entertainment practices in most parts of the world—constituted corrupt payments. Turning corporate entertainment into felonies was perceived as overkill. Because most companies settled rather than risk the time, expense, and exposure of trial, the U.S. Department of Justice ("DOJ") steadily expanded its unilateral definition of "corrupt practices" unchallenged. To many, FCPA enforcement became a puritanical prohibition of the conferral of any benefit to any person linked to a public figure or state-owned company. The real problem of foreign dictators becoming plutocrats with huge offshore holdings while their people lose the value of development was drowning in a sea of trivia.

THE PAUSE IN ENFORCEMENT

President Donald Trump entered this fray in the first weeks of his second term in office by signing an executive order on February 10, 2025, which paused all FCPA investigations and enforcement actions for a period of 180 days while the DOJ re-aligned its FCPA policies to comport with Mr. Trump's new policy focus. The executive order and comments from the White House stated specifically that the FCPA makes American companies less competitive and that U.S. companies are harmed by FCPA "overenforcement because they are prohibited from engaging in practices common among international competitors, creating an uneven playing field." But the argument was not that the FCPA was being misapplied by focusing on normal corporate entertainment; the Administration was suggesting that bribery of foreign officials was endemic and that US companies were losing out on valuable contracts because they could not make the payoffs that everyone else was making. Consistent with a habitual lack of nuance, Mr. Trump called the FCPA a "horrible law" and said "the world is laughing at us" for enforcing it.
The new directive instructed prosecutors to prioritize foreign bribery investigations that focus on bribery relating to cartels and transnational terrorist organizations, such as bribery of foreign officials to facilitate human smuggling and the trafficking of narcotics and firearms. While there is certainly bribery attendant to these cartels, the connection to U.S. citizens is doubtful, and there are other, effective criminal tools for dealing with these

important priorities. What the Executive Order was signaling was that the FCPA would be an adjunct to cartel enforcement, as opposed to commercial misconduct, vastly reducing the use of FCPA as a prosecutorial tool for deterring bribery of foreign politicians.

POST-PAUSE GUIDANCE

More recently, on June 9, 2025, Deputy Attorney General Todd Blanche issued new guidance for FCPA enforcement in the form of "Guidelines for Investigations and Enforcement of the Foreign Corrupt Practice Act (FCPA)" (the "Guidelines"). In commenting on the Guidelines, the head of the DOJ's criminal division, Matthew Galeotti, stated that "[t]hese Guidelines provide evaluation criteria and a non-exhaustive list of factors to balance when deciding whether to pursue an FCPA case." He maintained that "the Criminal Division will enforce the FCPA — firmly but fairly — by bringing enforcement actions against conduct that directly undermines U.S. national interests without losing sight of the burdens on American companies that operate globally." The new guidance is solidly in line with the priorities established in Mr. Trump's Executive Order. What U.S. national interests may be is not specified, but given the interest of the Trump Administration in promoting American business and specifically referencing burdens to American companies that operate abroad, the signal to U.S. companies is that commercial bribery of foreign officials or entities will not be a priority for enforcement; and, to the contrary , the argument that an American company had to "pay to play" would perhaps get significant traction in avoiding FCPA enforcement.

In addition to limiting undue burdens and focusing on conduct that undermine U.S. national interests, the Guidelines provide that FCPA investigations and enforcement action may not be initiated without the authorization of the head of the DOJ's Criminal Division or a more senior DOJ official. This is a departure from other recent directives freeing local U.S. Attorney's Offices from Main Justice oversight and will likely enable DOJ's senior leadership to provide a high-level political review of proposed FCPA targets *before* any investigation is launched. Companies that are politically connected or deemed crucial to U.S. national security or economic interests may well have opportunity to cut off investigations before they are formally contacted by prosecutors (which often triggers reporting obligations for many companies).

The Guidelines provide four non-exhaustive factors that are consistent with the redirection of the FCPA toward cartels and away from ordinary commercial activity:

1. Total Elimination of Cartels and Transnational Criminal Organizations;
2. Safeguarding Fair Opportunities for U.S. Companies;
3. Advancing U.S. National Security; and
4. Prioritizing Investigations of Serious Misconduct.

Tellingly, the focus of prosecutions for corrupt activities will apparently be on misconduct that deprives "specific and identifiable U.S. entities of fair access to compete and/or result[s] in economic injury to specific and identifiable American companies or individuals." The memo also makes note of the recently-enacted (December 2023) Foreign Extortion Prevention Act, 18 U.S.C. § 1352, by directing U.S. prosecutors to consider whether specific and identifiable U.S. entities or individuals have been harmed by foreign officials' demands for bribes.

The emphasis on harm to US companies from foreign bribery schemes would essentially turn FCPA enforcement on its head. It suggests the U.S. will prosecute *foreign officials* for demanding bribes but will also allow U.S. companies to pay bribes if it is in the U.S. national interest to do so.

COMPANIES AND INDIVIDUALS

Another major change lies in how the Guidance treats individuals and companies: "Effective today, prosecutors shall focus on cases in which individuals have engaged in criminal misconduct and not attribute nonspecific malfeasance to corporate structures; proceed as expeditiously as possible in their investigations; and consider collateral consequences, such as the potential disruption to lawful business and the impact on a company's employees, throughout an investigation, not only at the resolution phase."

In the past, DOJ policy was to investigate and prosecute both companies and individuals, and to consider collateral consequences only at the resolution phase. Successive generations of DOJ policy memoranda emphasized the importance of self-reporting and cooperation, allowing the DOJ to

leverage a company's own resources to engage outside counsel (usually former federal prosecutors) and private due diligence firms (usually former federal agents) to conduct internal investigations and turn the results over to the government. If companies cooperated fully, then at the end of the investigation, they might be granted a deferred prosecution agreement in lieu of a guilty plea. The investigations could run into tens of millions of dollars with subsequent fines eclipsing those amounts.

Now, under the Guidelines, the focus is on individuals, not companies, and collateral consequence considerations will be brought into play at a much earlier phase. In addition, the statement that DOJ will not attribute "nonspecific malfeasance" against companies is also telling. While every iteration of policy memoranda by successive Deputy Attorneys General for at least the past ten years has emphasized the importance of prosecutions of responsible individuals, this is the first memorandum to question the underlying concept of collective responsibility of the corporate entity itself. Taken with other policy directives, the Guidelines suggests a new paradigm in which the misconduct of relatively low-level employees—for example, the "bagmen" who make the pay-offs—will be prosecuted, but that misconduct will not be attributed to a corporation in the absence of some "[]specific malfeasance" that can be attributed to a corporation itself.

The question of when "nonspecific" becomes "specific" "malfeasance," attributable to a company, is one of the more important unknowns as enforcement in this Trump Administration takes shape. For example, to what extent will actionable malfeasance include generalized policy and compliance shortcomings? The Guidelines do not provide real guidance on such important issues.

IMPACT OF THE GUIDELINES

The "proof of the pudding," as they say, is in the eating. We have already seen some of the impact of the change in policy. In his first weeks in office, Mr. Trump disbanded the kleptocracy task force, a Biden-era task force focused on capturing assets of Russian oligarchs to then be used to fund Ukraine in its fight against Russian aggression. FCPA matters were previously handled by a specialized unit within the DOJ Frauds Section. According to Reuters, that unit has been cut from 32 prosecutors in January 2025 to just 15 today.

According to a report from the American Bar Association's Criminal Justice Section, at the time of the "pause," the DOJ had four cases pending trial that were then reviewed during the pause period. Following the review, the DOJ announced its intention to move forward with three of the cases and dismissed the fourth.

In *United States v. Bautista, et al*., (S.D. Fla. No. 24-cr-20343), three executives of the voting machine company Smartmatic were indicted on allegations that they paid over $1 million in bribes to the former chairman of the Philippines election commission to obtain and retain contracts relating to Philippines election machines and election services. Smartmatic was the company accused of using its software to shift votes to affect the outcome of the 2020 election. The accusations were not substantiated. In light of President Trump's interest in and hostility toward this company, it was not a surprise when the case was cleared to proceed to trial, which is scheduled for April 2026..

Also moving forward is *United States v. Hobson*, (W.D. Pa. No. 22-cr-86), in which Hobson, an executive at a Pennsylvania coal company, was alleged to have paid bribes to officials at an Egyptian state-controlled company to obtain roughly $143 million in coal contracts from the Egyptian company. The indictment also alleges that Hobson conspired to secretly receive a portion of the commissions on these contracts as kickbacks. This suggests that certain pure commercial bribery cases will be pursued. Trial is scheduled for February 2026.

In the third case to clear the "pause and review" process, *United States v. Zaglin, et al*., (S.D. Fla. No. 23-cr-20454), the owner of a Georgia-based manufacturer of law enforcement uniforms was alleged to have paid Honduran government officials $166,000 in bribes to secure contracts worth over $10 million to supply police uniforms to the Honduran federal police. In its opposition to a motion to dismiss, the government argued inter alia that Zaglin was not competing with foreign companies with respect to the contracts but rather was competing with American companies. **.** Two of the codefendants in this case pled guilty; defendant Zaglin is scheduled to go to trial in September 2025.

The fourth case, which was dismissed, was *United States v. Coburn et al.* (D.N.J. No. 19-cr-00120). The DOJ dismissed this case without comment, so the grounds for dismissal and the justification under the new Guidelines are difficult to discern. The 2019 indictment alleged that the two defendants, executives at a company called Cognizant, paid a $2 million bribe to an Indian official to expedite a construction permit for a building in India.

The basis for the varying treatment of these cases is not clear. The dismissed case, *Coburn*, was a very old indictment that some reports say had been mired in difficulties. Certainly, the fact that the case had been pending without trial for 6 years suggests there were difficulties with the case. None of the others invoke particular U.S. interests, and all are fairly straightforward corruption cases (with the exception of *Bautista*, which involves the Smartmatic election machine company and thus has a political aspect).

More recent cases also provide insight into DOJ perspective on FCPA. On August 7, 2025, DOJ issued a declination of prosecution involving insurance company Liberty Mutual. In avoiding prosecution, the global insurance company agreed to accept responsibility and disgorge profits (U.S. $4.7 million) realized from a bribery scheme perpetrated by certain employees of its Indian subsidiary. DOJ cited a number of reasons for the declination, including voluntary self-disclosure, a full internal investigation, cooperation with the government, enhancement of compliance controls by the company, and termination of the employees who paid the bribes. Although it is difficult to assess, these are the types of factors that under prior administrations would likely have led to a Deferred Prosecution Agreement, but not a declination. This case sends a clear message, particularly to U.S. companies, on the value of self-reporting.

In another case, on August 11, 2025, the U.S. Attorney for the Southern District of Texas announced charges against two Mexican nationals lawfully residing in the United States, which charges the payment of bribes to officials at Petróleos Mexicanos (PEMEX) the state-owned oil company of Mexico, and one if its subsidiaries. The indictment alleges that the two defendants, Ramon Alexandro Rovirosa Martinez and Mario Alberto Avila Lizarraga, paid bribes to PEMEX officials in exchange for valuable oil-related contracts.
The indictment describes an old-fashioned bribery case. The defendants are accused of providing approximately $150,000 in bribes in the form of luxury

goods, cash payments, and other valuable items to at least three employees of state-owned enterprises in exchange for access to contracts and business. It is the type of case that would have been brought by any DOJ leadership in the past 30 years. The facts of this case do not implicate many of the factors mentioned in the new DOJ guidance, but the case shows DOJ's willingness to bring FCPA cases to address garden-variety foreign corruption.

CONCLUSION

It is difficult to know whether the DOJ will be indicting new cases, at least in the non-cartel context. One open question is how the DOJ will define the term "serious misconduct" in the fourth general criterion set forth in the Guidelines. A distinction can be drawn between cash payments to a corrupt official on the one hand, and business entertainment in the form of dinners and sporting event tickets on the other. If the past criticism was that the DOJ had criminalized routine business conduct to the detriment of U.S. business interests, time will tell whether, under the new guidelines, American companies will have a green light to pay bribes with impunity. Another important question, noted above, concerns when "malfeasance" is so substantial and generalized that a company and not just an individual will be held accountable.

It is abundantly clear that defense counsel should press the argument in FCPA investigations that any acts on the part of defendant companies were undertaken to promote American business interests and to achieve a level playing field with foreign competitors. That argument, formerly "dead on arrival," will likely carry substantial weight under the new guidelines.

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