

Attorney General Bondi's Opening Salvo: Implications for FCPA and Beyond

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AUTHORS

William J. Stellmach | Timothy Heaphy | Soumya Dayananda | Andrew English
Robert J. Meyer | Michael S. Schachter | Sean Sandoloski | William Baxley

On February 5, 2025, just hours after taking the oath of office, Attorney General Pam Bondi signed [14 memoranda](#) outlining the policies and priorities of the Department of Justice (DOJ) under the second Trump administration. In one memo focused on cartels and human trafficking,¹ Attorney General Bondi shed important light on how the Trump administration may seek to use the Foreign Corrupt Practices Act (FCPA).² While much of the Memo describes how the administration will ramp up enforcement of various laws to “eliminate [the] threats” of “cartels and transnational criminal organizations (TCOs) to U.S. sovereignty,” the Memo also indicates that the DOJ under Attorney General Bondi intends to use the FCPA to snuff out narcotics smuggling and human trafficking. Companies and individuals covered by the FCPA will need to evaluate their ongoing business to determine if their dealings may fall in the cross-hairs of the new administration’s enforcement priorities—while remaining mindful that just because certain conduct is not a priority, does not mean that it is not a crime.

¹ Memorandum from the Office of the Attorney General, *Total Elimination of Cartels and Transnational Criminal Organizations* (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388546/dl?inline> [hereinafter the “Memo”].

² 15 U.S.C. § 78dd-1(a), *et seq.*

The FCPA Policy in the Cartel and TCO Memo

The Memo signed by Attorney General Bondi spells out policies and directives for attorneys at the DOJ to charge members of cartels and TCOs. One of the directives in the Memo specifically relates to the enforcement of the FCPA, and instructs that the Criminal Division's FCPA Unit "shall 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 connect."³ The Memo provides as an example "bribery of foreign officials to facilitate human smuggling and the trafficking of narcotics and firearms."⁴ The Memo also suspends portions of the Justice Manual that require all FCPA prosecutions be approved by the Criminal Division, or conducted by Fraud Section attorneys, for matters relating to foreign bribery associated with cartels and TCOs. Below we analyze the potential meaning of the administration's FCPA priorities, and the forecasted impact on FCPA enforcement for the DOJ under Attorney General Bondi.

Analysis of New Administration's FCPA Priorities

While the administration has clearly stated what its priorities will be in enforcing the FCPA, what is *not* clear is what types of activities or business dealings may fall within the perimeter of these priorities.

To start, the FCPA specifically applies to publicly traded companies, U.S. business, nationals and residents, and persons taking action while physically in the United States.⁵ This limits the types of entities and individuals that can be charged with FCPA violations, and necessarily may exclude many of the individuals or their businesses which may be implicated in cartel or TCO activities. For example, while it may be the case that certain drug kingpins or human traffickers pay bribes to government officials—or operate legitimate or illegitimate businesses which pay bribes to government officials—these kingpins and their businesses likely would not fall within the categories of covered persons or entities under the FCPA. Joaquín "El Chapo" Guzmán Loera himself likely could not be prosecuted under the FCPA, even under the Memo's priorities.⁶

Further, cartels and TCO activity may also not easily be covered by the FCPA because the statute only applies to improper payments made "in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person."⁷ While the activities of cartels and TCOs may take the form of illicit business dealings, it is not clear if such dealings would be covered by the FCPA. *United States v. Kay* is instructive.⁸ The opinion includes a lengthy discussion of whether bribing another individual to lower taxes could be considered "obtaining or retaining business" for purposes of the FCPA, but each of the points of analysis seems to relate to *legal* business dealings, not *illicit* enterprises.⁹ This application of the FCPA to legal business would also appear consistent with the

³ Memo at 4.

⁴ *Id.*

⁵ See 15 U.S.C. § 78dd-1(a), *et seq.*

⁶ See, e.g., Alan Feuer, 'El Chapo' Guzmán Sentenced to Life in Prison, Ending Notorious Criminal Career, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/nyregion/el-chapo-sentencing.html>.

⁷ 15 U.S.C. § 78dd-1(a), *et seq.*

⁸ 359 F.3d 738 (5th Cir. 2004).

⁹ See *id.* at 749 (discussing bidding on contracts, paying bribes to directly obtain contracts with foreign governments, and bribing foreign government officials to lower taxes such that reduced costs of business may allow a more competitive bid for a contract).

legislative history of the FCPA.¹⁰ Therefore it is not clear if a bribe in furtherance of illegal activity (such as narcotics sales or human trafficking) could trigger an FCPA violation.

While we are not aware of any FCPA violations brought under an anti-bribery theory for illicit or illegal business dealings, there may be a possible line of attack for violations under the books and records provision of the FCPA.¹¹ For example, Ericsson pled guilty to violating an FCPA deferred prosecution agreement (DPA) for failing to disclose all factual information and evidence related to other potential violations of the FCPA's anti-bribery or accounting provisions.¹² While Ericsson never explicitly faced FCPA charges over possible bribery payments related to business activities in Iraq, the company's failure to disclose evidence and allegations related to these activities—which activities may or may not have themselves constituted FCPA anti-bribery crimes—amounted to a violation of the DPA. It is therefore possible that the DOJ could use the books and records provisions of the FCPA, which are applicable to issuers and their controlled subsidiaries, to raise charges to target illicit activities (as part of legitimate, covered businesses) that further narcotics dealings and human trafficking. But this specific line of attack remains to be tested.

And finally, one could interpret the Attorney General's guidance to lead to enhanced scrutiny of conduct taking place in jurisdictions that the Administration believes are not doing enough to combat cartels and TCOs—even if bribes are not being paid directly to the governments of those jurisdictions—on the theory that money paid to those governments may be otherwise used to facilitate cartels and TCOs.

Broader Context: Enforcement of the FCPA under Second Trump Administration

Overall, it remains to be seen if the FCPA will be a focus for the DOJ under Attorney General Bondi. Facially, the Memo gives no indication that the FCPA is going anywhere anytime soon. We note that the Memo only directs DOJ attorneys to “prioritize” certain investigations and “shift *focus* away” from other investigations that are not relevant to narcotics smuggling and human trafficking. On its face, the Memorandum does not signal a wholesale retreat from non-narcotics, non-trafficking FCPA cases. And if the number of cases qualifying for priority status under the Memo proves insufficient, then it remains a very real possibility that enforcement remains static.

Further, if past is prologue, FCPA enforcement may continue unabated during this administration. Enforcement of FCPA seemingly reached its high-water mark under President Trump, and certainly eclipsed FCPA enforcement in

¹⁰ See, e.g., Omnibus Trade and Competitiveness Act of 1988, H. Conf. Rep. No. 576, 100th Cong., 2d Sess. 918 (Apr. 20, 1988) (“The Conferees wish to make clear that the reference to corrupt payments for ‘retaining business’ in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment.”).

¹¹ See 15 U.S.C. § 78m.

¹² See *Ericsson to Plead Guilty and Pay Over \$206M Following Breach of 2019 FCPA Deferred Prosecution Agreement*, U.S. DEP'T JUSTICE (Mar. 2, 2023), <https://www.justice.gov/archives/opa/pr/ericsson-plead-guilty-and-pay-over-206m-following-breach-2019-fcpa-deferred-prosecution>.

the Biden Administration.¹³ And of course, the DOJ (and SEC) whistleblower programs remain intact and will continue to be a source of FCPA related leads.

Accordingly, companies and individuals operating abroad should assess their potential risks, and be mindful that even if potential misconduct is unrelated to cartels or TCOs, it still could violate the FCPA. And the statute of limitations for a violation is five years, meaning any conduct occurring during the next four years very much remains a risk factor.

For questions or consultation, please reach out to one of the lawyers on our team listed below.

William J. Stellmach

202 303 1130
wstellmach@willkie.com

Timothy Heaphy

202 303 1068
theaphy@willkie.com

Soumya Dayananda

202 303 1312
sdayananda@willkie.com

Andrew English

202 303 1186
aenglish@willkie.com

Robert J. Meyer

202 303 1123
rmeyer@willkie.com

Michael S. Schachter

212 728 8102
mschachter@willkie.com

Sean Sandoloski

202 303 1047
ssandoloski@willkie.com

William Baxley

202 303 1019
wbaxley@willkie.com



BRUSSELS CHICAGO DALLAS FRANKFURT HOUSTON LONDON LOS ANGELES MILAN
MUNICH NEW YORK PALO ALTO PARIS ROME SAN FRANCISCO WASHINGTON

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¹³ See *Total and Average Sanctions Imposed on Entity Groups per Year*, STANFORD FCPA CLEARINGHOUSE, <https://fcpa.stanford.edu/statistics-analytics.html?tab=2> (last visited Feb. 6, 2025, 12:45 PM) (reporting roughly \$2 million in FCPA sanctions in 2017, \$2.96 million in 2018, \$3.11 million in 2019, and \$5.81 million in 2020).