FCPA Update

A Global Anti-Corruption Newsletter

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Trump Administration Pauses FCPA Enforcement

On February 10, 2025, in an executive order entitled "Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security" (the "Executive Order"), President Trump temporarily suspended much FCPA enforcement activity.[1] This followed a memorandum from Attorney General Pam Bondi dated February 5, 2025 (the "Bondi Memo"), announcing a refocusing of DOJ's FCPA enforcement on bribery involving drug cartels and transnational criminal organizations ("TCOs").[2]

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1. Executive Order, "Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security" (Feb. 10, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/pausing-foreign-corrupt-practices-act-enforcement-to-further-american-economic-and-national-security/.

2. 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.

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The FCPA and its statute of limitations remain unchanged, but the Executive Order paused DOJ's enforcement of the law for 180 days and directed the Attorney General to formulate new policies and guidelines governing such investigations and enforcement. During this 180-day period, DOJ shall: (i) "cease initiation of any new FCPA investigations or enforcement actions," unless the Attorney General grants an exception; (ii) review existing FCPA investigations and enforcement actions and "take appropriate action," which appears to mean aligning investigations or actions with the administration's priorities; and (iii) issue updated FCPA policies and guidelines, "as appropriate." Attorney General Bondi can extend this 180-day review period by an additional 180 days.

According to the Executive Order, after the review period, new FCPA investigations or enforcement actions may be initiated only with the authorization of the Attorney General. Previously, the Chief of the Criminal Division's FCPA Unit, with notice to the Assistant Attorney General overseeing the Criminal Division, could initiate an FCPA investigation. Further, the Bondi Memo authorized U.S. Attorney's Offices to pursue matters related to foreign bribery associated with cartels and TCOs without the FCPA Unit's involvement, requiring only advance notice to the FCPA Unit. Previously, U.S. Attorney's Offices could not initiate FCPA investigations or prosecutions without the FCPA Unit's approval and could pursue such matters only jointly with the FCPA Unit, unlike many other types of investigations and prosecutions.

The Executive Order also instructed the Attorney General, after the review period, to determine whether any "remedial measures" are warranted with respect to past FCPA investigations and enforcement actions, given DOJ's revised policies and guidelines.

The Executive Order and Bondi Memo leave much uncertainty about how FCPA enforcement will evolve over the course of this administration. We offer several observations below, and welcome discussions with our clients and friends regarding implications for their organizations.

- Neither the Executive Order nor the Bondi Memo changes or amends the FCPA or any other law or binding precedent. Legal obligations of companies subject to U.S. jurisdiction remain unchanged.

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- The FCPA's statute of limitations – five years for most offenses and six years for criminal violations of the accounting provisions, subject to tolling of up to three additional years if DOJ pursues evidence through the MLAT process – is likewise unchanged. Companies subject to the FCPA therefore must consider the potential for future revisions to enforcement policies in this administration and the next administration.
- Companies subject to the jurisdiction of the SEC are also subject to its civil FCPA enforcement, which extends to U.S. issuers and foreign issuers with ADRs that trade on a U.S. exchange or that trade in the OTC market but have SEC reporting obligations. The Executive Order does not, by its terms, impose the pause on the SEC's FCPA enforcement, though it is possible, and may be likely, that the SEC would introduce a similar pause to reorient its enforcement priorities.
- According to the Executive Order, the pause in FCPA enforcement is motivated by a view that the FCPA places U.S. companies at a disadvantage, especially in the areas of "critical minerals, deep-water ports, or other key infrastructure or assets."

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It is therefore possible that DOJ will prioritize enforcement against non-U.S. companies (which already comprised most of companies charged in recent FCPA enforcement actions), particularly if such companies are perceived as placing their U.S. competitors at an unfair disadvantage. If DOJ makes this a priority, we may see even more aggressive interpretation of FCPA extraterritorial jurisdiction, with prosecutors seeking to pursue non-U.S. companies that have tenuous connections to the United States.

- Aside from the FCPA, there are other important anti-bribery and anti-corruption laws and restrictions that impact companies. Such laws include the UK Bribery Act, France's Sapin II, and Brazil's Anti-Corruption Law, as well as U.S. federal and state laws, such as anti-money laundering laws that previously have been used in conjunction with the FCPA.

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- Companies' contractual obligations, such as financing covenants, often include extensive anti-corruption obligations the violation of which can have serious commercial consequences.
- And, of course, many companies' own compliance policies and programs address permissible and impermissible conduct, including with respect to bribery and other forms of corruption. Indeed, companies should consider reminding employees, especially local management in high-risk jurisdictions, that corporate compliance policies continue to apply, and invite them to raise any questions or issues that may arise.

Given the uncertainty introduced by the Executive Order and the Bondi Memo, companies should consider carefully their implications for their business activities.

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U.S. Antiboycott Laws and Their Enforcement Under the Trump Administration

U.S. antiboycott regulations, which seek to counteract boycotts of Israel by non-U.S. governments, have received greater attention in the last several years as a result of geopolitical events and, more recently, the change of administration in the United States. In December 2024, the U.S. House of Representatives introduced Resolution 10445 to enhance antiboycott regulations by requiring the Bureau of Industry and Security ("BIS") of the U.S. Department of Commerce to report to Congress on its efforts to counter foreign boycotts of Israel. The proposed legislation would also extend the statute of limitations for antiboycott violations to 10 years, aligning it with similar recent changes applicable to violations of most U.S. sanctions.

This followed earlier efforts of the Biden Administration to enhance antiboycott enforcement by BIS. In particular, between 2022 and 2024, BIS implemented several policy changes to promote the enforcement of antiboycott laws, including increased penalties, heightened scrutiny of foreign subsidiaries of U.S. companies, and public disclosure of the so-called "known boycotter" list of entities that have made boycott requests to U.S. companies.

Whether or not these changes are enacted, however, increased enforcement of U.S. antiboycott regulations is likely, given that the Trump administration has expressed strong support for stricter measures against efforts to isolate Israel.

Antiboycott regulations have been in force since the 1970s, with BIS and the U.S. Department of Treasury's Internal Revenue Service ("IRS") each administering relevant restrictions. BIS's regulations, found in the Export Administration Regulations ("EAR"), prohibit U.S. companies and their controlled subsidiaries from complying with unsanctioned foreign boycotts, whereas the IRS's regulations aim to discourage such compliance by threatening tax penalties. Both BIS and IRS require reporting requests related to participation in unsanctioned boycotts.

This article focuses primarily on the antiboycott regulations administered by BIS, with a brief overview of the IRS requirements.

BIS Antiboycott Regulations

BIS's regulations apply to "U.S. persons" conducting activities in the interstate or foreign commerce of the United States. U.S. persons include entities formed under U.S. law and foreign entities that are "controlled in fact" by U.S. entities, which in

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practice includes majority-owned subsidiaries of U.S. companies. Activities in the U.S. interstate or foreign commerce are broadly defined to include most commercial transactions, such as transfer of goods, services, and information involving the United States, and generally would describe dealings between a U.S. and non-U.S. affiliate. Transactions between a U.S. company's foreign subsidiary and a foreign company may also be covered so long as they involve goods or services acquired from a U.S. person. However, "ancillary services," such as financial, accounting, and other back-office services that a U.S. parent company may provide to its subsidiary, are insufficient in and of themselves to bring a transaction within the scope of BIS's antiboycott regulations.

Prohibition on Compliance with or Support of a Foreign Boycott of Israel

The regulations prohibit "complying with or supporting" an unauthorized foreign boycott. Although the regulations are not country-specific and do not mention Israel, in practice they have been applied only in connection with boycotts of Israel by foreign governments and not with respect to any other foreign embargoes or boycotts. A variety of conduct can be deemed "compliance" or "support" of an unauthorized embargo, but violations most commonly arise from (1) agreeing not to do business with or in Israel or with Israelis or Israeli companies, (2) furnishing or agreeing to furnish information about business relationships with Israel, Israelis, or Israeli companies or (3) providing negative certifications about the origin of goods imported into an embargoing country (i.e., these goods are not of Israeli origin).

This means that signing a contract that contains a requirement that no goods or services of Israeli origin can be used in connection with its execution, regardless of whether the U.S. person has any intention of complying with that clause, or whether Israeli-origin goods or services were even contemplated in connection with the contract, may be a violation of U.S. antiboycott regulations. A prohibited agreement not to do business with Israel can also include accepting a contract clause that requires compliance with a foreign country's boycott laws (assuming that includes a boycott of Israel).

Actions that do not involve a formal agreement can also risk running afoul of the antiboycott regulations. For example, a U.S. company can violate the regulations if it typically uses an Israeli service provider for a particular purpose but decides to use a different provider for a transaction with a company located in a country that boycotts Israel (where that decision was made, at least in part, for boycotting purposes).

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A U.S. person also risks violating the regulations if it furnishes certain information about its business or employees, including during contract negotiations, such as information about its operations in or business with Israel. In fact, antiboycott prohibitions may be triggered even if the U.S. person provides inaccurate information in response to the request – such as stating in a questionnaire that it does not do business with Israeli companies when in fact it does and has no intention of discontinuing those dealings.

BIS's antiboycott regulations do contain an intent requirement, but "intent" is defined broadly and can be inferred from circumstantial evidence. As explained by BIS in its guidance, a U.S. person is deemed to act with requisite intent if it takes an action (e.g., by furnishing requested information) knowing that this action was requested at least in part for boycott-related reasons.

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The regulations contain several exceptions to their otherwise broad prohibitions, including for the provision of so-called "positive certificates of origin" that indicate the country of origin of the goods – as opposed to negative certificates of origin, which state that the goods were *not* made in a particular country, i.e., Israel. Another exception allows U.S. persons to comply with import requirements of countries that restrict the imports of Israeli-origin goods. But these exceptions are written and interpreted narrowly and should be carefully analyzed in the context of the specific scenario at hand.

Reporting Requirement

Crucially, in addition to the substantive obligation not to comply with or support a foreign boycott of Israel, BIS's antiboycott regulations require U.S. persons to report to BIS any request they receive to comply with or support such a boycott, regardless of whether the U.S. person takes any steps to comply that request.

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BIS can and does impose penalties on companies for failing to report a boycott request, which may be separate or in conjunction with penalties for agreeing to comply with or support a boycott, and each unreported boycott request constitutes a separate violation.

In 2023, BIS imposed a civil penalty on a Dubai subsidiary of a U.S. company for 84 violations of antiboycott reporting requirements, one violation for each of the 84 purchase orders the subsidiary received from a Saudi customer over the course of four years. Each purchase order included either a requirement that "no Israeli products/components are allowed to enter/import into the Kingdom" or a requirement that the supplier comply with the Gulf Cooperation Council customs law, including its prohibition on the import of Israeli-origin goods. The case highlights the importance of reporting boycott requests even if the company does not respond to them.

There are limited exceptions to the reporting requirement, including for unsolicited requests for proposal to which the company does not respond, but overall, the reporting obligation is – by design – broader than the substantive obligation not to comply with a foreign boycott. For example, a violation of the reporting requirement does not require intent, since the obligation to report can be triggered upon receipt of the request, regardless of the action that a U.S. person takes, or does not take, in response.

IRS Antiboycott Regulations

IRS's antiboycott regulations have a different scope than BIS's – broader in some ways but more limited in others. They focus on business activity involving specific listed countries – currently Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, and Yemen – and they define "compliance with a foreign boycott" more narrowly than the BIS regulations.

That said, IRS reporting obligations are broader than BIS's, arguably requiring disclosure of all business activity involving or related to the listed countries. U.S. taxpayers with operations "in or related to" a listed boycotting country are required to file an annual report disclosing their operations in that country, in addition to disclosing any participation in or cooperation with a foreign boycott of Israel or a request to do so.

Under the IRS regulations, participating in or cooperating with a boycott can result in significant tax consequences, including the loss of foreign tax credits, deferral options, and exemptions on certain types of income.

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Considerations for Companies

Given the breadth and complexity of the U.S. antiboycott regulations, U.S. headquartered companies should consider, if they have not already, adopting risk-based antiboycott compliance programs that include training their global employees to identify potential boycott requests and escalate them to the company's legal and compliance teams for further assessment and action. The strict timelines for reporting boycott requests contained in the BIS regulations make it particularly important to ensure that such escalation happens expeditiously and gives legal and compliance sufficient time to assess the situation and make a report, if needed.

U.S. companies should be aware that these issues can be found in numerous jurisdictions, particularly in the Middle East, North Africa and parts of South Asia. However, unlike the IRS, BIS does not provide a list of jurisdictions that maintain boycotts of Israel and therefore it is not possible to focus the review on a defined list of countries. Rather, the list of known boycott requesters published on the BIS website includes companies located in a wide range of jurisdictions. Nevertheless, certain countries – in particular those on the IRS list – present higher risks, and business with those jurisdictions may warrant additional scrutiny under risk-based approaches to antiboycott compliance.

Finally, relevant employees should understand that boycott requests can come in many forms and in a variety of contexts – contracts, tender documents, due diligence questionnaires, shipping instructions, purchase orders, and email or verbal communications. Although there is no specific form that a request needs to take to be a problematic request, they are likely to mention Israel by name or allude to boycott or embargo laws of a foreign country.

Although antiboycott regulations have not seen the same spotlight in recent years as sanctions and export controls, that may change rapidly under the new administration, and companies should consider whether their existing policies and procedures are adequate to address these risks.

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