

THE JOURNAL OF FEDERAL AGENCY ACTION

Editor's Note: Limits

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Limits of the International Emergency Economic Powers Act's Designation Authority

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New Department of Justice Guidelines: The FCPA Has Survived ... But Not Without a Dent

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Tariff Evasion Is Within Justice Department's Crosshairs: Potential Criminal and Civil Consequences for Noncompliance With Increased U.S. Tariffs

Kristin Graham Koehler, Ted Murphy, Craig Francis Dukin, and Aaron M. Applebaum

U.S. Export Controls on "AI Diffusion" Officially Paused, But New Guidance Elevates Risk for AI-Related Exports

Joshua A. Geltzer, Neena Shenai, Barry J. Hurewitz, Hilary A. Hurd, Heather E. Hedges, Sydney J. Warren, Shervin Z. Taheran, and Jarrod R. Carman

Federal Trade Commission's Robinson-Patman Case Against Pepsi Goes Flat. Will Its Push for Robinson-Patman Act Enforcement Fizzle Out?

Sonia Kuester Pfaffenroth, Matthew Tabas, Wilson D. Mudge, and Annette Cremata Day

Federal Trade Commission and Department of Justice Weigh in on the Applicability of Antitrust Laws to Environmental, Social, and Governance Initiatives

Andre Geverola, Sonia Kuester Pfaffenroth, and Javier Ortega Alvarez

Securities and Exchange Commission's EDGAR Next Filer Management System Is Here

Darrick M. Mix and J. Blake Hovander

The Journal of Federal Agency Action

Volume 3, No. 6 | November–December 2025

- 399 Editor’s Note: Limits**
Victoria Prussen Spears
- 403 Limits of the International Emergency Economic Powers Act’s Designation Authority**
Michelle Nicole Diamond, Joshua A. Geltzer, Zachary Goldman, Matthew G. Olsen, Susan J. Hennessey, Amy Gopinathan, Joshua L. Mogil, and Annaka M. Merrick
- 413 New Department of Justice Guidelines: The FCPA Has Survived ... But Not Without a Dent**
Wifredo A. Ferrer and Marcelo Ovejero
- 419 Tariff Evasion Is Within Justice Department’s Crosshairs: Potential Criminal and Civil Consequences for Noncompliance With Increased U.S. Tariffs**
Kristin Graham Koehler, Ted Murphy, Craig Francis Dukin, and Aaron M. Applebaum
- 427 U.S. Export Controls on “AI Diffusion” Officially Paused, But New Guidance Elevates Risk for AI-Related Exports**
Joshua A. Geltzer, Neena Shenai, Barry J. Hurewitz, Hilary A. Hurd, Heather E. Hedges, Sydney J. Warren, Shervin Z. Taheran, and Jarrod R. Carman
- 433 Federal Trade Commission’s Robinson-Patman Case Against Pepsi Goes Flat. Will Its Push for Robinson-Patman Act Enforcement Fizzle Out?**
Sonia Kuester Pfaffenroth, Matthew Tabas, Wilson D. Mudge, and Annette Cremata Day
- 441 Federal Trade Commission and Department of Justice Weigh in on the Applicability of Antitrust Laws to Environmental, Social, and Governance Initiatives**
Andre Geverola, Sonia Kuester Pfaffenroth, and Javier Ortega Alvarez
- 447 Securities and Exchange Commission’s EDGAR Next Filer Management System Is Here**
Darrick M. Mix and J. Blake Hovander

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New Department of Justice Guidelines: The FCPA Has Survived . . . But Not Without a Dent

Wifredo A. Ferrer and Marcelo Ovejero*

In this article, the authors examine the Department of Justice's newly issued Foreign Corrupt Practices Act (FCPA) guidelines, which reflect a strategic shift in U.S. anti-corruption enforcement under the Trump administration. Additionally, the authors explore how the guidelines prioritize national security, economic competitiveness, and prosecutorial discretion, reshaping the FCPA into a tool for advancing American interests abroad. With practical insights for companies and legal practitioners alike, the authors highlight both the risks and opportunities presented by this recalibrated enforcement landscape.

In a significant recalibration of U.S. anti-corruption enforcement, the Department of Justice (DOJ) has issued new guidelines under the Foreign Corrupt Practices Act (FCPA) that reflect the Trump administration's evolving priorities. The June 9, 2025, memorandum—issued in response to President Donald Trump's Executive Order 14209, which paused all FCPA enforcement for 180 days and instructed DOJ to issue guidelines—directs prosecutors to consider four primary factors when evaluating whether to investigate and pursue FCPA cases.¹ These factors collectively signal a strategic pivot, aligning enforcement more closely with national security, economic competitiveness, and prosecutorial efficiency. This shift does not abandon the FCPA's traditional anti-bribery goals, but it does narrow the scope of enforcement to cases that intersect with broader American interests.

Cracking Down on Cartel-Linked Corruption

The first factor instructs prosecutors to prioritize cases where bribery facilitates the operations of cartels and transnational criminal organizations, including those involving money laundering

networks or foreign officials receiving bribes on behalf of cartels. This approach reflects a broader federal strategy to dismantle organized crime, as outlined in early executive actions by President Trump and reinforced by a February 5, 2025, memorandum from Attorney General Pam Bondi, in which she directed the DOJ's FCPA Unit to focus on foreign bribery that supports cartel activity.

While this factor reflects a tough-on-crime posture, it also raises questions about the practical application of the FCPA in this context. Historically, the FCPA has been used to prosecute multinational corporations for bribing foreign officials to secure business advantages—not to dismantle drug cartels. Bribery is just one of many crimes committed by cartels, and arguably not the most severe. Cartels are also responsible for murder, extortion, and trafficking—crimes that are more effectively prosecuted under anti-terrorism or organized crime statutes. Indeed, many Latin American cartels have recently been designated as foreign terrorist organizations, allowing the DOJ to pursue them under anti-terrorism laws that carry harsher penalties and broader jurisdictional reach than the FCPA. Thus, while the memo signals an intent to use the FCPA as a tool against cartels, it remains to be seen to what extent this will be done.

Prioritizing U.S. Economic Interests

The second factor may prove even more consequential. The new guidelines requires prosecutors to consider whether alleged misconduct has deprived identifiable American companies or individuals of fair access to compete or caused them economic harm. This reframing of the FCPA aligns with the administration's critique that previous enforcement practices placed U.S. firms at a disadvantage in global markets.

Although the guidelines explicitly state that enforcement decisions should not be based on nationality, the practical effect may be increased scrutiny of foreign competitors. In most countries, there is—at best—only one American company competing for government contracts in one particular industry. Thus, U.S. companies often find themselves competing against foreign entities rather than other American firms. If the DOJ prioritizes cases where U.S. firms were harmed by bribery, foreign companies will naturally become the primary targets of enforcement. As a result, foreign companies operating in high-risk jurisdictions may face heightened exposure,

particularly if they are competing with U.S. firms that may now feel more emboldened to report misconduct by foreign rivals.

Safeguarding National Security Assets

National security considerations also feature prominently in the new guidelines. The third factor urges prosecutors to assess whether the bribery scheme poses a threat to U.S. interests by involving key infrastructure or strategic assets, such as critical minerals, deep-water ports, or energy resources.

This factor reflects growing concern that bribery can be used to divert control of sensitive assets away from U.S. influence and into the hands of adversarial or unstable regimes. For example, DOJ may prioritize cases where foreign firms use bribes to acquire control over rare earth minerals in Ukraine or oil infrastructure in Afghanistan—assets the U.S. government may prefer to see in friendly hands. While FCPA enforcement alone cannot guarantee that American firms will secure such assets, the DOJ appears to believe that a corruption-free environment improves the likelihood of favorable outcomes.

Focusing on Serious Misconduct

The fourth factor outlined in the guidelines emphasizes the importance of focusing on clear and serious misconduct. Prosecutors are instructed to prioritize cases that demonstrate strong corrupt intent, such as those involving substantial bribe payments, sophisticated concealment efforts, fraudulent conduct, or obstruction of justice. Conversely, the DOJ advises against pursuing cases involving minor infractions, such as low-value business courtesies or lesser culpability based on constructive knowledge.

This factor appears to address long-standing concerns in the corporate community about the risk of enforcement for minor or technical violations. While such cases have historically been rare, the DOJ's FCPA Resource Guide has left open the possibility of their prosecution. By explicitly de-emphasizing these cases, the guidelines may offer reassurance to companies that enforcement will focus on serious wrongdoing.

Notably, the fourth factor also introduces a new consideration: the willingness and capacity of foreign law enforcement

to investigate and prosecute the misconduct. This could signal a departure from the DOJ's previous practice of pursuing multi-jurisdictional resolutions, potentially reducing the burden on companies facing parallel investigations in multiple countries.

A Narrower, More Strategic FCPA

Taken together, these four factors suggest a narrower, more strategic approach to FCPA enforcement—one that prioritizes national security, economic competitiveness, and prosecutorial discretion over broad anti-corruption goals. While the memo does not eliminate traditional FCPA enforcement, it clearly signals a shift in focus.

For companies, this means reassessing compliance programs to align with DOJ's new priorities. Firms operating in cartel-heavy regions, competing for strategic assets or facing U.S. competitors should pay particular attention. Proactive risk assessments, enhanced due diligence and robust internal controls will be essential.

For legal practitioners, the memo opens new avenues for advocacy. Defense counsel may now argue that a case lacks the national interest or economic harm required under the new guidelines. Conversely, companies harmed by bribery may find new support in the DOJ for pursuing enforcement against their competitors. The guidelines also provide a clearer framework for evaluating enforcement risk, which may influence decisions around voluntary disclosures and internal investigations.

Ultimately, the guidelines reflect a broader trend in U.S. policy: the use of legal tools to advance strategic national interests. Whether this approach will lead to more effective anti-corruption enforcement—or simply a more politicized one—remains to be seen. What is clear, however, is that the FCPA is no longer just a tool for promoting global business ethics; it is now also a mechanism for advancing American economic and security objectives.

Notes

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1. As DOJ has clarified, the four primary factors are not exhaustive, necessary, or dispositive, which means that there still may be FCPA cases in which the decision to pursue them relies on other factors. But given the guidelines' emphasis on these four factors, cases in which none of them is implicated would be exceptional.