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Cos. Must Assess And Prepare For Cartel-Related FCPA Risks

By **Sandra Moser, Humberto Padilla and Emily Ahdieh** (May 12, 2025, 12:57 PM EDT)

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On Feb. 10, President Donald Trump issued Executive Order No. 14209, temporarily halting the initiation of new Foreign Corrupt Practices Act investigations and enforcement actions.

The executive order also directed Attorney General Pam Bondi to both review existing policies and guidelines governing the U.S. Department of Justice's current approach to FCPA enforcement, and issue updated policies or guidelines within six months.

Only days prior to the president's order, Bondi had issued her own memorandum to the DOJ's FCPA Unit, directing those prosecutors to prioritize the investigation of foreign bribery offenses that facilitate the criminal operations of drug cartels and transnational criminal organizations, or TCOs, and "shift focus away from cases that do not involve such a connection."

Whether a cartel does or does not qualify as an "instrumentality" of a government under current FCPA law or based on the attorney general's forthcoming revised FCPA guidance, cartels' entanglement with corrupt officials and influence over local economies present real and fast-moving legal risks for companies operating in Latin America.

The U.S. administration's focus on cartels and TCOs underscores the importance of integrated compliance frameworks that are proactive, localized and constantly evolving.

While it is yet to be seen what new policies or guidance the DOJ will ultimately issue at the conclusion of the six-month period or prior thereto, the attorney general's directive regarding cartels and TCOs provides a window into at least one probable area of prioritization.

In light of this strong signaling, it is vital for global businesses and their compliance teams to understand and be prepared for what this change in course could mean. This includes considering how — and whether — the FCPA could be brought to bear, assessing what other laws might be applicable to corporations operating in relevant jurisdictions, and refreshing risk assessments given this potential shift in the federal enforcement agenda.

Defining "Instrumentality of a Foreign Government"

The FCPA prohibits, in part, a wide swath of companies and individuals from bribing foreign officials to obtain or retain business or gain some business advantage.

A central question in FCPA enforcement is what constitutes a "foreign official." Under the statute, a foreign official includes officers and employees of entities considered instrumentalities of a foreign government.

There is no bright-line rule to determine whether an entity is considered an "instrumentality of a foreign government" under the FCPA. In making this determination, courts have rejected an approach that is based entirely on the level of ownership by the government of the entity. Instead, courts consider the level of government ownership of the entity as one among several other factors.

Courts and enforcement agencies have interpreted "instrumentality" broadly, encompassing state-owned enterprises as well as entities where the government is not the sole owner or operator, but is nonetheless deemed to have sufficient control. As such, FCPA enforcement actions have not been limited only to cases involving entities that are majority-owned by foreign governments.

The seminal case of U.S. v. Esquenazi provides the definition of "instrumentality." In Esquenazi, the U.S. Court of Appeals for the Eleventh Circuit in 2014 adopted a two-part test, holding that an entity is an instrumentality of a foreign government if it (1) is "controlled by the government of a foreign country," and (2) "performs a function the controlling government treats as its own."[1]

The court identified several nonexhaustive factors relevant to determining whether an entity is controlled by a foreign government, including:

- The "government's formal designation of [the] entity";
- "[W]hether the government has a majority [ownership] interest in the entity";
- "[T]he government's ability to hire and fire the entity's principals"; and
- Whether the government reaps the profits or subsidizes the losses of the entity.[2]

Factors that weigh on whether the entity is "performing a function the government treats as its own" include whether the:

- "[E]ntity has a monopoly over the function it ... carr[ies] out";
- "[G]overnment subsidizes ... the entity";
- "[E]ntity provides services to the public at large"; and
- "[P]ublic and the government ... generally perceive the entity to be performing a governmental function."[3]

Weighing Whether Cartels and TCOs Could Qualify as Government Instrumentalities

In regions where state authority is weak or compromised, cartels and TCOs may effectively operate as de facto authorities that provide security, resolve disputes, impose taxes and control local economies.

In some instances, cartel influence may be so pervasive that the line between government and organized crime becomes blurred. In these circumstances, cartels and TCOs "perform a function the government treats as its own," which aligns these organizations as government instrumentalities, as laid out in Esquenazi.[4]

However, cartels and TCOs are not typically controlled by a government. No U.S. court has yet extended the definition of instrumentality of a foreign government to include a cartel or TCO.[5]

Importantly, the FCPA is designed to deter bribery of government officials; as such, making payments to cartel leaders or intermediaries, however coercive, is generally not an FCPA violation unless the cartel is functioning as an agent of the state, or the payment is routed through public officials.

Other laws — such as anti-money laundering statutes or the Foreign Narcotics Kingpin Designation Act — have traditionally been used to address criminal liability for transactions with cartels and TCOs.

Administration Focus on Cartels and TCOs

The updated FCPA policies and guidelines that the president directed the attorney general to issue may be key to determining whether cartels and TCOs will be considered government instrumentalities. The court in Esquenazi alluded to DOJ FCPA opinions as a viable mechanism for clarifying the FCPA.[6]

Specifically, in discussing the factors relevant to determining whether an entity is an instrumentality under the FCPA, the court noted that "[b]oth courts and businesses subject to the FCPA have readily at hand the tools to conduct that inquiry (especially because the statute contains a mechanism by which the Attorney General will render [advisory] opinions on request about what foreign entities constitute instrumentalities)."[7]

Business Implications and Compliance Risks

Companies operating in Latin America face exposure when navigating environments influenced by organized crime. Whether cartels and TCOs are considered instrumentalities under the FCPA or not, business dealings that involve extortion, facilitation payments or indirect connections to criminal groups pose serious risks.

If a payment is made to a public official at the direction of, or under pressure from, a cartel, FCPA liability may still attach. This can include such things as protection payments or donations. For example, cartels may, and allegedly have, infiltrated governmental bodies from time to time, particularly at the municipal and local levels. Cartels also often control vast amounts of land in Latin American countries, which are often needed for private and public projects.

The combination of cartels and TCOs infiltrating local government and controlling large amounts of land in Latin America provides a breeding ground for situations that run afoul of the FCPA.

Companies may be exposed to liability when securing land rights, construction permits or other government authorizations in regions where cartels and TCOs have influence over public officials. Even transactions that appear legitimate can carry heightened compliance risks if cartel influence is present behind the scenes.

Companies must exercise enhanced due diligence, not only on private counterparties and third-party intermediaries, but also as to the integrity of local government processes and the potential for criminal infiltration.

Payments to cartel-linked entities can also trigger violations of AML regulations or sanctions laws, especially if the recipient appears on the Office of Foreign Assets Control's Specially Designated Nationals list.

Importantly, the administration has recently designated certain cartels and TCOs as foreign terrorist organizations and specially designated global terrorists. Persons that are determined to have engaged knowingly in transactions with designated terrorist organizations or specially designated global terrorists can face criminal charges for providing material support and resources to foreign terrorist organizations.

For example, in 2022, the France-based multinational cement company Lafarge SA and its subsidiary in Syria pled guilty to conspiracy to provide material support to foreign terrorist organizations for making payments to ISIS in order to operate a cement plant in Syria.

Specifically, Lafarge and its subsidiary paid ISIS millions in order to protect their employees, ensure the continued operation of their cement plant in Northern Syria, and obtain advantages over their competitors in the market.

As part of its resolution with the DOJ, Lafarge paid approximately $778 million in fines and forfeiture.

Best Practices for Companies

To mitigate FCPA risk, companies should conduct enhanced due diligence, especially with respect to third parties that may be connected to government officials or instrumentalities of the government.

For example, companies that enter into government contracts are often required under the contract to hire local subcontractors. Companies operating in areas known for cartel influence are particularly at risk of hiring local cartel-related third parties to fulfill their contract requirements.

If companies do not go beyond routine due diligence in assessing third parties, they may unwittingly create exposure to FCPA liability. For this reason, as part of their third-party due diligence, companies should, at the very least, assess a third party's beneficial ownership, political exposure and criminal affiliations.

Given these heightened risks, companies should also establish internal escalation and reporting mechanisms designed to identify and address potential FCPA concerns, including extortion or threats of violence involving public officials.

Legal, security and compliance teams must work together to respond to red flags, and employees and third-party agents must be trained to recognize and report situations that could involve corrupt payments, including subtle coercion or demands for protection money.

Such training and internal controls are critical to help companies detect, respond to and remediate conduct that could give rise to FCPA liability.

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[1] United States v. Esquenazi, 752 F.3d 912, 925-927 (11th Cir. 2014).

[2] Id. at 926.

[3] Id. at 927.

[4] Id. at 926.

[5] The Federal Extortion Prevention Act (FEPA), despite being passed in 2023 as a companion statute to the FCPA to address the demand side of foreign bribery, differs in certain critical respects. While FEPA's definition of "foreign official" largely mirrors that of the FCPA, (1) it notably extends to individuals acting in both official and unofficial capacities for or on behalf of a government, department, agency, instrumentality, or a public international organization, and (2) included within FEPA's definition is a "senior political figure," drawn from federal AML regulations, thereby capturing senior executives of foreign state-owned enterprises.

[6] Esquenazi, 752 F.3d at 925, n.8.

[7] Id.