NEW GUIDELINES ON U.S. FOREIGN CORRUPT PRACTICES ACT (FCPA) ENFORCEMENT: WHAT DO THEY MEAN FOR SWISS COMPANIES?

The FCPA enforcement pause ordered in February 2025 by President Trump is over. The new FCPA enforcement guidelines signal a more targeted enforcement approach by the DOJ, which may potentially be more vigorous than before in focus areas.

Non-U.S. companies, including Swiss companies, are likely to face closer scrutiny than their U.S. peers. This applies especially if U.S. national security interests are implicated or if they compete with U.S. companies, e.g., in the healthcare, commodities, and infrastructure sectors.

Swiss companies are advised to reassess their FCPA enforcement risk profiles carefully against the backdrop of the new focus areas. They should also consider indirect risks from counterparties and acquisition targets. Compliance programs should be updated as needed.

At the same time, Swiss companies should bear in mind that the FCPA itself has not been changed. Enforcement priorities may, however, shift again in the future. This underscores the importance of robust FCPA compliance programs that also cover conduct not in focus today.

To the extent issues arise, careful consideration should be given to self-reporting through the DOJ's voluntary self-disclosure process.

INTRODUCTION

On June 9, 2025, the U.S. Department of Justice (DOJ) issued new guidelines (Guidelines) for investigations and enforcement of the Foreign Corrupt Practices Act (FCPA). They follow President Trump's Executive Order of February 10, 2025 (Executive Order), which initiated a pause in enforcement of the FCPA and called for new FCPA guidelines that "prioritize American interests, American economic competitiveness with respect to other nations, and the efficient use of Federal law enforcement resources". Correspondingly, the Guidelines aim to limit "undue burdens on American companies that operate abroad" and target "enforcement actions against conduct that directly undermines U.S. national interests."

This briefing summarizes the key features of the Guidelines and provides specific commentary on the implications for Swiss companies, as well as some recommendations for action.

KEY FEATURES OF THE NEW FCPA GUIDELINES

UPDATED SUBSTANTIVE ENFORCEMENT PRIORITIES

The Guidelines set out several "factors", or evaluation criteria, for prosecutors to consider when deciding whether to pursue FCPA investigations and enforcement given a specific case:

- Special importance is given to misconduct which: (i) is associated with the criminal operations of Latin American cartels and transnational

criminal organizations (TCOs), such as the Sinaloa Cartel and MS-13; (ii) involves money laundering on behalf of cartels or TCOs; or (iii) is linked to foreign officials who have received bribes from cartels or TCOs. This factor could be of particular relevance for the Anti-Money Laundering processes of Swiss financial service providers, such as banks, asset managers, payment service providers, and cryptocurrency service providers.

- Enforcement will further prioritize cases where misconduct deprived U.S. entities of **fair access to compete** or caused **economic injury to U.S. companies or individuals**. This consideration raises the risk profiles for Swiss companies competing with U.S. companies.

- Another focus for enforcement will be on cases involving corruption in sectors critical to **U.S. national security**, e.g., defense, intelligence, and critical infrastructure. Again, this consideration raises the risk profile for Swiss companies active in those sectors.

- To best advance the priorities listed above, the DOJ will focus on **"serious misconduct"**; i.e., "conduct with strong indicia of corrupt intent tied to particular individuals, such as substantial bribe payments", sophisticated concealment, or fraudulent conduct. On the other hand, misconduct involving "routine business practices" and "de minimis or low-dollar, generally accepted business courtesies" are explicitly de-prioritized.

- In addition, prosecutors are directed to prioritize **cases which foreign authorities are unlikely to be willing and able to investigate and prosecute**. In the context of enforcement against Swiss companies, it might therefore be reasonable to expect more cases where the DOJ would take on a supporting role and leave the lead to the Swiss Attorney General's Office – at least in cases that are not high-priority. Also, Swiss multinationals' indirect exposure to U.S. enforcement will remain through their non-Swiss subsidiaries (where compliance weaknesses tend to occur more often than with their Swiss parents) – at least to the extent that such subsidiaries are outside of the Swiss Attorney General Office's territorial jurisdiction and the local authorities do not enforce either.

The current head of the Criminal Division of the DOJ, Matthew R. Galeotti, noted in a recent speech accompanying the publication of the Guidelines that "no one factor is necessary or dispositive", and the Guidelines themselves note that the factors are "non-exclusive", making it clear that the above-listed factors – as well as additional ones – are to be weighed on a case-by-case basis.

SOME PROCEDURAL CHANGES

The Guidelines also establish some procedural changes:

- All new FCPA investigations and enforcement actions must now be **centrally authorized** by the Assistant Attorney General for the Criminal Division or a more senior DOJ official (rather than the DOJ's FCPA Unit in the Criminal Division's Fraud Section; the FCPA Unit will however continue to run investigations).

- Prosecutors must consider **"collateral consequences"**, such as the potential disruption to lawful business and its impact on employees – "throughout an investigation, not only at the resolution phase".

- Emphasis is to be put on investigating specific **misconduct by individuals**, rather than attributing "nonspecific malfeasance to corporate structures".

- Prosecutors are further instructed to conduct their **investigations as expeditiously as possible**.

IMPLICATIONS FOR SWISS COMPANIES

The extraterritorial reach of the FCPA remains very broad. The recently issued Guidelines do not alter the substantive provisions of the FCPA, nor did the recent pause in enforcement activity affect the statute's continued applicability. Consequently, it remains essential for Swiss companies and individuals to carefully assess how the new Guidelines may influence their potential exposure to FCPA enforcement risks.

INCREASED SCRUTINY FOR NON-U.S. COMPANIES, INCLUDING SWISS COMPANIES

While the Guidelines explicitly state that enforcement will not focus on nationality, it seems likely that non-U.S. companies, including Swiss entities and individuals, could be disproportionately targeted – especially in cases where U.S. interests are implicated: The memo containing the Guidelines observes in a footnote that the "most blatant bribery schemes have historically been committed by foreign companies" and that "the most significant FCPA enforcement actions – measured both by the scope of misconduct and the size of the monetary penalties imposed – have been overwhelmingly brought against foreign companies". Indeed, nine out of the ten largest FCPA enforcement cases (both when measured by value of sanctions imposed and value of bribes paid) have been brought against non-U.S. companies/individuals. This compares to an overall ratio of 41% non-U.S. vs. 59% U.S.

defendants (from 1977 until today).[1] This, especially in combination with the above-described enforcement focus on promoting U.S. interests and competitiveness, and on high-value/impact cases, suggests that future FCPA investigation and enforcement activity might indeed tend to focus on foreign companies. This could potentially even intensify preexisting FCPA enforcement risks.

INCREASED SCRUTINY FOR COMPANIES ACTIVE IN CERTAIN SECTORS AND REGIONS

Companies (or companies with affiliates/subsidiaries) operating in sectors relevant to U.S. national security, or in regions with significant cartel/TCO activity or widespread practice of bribery (e.g., Africa, Latin America), may face heightened scrutiny. Swiss companies active in commodities/natural resources, infrastructure, defense, intelligence, as well as financial services are likely to attract attention.

Furthermore, Swiss companies competing with U.S. firms for high-value contracts, or whose conduct could be seen as disadvantaging U.S. entities, are at risk. Swiss companies in the following sectors (and competing for the following types of contracts) might be particularly exposed:

- Pharma (e.g., drug development contracts, government procurement contracts for medication);
- Engineering and industrial solutions (e.g., energy infrastructure contracts);
- Med-tech (e.g., public health system tenders, insurance partnerships);
- Food and beverages (e.g., supply agreements with large retailers, government and institutional contracts).

REDUCED RISK FROM CERTAIN INFRACTIONS, E.G., ROUTINE CONDUCT?

The Guidelines explicitly exclude routine conduct and small-scale, generally accepted business courtesies from future enforcement priorities. However, given that no fixed enforcement priority hierarchy exists, where such misconduct touches upon the other priority areas (e.g., where it harms U.S. interests), this exclusion may prove to be an unreliable one.

This raises an important general point: While the DOJ has decided to deprioritize enforcement for certain types of misconduct, the FCPA itself remains unchanged, i.e., such misconduct still violates the FCPA's provisions. And the long statutes of limitations for violations of the FCPA's provisions mean that such misconduct could potentially be prosecuted under a future Administration, which may pursue different enforcement priorities.

NON-U.S. AUTHORITIES TO PLAY LARGER ROLE, BUT WILL NOT BE ABLE TO FILL GAPS LEFT BY DOJ ENTIRELY

The DOJ's application of the Guidelines will likely result in some gaps in traditional FCPA enforcement. This creates an opportunity – and a necessity – for the Swiss Attorney General's Office and other non-U.S. authorities to step in and attempt to fill those gaps. However, their lack of resources compared to those available to the DOJ will be a key constraint. It is therefore significant that the DOJ has pledged to support non-U.S. investigations. It is also important that foreign authorities continue to strengthen cross-border cooperation, as evidenced, e.g., by a newly established joint prosecutorial task force involving Switzerland, France, and the UK. Nonetheless, non-U.S. authorities are unlikely to be able to cover all the enforcement gaps left by the DOJ.

HOW SWISS COMPANIES SHOULD REACT

We see the above translate into the following specific recommendations for action:

ASSESS NEW FCPA ENFORCEMENT RISK PROFILE

A more focused FCPA enforcement apparatus is likely to investigate the most relevant misconduct more thoroughly as well as sanction it more vigorously. Swiss companies therefore need to assess their enforcement risk profile based on the new enforcement priorities. This applies especially to Swiss companies with a high-risk profile (e.g., because they compete with U.S. companies or affect U.S. national security interests), which need to ensure that targeted risk management is in place.

NO ROLLBACK OF FCPA COMPLIANCE PROGRAMS

Enforcement of the FCPA is set to continue. Swiss companies should also keep in mind that infractions outside of today's enforcement priorities may still be enforced under future, different guidelines. Accordingly, even Swiss companies without an obvious substantive exposure to the U.S. should maintain strong FCPA compliance programs.

ENSURE ROBUST THIRD-PARTY AND SUCCESSOR LIABILITY RISK MANAGEMENT

The DOJ continues to expect thorough vetting of third parties and acquisition targets. Swiss companies need to be able to demonstrate that they conducted robust due diligence on FCPA risks brought on by third parties, joint ventures, and acquisition targets. They also need to ensure prompt integration of compliance programs and remediation of any identified issues. To the extent issues

[1] Source: Stanford Law School FCPA Clearinghouse (https://fcpa.stanford.edu/statistics-analytics.html, last accessed June 25, 2025).

are identified post-acquisition closing, companies can take advantage of the DOJ's M&A Safe Harbor Policy.[2]

UPDATE COST/BENEFIT-ANALYSIS OF VOLUNTARY SELF-DISCLOSURE

Should FCPA compliance issues arise, careful consideration should be given to self-reporting. The Guidelines promise swifter and less disruptive investigations and stress that individual misconduct should not be blamed on corporate structures. Also, Mr. Galeotti has made a point of highlighting the DOJ's voluntary self-disclosure policy and indicating that going forward self-reporting and cooperation would be rewarded with "clear benefits".

[2] The Mergers and Acquisition Safe Harbor Policy has been in force since March 2024. On June 16, 2025, the DOJ announced the first declination of prosecution of an acquiring company under the policy.

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