

## **President Trump's Executive Order Limiting FCPA Enforcement and Reg S-K Item 406 Codes of Ethics**

On February 12, President Trump issued an Executive Order and Fact Sheet ordering, among other things, that the U.S. Attorney General cease initiation of any new FCPA investigations or enforcement actions for 180 days. As CEOs and boards of directors consider whether or not to change their practices in response to this Executive Order, they need to consider any risks of taking advantage of the suspension of enforcement and what the implications may be if they do so.

First, the Executive Order does not repeal the FCPA (this could only be done by Congress) and nowhere in the Executive Order is there any mention that President Trump intends to ask Congress to repeal the FCPA; instead Section 2 of the Executive Order mentions updating the “guidelines and policies” five times. Therefore, no company should expect the FCPA to disappear. Second, the statute of limitations for enforcement of the anti-bribery component of the FCPA is five years, meaning that any violations committed during this pause in enforcement could be prosecuted by a future attorney general appointed by a president who is elected in the next five years and who believes the status quo FCPA enforcement does not require adjustment. Third, U.S. companies remain subject to a myriad of anti-corruption laws that are in effect with many of our largest trading partners, including the UK, Canada, Mexico, China, and several countries in the EU. Bribes that otherwise might have been violations of the FCPA could still violate those statutes depending on the locus of the payment and the recipient. A fourth risk, and one of fundamental importance is reputational risk. Many companies have spent decades building their image to make themselves attractive to their customers, their shareholders, and their employees. If it becomes public that a company has decided to begin paying bribes to foreign officials to secure business, there could be reputational damage that cripples the company for years to come, and today, more than ever, news of corporate actions spreads quickly through a combination of the traditional media, Threads, Instagram, Facebook, and other sources.

Therefore, a very important consideration for public companies is to understand what disclosure would be required if they take advantage of the pause in enforcement and do not comply with the FCPA. Specifically, public companies must consider their obligations to disclose any amendment or waiver of their code of ethics within the meaning of Regulation S-K Item 406.

Form 10-K (via Regulation S-K Item 406) requires a reporting company to disclose whether it has adopted a code of ethics that applies to the company's principal executive officer, principal financial officer, principal accounting officer, controller, or persons performing similar functions (a “Covered Officer”). If the company has not adopted a code of ethics, it must explain why. As you would expect, almost all public companies have adopted a code of ethics in accordance with Regulation S-K Item 406.

Item 406(b) provides that a compliant code of ethics, among other things, must promote “honest and ethical conduct” and compliance with “applicable laws and regulations.” Based on the foregoing, as well as the importance that most companies place on their reputation, in many instances, these codes of ethics state that the company expects their employees' behavior to go beyond compliance with the letter of the law.

Companies must disclose their code of ethics in one of three ways: (i) file it as an exhibit to their Form 10-K; (ii) post it on the company's website and disclose its location in their Form 10-K; or (iii) offer in their Form 10-K to provide a free copy upon request.

The Form 8-K rules require that companies disclose any amendments or waivers to their codes of ethics. Specifically, Item 5.05 of Form 8-K requires companies to disclose any amendment or waiver within four business days. This disclosure must be done on a filed Form 8-K, or on the company's website if in its most recently filed Form 10-K it has disclosed that intention to disclose any amendment on its website (it must include the website address).

This brings us to the question of whether or not a company's decision to make payments that would violate the FCPA, but for President Trump's Executive Order, would require disclosure pursuant to Form 8-K.

Disclosure is required in two circumstances: (i) if a company amends its code of ethics, and such amendment applies to a Covered Officer; or (ii) if a company grants a waiver, including an "implicit waiver," to a Covered Officer. An "implicit waiver" means the company's failure to take an action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to an executive officer as defined in Rule 3b-7. The term executive officer is broader than Covered Officer and includes any vice president in charge of a principal business unit (such as sales, administration, or finance) and any other officer who performs a policy making function.

If a company were to decide to begin to pay bribes that would violate the FCPA but for the Executive Order, such payments would more likely than not still contravene its code of ethics, resulting in the need for the company to amend its code of ethics or grant a waiver to permit such activity, and such amendment or waiver would need to be publicly disclosed. There are a few reasons why this would likely be the case. First, as noted above, pursuant to Item 406(b), codes of ethics must mandate "honest and ethical conduct." Any payment of a bribe would clearly violate this standard independent of whether or not such bribe violates the FCPA, making the suspension of enforcement of the FCPA irrelevant. Further, most codes of ethics not only require compliance with the FCPA, but also explicitly state that all forms of bribery are prohibited and in many instances mandate compliance with the laws of other jurisdictions. In light of the foregoing, if a company elects to suspend its compliance with the FCPA, it will still likely need to amend its code of ethics or waive the provisions in it that more broadly prohibit bribery and violations of non-U.S. laws.

As described above, if a company were to decide to suspend its compliance with the FCPA it would likely need to amend or waive compliance with its code of ethics and publicly disclose such event. The basis upon which it would be required to do one or the other is set forth below, but for practical reasons, such a company would likely follow the path of a waiver rather than an amendment. Under such circumstances companies are unlikely to take the time to amend their codes of ethics for a number of reasons, including the uncertainty of the ultimate future for the FCPA as well as the time and expense needed to thoughtfully draft and get board approval for any such amendment.

However, as set forth above, a waiver, even an implicit waiver, also requires public disclosure. It is possible that a company might try to argue that the prohibition on bribery that would require disclosure would only apply to a waiver granted to a Covered Officer and that waivers of prohibitions on bribery could be granted to a sales force without a waiver and 8-K disclosure being required; however, this argument is unlikely to be persuasive as the waiver would likely be granted by a Covered Officer, or even the board of directors under the circumstances. Further, even the “implied waiver” is likely triggered, as once any executive officer, as defined in Rule 3b-7, became aware of employees of the company making bribes, their awareness, and failure to report this as a violation of the code of ethics, would be an implicit waiver and therefore required to be disclosed pursuant to Item 5.05 of Form 8-K.

To the extent executive teams and boards of directors consider taking advantage of this Executive Order, among their many action items, they should carefully review their codes of ethics with their legal counsel to examine what the consequences may be, including the potential need for public disclosure, and the impact that such disclosure may have on their reputations.

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