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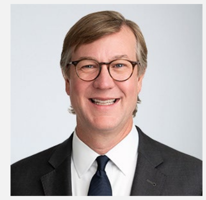
Cos. Face Convergence Of Anti-Terrorism Act, FCPA Risks

Published in *Law360*, July 17, 2025



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In his June 9 guidelines on resumed enforcement of the Foreign Corrupt Practices Act, Deputy U.S. Attorney General Todd Blanche refers to the "Total Elimination of Cartels and Transnational Criminal Organizations" as a primary factor for prosecutors to consider when choosing to pursue an FCPA investigation.

The Trump administration's U.S. Department of Justice has made clear its intent to use all available tools — including the FCPA and the Anti-Terrorism Act — to pursue these types of targets. So what should compliance practitioners know about the overlap between FCPA and ATA risk?

At first glance, the FCPA and ATA may appear to involve distinct risks: the FCPA targets bribery of foreign officials, while the ATA focuses on, among other things, the provision of material support to or aiding and abetting foreign terrorist organizations, or FTOs.

In practice, however, these risks can converge — particularly in jurisdictions with high levels of FTO activity — creating overlapping exposure.

Background

On Jan. 20, President Donald Trump issued Executive Order No. 14157, instructing, among other things, that certain international cartels and other transnational criminal organizations, or TCOs, be designated as FTOs.

Since February, the U.S. State Department has designated 11 organizations — primarily in Latin America — as FTOs. These designations carry significant implications: The ATA imposes broad civil and criminal liability for providing material support to FTOs, and enables asset forfeiture.

On Feb. 5, her first day in office, U.S. Attorney General Pam Bondi issued a memorandum on the elimination of cartels and transnational criminal organizations. The Bondi memo and subsequent guidance from the DOJ demonstrate that the department views both the ATA and the FCPA as tools to pursue conduct connected to cartels and TCOs.

For example, the Bondi memo:

- Instructs prosecutors to consider the applicability of terrorism charges, including provisions of the ATA, when considering charging decisions in matters involving cartels and TCOs;

- Removes centralized approval requirements administered by the DOJ's National Security Division to file most terrorism charges, including charges under the ATA, in connection with investigations involving cartels or TCOs designated as FTOs; and
- Directs that prosecutors "prioritize investigations related to foreign bribery that facilitates the criminal operations of Cartels and TCOs."

And if there was any lingering doubt on the DOJ's intent to use the FCPA to pursue TCOs, that was put to rest in the department's FCPA guidelines, which list misconduct associated with cartels and TCOs as one of only a handful of factors to consider when prioritizing FCPA enforcement.

Possible FCPA and ATA Risk Scenarios

Compliance practitioners should be aware of risk scenarios in which company interactions with cartels — including those designated as FTOs — and other TCOs might trigger both FCPA and ATA investigative scrutiny.

Note that, while the provision of material support to FTOs triggers criminal and civil liability under the ATA, payments more generally to TCOs, including entities not designated as FTOs, might still create investigative risk. As such, we refer to TCO interactions in these risk scenarios.

Inadequate Internal Controls or Incorrect Records

The FCPA does not only prohibit bribe payments to foreign officials. Its accounting provisions also require U.S. issuers — U.S. publicly traded companies, both domestic and foreign — to "devise and maintain a system of internal accounting controls" that ensures their assets are properly controlled and accounted for, and to maintain accurate books and records.

Thus, to the extent a company has inadequate controls that enable payments to be made to foreign officials, raising FCPA concerns, a company may face scrutiny by U.S. enforcement authorities for those same control deficiencies that could enable payments to TCOs.

If companies are recording payments to foreign officials incorrectly in their books and records, U.S. enforcement authorities may scrutinize those same inaccurate records in connection with TCO payments as well.

Local Officials With Ties to TCOs

A company might pay a local municipal official or other officials that are under the control of a TCO. Perhaps the TCO funded the local mayor's campaign and continues to have influence over local government. Or the official might be a member of the TCO.

Similarly, a local official might direct a company to make an improper payment to a third party controlled by a TCO, with both the foreign official and the TCO taking a cut. The purpose of the payment might be twofold — for example, for the company to receive a local permit from the mayor's office, and to obtain the TCO's permission to continue to operate in the locality.

In scenarios like these, the FCPA might be implicated, given that there are direct or indirect payments to government officials. The ATA might also be implicated if the TCO is designated as an FTO, as the company's payments could be considered material support.

Shell Company Payments

A company might have a relationship with a purported service provider or business partner that is in fact a shell company, and pay the shell company as a way of conveying improper payments to both corrupt government officials and TCOs.

To disguise the scheme, the shell company might create falsified records suggesting that goods and services were provided when they were not.

The payments to the government officials through the shell company might implicate the FCPA, while the same payments might be considered a form of material support to an FTO — if the TCO is designated as an FTO — implicating ATA liability.

Bribery That Facilitates TCO Operations

Companies might make improper payments to government officials to facilitate a TCO's operations. Perhaps a logistics company operating in countries where there is known TCO presence pays bribes to port officials to expedite cargo clearance.

If that cargo includes arms, precursors for fentanyl products, or other goods trafficked by a TCO, U.S. enforcement authorities may seek to investigate the company and its employees for potential violations of the FCPA and ATA.

Money Laundering Schemes

The same money laundering mechanism that enables a corrupt government official to launder illicit gains received from bribe payments might be used by a TCO to do the same, triggering enforcement interest in both.

For example, a company in the financial services industry may receive payments from a client or business partner that are derived from money amassed by both public officials and cartels based on the illicit conduct of each.

In such cases, the parties involved in the financial flows may face U.S. investigative scrutiny under an FCPA conspiracy or related theory, as well as the ATA.

The FCPA guidelines specifically reference use of "money launderers or shell companies that engage in money laundering for Cartels or TCOs" as conduct that would trigger prosecutorial interest in FCPA enforcement.

State-Owned Entity Dealings

The FCPA guidelines cite misconduct linked to employees of state-owned entities that have received bribes from cartels or TCOs as a priority area for enforcement.

Historically, dealings with Mexican state-owned entities, like Petroleos Mexicanos, also known as Pemex, or the state-owned utility, Comision Federal de Electricidad, have raised significant FCPA risks and led to FCPA enforcement actions. The DOJ has signaled that, to the extent officials at these companies are also involved in FTO activity, this could raise FCPA interest.

Improper payments to officials at such companies might implicate investigative scrutiny under the FCPA, as payments to government officials, as well as under the ATA, as material support to an FTO, if the involved TCO is designated as an FTO.

Conclusion

It is important to remember that these risk scenarios are not limited to the FCPA and ATA.

They can trigger investigative scrutiny in connection with various other U.S. criminal statutes, such as those prohibiting money laundering, economic sanctions violations and fraud, as well as the Foreign Extortion Prevention Act for the bribe takers. Such risk scenarios may also implicate business and human rights standards.

The end result of these evolving DOJ priorities are enforcement risks that, in some ways, are narrower and, in others, more complex. Compliance practitioners should consider the new ways that their companies may be scrutinized, and how these emerging risks can be managed.