



ForensicFocus

The DOJ's new FCPA Enforcement Policy

Disclose. Cooperate. Emphasize compliance.

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Today's reality

- Last November, the U.S. Department of Justice (DOJ) released the new Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy USAM 9-47.120 (the Enforcement Policy), which established new guidelines around the voluntary disclosure of FCPA violations.
- The Enforcement Policy encourages companies to make voluntary disclosures of potential FCPA violations by offering incentives, including declinations¹ and reduced fines, for adherence to good corporate behavior.
- The Enforcement Policy supersedes the DOJ's 2016 FCPA Pilot Program (the Pilot Program), which was launched to motivate companies to "do the right thing and voluntarily disclose misconduct" and set forth requirements for voluntary self-disclosure, cooperation, and remediation in FCPA cases.
- The first quarter of 2018 saw a decrease in the number of FCPA cases prosecuted by the DOJ and the U.S. Securities and Exchange Commission (SEC) combined—and a significant number of declinations (without disgorgements). According to Deputy Attorney General Rod J. Rosenstein, "the DOJ will place less emphasis on corporate prosecutions and greater emphasis on companies' compliance programs, along with individual prosecutions."²



The DOJ encourages companies to "see law enforcement as an ally. In turn, the government will provide incentives for companies to engage in ethical corporate behavior and to assist in federal investigations. That is the best way to deter crime and maintain the rule of law."

— Deputy Attorney General Rod Rosenstein

Understanding the changes

The Enforcement Policy was intended to set guidelines to encourage companies to voluntarily disclose FCPA violations and to provide guidance and greater certainty for companies struggling with the question of whether or not to disclose wrongdoing. The Enforcement Policy presumes that the DOJ will resolve cases through declination when companies self-disclose, fully cooperate with investigators, and remediate the situation in a timely and appropriate manner. The Enforcement Policy does note that this presumption may be overcome if there are aggravating circumstances or if the company is a repeat offender.

¹ In the Enforcement Policy, the DOJ defined "declination" as follows: "A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy. Declinations awarded under the FCPA Corporate Enforcement Policy will be made public."

² <https://www.lexology.com/library/detail.aspx?g=f4054869-6f41-4a92-a03c-5a35d1bf8f4e>



This Enforcement Policy was designed to:

- Provide clarity in the decision-making process to effectively prosecute violators of the FCPA
- Promote consistency by prosecutors throughout the DOJ
- Combat the perception that the DOJ acts in an arbitrary manner
- Allow investigators to focus on other criminal activity, such as gang violence, terrorism, and human trafficking.

Many of the Pilot Program's provisions are incorporated in the Enforcement Policy; however, the Enforcement Policy goes further to define voluntary disclosure, full cooperation, and timely and appropriate remediation. The Enforcement Policy also adopts new incentives to encourage companies to self-disclose FCPA violations.

Key takeaways

The Enforcement Policy:

- Removes the temporary status of the Pilot Program and adds it to the U.S. Attorneys' Manual
- Creates no private rights and is not enforceable in court
- Takes the Pilot Program further in important respects, including the fact that self-disclosing companies now have a presumption in favor of a declination of prosecution (which may not be enforceable in certain situations like aggravated circumstances or instances of repeated offenders)³
- May still require companies to disgorge profits tied to the misconduct, regardless of the criminal resolution
- Continues to reflect the DOJ's commitment to pursuing individual wrongdoers
- Provides details about how the DOJ evaluates an appropriate compliance program, which varies depending on the size and resources of a business⁴
- Still expects extensive cooperation from companies, which can be quite onerous.

³ Aggravating circumstances may arise when top management is involved in the misconduct, if the company experiences large profits from the misconduct, and/or if there is pervasiveness within the company.

⁴ If a company self-reports the misconduct but aggravating circumstances exist, the company may not be required to have an appointed monitor if the company has an effective compliance program in place.

Current effects

In the first quarter of 2018, there were eight declination cases that resulted from the application of the Enforcement Policy, involving both U.S. and non-U.S. companies, some of which included disgorgements.

This activity appears consistent with statements by DOJ officials that, in the absence of corporate misconduct that is “serious or pervasive enough” to warrant an entity-level criminal resolution, the DOJ wants “to avoid imposing penalties that disproportionately punish innocent employees, shareholders, customers, and other stakeholders” and “to reward companies that invest in strong compliance measures.”⁵

As a result of the Enforcement Policy, and as more declinations continue, U.S. enforcement actions by the DOJ and SEC⁶ are decreasing. While this is an encouraging outcome, it has also shown an increase in anti-bribery and corruption efforts in foreign jurisdictions. Once a declination is made public, foreign authorities are alerted to the allegations involving their countries. For at least one case resolved through a declination in the United States,⁷ foreign authorities subsequently initiated their own investigation against the company.

In the international fight against corruption, the follow-on investigations that resulted from the DOJ’s publicly disclosed declinations may be seen as a positive, and not negative, effect of the Enforcement Policy.

Benefits of disclosure and cooperation

The Enforcement Policy provides guidelines for voluntary disclosure, full cooperation, and timely and appropriate remediation—and the benefits are clear. If a company satisfies the requirements, the company may be incentivized to self-disclose FCPA misconduct, particularly when:

- The conduct was not pervasive
- A strong compliance program is in place
- The misconduct did not result in a significant profit to the company and did not involve executive management.

This gives corporate officers and board members a better understanding of the costs and benefits of cooperation.

According to DOJ, the Enforcement Policy also provides advantages to companies who do not voluntarily disclose but fully cooperate with investigators. For example, if a company did not voluntarily disclose its misconduct but fully cooperates and remediates the misconduct, the DOJ may recommend up to a 25 percent reduction to the low end of the fine range.

What companies can do now

The Enforcement Policy identifies the measures an organization may take in its efforts to prevent and detect bribery, including specific attributes of effective compliance programs.

Companies should start by implementing a compliance program or ensuring their current compliance program meets the attributes of an effective compliance program per the DOJ, which includes, but is not limited to:

- Creating a culture that teaches and emphasizes compliance
- Dedicating sufficient time and resources to compliance activities
- Ensuring that management and the board of directors have an open door policy for compliance personnel to enhance the compliance program and communicate potential issues of non-compliance.

Through the increased transparency of the DOJ’s Enforcement Policy and the benefits available for satisfying disclosure requirements, companies should ensure there is a robust compliance program in place to help deter the need for DOJ intervention.

⁵ <https://www.lexology.com/library/detail.aspx?g=f4054869-6f41-4a92-a03c-5a35d1bf8f4e>

⁶ <https://blogs.wsj.com/riskandcompliance/2018/04/16/a-quiet-beginning-for-2018-fcpa-enforcement/>

⁷ https://www.debevoise.com/~media/files/insights/publications/2018/02/fcpa_update_february_2018.pdf

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