

THE NEW FCPA CORPORATE ENFORCEMENT POLICY (and What It Says About the DOJ's Views on Corporate Compliance Issues)

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GUESS THE SPEAKER?????

- ▶ **THE FCPA “IS A HORRIBLE LAW AND SHOULD BE CHANGED.”**
- ▶ **“I MEAN, WE’RE LIKE THE POLICEMAN FOR THE WORLD”**
- ▶ **“IT’S RIDICULOUS” (REFERRING TO THE FCPA (AND LOTS OF OTHER THINGS THAT ANNOY THIS SPEAKER))**

GUESS THE SPEAKER?????



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THE REALITY OF FCPA ENFORCEMENT IN THE TRUMP ADMINISTRATION

PUBLIC STATEMENTS FROM THE SESSIONS JUSTICE DEPARTMENT:

- ▶ **“We will continue to strongly enforce the FCPA” - Attorney General Jeff Sessions (April 24, 2017)**

- ▶ **“The Department of Justice remains committed to enforcing the FCPA and to prosecuting fraud and corruption more generally.” - Trevor McFadden, Acting Principal Deputy Assistant Attorney General**

THE REALITY OF FCPA ENFORCEMENT IN THE TRUMP ADMINISTRATION

FCPA ENFORCEMENT IN 2017

- U.S. companies and foreign companies have been targeted and prosecuted
- More individual accountability for FCPA violations in 2017 than ever before
- The U.S. collected over \$1.1 billion in fines, penalties, and disgorgements in corporate FCPA enforcement actions
- There were a number of large FCPA resolutions (U.S. penalties alone in the Telia case will total between \$482.5 million and \$691 million)
- There has been global enforcement of the FCPA
- The DOJ has begun charging criminal cases accusing corporations of having deficient internal controls.

THE NEW DOJ POLICY ON FCPA CORPORATE ENFORCEMENT POLICY

- ▶ Announced in November 2017 and added to the United States Attorney's Manual
- ▶ Revises and effectively makes permanent the FCPA Pilot Program initiated in April 2016. That program provided that companies that voluntarily self-disclose improper conduct to the Fraud Section's FCPA Unit, fully cooperate, and appropriately
- ▶ remediate are eligible for a reduced monetary fine.

KEY FEATURES OF THE NEW FCPA CORPORATE ENFORCEMENT POLICY

► PRESUMPTION OF DECLINATION UNDER CERTAIN CIRCUMSTANCES

- A company that **voluntarily discloses, fully cooperates, and timely and appropriately remediates**, in most instances, will be **presumed** to be entitled to a declination unless there are certain aggravating circumstances related to the seriousness of the offense or nature of the offender.

KEY FEATURES OF THE NEW FCPA CORPORATE ENFORCEMENT POLICY

► “AGGRAVATING CIRCUMSTANCES” WHERE A DECLINATION WILL NOT OCCUR DESPITE THE PRESUMPTION

- Executive management is involved in the misconduct
- There is a significant profit to the company arising from the misconduct
- The misconduct was pervasive
- Criminal recidivism

KEY FEATURES OF THE NEW FCPA CORPORATE ENFORCEMENT POLICY

► The Benefits of Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation Are Made Clear

- Presumption of Declination in Such Cases
- If Criminal Resolution Still Warranted - Offender **Will** Receive a 50% Reduction Off the Bottom End of the U.S. Sentencing Guideline Fine Range If It Self-Discloses, Fully Cooperates, and Properly Remediates
- Offender **Will** Receive a 25% Reduction If They Do Not Self-Disclose But Do Fully Cooperate and Properly Remediate

KEY FEATURES OF THE NEW FCPA CORPORATE ENFORCEMENT POLICY

► To Receive Mitigation Credit, a Company Must Fully Disgorge All Profits Resulting From Its Misconduct

- The Policy also provides that forfeiture and restitution are required.
- The “declination with disgorgement” feature of the Policy makes voluntary disclosure a difficult decision to make

WHAT IS “VOLUNTARY DISCLOSURE”?

- ▶ Does not include disclosures required by law, agreement, or contract
- ▶ Must be prior to an imminent threat of disclosure or government investigation
- ▶ Must occur promptly after discovery
- ▶ Must be complete and include facts concerning individuals involved in the violations

WHAT IS “FULL COOPERATION”?

- ▶ Must timely disclose all facts uncovered of wrongdoing
- ▶ Must provide “proactive cooperation”
- ▶ Must preserve, collect, and disclose relevant documents, even those overseas
- ▶ Must de-conflict an internal investigation with the government’s investigation
- ▶ Must make employees available for DOJ interviews

WHAT IS “TIMELY AND APPROPRIATE REMEDIATION”?

FIRST FEATURE:

- ▶ A Company must conduct a “Root Cause Analysis”:
 - ▶ A company must demonstrate through an analysis that it has identified the cause of the underlying conduct and, where appropriate, remediation to address the root cause of the underlying conduct

WHAT IS “TIMELY AND APPROPRIATE REMEDIATION”?

SECOND FEATURE:

- ▶ A Company Must Implement “An Effective Compliance and Ethics Program,” Which Stresses Eight Features the DOJ Specifically Identifies

THE EIGHT FEATURES OF “AN EFFECTIVE COMPLIANCE AND ETHICS PROGRAM”

1. A culture of compliance at the company
2. The resources the company has dedicated to compliance
3. The quality and experience of the personnel involved in compliance
4. The authority and independence of the compliance function and the availability of compliance expertise to the Board

THE EIGHT FEATURES OF “AN EFFECTIVE COMPLIANCE AND ETHICS PROGRAM”

5. The effectiveness of the company's ability to access risk
6. The compensation and promotion of the personnel involved in compliance
7. The auditing of the compliance program to assure its effectiveness
8. Effective reporting structure of compliance personnel

OTHER STUFF THE DOJ CARES ABOUT

- THE APPROPRIATE DISCIPLINE OF WRONGDOERS
- THE APPROPRIATE RETENTION OF BUSINESS RECORDS
- STEPS THAT DEMONSTRATE RECOGNITION OF: (1) SERIOUSNESS OF MISCONDUCT; (2) ACCEPTANCE OF RESPONSIBILITY; AND (3) MEASURES TO REDUCE RISK OF REPETITION OF THE MISCONDUCT

PUBLICATION OF ALL FCPA DECLINATIONS AWARDED UNDER THE POLICY

- Feature designed to improve transparency by providing tangible examples of the benefits of self-disclosure
- Downside: May stigmatize a company by publicly branding it a bribe-payer. This may dis-incentivize voluntary disclosure

KEY TAKEAWAYS FROM THE NEW POLICY

1. THE NEW PRESUMPTION OF A CRIMINAL DECLINATION UNDER CERTAIN CIRCUMSTANCES QUANTIFIES A TANGIBLE BENEFIT OF SELF-DISCLOSURE, COOPERATION, AND REMEDIATION.
2. “DECLINATIONS WITH DISGORGEMENT” ARE NOW A PERMANENT FEATURE IN FCPA CASES

KEY TAKEAWAYS FROM THE NEW POLICY

3. THE POLICY’S INCORPORATION INTO THE USAM PROVIDES GREATER CERTAINTY THAT THE POLICY WILL HAVE LONGEVITY
4. THE POLICY CONTINUES THE TREND STARTED WITH THE YATES MEMO OF PLACING A PRIORITY ON THE INDIVIDUAL ACCOUNTABILITY OF WRONGDOERS

KEY TAKEAWAYS FROM THE NEW POLICY

5. SOME ADDITIONAL DOWNSIDES REMAIN

- The Policy is non-binding
- The Policy only concerns DOJ enforcement actions in FCPA cases
- The Policy still leaves government prosecutors with considerable discretion