Expert Analysis

FCPA Compliance 1 Year After DOJ Revised Policy

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The corporate compliance community is now one year out from the announcement by the U.S. Department of Justice that its Foreign Corrupt Practices Act pilot program was to be made permanent. Because of the rapid changes in this area over the past two and a half years, the visibility of anti-corruption efforts, and the continuing tremendous potential financial risks to companies, there is perhaps no compliance subject more written, talked and blogged about than the Foreign Corrupt Practices Act — and for good reason. Noncompliance with the FCPA creates eye-popping headlines, causes boardroom upheaval and wrings massive fines from household names such as Siemens, Walmart and Morgan Stanley.

Because of the risks, the dollars and the players, the FCPA connotes sophistication to the point of mystery and complexity to the point of opacity. We propose that the DOJ's FCPA policy, now formally adopted in the department's Justice Manual,[1] means that these two connotations — mystery and complexity — are not always true. The concepts of the law have always been relatively simple, and the compliance information provided by the government to corporations is plentiful. The combination of simplicity and information sharing ratchets up the government's expectation that companies will be FCPA-compliant. This expectation is even more forceful now that the government's FCPA policy creates a presumption of nonprosecution for compliant companies. All of this is good news, except that it heightens the resulting consequences when there is a compliance failure.

They're From the Government and Here to Help? In this Case, Yes

Many companies know the risks in this area, but there are others —

both large and small — that do not. The government now demands that companies understand its FCPA enforcement paradigm, which is:


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It's not that complicated.

The "Foreign Corrupt Practices Act" is a long, dissonant title, but its prohibitions are basic: one cannot pay, or agree to pay, money to a foreign official in order to get or keep business. By calling it "simple," we denigrate neither the statute nor its many practitioners. As with any federal statute with global ramifications, civil and criminal, the FCPA offers thorny legal questions, nuances of interpretation and difficulties of application. Because it tends to be enforced more often from Washington than from U.S. attorney's offices or regional offices of the U.S. Securities and Exchange Commission, FCPA practitioners tend to be concentrated geographically and a bit siloed professionally. The logistics of FCPA investigations can be complex. As with many areas of life, however, the FCPA is best approached as a simple problem meriting deep reflection.

It's an open-book test.

The FCPA is policed by both the DOJ and the SEC. Both entities are typically opaque in their investigative efforts, but the FCPA is an exception. Consider:

- In 2012, the DOJ and the SEC jointly published 130 pages of free FCPA guidance, with a detailed analysis of each element of the statute and what a corporate compliance program should look like.[2]

- The DOJ manages a "pre-clearance" program, which allows companies to obtain an opinion from the attorney general as to whether prospective conduct conforms to the DOJ's enforcement policy.[3]

- On Nov. 29, 2017, Deputy Attorney General Rod Rosenstein announced that the pilot program is now permanent. The policy creates a presumption that the DOJ will decline prosecution against corporations for FCPA violations committed by employees, so long as the company has an effective compliance program and other aggravating factors are absent.[4]

- As part of the pilot program, the DOJ publishes declination letters to companies, which outline its bases for declining to pursue charges in particular cases. The declinations are noteworthy in that they typically involve egregious violations by employees that occurred in spite of solid corporate compliance efforts, or are mitigated by full cooperation in an investigation.[5]

Compliance is expected (but so is failure).

Because the government opens its playbook, it is expected that corporations will devote sufficient resources to assess their particular enterprise risk for FCPA violations. The government understands that FCPA violations will occur and, in light of that recognition, assesses corporate responsibility and liability on a particular company's compliance efforts.

But what does this mean? What does FCPA "compliance" look like?

Compliance With the Government's Expectations

"Compliance" is a heavy term and means different things in different contexts. For the government in FCPA cases, "compliance" can be boiled down to three things: the prevention of misconduct, the detection of misconduct, and full cooperation with the government if an investigation begins.

1. Prevention

The government talks a lot about a company's "culture of compliance" and "tone at the top." It views compliance as an enterprisewide function that must be embedded in a company's operations and made a priority for corporate leadership. Compliance initiatives that are canned (or even original but placed on a shelf, so to speak, in the corporate law department) and do not become a part of the message from leadership and the company's day-to-day functions are worse than doing nothing. Past enforcement actions show that the best FCPA compliance programs include the following elements:

- *Tone at the Top.* Trite but true. Compliance should begin with the most senior person at the company and be a consistent part of leadership messaging. Corporate leadership should actively discourage the eye rolls and sarcasm that naturally accompany mandatory rules training and the administrative burdens that are necessary (and annoying) aspects of effective compliance.

- *Training.* This is the essence of effective prevention efforts. A company with significant FCPA risks will provide some training for everyone, but should focus efforts on employees operating in the zone of risk for foreign bribery. Who these people are varies, but often includes staff in sales, business development, government relations, licensing, human resources, and administration who review expenditures and expense reports.

- *Operational Oversight.* Lawyers, whether in-house or outside counsel, play a significant role in compliance by identifying risks and providing advice on how to manage those risks. However, compliance can only be effective when it moves out of the law department and into the business' day-to-day operations. The greatest FCPA risks often rest with third parties, such as vendors, agents and consultants. Only the "businesspeople" managing daily operations have the type of interaction with those folks and can properly assess the operational risks in the relationship.

2. Detection

Detection is the hardest aspect of FCPA compliance. There are many reasons why detection is hard, but a key reason is that an FCPA "bad actor" within a company is often acting with conscious disregard for company policy. Perversely, robust prevention efforts and compliance training can not only inform the employee of the policy but also inadvertently cue the employee into ways to defeat the company's enforcement mechanisms. DOJ precedent instructs that perfection is not expected, but a company should employ at least the following basics of effective detection efforts:

- *Inspect what you expect.* A company cannot look at every aspect of its business operations, but once key FCPA risk areas are identified, there should be some inspection/audit/review of employee activity in this area. Such reviews can vary from a detailed analysis of foreign political contributions and consultant invoices to random audits and periodic in-person interviews of key personnel.

- *Investigate.* A company must have a policy for investigating signs of FCPA violations. There should be a "tip line" that is regularly monitored and actually reviewed for potential issues. The government will not hold you to an investigation of every reported issue, but it expects that all will be reviewed and triaged in a consistent manner.

- *Remediate.* An FCPA compliance program must constantly adjust to both its internal risks and government enforcement trends and make corrections to areas of weakness. If your system for reimbursing expense reports easily allows for the concealment of illicit payments, you have to fix it.

- *Disclose.* Disclosure, of course, can only come after a problem is detected, but detection without disclosure is not detection at all. Under the pilot program, disclosure is essentially mandatory and can only provide mitigation where it is proactive and truly voluntary. In other words, it must be made before the government comes calling.

3. Cooperation

In its memorandum on the FCPA pilot program, the DOJ's Fraud Section outlined many facets of cooperation, which have since been incorporated into the permanent policy. Not all of them are required; most are common sense. The key takeaways of the government's expectations in this area are breadth and scale. The DOJ expects cooperation to be unlimited in terms of its access to people, documents and information the government deems relevant. Cooperation includes the proactive production of company records and the provision of translation services, if necessary. The government allows for assertions of legal privilege by the company, but expects those to be as narrowly tailored as possible.

On the other hand, the government explicitly recognizes that the scale and speed of cooperation will vary depending on corporate resources. The Fraud Section memorandum explicitly states that cooperation credit "typically" ensues from "an appropriately tailored investigation." In other words, there is no one-size-fits-all solution, but the one thing a company cannot do is obfuscate or feign full cooperation.

Conclusion — No One Said It's Easy

FCPA compliance is simple. Simplicity, however, does not mean lack of difficulty. Running a marathon is a simple task — merely putting one foot in front of the other — but it is far from easy. The marathon analogy translates well to the world of FCPA compliance. It's less a matter of figuring out what to do and more about getting motivated to actually do it. The key to good FCPA compliance is less about parsing statutory nuance and more about a company resolving to commit its culture and operations to implementing effective compliance measures and getting common-sense investigators on the ground when an investigation is called for.

A common-sense approach is not to say that sound legal advice is not a necessary and important aspect of setting up a useful compliance program. It certainly is, but the smartest legal analysis in the world cannot overcome the everyday effort that is essential to embedding compliance in business operations and demonstrating to the government, in the inevitable event of a failure, that it occurred in spite of the company's culture of compliance rather than because of it.

The lessons of past government enforcement actions are twofold. First, getting the compliance basics right will substantially mitigate for the company even egregious conduct by corporate employees. Second, the failure to heed the first lesson can result in aggressive enforcement actions that constitute a true enterprise risk to any corporation.

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[1] https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120

[2] https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf

[3] https://www.justice.gov/criminal-fraud/fcpa-opinions

[4] https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign

[5] https://www.justice.gov/criminal-fraud/pilot-program/declinations