



The Bottom Line

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DEPARTMENT OF JUSTICE UPDATES FOREIGN CORRUPT PRACTICES ACT (FCPA) CORPORATE ENFORCEMENT POLICY

Summary

On November 20, 2019, the Fraud Section of the Department of Justice's (DOJ) Criminal Division announced changes to its Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy ("the Policy") to encourage company self-reporting of violations.

Background

The Foreign Corrupt Practices Act (FCPA) is a United States law that was passed in 1977 that prohibits U.S. firms and individuals from offering anything of value to foreign officials in furtherance of a business deal. The law was passed in reaction to research conducted in the 1970s which showed that over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million. Enforcement of the law is shared by the Department of Justice (for criminal charges) and the Securities and Exchange Commission (SEC) (for accounting irregularities). The statutes of the law were first revised in 1988, where a "knowing" standard was introduced to include both 'conscious disregard' and 'willful blindness.' In the last ten years, the DOJ and SEC combined have brought over 450 enforcement actions against U.S. entities engaged in international commerce. The reach of the FCPA extends to the actions of companies, their directors, officers, shareholders, agents, employees (including third party consultants), and joint ventures. The definitions of "payment" and "foreign official" are sufficiently broad to cover virtually any benefit conferred on someone in a position to affect a person's business dealings with a foreign government—and the bribe need not actually be paid in order to violate the law. The FCPA prohibits any offer, authorization, or promise made with a corrupt motive or the intent to knowingly influence the recipient.

Current Status

This update follows several changes to the policy announced this year. In March, the guidelines were clarified regarding the restrictions on the use of instant and ephemeral services. The notice reinforced the importance of proper retention of business records.

In April, the Corporate Compliance Program Documents were updated to focus on three fundamental questions that prosecutors must ask when investigating alleged corruption:

- Is the compliance program well designed?
- Is the program being applied earnestly and in good faith (effectively)?
- Does the program work in practice?

This update, designed to encourage corporations to self-disclose violations early in the investigative process, states that a company must disclose "all relevant facts known to it at the time of disclosure." If the investigation is continuing, that information should be relayed as well. The revised policy no longer requires "all relevant facts: regarding a definite violation to be included before a disclosure takes place. A company that voluntarily discloses misconduct is eligible to receive benefits in the form of remediated penalties.

Impact

Failure to comply with the guidelines of the FCPA can have significant influence on a company's bottom line in terms of penalties—both civil and criminal. There is no concept of materiality in the FCPA. Companies have been prosecuted for very small bribes and inaccurate books and records, or failures to set up systems of controls (which arguably have no monetary value). Violations of the bribery statutes can carry criminal penalties of up to \$2 million for businesses and \$250,000 with five years in prison for individuals. The statute also forbids a company to pay fines on behalf of individuals. Violations of the accounting statutes can carry criminal penalties of up to \$50 million for companies and \$5 million with 29 years in prison for individuals. If violative circumstances exist, it is in the company's best interest to self-disclose as soon as possible in order to benefit from remediated penalties.

RESOURCES:

[FCPA Corporate Enforcement Policy](#) (Justice.gov)
[Overview of Foreign Corrupt Practices Act](#) (Jones Day)

BREAKING NEWS as of Friday, December 6, 2019:

[Ericsson Agrees to Pay Over \\$1 Billion to Resolve FCPA Case](#)