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Making the most of the FCPA Corporate Enforcement Policy

by Valerie Charles

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In November 2017, the U.S. Justice Department released the latest evolution of the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy. Companies are being encouraged to disclose FCPA violations voluntarily, cooperate with investigations, and remediate weaknesses by building effective compliance programs. Those three pillars of FCPA enforcement are still central today. The Corporate Enforcement Policy simply emphasizes them so much that, ideally, corporations will see no other useful course of action except to embrace all three.

Let's look at how corporate compliance professionals can seize on the enticements offered in the Enforcement Policy as they seek to build an effective compliance program.

What the policy entails

Launched in 2016, the FCPA Pilot Program was the precursor to the FCPA Corporate Enforcement Policy. The pilot program offered companies that violated the FCPA steep discounts in monetary penalties if they met three criteria:

- Voluntarily disclose the violation
- Cooperate fully with the Justice Department in ensuing investigations
- Remediate the policy or internal control weaknesses that led to the violation in the first place

With the Enforcement Policy, the Justice Department is rewarding good behavior. If an FCPA violator meets all three criteria, the Justice Department's presumption will be not to prosecute at all — no monetary penalties, no compliance monitor, no deferred-prosecution agreement. Instead, the company secures a full declination to prosecute, which the Justice Department will announce publicly. That approach reflects the enforcement philosophy of the Trump administration: that individuals commit crimes rather than corporations, and whole organizations should not suffer for the misdeeds of a few.

This doesn't mean organizations get off scot-free. Ideally, the company must still conduct a thorough investigation and remediate any compliance program weaknesses. Neither action comes cheap.

The Justice Department is also more strictly punishing bad behavior. For example, if the violation includes "aggravating circumstances," criminal charges and monetary penalties remain likely. Aggravating circumstances can include senior executives involved in the misconduct, significant profits gained from violations, or pervasive misconduct within the company.

If companies don't disclose violations, but then do cooperate and remediate weaknesses after the Justice Department begins its own investigation, the company will be eligible for a 25% reduction in fines based on the U.S. Sentencing Guidelines.

If a company wants to avoid the assignment of a compliance monitor, then according to the Enforcement Policy, it must have an effective compliance program in place by the time the FCPA investigation is resolved. If the company already has a compliance program in place, any weaknesses identified as part of the investigation must be remediated.

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