

DOJ Assistant FCPA Chief Discusses “Meat-and-Potatoes” Cases, a “Global Awakening” and the Impact of New Technologies on Evaluations of Corporate Compliance

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Litigation Alert

March 19, 2019

Key Points

- The prosecution of individuals remains a key priority for DOJ FCPA enforcement actions.
- DOJ is “busier than ever,” focused on “higher-priority,” “bread-and-butter,” and “meat-and-potatoes” cases.
- There is no “one-size-fits-all” compliance protocol for companies, who must continue to tailor their protocols to the specific business risks with which they are faced.

The Assistant Chief of the U.S. Department of Justice (DOJ), Criminal Division, Fraud Section’s Foreign Corrupt Practices Act (FCPA) Unit spoke at an event presented by Dow Jones Risk & Compliance on Tuesday, March 12, 2019, in New York City. The event focused on “The Future of Corporate Compliance.” In a wide-ranging discussion, Assistant Chief Ephraim (Fry) Wernick spoke of the FCPA Unit’s pursuit of individuals, the importance of foreign government cooperation to the FCPA Unit’s work, and the need for companies to continually adapt their compliance programs to the unique features of their businesses and technological developments.

While noting the increase in individual prosecutions under the FCPA in 2017 and 2018, Mr. Wernick emphasized that the FCPA Unit’s focus is not on just the number of prosecutions, but their quality. He stated that the FCPA Unit is intent on bringing “righteous cases” against culpable senior executives and affirmed that “individual prosecutions remain our chief goal” due to their deterrent effect. Referring to DOJ’s 2017 revisions to its Corporate Enforcement Policy, Mr. Wernick noted that companies whose senior executives participate in FCPA violations may still be able to avoid criminal charges if they fully and timely self-report the violations to DOJ, citing a recent

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enforcement action in which former senior corporate officials are alleged to have been culpable in the underlying conduct. Mr. Wernick noted that the early results from the policy revisions were “positive,” indicating that they are likely to continue for the foreseeable future. Mr. Wernick further stated that DOJ is “busier than ever” and is focused on “higher-priority,” “bread-and-butter,” and “meat-and-potatoes” cases—a change that he has seen as both the number of cases and number of resources devoted to them across multiple government agencies have grown over the past five years.

Regarding foreign governments’ cooperation with U.S. FCPA enforcement efforts, Mr. Wernick described a “global awakening” taking place in which foreign governments are not only cooperating with U.S. authorities, but are also passing their own legislation to proactively combat corruption. These governments have exhibited enthusiasm in partnering with U.S. authorities—enthusiasm that DOJ and the U.S. Securities and Exchange Commission (SEC) have met by offering foreign officials training in anticorruption investigation and enforcement techniques. Mr. Wernick stated that the Brazilian prosecution of *Petróleo Brasileiro S.A. (“Petrobras”)*, which also entered into settlement agreements with DOJ and the SEC, was one example of the “strong results” achievable through foreign enforcement efforts.

Mr. Wernick recognized that there is no “one size fits all” in corporate compliance and said that DOJ is “open-minded” to learning why a company might choose one compliance approach over another, given the unique features of its business. For example, the compliance program for a large, publicly traded company is bound to differ from that of a smaller, family-owned business. Mr. Wernick also cautioned that companies must adapt their compliance programs to account for new and emerging technologies that can both impact the operation of their businesses and the associated risks, and serve to enhance compliance. He cited “ephemeral messaging” through applications like WhatsApp as one such example of the need for companies to adapt their programs to address the evolution of criminal conduct. On March 11, 2019, DOJ announced that it was retracting a policy statement that was seen by many to require companies to completely ban such ephemeral messaging services in order to obtain the benefits of cooperation under the FCPA Corporate Enforcement Policy. Mr. Wernick explained that the policy was not meant to force companies to create and enforce a ban on individuals’ personal devices, but that companies must maintain proper records of employees’ actions on a company’s behalf. Mr. Wernick also clarified that, if a particular technology represents a “major form of communication” used by employees, it should be accounted for in a company’s policies. He noted that e-communications have moved far beyond the bounds of email messaging and that corporate policies should likewise expand beyond email forms of communication.

Conclusion

Ultimately, Mr. Wernick’s remarks reaffirm that the prosecution of individuals for FCPA violations remains a key enforcement priority for the government. Thus, officers and directors must continue to be vigilant in reporting any suspected violations of the FCPA through well-established compliance protocol. To that end, Mr. Wernick’s remarks, as well as DOJ’s recent enforcement actions, confirm that employing robust compliance protocols should remain a priority for companies to prevent violations of the FCPA, or enable companies to self-report and qualify for a declination under DOJ’s Corporate Enforcement Policy.