

The FCPA in 2018

Understanding Recent Changes to the FCPA Corporate Enforcement Policy and Requirement for Self-Disclosure

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Staying current with Department of Justice (DOJ) initiatives and policies is critical to sound corporate governance. Management must be alert to DOJ announcements as to how it will exercise its prosecutorial discretion. In some instances, these perspectives are delivered through memoranda or policy statements. Initiatives may also be discerned through announcements of prosecutions. In terms of Foreign Corrupt Practices Act (FCPA) prosecutions, the DOJ recently delivered important messages in both ways.

On December 22, 2017, the Department of Justice (DOJ) announced a deferred prosecution agreement with Keppel Offshore & Marine Ltd. (KOM), a Singapore-based company that operates shipyards and repairs and upgrades shipping vessels, charging KOM with conspiracy to violate the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA). Keppel Offshore & Marine USA Inc. (KOM USA), a wholly owned US subsidiary of KOM, pleaded guilty to a one-count criminal information charging the company with conspiracy to violate the anti-bribery provisions of the FCPA. The announcement also unsealed charges against a former senior member of KOM's legal department, who had previously entered a guilty plea on August 29, 2017 to one count of conspiracy to violate the FCPA.

In reaching the resolution, KOM and KOM USA received credit for their cooperation with the DOJ's investigation and for taking extensive remedial measures, including termination and discipline of employees involved in the criminal conduct, implementation of enhanced compliance and internal controls intended to address and mitigate corruption risks. As a result, KOM and KOM-USA received a 25% reduction on the imposed criminal penalty and agreed to pay a combined total penalty of over \$422M to resolve charges with authorities in the US, Brazil and Singapore. The corruption at issue began sometime before or during 2001 and continued until 2014.

KOM admitted to conspiring to violate the FCPA by paying approximately \$55M in bribes to officials at a Brazilian state-owned oil company and to the then governing political party in Brazil in order to win 13 contracts with the state-owned oil company and another Brazilian entity. KOM concealed the bribes by paying large commissions to intermediaries under the guise of legitimate consulting agreements, who then made payments for the benefit of the governing Brazilian officials and their political party.

The KOM and KOM USA resolution is particularly noteworthy because it includes many of the considerations and requirements recently written into DOJ policy. Companies doing business in the US will face new challenges in 2018 as they work to understand and navigate DOJ considerations for credit under the Corporate Enforcement Policy for the FCPA. The newly revised FCPA Corporate Enforcement Policy, now formally added to the United States Attorneys' Manual (USAM), may lead to more declinations, but companies should also anticipate greater federal law enforcement scrutiny over how corporate management teams respond to corrupt business practices inside their companies.

As a result, 2018 could become a very busy year for companies that must grapple with potential violations of the FCPA. The revisions to the Enforcement Policy do not create a statutory right. DOJ attorneys will undoubtedly continue to fully exercise their prosecutorial discretion in determining whether or not many of the broadly defined terms and requirements are in fact met. Still, the DOJ has stated its intention to make clear its internal directives and review process for awarding credit to companies for cooperation and self-disclosure, and potentially avoiding prosecution under the FCPA. The DOJ hopes that more companies may then be encouraged to proactively uncover corrupt business practices and willingly disclose that behavior to the government.

Deputy Attorney General Rod Rosenstein announced the policy changes in his remarks at the American Conference Institute's 34th International Conference on the FCPA held on November 29, 2017. He stated that, for the first time, changes would be incorporated directly into the USAM in order "to provide guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing."

Rosenstein suggested that the new policy would also serve to guide the DOJ in exercising its discretion and, thus, "combat the perception that prosecutors act in an arbitrary manner" by providing "transparency about the benefits available if corporations satisfy the requirements."

Rosenstein added that, unlike the practice under the Department's FCPA Pilot Program, established in early 2016, DOJ policy on FCPA matters would now include a "presumption" – but not a guarantee – in favor of declination of criminal charges "in the hope that more companies would chose to self-disclose corrupt business practices and work responsibly, in cooperation with the DOJ, to investigate, respond to and prevent this type of criminal behavior."

The decision to change existing practice and allow "a presumption that the Department will resolve [a]company's case through a declination" rests on the opinion that corporations should be "treat[ed] . . . differently than individuals, because corporate liability is vicarious [since] it is only derivative of individual liability." Nonetheless, in addition to requiring corporations to establish strong internal policies and procedures that require and monitor for ethical corporate behavior, Rosenstein stressed that "[g]ood corporate behavior also means notifying law enforcement about wrongdoing."

Simply put, a presumption in favor of declination will apply if a cooperating company has promptly and voluntarily self-disclosed FCPA misconduct or violations to government authorities. The terms "cooperation" and "voluntary self-disclose" will require far more than the words may ordinarily suggest. For example, the revised policy makes clear that to be considered voluntary, the disclosure must occur "prior to an imminent threat of disclosure or government investigation" as required under USS.G. § 8C2.5(g)(1) and it must be made "within a reasonably prompt time after becoming aware of the offense." Moreover, it is the company's burden to demonstrate that the disclosure was timely and it must include "all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law." USAM 9-47.120(3)(a).

In order to receive credit for full cooperation for purposes of the FCPA Corporate Enforcement Policy (and thus presumably declination), companies are required to do even more, including:

- Timely disclosure of all facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession and not otherwise known to the Department, it must identify those opportunities to the Department;
- Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;
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- Cooperation with DOJ requests for “de-confliction” of witness interviews and other investigative steps that a company intends to take as part of its internal investigation. In other words, if requested to do so, a company should proceed with its own investigation in a manner that does not interfere with or obstruct the government’s investigation;
- Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals’ Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

USAM 9-47.120(3)(b).

Companies seeking full credit for full cooperation will be expected to engage and respond proactively to facts and circumstances involving corrupt behavior and the company will be required to pay all disgorgement, forfeiture, or restitution resulting from the misconduct at issue. A cooperating company also bears the burden of establishing any claim that disclosure of certain information is “prohibited due to data privacy, blocking statutes, or other reasons related to foreign law” and will be expected to “work diligently to identify all available legal bases to provide such documents.”

Nothing in the FCPA Corporate Enforcement Policy suggests that a presumption of declination in favor of a corporation may in any way shield individuals from criminal prosecution. In his November remarks, Rosenstein noted that the revised policy would not protect individuals involved in the disclosed corrupt business practices from prosecution—only the company is shielded.

In addition, any presumption in favor of declination exists only to the extent there are no aggravating circumstances due, but not limited, to the seriousness of the corrupt behavior, substantial profits to the company resulting from the misconduct, the involvement of executive management in the corruption, the pervasiveness of the misconduct within the company or criminal recidivism. USAM 9-47.120(1).

Companies that demonstrate a culture of compliance, ethics and understanding of the root causes of corruption as well as a strong commitment to not tolerating such conduct, especially among its corporate officers, will be spared. In those cases still requiring a criminal resolution, the DOJ will recommend to the sentencing court partial or limited credit: (a) a 50% reduction off the low end of the US Sentencing Guidelines for a company that has voluntarily self-disclosed in a timely manner, fully cooperated with the government and has remediated the corrupt practices in a timely and appropriate manner or (b) a 25% reduction based on subsequent full cooperation (where the company did not voluntarily self-disclose in a timely manner) and there has been timely and appropriate remediation efforts within the company.

Remediation generally requires, but is not limited to, implementation of an effective compliance and ethics program based on risk assessment, audit controls, a defined reporting structure, accountability measures, disciplinary process, and employment of sufficient and experienced compliance personnel. See USAM 9-47.120(3)(c).

Remediation efforts must also now include “[a]ppropriate retention of business records, prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communication.” This new requirement is likely in response to evidence described in several recent resolutions in which company employees clearly intended to prevent or erase all electronic and digital records of their illegal bribes or related criminal behavior.

Since the change in administration in January 2017 through the end of the calendar year, only two DOJ declinations were publicly announced. Several more companies have issued their own press statements that the DOJ closed investigations involving possible violations of FCPA. Those cases were likely closed or declined, however, for other reasons and not under the FCPA Corporate Enforcement Policy. The DOJ's past practice has been to identify Enforcement Policy declinations on its website. Matters resolved through a criminal action are generally announced by press release. The USAM now expressly states DOJ policy to make public all declinations under the FCPA Corporate Enforcement Policy. See USAM 9-47.120(4).

In June 2017, the DOJ publicly released letter agreements with two US companies and certain foreign subsidiaries for each company, indicating the government's decision to close its investigation against those companies establishing illegal bribes and other transactions in violation of the FCPA. Both companies voluntarily self-disclosed the violations in a timely manner, fully investigated and took steps to remediate the corrupt behavior committed by company employees and also agreed to full disgorgement of all profits from the bribes to foreign government official and intermediaries.

On June 16, the DOJ by letter agreement closed its investigation of Linde North America Inc. and Linde Gas North America LLC (Linde) and certain other affiliates and subsidiaries, related to corrupt payments Linde made to high-level officials at the state-owned National High Technology Center (NHTC) for the Republic of Georgia. The payments were transmitted by a Linde subsidiary located in New Jersey.

In order to facilitate future bribes to NHTC officials, Linde and the NHTC agreed to form two companies, spun off of the New Jersey subsidiary, for the sole purpose of creating a fraudulent investment management company through which bribes, disguised as investment profits, were to be paid to NHTC officials. Linde voluntarily disclosed the corrupt practices in a timely manner, conducted a comprehensive and proactive investigation of the misconduct and those individuals responsible for the criminal enterprise, took steps to enhance its compliance program and internal accounting controls, made substantial efforts for full remediation of the illegal activity within its company and agreed to full disgorgement of over \$7.8M in profits and other monies received as a result of the creation and later dissolution of the investment management affiliate. Linde also agreed to forfeiture of over \$3.4M in corrupt proceeds due to NHTC, but withheld by Linde during its investigation of the bribery scheme.

The DOJ-Linde letter agreement further stated that it provided no "protection against prosecution of any individuals, regardless of their affiliation with the Company" and, moreover, provided no "protection for individuals against forfeiture claims by the [DOJ] for assets in those individuals' control."

On June 29, US-based CDM Smith Inc. (CDM), and its wholly owned subsidiary in India, admitted in a letter of agreement with the DOJ to payment of approximately \$1.8M in illegal bribes to government officials with India's state-owned highway management system in exchange for contracts for highway construction supervision and design, as well as a local water project. Bribes were paid through fraudulent subcontractors, who provided no actual services and understood the payments were meant to solely benefit the government officials. CDM agreed to disgorge over \$4M earned in profits from the illegally obtained contracts. The DOJ-CDM letter also stated that it afforded no protection against prosecution of any individuals regardless of affiliation the with company.

On September 21, November 7 and November 29, the DOJ announced three criminal resolutions involving US-based and foreign companies, as well as their subsidiaries. In all three, the DOJ imposed hefty criminal penalties, including fines, disgorged profits and significant remedial measures. Two of the resolutions also included criminal prosecution of individual company executives for their actions in furthering a conspiracy to bribe foreign officials.

While it is too early to conclude that DOJ's FCPA enforcement actions will substantially increase over time as a result of the revisions to its Enforcement Policy, it does offer a level of certainty in exchange for cooperation and transparency that companies should consider going forward.

Individual companies may be well-advised to examine their compliance programs now and develop a robust system of auditing and internal controls to ensure that, should it discover business practices that are likely in violation of the FCPA, the company is in a position to respond immediately by proactively investigating potential misconduct in a timely and thorough manner in order to self-disclose and receive maximum benefit for corrective actions and reduced financial penalties. Implementation of a strong compliance program may help to avoid criminal prosecution, despite cooperation and voluntary self-disclosure, because of significant aggravating circumstances requiring a criminal resolution over declination.

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