

A person wearing a dark pinstripe suit jacket and a striped tie is shown from the chest down. Their hands are in silver handcuffs, which are connected by a chain. The background is black.

A Return to Common Sense

The Justice Department's Latest Attempts
to Deter Corporate Criminals

By Michael Volkov

A Corporate Compliance Insights Publication

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Contents

FOREWARD

LARGE FINES - NO INDIVIDUALS

THE COURTS BEGIN TO RESPOND

THE ANTITRUST DIVISION MODEL

VOLUNTARY DISCLOSURES AND INCENTIVES

THE COMPLIANCE DEFENSE

REVISING FCPA PROSECUTION STRATEGIES

Foreword

The last decade has seen an explosion in criminal enforcement of corporations. The Justice Department and the white collar bar have transformed prosecutions of corporations from a relatively rare occurrence into a significant trend.

This has been a sea change, to put it mildly. Criminal investigations are now outsourced to white collar defense firms, supervised by DOJ prosecutors and then resolved through negotiations between the DOJ and the white collar law firm.

Prosecutors have a new toolbox that includes a variety of resolutions: a guilty plea by a parent company, a guilty plea by a subsidiary company, deferred and non-prosecution agreements and a standard declination. The focus of prosecutors in the last five years has been on one thing: large criminal fines. In fact, fines have replaced corporate criminal pleas, as well as individual prosecutions, as a key strategy for criminal enforcement and deterrence.

Gone are the days when criminal prosecutors conducted lengthy grand jury investigations, subpoenaing witnesses, squeezing information from subjects of investigation and ultimately charging corporations and individuals, leading to a criminal trial of all of the defendants, including the company. We have witnessed the transformation of the corporate criminal prosecution system from a binary system – criminal charge or declination – to a multidimensional system with a variety of possible results.

It is amazing to see this transformation in corporate responsibility. The change is perhaps most evident in the FCPA enforcement program conducted by the Justice Department and SEC prosecutors.

The Justice Department is in the throes of revising its FCPA enforcement model. As the DOJ re-examines its approach, policymakers have to ask the tough questions:

- *Does the extraction of large corporate fines without criminal guilty pleas promote deterrence?*
- *Do shareholders unfairly bear the burden of criminal fines and penalties?*
- *What impact has the current strategy had on individual prosecutions and the need to deter future misconduct?*

Like many issues in life, the answers are not black and white but require careful analysis and public policy discussions.

I would be remiss if I did not recognize that the policy discussion around these issues occurs in the context of a historical and glaring failure to act. Prosecutors failed to hold accountable companies and individuals who were responsible for the financial crisis in 2008 and 2009. No one can dispute the failure of the Department of Justice to act. Post hoc claims of “too big to fail” or “too big to jail” are convenient rationalizations for this debacle.

History will judge the officials responsible for this failure. In the immediate aftermath of the financial crisis, the public does not trust the criminal justice system; our government has neglected to prosecute officials responsible for the financial meltdown of our economy.

In the most ironic and obvious policy announcements, the Justice Department in September 2015 announced a new policy in its [Yates Memorandum](#), confirming what everyone already knows: our criminal justice system has failed to hold individuals accountable for criminal acts. Career prosecutors who recently left the government to join the white collar bar collectively shook their heads with the issuance of this memorandum. Why did the Jus-

tice Department issue a memorandum restating its commitment to ensure that culpable individuals are prosecuted? Talk about a restatement of what is otherwise obvious. It is evident that the Justice Department had veered off from its principal mission – to prosecute lawbreakers and hold individuals accountable. The Justice Department has returned to its primary mission, or as I suggest in the title of this book, it has returned to common sense.

It is safe to say that when we were prosecutors, we did not need anyone to remind us of the importance (let alone the requirement) of focusing criminal investigations on culpable individuals. We were well aware of our responsibilities and naturally focused on companies and individuals to hold them accountable for their criminal acts.

The Justice Department and the SEC are in the midst of an important process to recalibrate their FCPA enforcement program. It is an important process that could well have an impact across the DOJ's criminal prosecution responsibilities, not just on FCPA enforcement.

This book examines some of the important issues, enforcement models, trends in prosecution, and where we might land in a new corporate criminal enforcement model.

In the end, it is clear that DOJ is returning to an important common sense realization: criminal prosecution of individuals is a critical aspect of our criminal justice system -- and is a more effective tool to deterring criminal conduct by corporations.

“...When we were prosecutors, we did not need anyone to remind us of the importance of focusing criminal investigations on culpable individuals.”

LARGE FINES – NO INDIVIDUALS

Corporate criminal enforcement has become a cottage industry for the collection of large fines against companies across a range of industries, from

“Prosecutions of responsible individuals has diminished, partly because of resources needed to prosecute individuals, and the difficulty in identifying and successfully prosecuting culpable individuals.”

pharmaceuticals and auto manufacturers to financial institutions and defense contractors. A model of corporate fines, deferred prosecutions or non-prosecutions, and corporate supervision has replaced the old, “traditional” criminal prosecution model.

The Justice Department’s approach focuses on corporate prosecutions and imposition of large fines. Prosecutions of responsible individuals has diminished, partly because of resources needed to prosecute individuals and the difficulty in identifying and successfully prosecuting culpable individuals.

The pattern of accepting large fines, entering into DPAs and NPAs and forgoing individual prosecutions has created a model predicated on the criminalization of what

is otherwise a civil remedy. No one goes to jail; the company suffers no collateral consequences for its misdeeds, and the company’s consequences are “merely” financial and reputational harm.

The danger of this model has been evident in a number of major criminal prosecutions, but two stick out: one an FCPA case against Avon and the oth-

er against General Motors.

In September 2015, the DOJ announced the \$900 million criminal settlement with GM for the ignition switch scandal. Let's take a look at the terms of this deal:

- *A deferred prosecution agreement, not a guilty plea*
- *A \$900 million fine and settlement, less than Toyota's \$1.2 billion settlement for accelerator and floor mat safety defects.*
- *No individuals indicted*
- *An admission of causing 15 deaths, not the 124 deaths connected to the defect*

The DOJ's resolution was embarrassing. My heart goes out to the victims' families, and I share their disappointment in the failure of the Justice Department to carry out its mission.

The GM scandal is one of the most egregious examples of white-collar crime resulting in direct harm to the public -- the killing of many innocent consumers. It is a story that deserves greater punishment and individual accountability. Unfortunately, now it will go down in history as reflecting a bleak moment for the Justice Department as well as GM.

The facts surrounding the case are hard to stomach, even if you accept the Valukas Report, an internal investigation conducted by one of GM's primary law firms. For over a decade, GM employees, lawyers and senior officials were aware of the ignition switch defect and allowed the problem to go unresolved. The ignition device defect continued despite the fact that innocent people were being killed. Engineers and lawyers ignored or blatantly derailed internal attempts to address the problem.

GM's lawyers were complicit in this cover-up for fear of civil litigation implications. GM's ethics and compliance function was moribund to the point

of nonexistence, and corporate leadership was nowhere to be found.

If a CCO had been present in the upper level of senior management, GM might not have engaged in such criminal and tragic behavior. It is clear from reviewing the facts that no one spoke up or raised any concerns about the continuing harm to the public from the malfunctioning ignition switch.

The U.S. Attorney for the Southern District of New York, for whom I have a lot of professional respect, got it wrong when he told the press in a news conference, “We’re not done, and it remains possible we will charge an indi-

***“Each year,
approximately
half of all
criminal cases
are resolved
with a DPA or
an NPA.”***

vidual... If there is a way to bring a case like that, we will bring it.”

Prosecutors have a variety of tools available to them to bring individuals to justice, and I can assure you that the U.S. Attorney and senior Justice Department officials did not adequately review or push for the prosecution of culpable individuals.

Whatever may be the reasons for this failure, the Justice Department did not advance the ball on its so-called commitment to individual accountability. If anything, they let the public and, most importantly, the victims’ families down.

In the Avon case, a China subsidiary of Avon Products Inc. pleaded guilty to one count of conspiring to violate the Foreign Corrupt Practices Act. It will pay a \$67.7 million criminal fine and the Avon parent will enter into a three-year deferred prosecution agreement and appoint a compliance monitor. Avon also settled FCPA civil charges brought by the SEC for approximately \$67 million.

Avon paid roughly \$8 million worth of bribes to Chinese officials to secure authority to conduct direct selling operations in China. The Chinese bribes consisted of cash, gifts, travel and entertainment provided to various Chinese officials. In March 2006, Avon became one of the first companies to receive a direct selling license.

Avon management uncovered the bribery scheme, but three top officials, including the CFO, the Internal Auditor and the head of China's internal audit operation, destroyed documents and covered up the ongoing bribery findings. Surprisingly, no individuals from Avon -- including these three top officials -- were ever prosecuted for their criminal conduct.

Aside from these two high-profile cases, there have been a number of major financial institutions, such as AIG, Barclays, Credit Suisse, HSBC, JPMorgan, Standard, Lloyds and UBS, prosecuted over the last few years for a range of violations, including foreign currency manipulation, LIBOR collusion, mortgage-backed securities fraud, tax evasion and other types of misconduct.

DPA and NPA agreements with public companies to resolve criminal allegations have grown substantially. DPAs and NPAs have been used in virtually all areas of corporate criminal wrongdoing, including antitrust, fraud, domestic bribery, tax evasion, environmental violations and foreign bribery cases. Each year, approximately half of all criminal cases are resolved with a DPA or an NPA.

THE COURTS BEGIN TO RESPOND

With the increasing criticism of the DOJ's use of DPAs, it was inevitable that the courts would assert themselves in this area.

Last year, Judge Richard Leon in the District of Columbia rejected a DPA involving Fokker Services under which Fokker agreed to pay \$21 million in penalties for the violation of OFAC sanctions involving Burma, Sudan and Iran. During the period from 2005 to 2010, Fokker conducted almost 1,200 shipments of aircraft parts to customers in the prohibited countries, primarily Iran.

Judge Leon asserted the Court's "supervisory power" to reject the pro-

posed DPA. In particular, Judge Leon cited the fact that Fokker earned \$21 million in revenue from the illegal transactions and that the company committed the offenses with the knowledge and blessing of its senior management.

To support his decision, Judge Leon thought the penalty was too low given the gravity of the conduct and the number of transactions. The Court also pointed out that no individuals were prosecuted for criminal violations and

that individuals who engaged in the misconduct were still working at Fokker Services.

“Potentially facing increased scrutiny, the DOJ may need to adjust its strategy, requiring more guilty pleas by companies or even using non-prosecution „ agreements.”

Judge Leon is no stranger to questioning the government’s resolutions of serious and significant cases. He closely reviewed the SEC’s settlement with IBM in 2012 and required changes to the proposed settlement. He also delayed ultimate approval of the Daimler FCPA settlement based on questions he raised and changes made to the ultimate agreement.

In 2013, Judge Gleeson in the Southern District of New York asserted the same “supervisory power” over the HSBC DPA under which HSBC paid \$1.92 billion in fines. Judge Gleeson ultimately approved the DPA, but imposed specific reporting requirements.

Judge Leon and Judge Gleeson recognized that courts had no authority to review non-prosecution agreements. In contrast, a DPA required the court to enter a finding excluding time from the Speedy Trial calculation and approve the Agreement.

Judge Leon is the first judge to reject a DPA, specifically citing the seriousness of the conduct and the leniency of the penalty imposed on the company, as well as the failure to prosecute individuals or even impose discipline on employees involved in wrongdoing.

Judge Leon's decision sets an important precedent and reflects growing skepticism over the DOJ's use of DPAs. The head of the Criminal Division recently stated that the DOJ would enter into fewer DPAs in the future.

The DOJ has demonstrated that companies can plead guilty to criminal offenses and survive. In addition, the DOJ can impose the same requirements on a company in a guilty plea as in a DPA. If companies choose to go to trial and lose, the courts can fashion an appropriate sentence based on recommendations from the Justice Department. Recently, AU Optronics was found guilty of a criminal price-fixing conspiracy and the court imposed appropriate punishment and remediation to improve compliance.

Judge Leon's decision may encourage other judges to question DPA settlements and exercise the court's supervisory powers. In response to judicial oversight and to Judge Leon's close scrutiny and questioning of the IBM settlement, the SEC has turned to administrative proceedings to avoid judicial review. Not surprisingly, the SEC has been extremely successful in winning administrative proceedings.

Potentially facing increased scrutiny, the DOJ may need to adjust its strategy, requiring more guilty pleas by companies or even using non-prosecution agreements. If the DOJ does not alter its DPA policy, more courts will intervene and assert authority. The DOJ does not want that to happen.

THE YATES MEMORANDUM

The controversy surrounding the DOJ's failure to prosecute an appropriate number of individuals for white collar crimes – and FCPA violations in particular – has persisted for some time, at least since Senator Arlen Specter pressed the issue in 2010 in relation to the Siemens FCPA settlement.

Since then, the DOJ has continued on its merry way, racking up huge cor-

porate fines, entering into DPAs and NPAs and apparently not devoting enough resources to the prosecution of culpable individuals.

Last year, DOJ officials gave a series of speeches urging corporations to provide additional information in the course of their cooperation to aid in the prosecution of culpable individuals. DOJ officials warned that companies would have to serve up individuals if they wanted to receive full cooperation credit.

In September 2015, the Justice Department announced a new policy – entitled the Yates Memorandum – governing the criminal prosecution of individuals. The Yates Memorandum explains how companies can earn favorable treatment from prosecutors during an investigation, both raising the standard for cooperation and increasing the opportunities for credit. Companies cannot get cooperation points toward more favorable treatment unless they provide “all relevant facts” regarding the misconduct in question.

Deputy Attorney General Sally Quillian Yates clarified that while the bar will be raised for companies to get cooperation credit, businesses will get an extra shot at favorable treatment from the government based on their disclosure of wrongdoing.

All the commentators reporting on the DOJ’s announcement have missed the real point of the Yates Memo: The DOJ is not going to turn around now and indict numerous executives from the financial industry or any other industry retroactively.

As a former Assistant U.S. Attorney in Washington, D.C., I can tell you firsthand how policy memos like the Yates Memo impact the work of prosecutors around the country. On the front lines of criminal investigations, the Yates Memo will definitely have a significant impact moving forward.

Prosecutors conduct investigations under the direct supervision of line prosecutors who are charged with carrying out various policies. As the prosecutors focus their investigations on companies, more time and attention will be paid to building cases against individuals. As a result, line prosecutors, with the support of their supervisors, will define “success” in a new

way: a corporate settlement with appropriate individual prosecutions of culpable individuals. The real impact of the Yates Memo is that it pushes line prosecutors and their immediate supervisors to build cases that target not only the company, but also culpable individuals. It is now a requirement that needs to be addressed – not just an issue that can be resolved by a line prosecutor.

The challenge for prosecutors will be to attend to individual investigations, ensure that the case is investigated and brought within the statute of limitations, and build a case that is strong against not only the company, but also the culpable individuals.

Some cynics might write off the Yates Memo as just a political posturing piece, but those folks just do not understand the impact that DOJ policies can have as they filter through the organization to the line prosecutors and supervisors charged with their implementation. It is too naive of these critics and easy for them to ignore the implications of the Yates Memo and the real-world impact the policy will have.

We should expect to see a significant increase in the prosecution of individuals for health care and financial fraud, environmental, false claims, antitrust, export control and sanctions, food safety and other criminal cases. A strong argument can be made that individual accountability will have a dramatic impact on deterrence and overall compliance.

If the Yates Memorandum fails to result in any significant uptick in criminal prosecutions of individuals, cynicism will only increase and undermine the overall integrity of the justice system. The Justice Department has to be held accountable on this issue.

The performance of the DOJ has to be measured over a lengthier time

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period, such as over the next year. Case statistics will be important, and an increase in the number of individuals charged has to be measurable and apparent.

It is easy to see what kind of impact this policy will have in the FCPA arena. If you look through corporate settlements in the last two or three years, you can quickly identify potential individuals who could or should have been prosecuted.

As an example, the Avon prosecution last year identified three senior executives who were aware of the ongoing bribery and took active efforts to obstruct the investigation, including destroying documents. Yet none of the three individuals was charged. Under the Yates Memorandum policies, it is difficult to imagine how DOJ prosecutors would have been able to avoid prosecuting the three Avon executives.

Considering the GM and Avon cases cited above, it is hard to see how those cases would pass through the Yates Memo standard for individual culpability. If those cases occurred today, Avon and GM executives would be prosecuted.

THE ANTITRUST DIVISION MODEL

The Antitrust Division Leniency Program provides a pass or immunity to the first company (and its executives) to report on its participation and that of other companies involved in an illegal cartel. After the first company, succeeding companies that report on their own participation in a criminal cartel receive discounts in declining amounts. As an added carrot, companies that self-report their cartel activity receive a benefit in civil litigation: damages are de-trebled to single claims in contrast to non-rewarded companies who have to pay trebled damages to consumers and businesses that suffer harm from the cartel.

The DOJ's Antitrust Leniency Program has been a success. Since its inception in the 1990s, the Antitrust Division has built a robust criminal enforcement program, rewarding companies who self-report on cartel activity. Like bribery, cartel activity is carried out in secret and with minimal participation of company executives and officials. The incentive to self-report can often lead to the uncovering of significant cartels, resulting in substantial consumer benefits.

Policy proponents have argued that the same considerations of secrecy and incentives apply to the world of foreign bribery. But there is one big question: since corporate bribery almost always involves conduct by a single corporation, who is the company going to collaborate against?

This is where the Yates Memorandum and the Justice Department may be inclined to make an explicit trade-off. If the company is able to provide the Justice Department with evidence needed to prosecute individuals internally who were responsible for the bribery – actively and by failure to act – would it be in the public interest to reduce or even give the self-reporting company immunity or a pass?

Before the Yates Memorandum and the increased focus on individual liability, I would have argued that the DOJ would never adopt the antitrust model for FCPA purposes. Should the DOJ and policy advocates re-examine this issue?

At the heart of the issue is the question of what is the most effective deterrent. No one can dispute that big fines fall largely on the shoulders of shareholders. However, there may be serious reputational harm from large fines to a company. Whether that is an adequate reason to deter bribery is unclear.

The issue of deterrence is easy to boil down. A company pays a fine of \$500 million for illegal conduct and continues on its merry way. If that same

“Common sense tells us that deterrence results from punishing culpable individuals.”

company pays the same fine of \$500 million and three of its top executives are prosecuted, convicted and sent to jail, the value of deterrence has increased significantly. Common sense tells us that deterrence results from punishing culpable individuals.

In an important speech in February 2016, Brent Snyder, the head of the Antitrust Division's criminal cartel prosecutions, provided a basic, common-sense explanation of its cartel enforcement program.

Snyder outlined the Antitrust Division's focus on individual prosecutions and set out statistics that proved his point. Since the 1990s, the Antitrust Division has harnessed the power of its leniency program to increase the ratio of individual to corporate prosecutions to basically 3:1, meaning that three individuals are prosecuted for every one corporate settlement for cartel activity. An impressive ratio.

Underlying this focus on individual prosecutions, Snyder cited a basic proposition: "The [Antitrust] Division has long touted prison time for individuals as the single-most effective deterrent to the temptation to cheat the system and profit from collusion."

Snyder cited Scott Hammond, his predecessor, who said, "[i]t is indisputable that the most effective deterrent to cartel offense is to impose jail sentences on the individuals who commit them."

For criminal cartel practitioners like myself, the interesting issue is the impact the Yates Memo will have on individual prosecutions for cartel violations. Applying the policy could lead to an even higher ratio so that Antitrust Division prosecutors will increase the number of individuals prosecuted in each case.

In his speech, Snyder explained:

"We have adopted new internal procedures to ensure that each of our criminal offices systematically identifies all potentially culpable individuals as early in the investigative process as feasible and that we bring cases against individu-

als as quickly as evidentiary sufficiency permits to minimize the risk that cases will be time-barred or that evidence will become stale from the passage of time. We are also undertaking a more comprehensive review of the organizational structure of culpable companies to ensure that we are identifying and investigating all senior executives who potentially condoned, directed or participated in the criminal conduct.”

Snyder’s observations not only apply to antitrust criminal prosecutions, but also translate to a full range of corporate criminal conduct, including bribery, fraud, environmental sanctions and export controls. Unfortunately, criminal prosecutors do not have a consistent record like cartel prosecutors in the Antitrust Division.

Given the uneven performance of criminal prosecutors across specific divisions and criminal enforcement programs, it is easy to understand why the DOJ adopted and announced the Yates Memorandum policy directing greater focus on the prosecution of individuals.

The DOJ has an internal management issue that needs addressing. Instead of relishing in large-fine announcements from corporate clients (e.g., the GM case), the DOJ must refocus and reiterate a management message: line prosecutors, supervisors and managers up the chain of command have to ensure that individual prosecutions are increased. No longer will managers and line prosecutors be rewarded for large-fine corporate settlements without proper consideration of and focus on individual accountability. The DOJ has to step up to the challenge and show improvement, or else they need to be held accountable for enforcement failures.

“The DOJ has to step up to the challenge and show improvement, or else they need to be held accountable for enforcement failures.”

VOLUNTARY DISCLOSURES AND INCENTIVES

The Justice Department's re-examination of corporate incentives to disclose violations appears to be in reaction to the steady escalation of cooperation requirements. In response to these extra burdens, the DOJ could be concerned that FCPA voluntary disclosures will dwindle. For years, voluntary disclosures have fueled the DOJ's FCPA enforcement program.

In the context of a voluntary disclosure program, I have consistently written that the DOJ has failed to define a critical element: *what benefit will the company earn if they cooperate?* Companies need to know in advance what to expect and then balance that information against other factors: potential reputational harm, earnings decline, risk of detection and cost of remediation.

The dialogue surrounding this issue can be very troublesome, however, when simplistic solutions are offered. For example, it is easy to say that no company should be fined because it is unfair to punish the company's shareholders. Such an approach, while facially appealing, ignores several factors. First, the cost of a corporate fine or penalty is not just the amount of money involved, but the reputational damage as well.

Second, if there is some notion of corporate democracy, Board members and shareholders should hold accountable for those senior executives who failed to follow or ensure FCPA compliance.

Corporate penalties are an important way to trigger corporate governance reforms and should not be ignored as a tool in the punishment and deterrence of corporate wrongdoing.

FCPA enforcement history is replete with instances in which companies systematically, from top to bottom, were involved in active bribery schemes. Siemens, Alstom, Avon, Daimler and others all engaged in bribery with the active participation of senior executives. A systemic breakdown requires a

punishing fine and overhaul of corporate governance. Prosecuting individual executives may or may not lead to that needed response.

On the other hand, in the balancing process, it is clear that active prosecutions of individual actors, particularly in the systemic cases, should be part of DOJ enforcement actions. The Yates Memorandum has now changed the equation so that individuals who are culpable and prosecutable will be charged.

As a consequence, company internal investigations that are conducted as part of a DOJ investigation will require more comprehensive analysis of individual liability. The burden of such an analysis will depend on the circumstances. In some cases, the analysis could be significant.

There has to be a proper balance between corporate and individual enforcement.

As the Justice Department wrestles with these considerations, it would be important for DOJ officials to define the benefits of corporate cooperation and to inject a needed stimulus to incentivize self-reporting. That is, so long as the DOJ reserves the right to prosecute companies as appropriate and increase individual prosecutions.

THE COMPLIANCE DEFENSE

It is hard to understand why there are still advocates for an FCPA compliance defense. The issue is dead and gone, and it's unlikely to come back in any form. Perhaps these hangers-on are the same people who enjoy "zombie" movies. For the life of me, I cannot understand the fascination with zombies, aside from the classic, "Night of the Living Dead."

The advocates of the FCPA compliance defense continue to use the obvious (but unsubstantiated) claim that an FCPA compliance defense would necessarily increase the amount and quality of company compliance pro-

grams. While that may be true, they fail to address how a compliance defense would work.

No one has answered this basic question. The Justice Department and Congressional legislators need to know the answer to this question. Until an explanation is provided, there is no chance – and I mean *no* chance – that an FCPA compliance defense will ever be enacted, nor will the DOJ adopt such a policy in its enforcement decisions.

Let's examine the issue. First and most significantly, companies cannot afford (rightly or wrongly) to go to trial and require the government to satisfy its burden of proof. As a result, companies almost uniformly resolve their cases pre-indictment. A compliance defense, if authorized, would allow a company to argue against a proposed settlement by citing evidence of its compliance program. That already occurs in the context of settlement negotiations and remediation requirements in any settlement. The existence of a compliance defense will have little impact, if any, on these negotiations because companies do not plan to go to trial and will not go to trial even with the availability of a compliance defense.

“Companies will rue the day they bought in to this silly idea – and they’ll re-examine their priorities.”

Second, advocates for a compliance defense suggest that the defense should be added to the FCPA statute. Even more dangerously, they have argued that the compliance defense should be added as an element of the FCPA offense, thereby requiring the government to prove a negative: that the company did not have an adequate compliance program. Talk about convoluted. There is not one criminal offense that requires proof beyond a reasonable doubt of a negative (aside from a regulatory crime wherein a defendant does not have the requisite license).

Do companies really want the DOJ to conduct grand jury investigations of

their entire anti-corruption compliance program? Can you imagine the practical issues that would arise when compliance programs are subject to a DOJ investigation and protecting the company from other enforcement actions?

They will long for the old days when a compliance program was designed to detect and prevent an FCPA violation and when the company could argue and cite its program as a reason to decline prosecution of an FCPA violation.

Good ideas gain support through education and dialogue. The FCPA compliance defense has been the exact opposite; the more it is discussed, the more light that is shed on the issue, the less traction and support for the idea.

REVISING FCPA PROSECUTION STRATEGIES

Recent press reports suggest that the Justice Department is reconsidering its FCPA criminal prosecution policies, particularly with respect to corporate defendants. As reported, the DOJ is weighing the advantages of defining and increasing corporate benefits from voluntary disclosures and cooperation. This re-evaluation appears to have been triggered by changes in the Criminal Division leadership.

The DOJ's Yates Memorandum imposed new and significant obligations on companies seeking credit for cooperation, requiring companies to identify and provide information about all culpable individuals. The DOJ is now rethinking the benefits offered to companies for disclosure of potential FCPA violations and considering ways to increase incentives for companies that decide to disclose and cooperate.

The DOJ is contemplating giving an organization a pass or significant reductions in FCPA liability if the company fully discloses all FCPA violations and identifies and assists in the prosecution of culpable individuals. If the DOJ goes so far as is being reported, this would be a significant shift in

corporate decisions to disclose and cooperate.

Many years ago, when the FCPA was originally enacted, the SEC's Director of Enforcement and the (Grand)father of the FCPA, Stanley Sporkin, offered a similar strategy. Under Sporkin's policy, companies were given a window to investigate and disclose FCPA violations. Any company that participated in the program and made such disclosures escaped liability.

I have written previously that the DOJ needs to define the specific benefit companies would receive for voluntary disclosure and cooperation. Some

“It is unclear what is motivating this policy revision other than personnel changes and political appointments in the Fraud Section and Criminal Division.”

have suggested a sliding scale of percentage reductions in potential fines. Others have proposed a leniency program, like the Justice Department's Antitrust Division's Leniency Program, under which a company that fully cooperates would receive a full pass, but individual executives and employees would be subject to prosecution.

The Justice Department's policy revision appears to be premised on the decision that individual prosecutions, rather than corporate prosecutions, will maximize deterrence of foreign bribery. The balance between corporate and individual liability is an important calculation. It is unlikely that betting on

one extreme – maximizing either corporate or individual prosecutions – will be the most effective strategy.

Corporate prosecutions have to be reserved for the right cases. No one can argue that Alstom, Siemens or other companies involved in systemic foreign bribery schemes should not have been prosecuted. Those corporate cases, however, may have had a more significant impact if relevant corporate officials were prosecuted, even while the company received a reduced fine to reward them for cooperating against the culpable individuals.

The DOJ's recalibration of FCPA prosecutions has been telegraphed by statements that the DOJ was seeking to bring "high-profile" FCPA cases. Unfortunately, the DOJ has not defined what it means by that term, and there are many interested parties who will be ready to comment and criticize the DOJ for a significant policy change based on an undefined concept such as "high-profile" FCPA prosecutions.

Whether or not the DOJ strikes the right balance, it is unclear what is motivating this policy revision other than personnel changes and political appointments in the Fraud Section and Criminal Division. How this change comes about and the reasons for the changes will be scrutinized, so whatever is ultimately done, the key political appointees better make sure they implement changes carefully and with proper consideration of relevant factors and influences.

The DOJ's press spokesperson put out a strange and puzzling message recently, saying the DOJ is dedicating itself to "high-impact" corruption cases, suggesting somehow that what the Justice Department was doing before was "low-impact" or "lower" impact.

Word games like this only undermine DOJ prosecutors and the hard work they put in on FCPA cases. Frankly, I have no idea what is meant by "high-impact" cases. From my perspective, almost every case the DOJ has brought has been a high-impact case because of the message sent and the increased attention of corporate executives, general counsel and compliance officers.

The DOJ and SEC have created a significant global trend that has resulted in increased corporate focus on ethics and compliance. Additionally – and some may argue more importantly – the DOJ and SEC have created a global

“(it is) a global anti-corruption enforcement movement that has united leaders, prosecutors and law enforcement in the battle against corruption.”

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DOJ and SEC officials have been giving speeches to defend their existing model for FCPA investigations and prosecutions; the DOJ has significantly increased its investigative abilities by leveraging its resources to oversee the investigations and also to direct outside counsel, ensuring a robust investigation. This strategy, however, comes at a cost: the investigations are not conducted with the same incentive or the same quality that DOJ prosecutors would apply when conducting their own investigation. To suggest that everything is still the same would be naive.

In a new model, the DOJ is recalibrating incentives to motivate corporate outside counsel. The DOJ's primary carrot/stick tools are avoidance of a criminal charge, reduced fines and cooperation credit.

A new focus on individual prosecutions and timely corporate investigations means that endless or lengthy internal investigations will have to be avoided. The DOJ claims that it "pressure tests" investigations conducted by outside counsel and intends to demand greater focus on individual culpability. The DOJ wants to prosecute more individuals and to see company investigations serve up more individuals for criminal prosecution.

As the DOJ refines its balancing of factors, companies should continue to focus on ethics and compliance in order to prevent FCPA violations in the first place. If the DOJ adopts a new framework beyond just the emphasis on individual prosecutions and offers companies some defined and significant benefits from voluntary disclosures and cooperation, corporations that discover potential violations will have to re-evaluate the strategy decisions they make on whether to disclose such violations.

ABOUT THE AUTHOR



MICHAEL VOLKOV is the CEO of The Volkov Law Group LLC, where he provides compliance, internal investigation and white collar defense services. He can be reached at mvolkov@volkovlaw.com. His practice focuses on white collar defense, corporate compliance, internal investigations, and regulatory enforcement matters. He is a former federal prosecutor with almost 30 years of experience in a variety of government positions and private practice.

Michael maintains a well-known blog: [Corruption Crime & Compliance](#), which is frequently cited by anti-corruption professionals and professionals in the compliance industry. He has extensive experience representing clients on matters involving the Foreign Corrupt Practices Act, the UK Bribery Act, money laundering, Office of Foreign Asset Control (OFAC), export controls, sanctions and International Traffic in Arms, False Claims Act, Congressional investigations, online gambling and regulatory enforcement issues.

He has assisted clients with design and implementation of compliance programs to reduce risk and respond to global and US enforcement programs.

He has built a strong reputation for his practical and comprehensive compliance strategies. He served for more than 17 years as a federal prosecutor in the U.S. Attorney's Office in the District of Columbia; for 5 years as the Chief Crime and Terrorism Counsel for the Senate Judiciary Committee, and Chief Crime, Terrorism and Homeland Security Counsel for the Senate and House Judiciary Committees; and as a Trial Attorney in the Antitrust Division of the U.S. Department of Justice.

Michael also has extensive trial experience and has been lead attorney in

more than 75 jury trials, including some lasting more than six months. His clients have included corporations, officers, directors and professionals in internal investigations and criminal and civil trials. He has handled a number of high-profile criminal cases involving a wide-range of issues, including the FCPA and compliance matters, environmental crimes, and antitrust cartel investigations in countries all around the world.

REPRESENTATIVE ENGAGEMENTS

- Successfully represented three officers of a multinational company in two separate criminal antitrust investigations involving a criminal antitrust investigation in the District of Columbia and the Southern District of New York.
- Defended pharmaceutical company before the Food and Drug Administration and Senate Finance Committee relating to application for approval of generic drug.
- Conducted internal investigation which exonerated company against allegations of false statements in submissions to the FDA and against improper conduct alleged by Senate Finance Committee.
- Represented company before the US State Department on alleged violations of ITAR which lead to voluntary disclosure and imposition of no civil or criminal penalties.
- Advised several multinational companies on compliance with anti-corruption laws, and design and implementation of anti-corruption and anti-money laundering compliance programs.
- Advised hospitals, pharmaceutical companies and medical device companies on compliance issues relating to Stark law and Anti-Kickback law and regulations.
- Conducted due diligence investigations for large multinational com-

panies for anti-corruption compliance of: potential third party agents, joint venture partners and acquisition targets in Europe, Africa, Asia and Latin America.

- Represented individual in white collar fraud case in Alexandria, Virginia and secured dismissal of criminal charges and expungement of criminal record.
- Represented company before Congress and Executive Branch in effort to modify Justice Department regulations concerning use of federal funds.
- Advised and assisted World Bank in review of global corruption policies, enforcement programs and corruption investigations and prosecutions.



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