

The FCPA Guidance and Declinations

I have previously written about my belief that the US Department of Justice (DOJ) should go further in releasing information about Declinations to Prosecute Foreign Corrupt Practices Act (FCPA) cases self-reported to both it and the Securities and Exchange Commission (SEC). The FCPA Professor, Mike Volkov and others have also written and advocated that the DOJ should release information about Declinations because they are an excellent source of information for the compliance practitioner about the DOJ's thinking on FCPA enforcement issues.

In a piece I wrote for the Washington Legal Foundation, entitled "*DOJ Should Release FCPA Declination Opinions*", I stated that "In an area like Foreign Corrupt Practice Act (FCPA) enforcement, where guiding case law is largely non-existent, compliance practitioners must rely on the actions and decisions of federal enforcement agencies for information. Such information is available in the form of enforcement actions, the release of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs), and hypothetical fact patterns presented to the Department of Justice (DOJ) through its Opinion Release procedure. But one highly valuable source of guidance has been kept from regulated entities and their counsels: DOJ and Securities and Exchange Commission (SEC) "declination" decisions, opinions which are drafted when the agencies decline to prosecute an individual or organization. A change is needed in this counterproductive policy. The release of substantive information on declinations would help foster greater compliance with the FCPA by providing practitioners with specific facts of circumstances where investigations did not result in an enforcement action."

This request for such information was provided in the recently released document "*A Resource Guide to the US Foreign Corrupt Practices Act*" by the DOJ and SEC. In it presented six recent matters that the "DOJ and SEC declined to pursue." I have set them out in full because I believe that they provide solid information for the compliance practitioner.

Example 1: Public Company Declination

DOJ and SEC declined to take enforcement action against a public U.S. company. Factors taken into consideration included:

- The company discovered that its employees had received competitor bid information from a third party with connections to the foreign government.
- The company began an internal investigation, withdrew its contract bid, terminated the employees involved, severed ties to the third-party agent, and voluntarily disclosed the conduct to DOJ's Antitrust Division, which also declined prosecution.
- During the internal investigation, the company uncovered various FCPA red flags, including prior concerns about the third-party agent, all of which the company voluntarily disclosed to DOJ and SEC.
- The company immediately took substantial steps to improve its compliance program.

Example 2: Public Company Declination

DOJ and SEC declined to take enforcement action against a public U.S. company. Factors taken into consideration included:

- With knowledge of employees of the company's subsidiary, a retained construction company paid relatively small bribes, which were wrongly approved by the company's local law firm, to foreign building code inspectors.
- When the company's compliance department learned of the bribes, it immediately ended the conduct, terminated its relationship with the construction company and law firm, and terminated or disciplined the employees involved.
- The company completed a thorough internal investigation and voluntarily disclosed to DOJ and SEC.
- The company reorganized its compliance department, appointed a new compliance officer dedicated to anti-corruption, improved the training and compliance program, and undertook a review of all of the company's international third party relationships.

Example 3: Public Company Declination

DOJ and SEC declined to take enforcement action against a U.S. publicly held industrial services company for bribes paid by a small foreign subsidiary. Factors taken into consideration included:

- The company self-reported the conduct to DOJ and SEC.
- The total amount of the improper payments was relatively small, and the activity appeared to be an isolated incident by a single employee at the subsidiary.
- The profits potentially obtained from the improper payments were very small.
- The payments were detected by the company's existing internal controls. The company's audit committee conducted a thorough independent internal investigation. The results of the investigation were provided to the government.
- The company cooperated fully with investigations by DOJ and SEC.
- The company implemented significant remedial actions and enhanced its internal control structure.

Example 4: Public Company Declination

DOJ and SEC declined to take enforcement action against a U.S. publicly held oil-and-gas services company for small bribes paid by a foreign subsidiary's customs agent. Factors taken into consideration included:

- The company's internal controls timely detected a potential bribe before a payment was made.

- When company management learned of the potential bribe, management immediately reported the issue to the company’s General Counsel and Audit Committee and prevented the payment from occurring.
- Within weeks of learning of the attempted bribe, the company provided in-person FCPA training to employees of the subsidiary and undertook an extensive internal investigation to determine whether any of the company’s subsidiaries in the same region had engaged in misconduct.
- The company self-reported the misconduct and the results of its internal investigation to DOJ and SEC.
- The company cooperated fully with investigations by DOJ and SEC.
- In addition to the immediate training at the relevant subsidiary, the company provided comprehensive FCPA training to all of its employees and conducted an extensive review of its anti-corruption compliance program.
- The company enhanced its internal controls and record-keeping policies and procedures, including requiring periodic internal audits of customs payments.
- As part of its remediation, the company directed that local lawyers rather than customs agents be used to handle its permits, with instructions that “no matter what, we don’t pay bribes”—a policy that resulted in a longer and costlier permit procedure.

Example 5: Public Company Declination

DOJ and SEC declined to take enforcement action against a U.S. publicly held consumer products company in connection with its acquisition of a foreign company. Factors taken into consideration included:

- The company identified the potential improper payments to local government officials as part of its pre-acquisition due diligence.
- The company promptly developed a comprehensive plan to investigate, correct, and remediate any FCPA issues after acquisition.
- The company promptly self-reported the issues prior to acquisition and provided the results of its investigation to the government on a real-time basis.
- The acquiring company’s existing internal controls and compliance program were robust.
- After the acquisition closed, the company implemented a comprehensive remedial plan, ensured that all improper payments stopped, provided extensive FCPA training to employees of the new subsidiary, and promptly incorporated the new subsidiary into the company’s existing internal controls and compliance environment.

Example 6: Private Company Declination

In 2011, DOJ declined to take prosecutorial action against a privately held U.S. company and its foreign subsidiary. Factors taken into consideration included:

- The company voluntarily disclosed bribes paid to social security officials in a foreign country.
- The total amount of the bribes was small.
- When discovered, the corrupt practices were immediately terminated.
- The conduct was thoroughly investigated, and the results of the investigation were promptly provided to DOJ.
- All individuals involved were either terminated or disciplined. The company also terminated its relationship with its foreign law firm.
- The company instituted improved training and compliance programs commensurate with its size and risk exposure.

From these six examples, I believe that there are some common elements that the compliance practitioner can draw upon, which I expand on below:

1. The company was alerted to possible corrupt conduct via its compliance program or internal controls. This clearly follows Paul McNulty's Maxim No. 2, "What did you do to detect it?" If a company has a robust internal reporting system, including anonymous whistleblower line and strong internal reporting lines that are not only respected but taken seriously, this clearly is a plus. But more than internal reporting is both monitoring and auditing to determine not only the effectiveness of your compliance program, but to pick up potential violations.
2. Possible FCPA violations were self-reported or otherwise voluntarily disclosed to the DOJ/SEC. These declinations make clear that self-disclosure pays off in positive benefits by creating credibility in the eyes of the DOJ.
3. The entities in question conducted a thorough internal investigation and shared the results with the DOJ/SEC. I would view this as mandatory if a company is to have any hope of receiving a declination.
4. The conduct violative of the FCPA was not pervasive and consisted of relatively small bribes or other corrupt payments.
5. The company took immediate corrective action against the person engaging in the conduct.
6. Each company's compliance program was expanded or enhanced and these enhancements were reflected in compliance training, internal process improvements and additional enhanced internal controls.

So I applaud the DOJ for releasing this information on Declinations. I have written that I believe the DOJ Declination given to Morgan Stanley was the most important FCPA (non) enforcement action of 2012. While the Guidance may be a more significant overall FCPA event because of its wider focus and reach, the inclusion of these six declinations continues to provide solid information to compliance practitioners to use in creating or evaluating their compliance programs. I ended my piece for the Washington Legal Foundation with the following, "In the declination process, DOJ is handling a much broader and more significant amount of

information. A self-disclosing company has investigated or will investigate a matter, most likely with the aid of specialized outside FCPA investigative counsel. DOJ has the opportunity to review the investigation and suggest further or other lines of inquiry. Company personnel are made available for DOJ interviews, if appropriate. In short one would have actual facts and detailed oversight by DOJ, which in the case of a declination to prosecute, would provide substantive guidance on why it did not believe a FCPA violation had occurred in the face of a company's good faith belief that it had violated the FCPA."

I believe that this is still true.

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