

FCPA Declinations: How to Maximize Your Chance to Get a Pass When a Corruption Problem Occurs

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Bribes happen – unfortunately, all the time. Somewhere in the world, an employee of an overseas subsidiary, partner in a joint venture, local sales agent, or other business partner is paying a bribe to win business. The World Bank estimates that there is at least a trillion dollars of corruption every year – almost \$3 billion in bribes paid every single day.¹ Given the reality of the international business world today, even the most ethical companies can face the prospect of an improper payment being made within their organization. Enforcement of anticorruption laws, including the U.S. Foreign Corrupt Practices Act (“FCPA”), is at an all-time high as governments recognize the devastating impact that corruption has on economic growth. Law enforcement agencies act aggressively to investigate and prosecute corruption cases that years ago would not have been discovered and are working with countries that never before sought to target such conduct.

The inevitable result, however, does not have to be a multi-year investigation followed by massive criminal penalties. Companies that can demonstrate a truly proactive approach to anti-corruption compliance, both before a problem arises and after an allegation is received, can do much to help themselves in order to obtain the real golden carrot – the much-desired “declination” from the U.S. Department of Justice (“DOJ”) and similar treatment from the Securities and Exchange Commission (“SEC”). Not every case is appropriate for a declination – the strategy for each case must be carefully considered on its own merits. The following is the roadmap for those with the right facts and interest in pursuing the goal of a formal declination from the U.S. government.

What Is a Declination?

Even in the midst of heightened enforcement, DOJ recently stated that it declined numerous FCPA cases in recent years.² A declination occurs when a viable criminal investigation or prosecution exists, but DOJ determines that no further action should be taken.³ Prosecutors are guided by the Principles of Federal Prosecution of Business Organizations,⁴ which assist in determining whether a prosecution of a corporation is in the best interests of society. While some factors may be outside of a company’s control once a problem occurs, a solid understanding of what prosecutors consider will enable a company to better advocate why it should not be prosecuted even after a serious corruption issue has been identified. Such factors, discussed more fully below, include the existence and effectiveness of the company’s pre-existing compliance program, the company’s remedial actions, and the company’s timely and voluntary disclosure and cooperation.⁵

What to Do Now Before a Corruption Problem Is Identified

When working in the international business world, problems inevitably will occur. Businesses are operating in certain countries that pose tremendous corruption risks, and individual employees or agents can take action sometimes in direct violation of written company policies. Companies must take steps before an improper payment is specifically identified to ensure their compliance policies and procedures are designed adequately to prevent and detect corruption based on the unique risks of their business. While nearly every company knows that enhancing a compliance program may reduce the likelihood of an improper payment, most companies fail to recognize the impact of an effective compliance program in favorably resolving a government investigation should an issue later occur.

DOJ looks to a company's "Pre-Existing Compliance Program" to determine whether a corruption charge should even be brought when an improper payment is identified.⁶ DOJ will examine a number of factors that should be included in a compliance program:

- Substance, not just style. "Tone" at the top is not enough. DOJ has stated explicitly that there must be a commitment towards compliance not just from senior leadership, but that the "tone" at the top must be "reinforced and implemented by middle managers and employees at all levels of a business."⁷ A company with a good "tone at the middle" has managers at its overseas subsidiaries who understand the compliance program and know how to implement that program considering the unique aspects of the business in that country. DOJ is looking beyond the paper program to ensure that tough work in the trenches matches words from the executives.
- Continuous improvement. Anticorruption compliance is rapidly evolving. What was a best practice in 2007 may be inadequate now. What is sufficient now may be unacceptable in 2017. DOJ has made clear that they expect continuous improvement, periodic testing, and review.⁸ When considering the "pre-existing compliance program," DOJ will expect to hear not just about the new program that was created three years ago, but also how the new program was rolled out in subsidiaries across the world. Most importantly, DOJ will want to understand how the program is improving this year based upon the lessons learned during implementation over the past few years.
- Risk-based compliance. From DOJ's perspective, not every dollar spent on compliance is equal. A company's dollars spent on policing gifts, travel, and entertainment policies are not as important to DOJ as dollars spent evaluating a high-risk intermediary.⁹ DOJ has made clear that if a company is seeking credit for a strong pre-existing compliance program, it must be focused on the greatest "corruption" risks – which often occur in strategic transactions and when dealing with third parties.

Consequently, whether using outside counsel's advice or relying on internal expertise, companies should examine their compliance programs now with a critical eye to evaluating effectiveness and identifying gaps and areas consistent with current best practices. The work done this year will help not just to reduce future corruption problems, but also to maximize the likelihood of obtaining a declination if DOJ gets involved years from now.

What to Do When a Problem Arises

Allegations of improper payments can surface from a variety of sources – from anonymous tips on the compliance hotline, questionable payments identified by internal audit, or remarks during an exit

interview of a departing employee. Companies should be aware that even though an alleged corruption problem seems to be isolated and contained, it is increasingly likely that the U.S. government will learn of it, whether from the SEC's Dodd-Frank whistleblower program, or the U.S. government's increased investigative efforts and cooperation with law enforcement authorities from around the world.

What should a company do in order to maximize the chance of getting a declination before the government knows about the problem? Three things are critical:

- Stop the bribes. Stopping the bribes may sound simple, but it is not. Once a company learns of an alleged problem, it must ensure that there are no upcoming transactions that could be infected by the issue. If problematic third parties have been identified, make sure further payments are not made until legal counsel is comfortable that the payments are well supported. If a country manager or sales representative is implicated in the alleged wrongful conduct, make sure that further transactions over which they have control are given additional scrutiny. Enforcement authorities will have strong negative reactions if improper conduct continued after the company learned of potential improprieties. Because management's inaction and tacit approval of the payment can be considered under the Principles of Federal Prosecution of Business Organizations,¹⁰ a declination may be impossible to obtain unless future improper payments stop.
- Preserve the evidence. Companies that fail to preserve relevant evidence¹¹ have a much harder time bringing the internal investigation to a quick conclusion and, if the improper conduct is discovered by the government, obtaining a timely declination. Without all evidence preserved, a company will be unable to determine if an improper payment is corruption or simple embezzlement. If the government authorities eventually learn of the allegation, failure to preserve evidence can be a substantial factor in the government's evaluation of the company's internal investigation and efforts to undertake proper remediation. Indeed, failure to preserve evidence could lead to the U.S. government taking aggressive actions to more fully and independently investigate the conduct, which can be disruptive to business operations and substantially lengthen an investigation.
- Appropriately scope the inquiry. Companies often fail to appropriately scope an internal investigation – either looking much too broadly or not broadly enough. The inquiry must be scoped to determine if the allegation is a single failure of strong internal controls or a systemic problem that has ramifications beyond the issue identified. DOJ does not expect every company to conduct a worldwide review based on a single unsubstantiated allegation. Nor should companies only look at the payment in an isolated fashion and not examine how that particular internal control failure may have ramifications elsewhere in the company. Companies must ensure the investigation scope is appropriate to meet DOJ's expectations without wasting limited compliance funds.

Self-Disclosure Is Never an Easy Decision

Perhaps the most important question before the government learns of an issue is whether to voluntarily disclose that information to the government. Self-reporting or voluntary disclosure is an extremely important factor for DOJ in considering a declination.¹² Companies often undertake a complicated analysis examining the nature and origin of the allegations, the materiality and pervasiveness of the conduct, requirements of disclosure to shareholders or other stakeholders, and

the likelihood that enforcement authorities will independently learn of the issue. As companies around the world recognize, DOJ cannot be aware of every potentially improper transaction and will never have the resources to identify and investigate every possible lead.¹³ There is often no perfect answer whether to disclose potentially improper conduct to the U.S. government. However, the possible costs of failing to disclose can be irreparable. An allegation may surface years later through a variety of sources, which can lead to a lack of trust and confidence in the organization with a lengthy and disruptive investigation to follow. Corporations must carefully consider their options and find the best choice given the facts and circumstances of the issue, the effectiveness of the compliance program to detect and remediate the conduct, as well as considerations of corporate culture, transparency, and the priorities of the company in a world of expanding enforcement.

What to Do When Interacting with DOJ

Once the Government has learned of the potential improper payment, either through a voluntary disclosure or through other law enforcement methods, the company can still do much to earn a declination. In determining whether to bring criminal charges, DOJ will carefully weigh the level of cooperation with its investigation and the degree of information provided by the company.¹⁴ Companies should recognize a few key issues when in discussions with DOJ:

- Provide accurate facts. A declination requires cooperation and the provision of all relevant facts to the government in an accurate and logical manner. To be clear, responding to a subpoena is not cooperation – that is required by law. Cooperation goes beyond legal obligations and includes “the corporation’s willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.”¹⁵ Do not hide the ball or bury relevant documents. This is a criminal investigation, and prosecutors are evaluating the company’s cooperation in every interaction. The Principles of Federal Prosecution of Business Organizations and the U.S. Sentencing Guidelines are structured to provide significant benefits to companies that cooperate, and prosecutors have seen some companies provide exemplary cooperation. Doing the bare minimum will not be enough to earn a declination.
- Be honest. The trust of the prosecutors, once lost, is very difficult to recover. Do not state that there is “no evidence” supporting whether a payment was corrupt when all the available evidence has not yet been examined. Do not assume that DOJ cannot find evidence if it is not delivered to them – prosecutors may be investigating the conduct without the company’s knowledge. DOJ no longer relies primarily on company representations and will obtain witness statements (either through voluntary interviews or undercover recordings) and get documents and emails from locations outside of the company’s control (whether through search warrants, third parties, or foreign mutual legal assistance requests). If a company or counsel is found to have shaded the truth as part of advocacy, the investigation will continue much longer and the result is unlikely to be a declination.
- Structure your argument about what matters to DOJ. DOJ has heard nearly every type of argument out there and can identify those that are legitimately based in law and fact. Do not argue that the FCPA has never been applied to this particular factual situation, but rather structure your arguments around the Principles of Federal Prosecution of Business Organizations. While collateral consequences, such as debarment or the loss of export privileges, can be significant and should be considered by DOJ, companies must be prepared to describe actual and non-hypothetical consequences that would stem directly from

obtaining any resolution other than a declination. Understanding how prosecutors make their decisions will allow a company to most effectively advocate for a declination.

Conclusion

At the end of nearly every FCPA investigation, a request is made to prosecutors for a declination. The most compelling legal arguments and stirring emotional appeals often are not enough. Unfortunately, these arguments come only at the end of the investigation when limited factors remain within a company's control. Companies instead must develop a proactive approach well before an improper payment is identified and should consider the following steps to maximize their chance for a declination:

- Before the problem is identified, establish an effective compliance program through continuous improvement and a risk-based approach;
- After the problem is identified, ensure improper payments do not continue, preserve and gather all appropriate evidence, and engage experts to undertake an investigation that is appropriately scoped; and
- Once involved in negotiations with the U.S. government, provide meaningful cooperation built on trust and confidence in the company's remedial actions, transparency, and demonstrated efforts to ensure a compliance-based culture within the organization.

While a declination can never be guaranteed, companies should take steps now to maximize their options for seeking a declination from DOJ when the inevitable corruption problem arises.

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¹ See "Six Questions Regarding the Costs of Corruption," <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

² A Resource Guide to the U.S. Foreign Corrupt Practices Act (the "FCPA Resource Guide") at 75, available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

³ A declination does not occur if an element of the crime is not met – for example, the bribe recipient was not a foreign official or there was no criminal intent.

⁴ U.S. Attorney's Manual ("USAM") 9-28.000, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

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- ⁵ See USAM 9.28-300 (Factors to Be Considered), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300.
- ⁶ Prosecutors will look to the “existence and effectiveness of the corporation’s pre-existing compliance program.” See USAM 9.28-800 (Corporate Compliance Programs), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800.
- ⁷ FCPA Resource Guide at 57.
- ⁸ FCPA Resource Guide at 61.
- ⁹ FCPA Resource Guide at 58 (“One-size-fits all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company’s compliance program is ineffective.”).
- ¹⁰ If improper payments continued after the company learns of the allegations, DOJ could consider that to be “complicity in, or the condoning of, the wrongdoing by corporate management.” USAM 9-28.300, citing USAM 9-28.500, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300.
- ¹¹ Companies should evaluate whether they are accurately preserving the right evidence – not just hard copy files, but also the electronic data, keeping in mind all of the employment law and data privacy restrictions occurring in different jurisdictions.
- ¹² “In gauging the extent of the corporation’s cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure....” USAM 9-28.700 (The Value of Cooperation), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.700; *see also* FCPA Resource Guide at 54 (“DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.”).
- ¹³ “[F]ederal law enforcement and judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists.” FCPA Resource Guide at 75.
- ¹⁴ USAM 9.28-700.
- ¹⁵ *Id.*