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What Makes FCPA Enforcement So Special?

At the end of last year, the DOJ announced that its FCPA Pilot Program would be permanently incorporated into the U.S. Attorneys' Manual as a new policy for handling FCPA corporate issues. I took a deep dive into what the new policy means for companies and enforcement in a three-part series. One issue that, despite not receiving much press, continues to intrigue me is why FCPA actions are singled out for their own DOJ enforcement policy.

"It is interesting that this new policy is focused on just the FCPA and not rolled out more broadly," Nat Edmonds, a former Assistant Chief of the FCPA Unit and current partner at Paul Hastings, told me during an extensive interview. "If these are the aspects that are relevant for settling an FCPA case, why do they not apply to other international cases?" he asked.

Philip Urofsky, a former Assistant Chief of the DOJ's Fraud Section and now a partner at Shearman, noted in an email that "neither the policy nor any DOJ official, including [Deputy Attorney General Rod Rosenstein], has truly and seriously sought to explain why FCPA corporate cases are any different than other corporate cases." In FCPA cases, corporations are vicariously liable for the acts of individual employees, but that is common to almost all corporate enforcement actions. And while FCPA cases inherently involve conduct in foreign jurisdictions and, thus, overseas evidence, that is also true in transnational fraud cases, cartel cases and many cases involving multinational corporations. "Essentially, the DOJ has, for reasons unknown, carved out an exception to generally applicable corporate law for FCPA cases," Urofsky said.

While the reasoning for this carve-out may be mysterious, those who deal with FCPA cases can benefit from the increased clarity the DOJ has provided on both its enforcement expectations and what it is looking for in terms of cooperation. But if you have thoughts on why the FCPA has been singled out for special treatment, or what that means for companies, we would love to hear them.

Warmly,

Megan Zwiebel

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