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DOJ SHOULD RELEASE FCPA DECLINATION OPINIONS

by
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In an area like Foreign Compliance Practice Act (FCPA) enforcement, where guiding caselaw 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.

The Issue Regarding Declinations. In an article by Miller & Chevalier attorneys James G. Tillen and Marc Alain Bohn, "*Declinations During FCPA Boom"* the authors reported that since 2008, there have been "at least twenty-five formal declinations by the DOJ and/or SEC involving twenty companies, nearly all of them publicly-listed. We also identified several additional cases that might represent declinations, but for which we could find no explicit confirmation of a decision to decline prosecution." However, these raw numbers do not provide information as to the reasons for the declinations as "it is often unclear why a government investigation has closed without enforcement. It could be that no violations were found to have occurred, that no basis for jurisdiction existed, that enforcement authorities elected to do nothing in deference to a foreign investigation, or that the declination itself represents a benefit in recognition of a company's voluntary self-disclosure, remediation and/or cooperation."

Tillman and Bohn believe that the majority of cases where DOJ or SEC issued declinations were matters in which a company self-reported a potential FCPA violation. Such information would seem to add credence to the oft-stated DOJ position that a company should always self-report. The authors also noted that were such information made publicly available, it could be better quantified and then corporations would understand that self-disclosure can provide a measurable benefit. Others, including Professor Mike Koehler, have called for the public release of the facts and circumstances around the DOJ/SEC decisions not to prosecute companies that self-disclose what they believe are FCPA violations.

DOJ Response. Why would DOJ not provide substantive information regarding declinations? One possible answer, Tillen and Bohn wrote, came from a June 2011 House Judiciary Committee on the FCPA, where DOJ representative Greg Andres explained that the government does not disclose this information "in large part because we don't want to penalize a company or an individual that's been investigated and not prosecuted"

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suggesting "[t]here may be some prejudice from that." Interestingly, soon after the conclusion of the House Judiciary Committee hearing, Chairman James Sensenbrenner and Representative Sandy Adams sent Andres a letter and requested information on DOJ declinations. The letter stated, "Please provide to us information on cases that been brought to the attention of DOJ, but your agency decided, for one reason or another, not to investigate or pursue prosecution within in the last year along with the rationale for those decisions."

As reported in *The FCPA Professor* blog in a post entitled *DOJ Declines to Get Specific in Declination Responses*, DOJ responded to the request. Assistant Attorney General Ronald Weich wrote that "the Department has declined to prosecute corporate entities in several cases based on particular facts and circumstances presented in those matters, and taking into account the available evidence." He also provided several examples of matters DOJ has declined to prosecute where "some or all of the following circumstances existed":

1. A corporation voluntarily and fully self-disclosed potential misconduct;

2. Principals of a corporation voluntarily engaged in interviews with DOJ and provided truthful and complete information about their conduct;

3. A parent corporation voluntarily and fully self-disclosed information to DOJ regarding alleged conduct by subsidiaries;

4. A parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries, and engaged in significant remediation efforts in acquiring the relevant subsidiaries;

5. A company provided information to DOJ about the parent's extensive compliance policies, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries; and

6. A company agreed to a civil resolution with the SEC, while also demonstrating that a declination was appropriate for additional reasons; a single employee, and no other employee, was involved in the provision of improper payments; and the improper payments involved minimal funds compared to the overall business revenues.

Proposal. Imagine the guidance which DOJ *could* have provided if any or all of the above six instances cited in Weich's letter was made available to companies and compliance practitioners. A model to follow for doing this already exists at DOJ. Its Opinion Release procedure offers a specific opinion on whether a certain set of hypothetical facts, based upon a written submission, would lead to a FCPA enforcement action.

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.

DOJ's reasoning for refusing to release declination opinions is misplaced. While DOJ is appropriately concerned with the release of names or other substantive identifiers of any company which receives a declination, such information can be easily removed or scrubbed. In Opinion Releases, DOJ identifies the industry, geographic location, and other specific facts which are of great benefit to compliance practitioners. DOJ could easily do the same with declinations while still providing its reasoning for declining to prosecute.

The substantive portions of declinations, excised of company-specific information, would greatly increase FCPA enforcement transparency. This, in turn, would inspire greater FCPA compliance through a better understanding of how DOJ interprets the law with the specific facts presented to it.

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