Bloomberg Law®

Corporate Law & Accountability Report™

FCPA

Former Justice Department Compliance Counsel Hui Chen, now a private consultant, discusses corporate compliance in a regular column for Bloomberg Law.

DOJ's FCPA Corporate Enforcement Policy: Viewing It In Light of Antitrust and Domestic Corruption Prosecutions

BY HUI CHEN

On Nov. 29, 2017, the Department of Justice (''DOJ'') released its new Corporate Enforcement Policy for prosecutions of corporate cases under the Foreign Corrupt Practices Act (''FCPA''). This policy is an extension of the 2016 FCPA Pilot Program, providing companies with incentives to self-report, cooperate, and remediate. The new policy has gone further than the pilot program by granting ''a presumption that the [qualifying] company will receive a declination absent aggravating circumstances . . .''

The FCPA Corporate Enforcement Policy is not the DOJ's only policy that grants corporations leniency from criminal prosecution to incentivize self-disclosure and cooperation. The Antitrust Division, for example, has had a Corporate Leniency Policy that grants automatic leniency from criminal prosecution to qualifying companies since 1993. In a February 2010 speech, Scott Hammond, the then-Deputy Assistant Attorney General for Criminal Enforcement in the DOJ's Antitrust Division, called the Leniency Program ''Antitrust Division's most effective investigative tool.'' Hammond cited over $5 billion in criminal antitrust fines since 1996, and attributed 90 percent of this total to ''investigations assisted by leniency applicants.''

Note that Hammond referred to the Leniency Policy as an ''investigative tool'' and he focused not on fines from the leniency applicants, but on fines generated by investigations assisted by them. That focus on the investigative value of cooperation is significantly absent from both the pronouncement and the discussion on the FCPA Corporate Enforcement Policy. It seems as if the FCPA bar believes the enforcement policy begins and ends with the reporting company itself, with declination as the ultimate end result. Such a view may be shortsighted.

One of the oldest and most useful prosecutorial tools is the use of cooperators.

One of the oldest and most useful prosecutorial tools is the use of cooperators. No diligent prosecutor is satisfied with ending an investigation with just the cooperator: it is always about how that cooperator can provide information to the next investigation, and the next. When Deputy Attorney General Rod Rosenstein cited the increased number of self-disclosures during the FCPA Pilot program (30 versus 18 in the 18-month pe-

Hui Chen (www.HuiChenEthics.com) was the Justice Department's first-ever compliance counsel expert before leaving in June to start her own private compliance consulting service. Before she joined the DOJ, Hui served in global senior compliance lead positions at Microsoft, Pfizer, and Standard Chartered Bank.

riod), I view those as nothing but preliminary indicators of how many potential cooperators there might be, not results of what their cooperation could lead to. The measure of this enforcement policy's success will be its effectiveness as an *investigative* tool. Given the length of complex white-collar crime investigations, it will be several years before the Criminal Division can cite the type of data that Hammond cited: amount of fines and penalties from investigations assisted by cooperating companies. That is where the real influence and impact will be: cases made from information gained through self-disclosure and cooperation that might not otherwise have been made.

There is another interesting comparison between the FCPA Corporate Enforcement Program and the Antitrust Leniency Program: the latter has an individual component. The Antitrust Division's Leniency Policy for Individuals grants leniency from criminal prosecution to individuals who report wrongdoing. I am not aware of publicly available data on the contributions of individual versus corporate cooperators in developing investigations, yet the injection of the individual leniency approach is certainly one that might change a company's self-disclosure calculus. Has the DOJ analyzed the data from the Antitrust Division's decades-long Leniency Program to determine whether it might be worth considering in the FCPA context?

Finally, it is not clear why such a corporate enforcement policy should be limited only to FCPA matters. In his announcement, Rosenstein repeatedly stressed the point about transparency regarding the cost and benefits of self-disclosure and cooperation. Why is such transparency not equally as desirable in other corporate cases: securities fraud, market manipulation, healthcare fraud, money laundering, sanctions violations, environmental crime, etc.? The policy itself refers to the ''inherently international character'' as a ''unique issue'' in FCPA matters, but aren't money laundering, financial fraud, import/export matters, narcotics matters often international in nature as well?

Rosenstein also spoke of combating corruption. According to the Fraud Section's 2016 Year in Review, the FCPA Unit secured charges or guilty pleas against 17 individuals and 13 corporate resolutions. During the same year, over 700 federal, state, and local government officials were charged for corruption by the DOJ, yet there is no data on corporate prosecutions in the Report to Congress on the Activities and Operations of the Public Integrity Section for 2016. Does the DOJ have a policy governing corporate prosecution of domestic corruption cases? If not, why not? Has the DOJ coordinated its domestic and international anti-corruption investigations and prosecutions to ensure consistency?

If the goal of the new policy is truly to combat corruption, and to secure the partnership of corporations in such efforts by providing greater transparency and consistency, then isolating its application only to the FCPA is an unfortunate limitation that invites inconsistency in the bigger picture.

   ISSN 2330-6300