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Thad McBride
(tmcbride@bassberry.com) is a Partner at Bass, Berry & Sims PLC in Washington, DC, USA.



Lindsey Fetzner
(lfetzer@bassberry.com) is a Partner at Bass, Berry & Sims PLC in Washington, DC, USA.

FCPA update: Recent enforcement, DOJ clawback program

By Thad McBride and Lindsey Fetzner

The Foreign Corrupt Practices Act (FCPA) is the U.S. government’s main tool for punishing US actors involved in corruption of non-U.S. governments. The U.S. Department of Justice (DOJ) has imposed significant penalties on corporate organizations and individuals alike under the FCPA. Recent enforcement action—including several actions against prior offenders—suggests that such penalties will continue. Recent guidance issued by DOJ also suggests that DOJ and the U.S. Securities and Exchange Commission (SEC)—which also administers and enforces the FCPA—are particularly interested in individual compensation as a driver of compliance. This focus on individuals presents challenges and opportunities for compliance personnel.

This article begins with a brief overview of the FCPA, followed by details of recent enforcement actions. Through the lens of those actions, the article addresses the focus on individual enforcement and the DOJ guidance related to individual compensation. The article concludes with practical suggestions for managing this evolving enforcement and compliance landscape.

Background on the FCPA

Enacted in 1977, the FCPA is a federal statute that prohibits payments to foreign officials for the purpose of obtaining or retaining business or an improper advantage or directing business to any person.^[1] The law and its terms are defined broadly. For example, a “payment” can be money, a gift, a business courtesy, or anything of value to the recipient, regardless of monetary value. A “foreign official” can be any official or employee—regardless of rank or title—of any government agency or any entity owned or controlled by a government, including a national oil company, a national airline, or a state-run hospital. The FCPA also includes accounting and internal controls provisions. While these provisions only apply directly to companies that are publicly traded in the US, it is incumbent on all companies to keep and maintain accurate books and records that fairly reflect transactions and controls to prevent and detect potential FCPA violations.

FCPA enforcement actions have dipped slightly in recent years—from more than 50 actions brought by DOJ and SEC in 2016 to only 20 in 2021.^[2] Glenn Leon, the head of the Fraud Section of DOJ’s Criminal Division, has emphasized that the Fraud Section (which takes the lead on FCPA investigations and prosecutions) is prioritizing quality over quantity.^[3] Moreover, enforcement policy changes mean that companies need to approach FCPA compliance with an eye to the increasing focus on individual accountability.

Focus on individual accountability

DOJ sharpened its focus on individual wrongdoers in 2015 with a memo from then-Deputy Attorney General Sally

Yates.^[4] Yates called individual accountability “one of the most effective ways to combat corporate misconduct” as it “incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.”^[5] The so-called Yates Memo offered six steps to strengthen DOJ’s pursuit of individual corporate wrongdoing including:

- Requiring companies to provide DOJ with relevant information related to individual wrongdoers to qualify for cooperation credit;
- Refocusing investigators to prioritize prosecution of individuals from the outset of an investigation; and
- Ensuring DOJ attorneys do not resolve matters with corporations without a plan to resolve the cases of related individuals.

Current Attorney General Merrick Garland himself has also expressed his intention of prosecuting individuals, stating, “I have made it clear that the Department’s first priority in corporate criminal cases is to prosecute the individuals who commit and profit from corporate malfeasance.”^[6]

Recent FCPA enforcement actions suggest DOJ is indeed focusing on individuals. Since 2000, DOJ has charged nearly 250 individuals with FCPA criminal offenses.^[7] In 2022, there were more than 20 FCPA and related charges against individuals. For example, in September 2022, DOJ charged Cary Yan and Gina Zhou, two Marshallese nationals, with conspiring to pay government officials from the Marshall Islands in return for passing certain legislation.^[8] Both pleaded guilty and now face up to five years in jail. Similarly, Asante Berko, a former executive at a UK subsidiary of US bank Goldman Sachs, was indicted on six counts related to his participation in a bribery scheme in Ghana.^[9]

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