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New DOJ policy grants companies expanded credit for voluntary disclosure of criminal misconduct

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In a development with potentially far-reaching consequences for white collar enforcement, the U.S. Department of Justice (DOJ) Criminal Division has expanded the opportunity for companies to earn credit for voluntary disclosure of criminal misconduct. The policy change may encourage voluntary disclosure consistent with prior DOJ initiatives, which have sought to increase corporate disclosure of apparent Foreign Corrupt Practices Act (FCPA) violations.

In a March 1, 2018 speech at the American Bar Association National Institute on White Collar Crime in San Diego, Acting DOJ Criminal Division Head John Cronan announced that the Criminal Division will begin to apply the FCPA Corporate Enforcement Policy (CEP) as "nonbinding guidance" outside the FCPA context.

The new Criminal Division policy marks a significant development in white collar enforcement, as companies will now have the opportunity to earn disclosure credit in most white collar matters.

Though Mr. Cronan, whose announcement was affirmed the following day by Deputy Attorney General Rod Rosenstein, emphasized a presumption of declination of charges in response to adequate disclosures, the CEP and the new policy appear to offer the possibility of resolutions more akin to non-prosecution agreements with conditions. Which form these future DOJ resolutions primarily take will determine the true significance of the recent announcement.

VOLUNTARY DISCLOSURE POLICY CHANGE

The new policy builds upon a recent development in FCPA enforcement, which made certain credit available to companies disclosing misconduct in violation of the FCPA. In November 2017, Deputy Attorney General Rosenstein announced that the DOJ would codify the CEP, which the DOJ has characterized as including a presumption of declination for companies that disclose apparent FCPA violations.

While a declination traditionally involves no charges at all, the CEP's provisions indicate a disclosure benefit that appears more like an NPA, which can include conditions such as the disgorgement of profits. Under the new policy, the Criminal Division will apply the CEP as nonbinding guidance when companies disclose non-FCPA-related misconduct.

In FCPA matters, the DOJ currently resolves matters with non-prosecution when companies meet three requirements.

First, companies must disclose apparent violations soon after discovering them and before a government investigation is imminent.

Second, they must cooperate fully with government investigators, providing complete, detailed, and timely disclosures and updates.

Third, companies must take steps to address the causes of the misconduct and prevent future violations.

Beyond the three pillars of corporate disclosure — disclosure, cooperation, and remediation — the DOJ also requires consideration of potential aggravating circumstances.

Under the CEP, the presumption of non-prosecution does not apply where (1) executive management is involved in misconduct, (2) the misconduct results in significant profit, (3) the misconduct is pervasive, or (4) the company is a repeat offender. In such instances, DOJ is required to recommend a 50% reduction off the minimum sanction under the U.S. Sentencing Guidelines.

ANALYSIS

The new Criminal Division policy marks a significant development in white collar enforcement, as companies will now have the opportunity to earn disclosure credit in most white collar matters.

It is uncertain whether the new policy is indicative of (1) an extension of the so-called "Yates Memo" and its progeny's emphasis on cultures of compliance or (2) the vanguard of a new era of significantly reduced white collar enforcement.

The recent announcement could represent the next step in the DOJ's approach to criminal enforcement that began with the Yates Memo in September 2015. That document instructed DOJ personnel and components to emphasize individual prosecutions in cases of corporate misconduct.

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In April 2016, the DOJ announced its FCPA Pilot Program, which enabled companies to earn credit and avoid full criminal penalties for voluntarily disclosing misconduct, an approach that the DOJ believed would lead to increased individual prosecutions.

In 2017, the DOJ brought several significant individual prosecutions in the FCPA context, with individual cases representing approximately 70% of the DOJ's FCPA cases last year. Many of these cases were likely initiated under the prior administration, though, so 2018 may be more indicative of the Trump Administration's approach.

On the other hand, the new policy may indicate a fundamental retrenchment of white collar enforcement, with the U.S. Government shifting greater responsibility for uncovering and remediating misconduct to private companies.

Past commentary by Trump Administration officials has suggested a preference for allowing self-regulation by the market, which may lead to a reduced number of white collar enforcement actions under the new policy.

As companies consider the impact of this latest DOJ policy development, they should continue to emphasize strong compliance policies and practices. Companies must also develop procedures for assessing and disclosing misconduct where appropriate in order to avoid or reduce criminal penalties.

Given the contents of the CEP, companies must also be cognizant of limitations to the credit they may receive for disclosing misconduct.

Although the DOJ's recent announcement raises the possibility of earning declinations (which generally involve situations where cases are not prosecuted or criminally resolved), the benefit of self-reporting may in practice be primarily limited to non-prosecution agreements with potentially onerous terms.

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