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DOJ Updates its Corporate Criminal Enforcement Policy

Steven A. Fredley and Patrick O'Donnell

The U.S. Department of Justice recently unveiled changes to its Corporate Criminal Enforcement Policy. The policy—previously known as the FCPA Corporate Enforcement Policy—applies to all Foreign Corrupt Practices Act cases and all other corporate criminal matters handled by the Criminal Division of the DOJ. The policy change creates significant incentives for corporations to self-report misconduct by opening pathways for corporations to avoid criminal prosecution or receive substantial reductions in criminal penalties. The policy sets forth important criteria a company must meet to achieve its full benefits and reinforces long-standing DOJ policy regarding the importance of implementing an effective compliance program.

Presumption of Declination for Voluntary Disclosure

Most significantly, the revised policy provides that when a company has voluntarily self-disclosed misconduct to the Criminal Division, fully cooperated, and timely and appropriately remediated the misconduct, there will be a *presumption* that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. To qualify for a declination, a company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue. Although corporations are required to pay disgorgement, forfeiture, and/or restitution, which can be substantial, a criminal prosecution declination offers considerable benefits, including avoiding further criminal proceedings and potential fines.

Aggravating Circumstances and Ability to Receive Declination

Aggravating circumstances that may prevent a company from receiving a declination, while not exhaustive, include involvement by executive management in the misconduct; a significant profit (meaning significant proportionally to the company's overall profits) to the company from the misconduct; egregious or pervasiveness of the conduct within the company; and criminal recidivism. Yet, even if DOJ finds the presence of aggravating circumstances, a declination is not foreclosed. The policy explains that the company will not receive a *presumption* of a declination, but prosecutors may nonetheless determine that a declination is appropriate. Such a determination may be made if the company can demonstrate it has satisfied three specified factors: (1) the voluntary self-disclosure was made immediately upon the company becoming aware of the misconduct; (2) at the time of the misconduct and disclosure, the company had an effective compliance program and system of internal accounting controls, which enabled the identification of the misconduct and led to the company's voluntary self-disclosure; and (3) the company provided extraordinary cooperation with the DOJ's investigation and undertook extraordinary remediation.

Other Benefits

While declination is obviously the biggest benefit available under the revised policy, companies that do not receive a declination are still eligible for significant benefits. If DOJ elects to move forward with a criminal resolution, a company that voluntarily self-disclosed the misconduct, fully cooperated, and timely and appropriately remediated, will receive a recommendation at sentencing of at least a 50% and up to a 75% reduction off of the low end of the U.S. Sentencing Guidelines fine range. In the case of a corporate recidivist, however, the recommended reduction will not be from the low end of the guidelines and prosecutors will have discretion to determine the starting point for the reduction.

In addition, corporations that voluntarily self-disclose, cooperate, and remediate the misconduct will generally not be required to enter a corporate guilty plea absent the presence of particularly egregious or multiple aggravating circumstances (except recidivism). And DOJ will generally not require the appointment of a monitor if a company has, at the time of resolution, demonstrated that it has implemented and tested an effective compliance program and remediated the root cause of the misconduct.

M&A Due Diligence and Remediation

The policy also addresses the not uncommon circumstance of an acquiring company discovering during due diligence or post-acquisition misconduct by the acquired company. Acquiring companies routinely find themselves responsible for misconduct for which they were not involved. Under DOJ's revised policy, where a company uncovers misconduct and voluntarily self-discloses the misconduct and otherwise takes actions consistent with the policy, including the timely implementation of an effective compliance program at the merged or acquired entity, there will be a presumption of a declination.

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For more information on HWG LLP's government investigations practice group, please contact Steven A. Fredley and Patrick O'Donnell.

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