

CLIENT ALERT

DOJ Criminal Division Announces Expansion of Leniency Policy

Recent FCPA Policy Extended to Other Criminal Investigations

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On March 1, 2018, the U.S. Department of Justice (the “DOJ”) announced that it would expand the recently implemented Foreign Corrupt Practices Act (“FCPA”) leniency policy to other types of criminal investigations. As a result of this decision, companies being investigated for offenses other than FCPA violations may be able to obtain declinations from the DOJ based on self-reporting, cooperating, and taking remedial measures.

The DOJ’s decision expands the FCPA Corporate Enforcement Policy (the “Enforcement Policy”) beyond just FCPA cases, extending it to, as nonbinding guidance, criminal investigations of other offenses. The Enforcement Policy, announced last November, allows companies that self-disclose FCPA violations to avoid any criminal charges, absent “aggravating circumstances,” provided they meet the Enforcement Policy’s requirements related to cooperation and remediation. The Enforcement Policy went a significant step further than the prior FCPA “pilot program,” in effect since April 5, 2016. Under the pilot program, the DOJ provided more limited incentives for self-disclosure, merely pledging to companies that they might receive a range of benefits, such as lower fines, but without creating a presumption of a declination.

The Enforcement Policy defines the terms “voluntary self-disclosure,” “full cooperation,” and “timely and appropriate remediation,” which are the criteria that must be met to qualify for a declination. “Voluntary self-disclosure” requires a company to disclose “all relevant facts” prior to “an imminent threat of disclosure or government investigation” and “within a reasonably prompt time after becoming aware of the offense.” “Full cooperation” requires “proactive cooperation,”

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including timely disclosing relevant facts, preserving relevant documents, and, if requested, making witnesses available for interviews. “Timely and appropriate remediation” requires a company to remediate the root causes of the underlying misconduct, to discipline relevant employees, and to implement an effective compliance and ethics program.

The Enforcement Policy states that even where aggravating circumstances are present, companies that self-disclose, cooperate, and remediate fully will (1) receive an automatic “50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist,” and (2) “generally” not be required to appoint an independent compliance monitor as long as the company has “an effective compliance program” “at the time of resolution.” In addition, the policy affords companies that do not self-disclose a 25% fine reduction as long as they cooperate and remediate issues fully. This Enforcement Policy crystalizes the incentives for self-disclosure by creating a presumption in favor of a declination for self-disclosures that meet the relevant standards and by granting automatic penalty reductions to companies that cooperate and remediate misconduct.

The DOJ Criminal Division’s decision to expand the Enforcement Policy to non-FCPA investigations is significant, as the Criminal Division investigates and prosecutes major financial and healthcare fraud cases, among others, in addition to FCPA cases. The expansion of the policy is presumably nonbinding in its application to criminal matters brought by other criminal litigating units within the DOJ and U.S. Attorney’s offices around the country. Notably, other regulators such as the Securities and Exchange Commission or the Commodity Futures Trading Commission do not have leniency policies such as this one. The announcement demonstrates the DOJ’s continued movement toward a corporate criminal enforcement regime that seeks to rely to a greater extent on, and meaningfully reward, corporate self-disclosures. Companies that discover possible criminal issues, FCPA or otherwise, should keep these expanded incentives in mind as they make the difficult decision of whether to self-disclose potential criminal conduct.

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