CLIENT ALERT

DOJ Further Encourages Swift Self-Reporting with Changes to Corporate Enforcement Policy

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On November 20, 2019, the U.S. Department of Justice (DOJ) revised its Foreign Corrupt Practices Act Corporate Enforcement Policy ("FCPA Policy") in a further move to encourage early self-disclosures. The changes make clear that DOJ does not expect a company to hold off on self-disclosure until it conducts a complete investigation that identifies all relevant facts, or until it determines that a violation of law occurred. Instead, DOJ expects companies that self-disclose to report on the relevant facts *known at the time of disclosure*, and to specify when those disclosures are based only on preliminary investigative efforts.

The revisions also include minor clarifications that deal with evidence outside of a company's possession and with the application of the FCPA Policy to mergers and acquisitions.

This latest update follows extensive revisions made in March of this year and the announcement that the FCPA Policy will apply as non-binding guidance for all criminal cases; all reflect DOJ's continued efforts to promote self-disclosures and provide clarity on DOJ's approach for companies deciding whether to self-disclose.

Timing and Content of Self-Disclosures

DOJ made two changes to the definition of voluntary self-disclosure, both designed to encourage early self-disclosure. First, DOJ modified the requirement that a company disclose "all relevant facts known to it" by adding the phrase "at the time of disclosure." DOJ acknowledged that a company may not know all relevant facts at the time of disclosure, "especially where only preliminary investigative efforts have been possible." Instead, DOJ expects a fulsome disclosure of the relevant facts known at the time, so long as the company makes clear its disclosure is based upon a preliminary investigation.

Second, DOJ changed the requirement to disclose facts about "individuals substantially involved in or responsible for the *violation of law***,**" replacing the latter term with "*misconduct*." This change harmonizes the language with the rest of the FCPA Policy, which focuses on "misconduct" or "wrongdoing" rather than "violations of law." It also sends a clear signal that a company need not wait to conclude that a violation of law occurred before making a self-disclosure—yet another push for rapid reporting. Oddly, DOJ left unchanged language quoting the United States Sentencing Guidelines (USSG) requiring a disclosure "within a reasonably prompt time after becoming aware of the *offense.*" (emphasis added).

Identifying Evidence Outside a Company's Possession

Another change focuses on the requirement to disclose opportunities for DOJ to obtain relevant evidence not in the company's possession when the company is or *should be* aware of any. The revised policy does away with the "should be" language, probably in recognition of the fact that companies can only identify evidence of which they are actually aware. While helpful to clarify DOJ's expectations, this change will likely have little practical impact on the conduct of investigations. As before, DOJ will continue to expect companies to conduct thorough investigations that identify relevant evidence—both in their possession and beyond.

Application of the Policy to Mergers and Acquisitions

DOJ had previously announced that the FCPA Policy's presumption of a declination would be available to companies who self-disclosed misconduct identified in the course of a merger or acquisition. Language to this effect was included in the March 2019 revisions to the policy. In its latest revisions, DOJ confirmed the well-established interpretation that this section only applies to misconduct "by the merged or acquired entity"—not the merging or acquiring company.

Key Takeaways

Since its introduction as a pilot program and subsequent adoption into the Justice Manual in 2017, DOJ has continuously honed its FCPA Policy—each time in a clear effort to encourage prompt but thorough self-disclosures. These recent changes are no exception. DOJ has now confirmed it is open to self-disclosures based only on preliminary investigative efforts and in advance of finding that any violations of law occurred. Whether this reflects a heightened set of expectations or is just a clarification of the current policy remains unclear. What is clear is that companies will continue to juggle the chaotic early stages of an investigation with the need to decide—now earlier than ever—whether or not to self-disclose in order to maximize the potential benefits of the FCPA Policy.

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