PAUL HASTINGS

STAY CURRENT

March 2018

Follow @Paul_Hastings

DOJ May Rely on FCPA Policy in Resolving Securities and Financial Fraud Cases

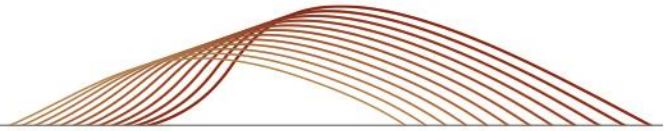
By Investigations and White Collar Defense Group

On March 1, 2018, John Cronan, Acting Assistant Attorney General for the Criminal Division of the U.S. Department of Justice (the "DOJ"), and Benjamin Singer, Chief of the Securities and Financial Fraud Unit of the DOJ Fraud Section, announced that the DOJ will use the Foreign Corrupt Practices Act Corporate Enforcement Policy (the "FCPA Policy") as nonbinding guidance in non-FCPA criminal cases. According to Cronan, the DOJ wishes that this guidance will encourage approaches and principles similar to the FCPA Policy for all securities and financial fraud cases.[1] The FCPA Policy provides a clear and specific path toward a possible declination by the DOJ in FCPA cases. This shift in approach could impact a corporation's determination of whether and how to cooperate with the DOJ in criminal investigations.

The FCPA Corporate Enforcement Policy

The FCPA Policy was introduced and incorporated into the United States Attorneys' Manual ("USAM") on November 29, 2017. Most notably, the FCPA Policy includes a presumption that the DOJ will decline to prosecute a company that has "voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated and timely and appropriately remediated."[2] The voluntary self-disclosure must be prompt and comprehensive, and must be "prior to an imminent threat of disclosure or government investigation."[3] Cooperation must be proactive and must include, at a minimum, timely disclosure of all relevant facts including those gathered in connection with the company's internal investigation, and making current and former company personnel available for interviews when requested.[4] Finally, companies must demonstrate remediation that includes, *inter alia*, thorough analysis of the underlying conduct, appropriate discipline of employees engaged in misconduct, retention of records and the implementation of an effective compliance program.[5] Criteria for assessing the effectiveness of a compliance program may include, but is not limited to, the company's culture of compliance, resources dedicated to compliance, authority and independence of the compliance function including access to company management and board, whether the program is tailored to the company's potential risks, and auditing of the compliance program.[6]

The presumption may not apply when there are aggravating circumstances that warrant a criminal resolution, such as pervasiveness and management involvement in the misconduct, significant profits from the misconduct, and prior wrongdoing by the company. However, despite such aggravating circumstances, a company that is not a repeat offender and that has self-disclosed, cooperated and remediated will receive some cooperation credit. The Policy indicates that for such cases, the DOJ will recommend a 50% reduction of the low end of the fine range under the U.S. Sentencing Guidelines



and generally will not require appointment of a monitor if the company has an effective compliance program.[7]

Moreover, companies that meet some but not all criteria listed in the FCPA Policy may be still rewarded with cooperation credit.[8] For instance, companies that do not timely disclose its misconduct, but later cooperate with the DOJ and take remedial steps as specified in the FCPA Policy will receive up to a 25% reduction off of the low end of the U.S. Sentencing Guidelines fine range.[9]

Potential Impact of Applying the FCPA Policy to Non-FCPA Cases

The DOJ's "Principles of Federal Prosecution of Business Organizations" (the "Principles") historically have provided guidance for corporate criminal cases.[10] Like the FCPA Policy, the Principles explain that, before a charging or settlement decision is made with respect to a company, prosecutors should consider cooperation, self-disclosure, remediation (including effective corporate compliance programs), and other factors relating to the nature of the case such as:

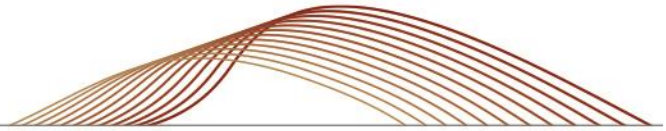
- the seriousness of the offense including risk of harm to the public,
- pervasiveness and management involvement in the misconduct,
- the company's history of misconduct, collateral consequences to shareholders,
- employees or the public, and
- the adequacy of civil enforcement actions and individual prosecutions relating to the misconduct.

However, unlike the FCPA Policy, the Principles do not explain when a declination is appropriate or warranted. Instead, the Principles only describe factors that should be considered when determining whether a company is eligible for cooperation credit that could result in resolutions for cases that the DOJ would deem appropriate for indictment or prosecution.[11] The Principles also do not specify how cooperation credit would be implemented in penalty calculations.

If the DOJ views the FCPA Policy as guidance for *all* criminal securities and financial fraud cases, corporations under investigation by the DOJ might look to the FCPA Policy to help determine whether, when and how they should cooperate, disclose and remediate. Indeed, the FCPA Policy's clarifications related to declinations and application of cooperation credit could help corporations navigate potential negotiations with the DOJ.

However, the DOJ has not formally announced that it would, in fact, adopt the FCPA Policy for all criminal securities and financial investigations. Accordingly, it remains to be seen how this recent statement by Cronan and Singer will impact DOJ resolutions with corporations in non-FCPA cases going forward. Unless and until the DOJ firmly and formally adopts a policy, corporations should certainly consider this announcement in their calculus regarding self-disclosure, with the understanding that it might not necessarily override other factors also being considered. It should also be noted that this announcement does not affect non-DOJ matters, such as civil or regulatory inquiries, enforcement actions or sanctions.

✧ ✧ ✧



[1] Kelly Swanson, *DOJ expanding use of FCPA declination policy principles*, GLOBAL INVESTIGATIONS REVIEW, Mar. 2, 2018, at https://globalinvestigationsreview.com/article/1166274/doj-expanding-use-of-fcpa-declination-policy-principles.

[2] USAM 9-47.120.

[3] USAM 9-47.120(3)(a), quoting U.S.S.G. § 8C2.5(g)(1).

[4] USAM 9-47.120(3)(b).

[5] USAM 9-47.120(3)(c).

[6] USAM 9-47.120(3)(c), and Remarks by Deputy Attorney General Rod Rosentein from the 34th International Conference on the Foreign Corrupt Practices Act, Nov. 29, 2017, https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[7] USAM 9-47.120(1).

[8] USAM 9-47.120(4).

[9] USAM 9-47.120(2).

[10] *See* USAM 9-28.000 and U.S. Department of Justice, Criminal Division, Fraud Section, *Evaluation of Corporate Compliance Programs*, Feb. 2017, https://www.justice.gov/criminal-fraud/page/file/937501/download.

[11] The Principles of Federal Prosecution of Business Organizations also encourages prosecutors to focus on individual wrongdoing, but we do not discuss that here.