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Assistant AG Provides Clarity on FCPA Self-Disclosure Credit

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Assistant Attorney General Brian Benczkowski's remarks provide important guidance for management and boards, and underscore the US Department of Justice's commitment to prosecuting individuals for corporate misconduct.

In Depth

At the American Bar Association's Annual National Institute on White Collar Crime on March 8, 2019, Assistant Attorney General Brian Benczkowski clarified the US Department of Justice (DOJ) self-disclosure program under the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy. The policy includes a presumption that the government will decline to prosecute business organizations that meet the DOJ's standards of "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation." However, the policy explains that this presumption can be negated if "aggravating circumstances" exist involving the nature of the offender or the seriousness of the offense.

In providing insight on how the DOJ is applying this policy, Benczkowski explained that prompt investigation and self-disclosure of FCPA issues may allow companies to overcome aggravating factors that otherwise could prevent the DOJ from declining prosecution. He highlighted that two recent DOJ declinations "make clear that aggravating factors like high-level executive involvement in the misconduct will not necessarily preclude a declination when the company's actions are otherwise exemplary."

Companies have wrestled with whether to self-report potential violations of the FCPA when aggravating circumstances are present. The FCPA corporate enforcement policy states that aggravating factors include, but are not limited to, the following:

- Involvement of company executive management in the misconduct
- A significant profit to the company from the misconduct
- Pervasiveness of the misconduct within the company

If the DOJ determines that aggravating circumstances do exist warranting criminal prosecution for a company that nevertheless has voluntarily disclosed the wrongdoing, fully cooperated, and timely and appropriately remediated, the policy (1) requires the government to recommend to the sentencing judge a 50 percent reduction off the low end of the US Sentencing Guidelines fine range (except in the case of a criminal recidivist), and (2) generally will not require the appointment of an independent monitor if the company has implemented an effective compliance program.

Benczkowski's speech provides important clarity for management and boards. While misconduct in one recent DOJ investigation "reached the highest levels of the company," the DOJ declined prosecution because that company had voluntarily self-disclosed conduct within two weeks of when the company's board learned of it. The rationale for the declination, according to Benczkowski, was that the swift disclosure allowed the DOJ to bring charges against the company's former president and former chief legal officer in connection to their alleged involvement in the conduct.

Benczkowski also clarified the DOJ's approach to crediting self-disclosures in the M&A context. When companies uncover potential FCPA violations during a corporate merger or acquisition, the DOJ will provide credit in those circumstances. Applying the self-disclosure policy "to the M&A context avoids chilling acquisition activity by law-abiding companies, who might otherwise walk away from worthwhile investments due to the risk of FCPA enforcement," Benczkowski said. According to Benczkowski, the DOJ does not want "the good corporate actors to cede the field to higher-risk entities that may only perpetuate illegal conduct."

Key Takeaways and Recommendations

- Benczkowski's comments are another sign of the DOJ's heightened commitment to prosecuting individuals for corporate misconduct. The DOJ continues to incentivize companies to identify culpable individuals while moving away from punishing corporate entities and shareholders for those individual actions.

- Time is of the essence in identifying who may be involved in potential FCPA violations. In instances where senior management is implicated, the board should be informed immediately to assess whether self-disclosure is appropriate.

- Management and boards should not be deterred by potential aggravating circumstances or factors when considering whether to self-report misconduct. The DOJ may still decline prosecution if the company's actions in responding to the conduct are "exemplary."

- When misconduct is identified post-acquisition, acquiring companies should promptly respond, remediate and consider whether to self-report. Self-disclosure credit still may apply in these circumstances.

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