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# DOJ's Quiet Changes to the FCPA Corporate Enforcement Policy Likely to Have a Significant Impact on Corporate Investigations

As the annual ABA White Collar Crime Conference wrapped up in New Orleans last Friday night, the Department of Justice released the latest updates to its FCPA Corporate Enforcement Policy. The key changes to the policy include new guidance regarding: (1) mergers and acquisitions and legacy liability as a result of misconduct prior to the acquisition; (2) DOJ's interactions with company counsel and requests that company counsel refrain from taking investigative steps; and (3) the scope of disclosure and remediation required in order to be eligible for a declination under the policy. Although DOJ chose to release the amendments with little fanfare, corporate executives, boards of directors, special committee members and practitioners alike will feel the effect immediately.

## I. MERGERS & ACQUISITIONS GUIDANCE

It has long been known that companies that discover evidence of misconduct while conducting pre-acquisition due diligence can engage with DOJ to address potential successor liability issues. But exactly what acquiring companies could expect to receive through that process was never quite clear. The Corporate Enforcement Policy now provides explicit guidance for mergers and acquisitions:

> [W]here a company undertakes a merger or acquisition, uncovers misconduct [1] through ***thorough and timely due diligence*** or, ***in appropriate instances, through post-acquisition audits or compliance integration efforts***, and [2] voluntarily self-discloses the misconduct and [3] otherwise ***takes action consistent with this Policy*** (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), there will be a presumption of a declination in accordance with and subject to the other requirements of this Policy.[1]

Moreover, a footnote to the comment states that "even if aggravating circumstances existed as to the acquired entity," the acquirer may still be eligible for a declination.

At a high level, it appears that acquiring companies that adhere to the Corporate Enforcement Policy can expect to receive the same benefits under the policy just as any other company would. But while the comment brings welcome clarity to a previously obscure process, questions remain. For example, will a company that conducts "thorough and timely" due diligence, yet nevertheless fails to uncover the misconduct, still be eligible for a declination? If not, what is the policy goal DOJ promotes by not permitting a company that conducts "thorough and timely" due diligence to be eligible for a declination? And what additional circumstances would be necessary in order to be an

[1] JM § 9-47.120(4), FCPA Corporate Enforcement Policy, [https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977](https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977) (emphases added).

"appropriate instance" in which the company still would be eligible under the policy?

Answers to these questions presumably will be illuminated when DOJ begins to issue declinations in M&A matters. Until then, corporate executives considering how much time and effort to devote to due diligence should include in their analysis the potential benefit to be obtained under the Corporate Enforcement Policy from "thorough and timely" due diligence, and they should be sure to create a record of the resources expended in attempting to uncover evidence of misconduct at the acquired entity.

## II. "DE-CONFLICTION" OF GOVERNMENT AND INTERNAL INVESTIGATIONS

The second major amendment to the policy concerns companies' agreement to refrain from taking investigative steps when requested by the government. The Corporate Enforcement Policy always has required companies to acquiesce to DOJ requests to defer taking action, such as interviewing certain witnesses, in their internal investigations. The policy now includes a footnote that states, "Although the Department may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the ***Department will not take any steps to affirmatively direct a company's internal investigation efforts***."[2]

This amendment likely results, at least in part, from cases in which individual defendants have raised arguments about DOJ's interactions with corporate counsel. For example, in *United States v. Connolly*, a former Deutsche Bank employee accused of manipulating LIBOR argued that the government took so active a role in Deutsche Bank's internal investigation that his statements in interviews conducted by the bank's outside counsel amounted to compelled testimonial self-incrimination. According to the defendant, Deutsche Bank's counsel pre-cleared with the government the interviews they planned to conduct, and on at least one occasion, the government obtained outside counsel's "word" that he would "approach [a particular] interview as if he were a prosecutor."[3] At a subsequent evidentiary hearing, Deutsche Bank's outside counsel revealed that the CFTC had instructed Deutsche Bank to conduct the internal investigation in the first place. And because Deutsche Bank employees who refuse to be interviewed in such investigations are subject to termination, the defendant argued that his statements in the interviews should be suppressed under a line of decisions that applies constitutional principles to private entities when the government exerts sufficient control over those entities. The issue has not yet been resolved in the *Connolly* case, but whatever the outcome, the Department undoubtedly wants to avoid issues like this arising in subsequent cases, and the amendment to the Corporate Enforcement Policy likely reflects that.

## III. OTHER SIGNIFICANT CHANGES TO ELIGIBILITY CRITERIA

Two remaining modifications bear emphasis. *First*, in order to obtain credit for voluntary self-disclosure, the revised policy requires a company to disclose "all relevant facts known to it, including

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[2] *Id.* (emphasis added).

[3] *See* Gavin Black's Individual Motions *In Limine*, *United States v. Connolly*, No. 16 Cr. 370 (CM) (S.D.N.Y. Apr. 23, 2018) (Dkt. No. 233). Although not an FCPA case, *Connolly* was prosecuted by DOJ Fraud Section, which includes the FCPA Unit.

all relevant facts about individuals ***substantially*** involved in ***or responsible for*** the violation of law."[4] The prior version of the policy did not contain "substantially" or "or responsible for." This amendment harmonizes the Corporate Enforcement Policy with DOJ's "Individual Accountability for Corporate Wrongdoing" policy—otherwise known as the Yates Memo. On November 29, 2018, the Deputy Attorney General announced that DOJ would no longer require companies to identify every single individual involved in the misconduct, but instead those "substantially involved in or responsible for" the misconduct.[5] The change to the FCPA Corporate Enforcement Policy eliminates the disparity between FCPA matters and all other criminal investigations in this respect.

*Second*, DOJ softened the policy regarding retention of certain business records. Previously, companies could not obtain full credit for remediation unless they "prohibit[ed] employees from using software that generates but does not appropriately retain business records or communications." Examples of such software included WhatsApp and other common communications platforms, which created a concern that companies could not be eligible for full remediation credit unless they instituted unpopular and unrealistic prohibitions against such communications. The revised Corporate Enforcement Policy instead requires companies to "implement[] appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations."[6] In effect, the revised policy permits a company to be eligible for cooperation credit so long as it takes reasonable steps to ensure that employees' use of such communications platforms does not interfere with the company's ability to preserve relevant communications.

## IV. KEY TAKEAWAYS

The revisions to the Corporate Enforcement Policy appear to reflect DOJ's continuing desire to make the policy an effective tool both for companies that want to resolve their criminal exposure and for prosecutors and investigators who want to identify and prosecute culpable individuals. By formalizing the policy with respect to mergers and acquisitions (albeit with a few open questions), DOJ has given comfort to executives who previously were unsure about what would happen if they self-disclosed. And the changes regarding the use of ephemeral messaging and the scope of disclosure concerning culpable individuals likely will make the policy more realistic and less burdensome, making companies more inclined to pursue a declination under the policy. And at the same time, the Department's additional "de-confliction" language will help avoid potential issues that might arise in subsequent prosecutions of individuals. Just as it did with its recent declination as to Cognizant Technology Solutions,[7] DOJ is sending a clear message that it is eager for companies to participate in the Corporate Enforcement Policy, and it is ready to reward those that do.

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4 JM § 9-47.120(3)(a), FCPA Corporate Enforcement Policy, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977 (emphases added).

5 Deputy Attorney General Rod J. Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

6 JM § 9-47.120(3)(c), FCPA Corporate Enforcement Policy, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977.

7 *See* Quinn Emanuel Firm Memorandum, *Key Takeaways from Cognizant Technology's Improbable Receipt of a Declination from DOJ*, https://www.quinnemanuel.com/media/1419305/client-alert-re-cognizant-technology-resolution-2019.pdf.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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