DOJ Clarifies Corporate Enforcement Policy

December 3, 2019

On November 20, 2019, the Department of Justice ("DOJ") modified its Corporate Enforcement Policy to clarify what level of disclosure is expected from companies in the early stages of an investigation. In short, the Policy reaffirms that companies should disclose known information—and the individuals involved—at the outset of investigations, while recognizing companies may not yet know all the relevant facts or individuals at that time.

The Corporate Enforcement Policy, first introduced as a pilot program concerning FCPA-related investigations in April 2016 and formalized in November 2017 by then–Deputy Attorney General Rod Rosenstein, offers incentives to companies that voluntarily disclose misconduct, timely remediate, and cooperate fully with the DOJ. Absent certain aggravating circumstances, a company following these steps can receive a declination assuming it fully disgorges any associated profits.[1] In March 2018, DOJ extended the Corporate Enforcement Policy beyond FCPA violations as nonbinding guidance concerning any corporate investigation. Since the Policy was introduced, DOJ has issued thirteen public FCPA declinations under its terms.[2]

The new language clarifies the extent of information expected in self-disclosures and acknowledges that companies often have limited knowledge at the preliminary stages of investigations.

- A new footnote to the self-disclosure provision states that "the Department recognizes that a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible."[3] A company in this position should "make clear that it is making its disclosure based upon a preliminary investigation or assessment of information," but still fully disclose "the relevant facts known to it at that time."[4] The same applies to the disclosure of individuals involved, with companies likewise directed to provide relevant facts about any individuals known "at the time of the disclosure."[5] The language thus distinguishes between information provided during the disclosure phase versus what might be required as part of "cooperation" as dictated by the Yates Memo.
- The definition of "full cooperation" now advises cooperating companies to notify DOJ of evidence not in its possession of which the company "is aware," no longer extending this to evidence of which the company "should be" aware.[6]

These changes come on the heels of other recent developments in DOJ's approach to corporate enforcement, including a decision in March not to prohibit companies from using "disappearing" messaging services like WhatsApp in order to receive full credit for remediation.[7]

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[1] *See* U.S. Dep't of Justice, Justice Manual § 9-47.120 (Nov. 2019).

[2] *See* U.S. Dep't of Justice, Corporate Enforcement Policy Declinations (Sept. 26, 2019), **https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations**.

[3] Justice Manual § 9-47.120 at n. 1.

[4] *Id.*

[5] Justice Manual § 9-47.120 at 3(a).

[6] Justice Manual § 9-47.120 at 3(b).

[7] *See* Justice Manual § 9-47.120 at 3(c) (modified this year to discourage, rather than prohibit, "ephemeral messaging platforms").

The revised policy is available **here**.

A redline comparison between the old and new policies can be found **here**.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

New York		
Greg D. Andres	+1 212 450 4724	**greg.andres@davispolk.com**
Martine M. Beamon	+1 212 450 4262	**martine.beamon@davispolk.com**
Angela T. Burgess	+1 212 450 4885	**angela.burgess@davispolk.com**
Tatiana R. Martins	+1 212 450 4085	**tatiana.martins@davispolk.com**
Washington, DC		
Robert A. Cohen	+1 202 962 7047	**robert.cohen@davispolk.com**
Neil H. MacBride	+1 202 962 7030	**neil.macbride@davispolk.com**
Paul J. Nathanson	+1 202 962 7055	**paul.nathanson@davispolk.com**
Linda Chatman Thomsen	+1 202 962 7125	**linda.thomsen@davispolk.com**
Kenneth L. Wainstein	+1 202 962 7141	**ken.wainstein@davispolk.com**
Hong Kong		
Patrick S. Sinclair	+852 2533 3305	**patrick.sinclair@davispolk.com**

*Mr. Cohen is admitted to practice in New York and Maryland, and is practicing in DC under the supervision of partners of the firm.