



BUSINESSES SHOULD APPROACH NEW DOJ CORPORATE SELF-DISCLOSURE POLICY WITH HOPEFUL CAUTION

by Mary Beth Buchanan and Brooke J. Cook

On March 1, 2018, John Cronan, Acting Head of the Department of Justice's (DOJ) Criminal Division, and Benjamin Singer, Chief of DOJ's Securities and Financial Fraud Unit, announced a shift in DOJ policy on corporate compliance. While addressing the 32nd Annual American Bar Association's National Institute on White Collar Crime, Cronan and Singer told attendees that DOJ's Criminal Division will model the policy after the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, as nonbinding guidance to be applied to other white collar offenses.¹

In the wake of this announcement, several sources have noted that this policy would not be applied to United States Attorney's Offices, because the policy is not an official one.² Thus, only DOJ's Criminal Division will have the ability to apply the FCPA Corporate Enforcement Policy outside the FCPA context.

The FCPA Corporate Enforcement Policy, updated on November 29, 2017, "provides incentives for companies to engage in ethical corporate behavior" which means "fully cooperating with government investigations, doing what is necessary to remediate misconduct,...and notifying law enforcement about wrongdoing."³ Specifically, the policy provides that if a company voluntarily discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution unless there are aggravating circumstances.⁴ If DOJ does not issue a declination, but decides that criminal charges are warranted, the company's voluntary self-disclosure, cooperation, and timely remediation, will earn the company a recommendation by the DOJ for a 50% sentence reduction from

¹ Jody Godoy, *DOJ Expands Leniency Beyond FCPA, Lets Barclays Off*, LAW360, Mar. 1, 2018, <https://www.law360.com/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off>; Mark A. Srere, *et al.*, *DOJ to Apply FCPA Corporate Enforcement Policy as 'Nonbinding Guidance' to Other Crimes*, Mar. 2, 2018, <https://www.bryancave.com/en/thought-leadership/doj-to-apply-fcpa-corporate-enforcement-policy-as-nonbinding.html>.

² Godoy, *supra*; see also Gary P. Naftalis, *et al.*, *DOJ Criminal Division Announces FCPA Corporate Enforcement Policy Provides Nonbinding Guidance for All Criminal Cases*, ALERT, Mar. 9, 2018, <https://www.kramerlevin.com/en/perspectives-search/doj-criminal-division-announces-fcpa-corporate-enforcement-policy-provides-non-binding-guidance-for-all-criminal-cases.html>; Jonathan S. Kolodner, *et al.*, *DOJ Announces Expansion of Approach Encouraging Self Reporting and Cooperation*, CLEARLY ENFORCEMENT WATCH, Mar. 5, 2018, <https://www.clearlyenforcementwatch.com/2018/03/doj-announces-expansion-approach-encouraging-self-reporting-cooperation/>.

³ Remarks of Deputy Attorney General Rod Rosenstein, Nov. 29, 2017, <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-34th-international-conference-foreign>.

⁴ FCPA Corporate Enforcement Policy, USAM Insert, 9-47.120, <https://www.justice.gov/criminal-fraud/file/838416/download>.

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the low end of the U.S. Sentencing Guidelines.⁵

In order to qualify under the new program, the company's voluntary disclosure must occur prior to a threat of disclosure of the wrongdoing and before the commencement of an investigation by the government.⁶ If the company does not self-report the wrongdoing and DOJ institutes a criminal investigation, any subsequent cooperation and remediation by the company would result in a recommendation by the DOJ of only a 25% sentence reduction from the low end of the sentencing guidelines.⁷

Since DOJ announced the application of the FCPA policy to other white collar crimes, only one declination has been issued.⁸ In this matter, Barclays employees traded on confidential information provided by Hewlett-Packard (HP) regarding certain foreign exchange transactions, manipulated the "Bloomberg fix" by purchasing British pounds in a manner that increased Barclays traders' profits, and actively deceived HP about the cause of the market's movements during this period.⁹ Barclays provided a timely, voluntary self-disclosure, and DOJ declined prosecution. Barclays agreed to pay the government \$12 million as restitution and disgorgement of profits, and to institute corporate policies and procedures to prevent future fraud and market manipulation.¹⁰

Because the corporate enforcement policy discussed above is relatively new, it is likely that DOJ decided to limit its application to the Criminal Division as a way to monitor its application and effectiveness. DOJ will need to determine whether and how to fully implement this new policy generally, and also more specifically how the policy can be consistently applied across all U.S. Attorneys' offices.

Once adequately assessed, DOJ may then choose to expand the policy to U.S. Attorneys' Offices nationwide. In that event, the Department would develop guidance to enable federal prosecutors (and companies) throughout the country to potentially benefit from the policy's goals of prevention and early detection of white collar offenses.

Limited application of the new policy at this early stage will reduce the risk that it will be applied inconsistently. Once evaluated, the policy may be used as another mechanism to encourage companies to develop more effective compliance and fraud detection programs. Although there is still risk that a corporation's self-disclosure could result in criminal prosecution, DOJ's application of its FCPA Corporate Enforcement Policy to a broader range of white collar offenses gives more incentives to companies to self-disclose wrongdoing.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Letter from U.S. Dep't of Justice, Criminal Division, Fraud Section, to Alexander J. Willischer and Joel S. Green, Feb. 28, 2018, <https://www.justice.gov/criminal-fraud/file/1039791/download>.

⁹ *Id.* at 1.

¹⁰ *Id.* at 2.