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JODY L. RUDMAN

AUSTIN:

512.703.5716

JODY.RUDMAN@

HUSCHBLACKWELL.COM

KIP B. RANDALL

KANSAS CITY:

816.983.8000

KIP.RANDALL@

HUSCHBLACKWELL.COM

DOJ Updates FCPA Corporate Enforcement Policy

On January 17, 2023, Assistant Attorney General (AAG) Kenneth Polite, Jr. announced updates to the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy. Since the inception of the FCPA Corporate Enforcement Policy in 2017, the Department of Justice (DOJ) has been “rewarding companies that do the right thing when learning about possible misconduct.” Now, DOJ has further incentivized disclosure of FCPA misconduct and full and willing cooperation with an investigation. With a voluntary disclosure, full cooperation, timely and appropriate remediation, and full disgorgement, entities may be able to receive a declination of prosecution and greatly reduced sentencing, even when there are aggravating circumstances.

Beginning in 2019, DOJ offered presumptive prosecution declinations and reduced sentencing to companies to disclose FCPA violations and then cooperate with their investigation. Originally, “aggravating circumstances” automatically disqualified one from the declination. With the most recent update, a corporation may receive a declination, even if there are aggravating circumstances following specific corporate actions.

Corporations having committed misconduct with aggravating circumstances may receive a declination if they make a full, voluntary disclosure, had an effective compliance policy in effect at the time of the misconduct, and take extraordinary acts to cooperate with the Department and remediate. These are very similar requirements as in the original program with the addition of “extraordinary” cooperation and remediation.

While the distinction is slight, AAG Polite offered four concepts to differentiate between “full” and “extraordinary.” Cooperators need to keep in mind “immediacy, consistency, degree, and impact.” These will be the concepts measured to inform prosecutors’ decisions. Polite commented, “In many ways, we know ‘extraordinary cooperation’ when we see it, and the differences

between ‘full’ and ‘extraordinary’ cooperation are perhaps more in degree than kind. To receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary.”

In addition to allowing declinations even in light of aggravating circumstances, DOJ has increased the fiscal incentives for participating with the Corporate Enforcement Policy. Initially, participating offenders would get a 50% reduction from the low end of the sentencing guidelines fine range. Now, a fully cooperating entity can receive a reduction starting at 50%, going up to 75%, for complying with the Policy. In order to receive the sentencing reductions, corporations need to take significant steps as set forth in the Policy.

First, corporations having violated the FCPA must make a full, voluntary disclosure to the Department. Their disclosure should be “reasonably prompt” and reveal all “relevant, non-privileged facts.” There can be no pre-existing obligation to disclose, and the disclosure must be “prior to an imminent threat of disclosure or government investigation.”

Second, corporations must fully cooperate with the Department’s investigation. The Department emphasizes cooperation must be proactive, as opposed to reactive. Corporations should make timely disclosures of facts and preserve and collect relevant documentation. Finally, when the Department investigates, the corporation should take steps for “de-conflictions of witness interviews and other investigative steps that a company intends to take” so they do not interfere with the Department’s investigation.

Third, a timely and appropriate remediation is required. Corporations must conduct a “thorough analysis of causes of underlying misconduct.” When the cause of misconduct is discovered, corporations must take measures to remediate and address the causes. Compliance programs should be implemented, if there is none. Employees should be disciplined as appropriate, and corporations should take “any additional steps that demonstrate recognition of the seriousness of the company’s misconduct.”

Finally, companies are required to pay disgorgement, forfeiture, and/or restitution to participate as a cooperator.

Contact us

If you have further questions regarding the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, please contact Jody Rudman, Kip Randall, Peter Strickland, or your Husch Blackwell attorney.