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CLIENT ALERT

DOJ announces changes to FCPA Corporate Enforcement Policy

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On November 20, 2019, the U.S. Department of Justice ("DOJ") made several subtle changes to the Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy (the "Policy"). The Policy provides potential leniency to companies for voluntarily self-reporting internal misconduct. There are three notable changes, two of which are designed to clarify what businesses need to disclose to obtain the benefits of the Policy, while one limits the type of misconduct that may receive this leniency.

First, prior to the November 20 changes, in order for a company to receive credit for voluntary self-disclosure of wrongdoing, the Policy required companies to disclose facts "as to any individual" who was "substantially involved in" a "*violation of law*." The latter phrase has now been changed to an individual "substantially involved in" the "*misconduct* at issue." This edit signals that the federal government does not want to delay companies' self-disclosure while the company performs an internal investigation to determine if a true violation has occurred. This is further supported in the language of new footnote 1, which states that the DOJ "recognizes that a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure."

Second, and perhaps due to the same underlying motivation, the DOJ formerly required companies to identify evidence that the company "is or *should be* aware of." Now, companies need only alert DOJ of evidence of misconduct when they are *aware* of it. The removal of the conditional language adds clarity and parameters to the Policy. The DOJ may again be signaling that discourse with the federal government is critical for credit, even before a company is positive that a true legal violation has occurred.

Third, the DOJ revised the "M&A Due Diligence and Remediation" guidance, which gives potential leniency to companies that report misconduct that was discovered following a merger or acquisition. The change makes it clear that the potential benefit relates to disclosure of misconduct committed "by a merged or acquired entity" not the legacy entity. This may have been changed due to an oversight in the original drafting, but it adds clarity to the limitations of the Policy.

In sum, although the changes do not create new incentives for companies to self-report, they do provide greater clarity to companies on the categories of misconduct eligible for leniency and the requirements to receive credit. The changes also highlight DOJ's desire to have companies disclose potential wrongdoing as soon as possible, rather than waiting for a full internal investigation to show a violation of law.

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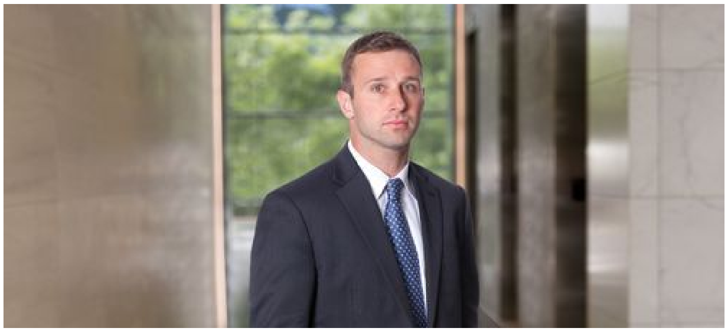

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