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Senior DOJ Official Highlights Importance of Voluntary Disclosure and Effective Compliance Programs; Renews Commitment to Prosecuting Executives and Robust FCPA Enforcement

Signaling a renewed commitment to rewarding corporations that voluntarily disclose criminal conduct, Criminal Division Assistant Attorney General Brian Benczkowski announced last week at the annual American Bar Association's National Institute on White Collar Crime that the Department of Justice will endeavor to foster even greater transparency and uniformity in its corporate charging decisions. Benczkowski noted that corporations are more likely to implement effective compliance programs and to disclose misconduct voluntarily if they "understand what conduct will be credited or penalized" when prosecutors are making charging decisions.¹ Benczkowski observed that increased transparency and predictability in the exercise of prosecutorial discretion will ultimately help the Department deter and address corporate wrongdoing by encouraging voluntary cooperation.

To that end, Benczkowski touted the increasing use of publicized declinations in cases charged under the Foreign Corrupt Practices Act (FCPA), a practice formalized by the Department's new FCPA Corporate Enforcement Policy.² Publishing the factors underlying its decision to decline prosecution in a certain matter provides corporations with a window into the Department's heretofore private exercises of its discretion. Notably, Benczkowski highlighted two recent FCPA cases in which the Department granted declinations despite the involvement of high-level executives in the bribery schemes, a factor that would typically weigh against a declination. Benczkowski noted that both of the companies had voluntarily disclosed the conduct, engaged in exemplary cooperation, self-remediated, and either demonstrated an effective compliance program or took steps to implement one prior to settlement.

Indeed, Benczkowski emphasized the importance of robust compliance programs in the Department's assessment of corporate liability and noted that the Department believes such programs result in front-end deterrence of corporate crime. To highlight the importance the Department will place on evaluating the efficacy of compliance programs in its charging decisions, Benczkowski announced the launch of a nationwide annual training program for white collar prosecutors on how to evaluate an effective compliance program. The training will educate the Department's trial attorneys on recent resolutions and provide a forum to discuss compliance challenges, all in an effort to ensure that the Department's attorneys are guided by the same principles when deciding whether to pursue corporate charges.

Benczkowski also reaffirmed the Department's commitment to extending the FCPA Corporate Enforcement Policy to Merger & Acquisition transactions so that law-abiding companies are not deterred from acquiring entities for fear of trailing FCPA enforcement.³ He noted that the Department's non-binding guidance about mitigation of FCPA liability for acquirers, which is currently found in the DOJ and SEC Resource Guide to the FCPA, will be formalized under the FCPA Corporate Enforcement Policy.⁴ Applying this policy to M&A transactions will encourage companies with effective compliance cultures to acquire businesses that operate in higher risk areas of the global economy. These developments are the latest manifestations of the Department's recent efforts to increase transparency in its corporate charging policies, an effort that has included:

- The formalization of previously informal guidance about FCPA corporate charging decisions and requirements for voluntary cooperation;⁵
- The issuance of new guidance regarding the selection criteria for monitors, emphasizing the importance of having an effective compliance program to avoid imposition of a monitor;⁶ and
- The announcement of its "anti-piling on" policy to provide greater clarity on how fines may be reduced or apportioned when multiple jurisdictions seek to impose penalties.⁷

Renewed Commitment to Prosecution of Individuals and FCPA Cases

Benczkowski also reiterated the Department's commitment to prosecuting culpable individuals in FCPA and securities and financial fraud cases, which he described as the most effective deterrent to corporate crime. He noted that in 2018, the Fraud Section charged 406 individuals and won 268 convictions in fraud, FCPA, and health care fraud cases, representing a 33 percent and 40 percent increase from 2017, respectively.

In line with this continued commitment to prosecuting international corruption, the Federal Bureau of

Investigation recently announced the establishment of an international corruption squad based in its Miami field office to target corruption in Latin America. The squad, which will include four agents and one supervisor, will help the Bureau develop relationships with foreign partners also investigating corruption in Latin America. The launch of the Miami squad follows the 2015 establishment of standalone international corruption squads in the Bureau's field offices in Los Angeles, New York, and Washington D.C.

¹ Department of Justice, Assistant Attorney General Brian Benczkowski Remarks at the American Bar Association National Institute on White Collar Crime (Mar. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-33rd-annual-aba-national>.

² USAM § 9-47.120, FCPA Corporate Enforcement Policy (announced Nov. 29, 2017).

³ See, e.g., Department of Justice, Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (July 25, 2018), <https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th>.

⁴ FCPA Policy, *supra* note 2.

⁵ *Id.*

⁶ Brian Benczkowski, Department of Justice, Memorandum re: Selection of Monitors in Criminal Division Matters (October 11, 2018), <https://www.justice.gov/criminal-fraud/file/1100366/download>.

⁷ USAM §1-12.100, USAM §9-28.1200 (announced May 5, 2018).

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