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DOJ Applies Principles of FCPA Corporate Enforcement Policy in Other White-Collar Investigations, Increasing Opportunity for Corporate Declinations

Late last week, the Department of Justice’s Criminal Division announced at an ABA white-collar conference that it has begun using the FCPA Corporate Enforcement Policy as “nonbinding guidance” in other areas of white-collar enforcement beyond the FCPA. As a result, absent aggravating factors, DOJ may more frequently decline to prosecute companies that promptly self-disclose misconduct, fully cooperate with DOJ’s investigation, remediate in a complete and timely fashion, and disgorge any ill-gotten gains. As a first example of this approach, the officials pointed to DOJ’s recent decision to decline charges against Barclays PLC, after the bank agreed to pay back $12.9 million in wrongful profits, following individual charges arising out of a foreign exchange front-running scheme.

At the same conference, DOJ officials, along with their counterparts at the Securities and Exchange Commission, promised vigorous enforcement, rejecting the notion that the current administration has pulled back in the battle against white-collar crime. Deputy Attorney General Rod J. Rosenstein pledged that DOJ would hold individual wrongdoers responsible for corporate criminal conduct, demonstrating continued DOJ focus on individual accountability. And although DAG Rosenstein warned that criminal prosecutions of corporations would still be warranted where misconduct was particularly serious or pervasive, he emphasized that DOJ would strive to avoid imposing corporate penalties that harm innocent shareholders, employees, and other stakeholders.

We welcome the continued evolution of DOJ’s approach to corporate criminal enforcement. In a memo last year, we suggested that it would be wise for DOJ to extend the incentives for self-reporting and cooperation to areas outside of the FCPA arena, and we thus applaud DOJ’s latest step in that direction. However, because this extension of the FCPA Policy to other areas is nonbinding, we remain concerned that the revised policy will not provide companies with sufficient clarity and predictability. We continue to believe that DOJ should apply the FCPA Policy to all corporate investigations across all DOJ components, and we urge the SEC and other regulators to adopt parallel, complementary policies. Fostering a climate in which companies are fairly and predictably treated when they report misconduct will increase self-reporting and individual accountability — an outcome that would be beneficial for the government and companies alike. Well-managed companies should, of course, continue to invest in effective
compliance programs and robust control systems to prevent misconduct and, in the event of a detected violation, to consider taking full advantage of DOJ’s emerging enforcement approach.

John F. Savarese
Ralph M. Levene
Wayne M. Carlin
David B. Anders
Marshall L. Miller
Jonathan Siegel