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THE DOJ'S NEW OFFICIALLY UNOFFICIAL POLICY MAY ENABLE FEDERALLY REGULATED BUSINESS TO AVOID CRIMINAL CHARGES

By Laurel Brandstetter and Danielle Morrison

Last November, Deputy Attorney General Rod Rosenstein announced a new enforcement policy. Under the new policy, businesses subject to the Foreign Corrupt Practices Act ("FCPA") may avoid criminal liability by self-reporting wrongdoing, fully cooperating with Department of Justice ("DOJ") investigations, and demonstrating timely and appropriate remediation of the conduct at issue. United States Attorneys' Manual ("USAM") [Insert § 9-47.120](#).

Last week, the DOJ unofficially extended this new policy to other federal regulations. More specifically, John Cronan, the acting head of the DOJ's Criminal Division, and Benjamin Singer, chief of the DOJ's securities and fraud unit, stated that the DOJ would be extending this policy to "other contexts." Cronan and Singer told attendees of the American Bar Association's white collar conference that Barclays Bank PLC ("Barclays") would be the first beneficiary of this extension of the new policy beyond the FCPA.

The DOJ began investigating Barclays after it obtained information suggesting that Barclays employees had misused confidential information to manipulate the price during Hewlett-Packard's ("HP") potential acquisition of a United Kingdom-based company. Employing what is commonly referred to as "front running," Barclays employees

were able to manipulate the foreign exchange market to Barclays' benefit, causing HP to lose millions of dollars. Following Barclays' voluntary disclosure, "thorough and comprehensive" internal investigation, and creation of a compliance program that would identify and remediate any similar conduct in the future, the DOJ declined to pursue formal charges or a deferred prosecution agreement. Instead, the DOJ required the company to pay \$12.9 million in restitution to HP and disgorge any profits. Notably, the DOJ officials contrasted the Barclays settlement with other recent cases where the businesses under investigation were unwilling to admit wrongdoing and thus ultimately received significant penalties under deferred prosecution agreements.

The Barclays result is important not only as an illustration of the new DOJ policy, but also in its apparent expansion beyond the FCPA to other federally regulated areas. Significantly, the DOJ is not required to follow USAM Insert § 9-47.120 in cases that do not fall under the FCPA. However, Cronan and Singer made clear that the FCPA policy would be considered when deciding whether to bring charges under other federal laws such as the False Claims Act, Dodd-Frank Act, and Sarbanes-Oxley Act. The affirmative steps by the DOJ towards creating "a culture of openness and

cooperation” with potential corporate targets as well as the DOJ’s treatment of Barclays as compared to other recent cases for companies unwilling to admit wrongdoing, suggest that Cronan and Singer’s assertion that it will apply the FCPA’s “nonbinding” policy to companies being investigated for violations under other laws should be taken at face value.

Based upon the DOJ’s apparent kinder and gentler approach to potential corporate targets, businesses should ensure that they are well positioned to detect and respond promptly to misconduct. The following measures will help business leaders to appropriately identify and address problems and also demonstrate the internal compliance capacities that may persuade government agencies not to press criminal charges: (1) undertake a comprehensive assessment of existing corporate policies and training to ensure that they are designed to foster a culture of transparency and integrity; (2) provide regular training so that all personnel understand how to appropriately respond to allegations of misconduct; (3) create an internal investigation plan in advance of any allegations to confirm that the business is positioned to respond promptly and thoroughly; (4) regularly evaluate and test compliance programs to verify that they will operate to identify and detect wrongdoing; and (5) embed disclosure policies in all relevant operational guidelines so that voluntary disclosure becomes part of corporate culture. ◆

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