

When It's Legally Benign and DOJ Has Closed Its Case

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Woody Allen once famously joked that the words “it’s benign” are the most beautiful in the English language. Although a prosecutor’s decision to decline to bring a case may be less personally consequential than a clean bill of health, it is nonetheless a tremendous relief to learn that conduct, in the eyes of the government, is viewed as legally benign. Unfortunately, such notice all too often is long delayed and, in some cases, never given at all.

This type of uncertainty takes a tremendous toll on those who have been notified of a potential criminal investigation but have to wait many months or years to learn whether the government will bring charges or decline to prosecute. Too often, businesses and individuals unexpectedly become ensnared in complex, costly and lengthy investigations, with little understanding as to when or how the legal journey will end. Criminal investigations—whether handled internally by a corporation’s outside counsel or externally by government

agencies—present significant costs in both legal fees and collateral consequences, including the chilling effect on corporate investment and innovation, distracted management, and harm to the reputation of individuals and entities involved in the investigation.

Unfortunately, such consequences exist whether charges are ultimately brought or declined. For example, one U.S.-based energy company recently had to endure more than a half-decade of uncertainty before finally being able to announce that a federal investigation was closed in April 2012, more than six years after receiving initial notice of the investigation and two years after the U.S. Department of Justice had returned all documents seized during the probe. During this period, the company’s share price lost approximately 90 percent of its value.

DOJ can significantly reduce the adverse consequences that accompany an investigation’s potentially endless period of uncertainty through a simple



DOJ should provide better notice and guidance when the agency declines to bring a white-collar criminal case.

reform of its policy regarding when prosecutors should notify former targets that an investigation has been closed. Department statistics show that federal prosecutors take, on average, more than 400 days to reach a declination

decision. During this time, the investigation's target must function under a disruptive cloud that can cause significant reputational harm. Yet DOJ policy contains no requirement that former investigation targets be given notice of a prosecutor's declination decision.

Whereas current DOJ policy merely permits prosecutors to give targets notice of a declination decision, a better approach would provide that notice of declination be issued presumptively once a decision has been made, unless such notice would endanger an ongoing investigation. After all, once a decision has been made not to pursue criminal charges, it is in everyone's interest to allow businesses and individuals to turn the page and return to their normal affairs.

In addition to providing more timely notice of case declination decisions, additional guidance and clarity are needed from U.S. regulators to help businesses caught in complex and lengthy investigations better understand DOJ's enforcement priorities and compliance expectations. To that end, late last year, DOJ and the Securities and Exchange Commission issued the long-awaited "Resource Guide to the U.S. Foreign Corrupt Practices Act." While this new guidance should be helpful in providing additional clarity to businesses facing FCPA investigations, businesses and individuals should be provided with clarity and certainty as to their obligations elsewhere under the law.

To help provide this needed guidance, we proposed on behalf of the U.S. Chamber of Commerce's Institute for Legal Reform that DOJ publish meaningful summaries regarding its declinations decisions each year. To DOJ and the SEC's credit, the FCPA Guide contained six sanitized examples of cases in which

either DOJ and/or the SEC declined to pursue prosecutions against corporations for possible FCPA violations, significantly improving the regulated community's understanding of the agencies' FCPA enforcement expectations.

While DOJ and the SEC certainly deserve credit for providing real-world examples of circumstances in which companies were rewarded for robust compliance and proactive investigation and remediation of wrongdoing, we believe more can and should be done. The business community and its compliance efforts would benefit greatly from clear and regular reporting of declined prosecutions and the factors that influenced the prosecutors' decisions across a range of case categories. Such declination guidance would greatly help companies facing extensive investigations better understand the factors that matter to the Justice Department in weighing whether to pursue charges.

Aside from the recently published FCPA Guide, some related information provided to Congress and annual statistics containing broad, minimally descriptive declination categories regarding its declination decisions, DOJ shares little information about its case declinations practices. For example, DOJ's 2011 annual report shows that of the 5,814 white-collar matters declined for prosecution during the 2011 fiscal year, only 22 were listed under the broad declination category of "Suspect Cooperation or Restitution Being Made." No further information was provided about how cooperation efforts were valued or whether the remaining 5,792 declinations were influenced, in any way, by the target's cooperation.

An annual report of sanitized declination decisions describing con-

crete factors that were considered in determining to decline a prosecution would provide substantive guidance to the business community as it strives to create and maintain cost-effective compliance programs that also meet government expectations. Because DOJ has an interest in preventing crime, issuing regular guidance on what factors have influenced declination decisions, such as the nature and extent of voluntary disclosures, preacquisition due diligence or robust compliance programs, will enable businesses to devote greater resources to those activities, enhancing the deterrent effect of the law.

Through these simple reforms to its declination notice and reporting policies, the Justice Department can significantly reduce these costs and improve expectations in ways that will both grant repose to those at the close of an investigation and encourage heightened compliance for those who seek to avoid investigation altogether.

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