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# DOJ Rolls Back Ban On Disappearing Messages

By **Jody Godoy**

*Law360 (March 11, 2019, 10:46 PM EDT)* -- The U.S. Department of Justice jettisoned a policy that required companies to internally ban disappearing messaging services such as WhatsApp when seeking to avoid bribery charges, and will instead now require companies to put in place controls on such communication methods.

The change was among tweaks the DOJ made to its Foreign Corrupt Practices Act corporate enforcement policy on Friday. Under the policy, the DOJ promises to generally decline to bring FCPA charges against companies that tick certain boxes, including self-reporting the suspected bribes, cooperating with prosecutors and remediating the problem via a compliance program.

While generally welcomed by the corporate defense bar when it was formalized in 2017, the policy met with concern from some corners of the business community over the practicality of enforcing what read like a ban on disappearing messages.

The policy had said that in order to receive full credit for remediation, companies had to prohibit employees "from using software that generates but does not appropriately retain business records or communications."

Instead of a prohibition, the policy now calls on companies to implement "appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations."

The changes addressed concerns expressed by the U.S. Chamber of Commerce.

Harold Kim, vice president of the U.S. Chamber of Commerce, welcomed the policy shift on Monday. He told Law360 that the move provided clarity for companies by removing what had been viewed by some as a blanket prohibition.

The new messaging policy provides flexibility for companies to choose the technology and compliance solutions that work for them, he said.

“This policy really reflects the acceleration of technology and will give companies more ability to craft their compliance programs, pursue policies that are risk-based and balance the need to retain business records with the realities of how things are done in a business setting, whether in the U.S. or globally,” Kim said.

Other tweaks the DOJ adopted spoke to specific issues. One addressed the practice of de-confliction, that is, when prosecutors ask a company’s lawyers to hold off on interviewing someone in an internal investigation because the DOJ would like to talk with them first.

The new policy adds a footnote stating that, “although the Department may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Department will not take any steps to affirmatively direct a company’s internal investigation efforts.”

Showing that prosecutors aren’t running corporate investigations became a concern for the DOJ after two cases in which individual defendants claimed that their employers were acting as arms of the government. In one case, the defendant sought to make prosecutors search the company’s files as if they were the government’s, and in another, the defendant is arguing his Fifth Amendment rights were violated by the government via his employer.

Quinn Emanuel partner Sandra Moser, who until recently led the DOJ's Fraud Section, said on Monday that the changes “appear to be nimble, common-sense responses to a shifting landscape on a few fronts,” including “novel theories offered by defense counsel concerning the government’s interaction with company counsel.”

Another change made clear that companies that are undergoing mergers or acquisitions can avail themselves of the corporate enforcement policy if they find wrongdoing at a target company. DOJ official Matthew Miner had previously announced that concept in a speech**.**

Yet another tweak sought to relieve tension that arose after a different policy change. In November, the DOJ had softened a demand in its general corporate cooperation policy for companies to give up all relevant facts on individuals "involved," amending the policy to call for information on those who were “substantially involved.”

The tweaks to the FCPA policy on Monday mirrored that language, and clarified that while the more general policy sets the threshold for cooperation, the FCPA corporate enforcement policy outlines what companies must do for “maximum” credit.

The final change made clear that companies need not give up attorney-client privilege to get cooperation or self-reporting credit under the FCPA policy.
The DOJ said via a spokeswoman on Monday that the changes were “clarifications” aimed at giving practical detail on how the policy is enforced.

“We have continued to assess how the Corporate Enforcement Policy is working in practice and feel these clarifications will make the Policy more effective and provide additional transparency to companies about the benefits of voluntarily self-disclosing misconduct, cooperating, and remediating,” read the statement, which was attributed only to a DOJ official.

The DOJ made the tweaks on Friday after DOJ criminal division chief Brian Benczkowski gave a

speech alluding to some of them and reiterating a commitment by the DOJ to transparency and predictability.

Morgan Lewis partner David I. Miller saw the changes as in keeping with that spirit of transparency, and said they make it easier to communicate the DOJ's thinking to clients.

"Having those policies memorialized in the Justice Manual rather than in verbal remarks is essential for defense practitioners to be able to counsel their clients," Miller said.

--Editing by Emily Kokoll.