

Key Takeaways from Cognizant Technology’s Improbable Receipt of a Declination from DOJ

Last week, in what marked the first FCPA enforcement action of 2019, a federal grand jury in New Jersey returned an indictment against two former high-level executives—the president and chief legal officer—of Cognizant Technology Solutions Corporation, a New Jersey-headquartered information technology service provider. Contemporaneously, the Fraud Section and the New Jersey U.S. Attorney’s Office made public their decision to decline to prosecute Cognizant pursuant to the FCPA Corporate Enforcement Policy. The declination was given notwithstanding the presence of at least one significant aggravating factor—direct participation in the alleged criminal bribery scheme by two of the company’s most senior executives. This development provides valuable insight into the Department’s approach to applying the FCPA Corporate Enforcement Policy going forward, and reaffirms DOJ’s continued focus on pursuing individual wrongdoers, the importance of effective compliance programs, and the Department’s efforts to encourage companies to root out bad actors in the wake of misconduct. Executives, boards of directors, special committee members, and anyone else weighing the merits of the FCPA Corporate Enforcement Policy should take notice that aggravating factors will not necessarily extinguish the incentives and potential reward in the form of a declination for companies that avail themselves of the policy.

I. THE ALLEGED SCHEME

According to the Cognizant declination letter,¹ the company’s personnel authorized a third-party construction company to pay approximately \$2 million to government officials in India in order to obtain a permit necessary for the construction of an office park. Cognizant later reimbursed the construction company through inflated invoices and change orders at the end of the project. The scheme also involved falsifying the company’s internal books and records and making false certifications required by Sarbanes-Oxley regulations.

Significantly, however, Cognizant’s “senior management participated in and directed the criminal conduct at issue.” According to the indictment of Cognizant’s former president and chief legal officer,² the culpable senior management included at least the company’s former (1) president (who previously served as CFO and COO); (2) COO; (3) Executive Vice President, Chief Legal and Corporate Affairs Officer; and (4) Vice President of Administration. The indictment alleges that these four participated in a videoconference in which they discussed demand for a bribe that one of the company’s third-party construction contractors had received from Indian officials and further agreed that the contractor should pay the bribe and that Cognizant later would reimburse it. Moreover, according to the indictment, in order to “increase the pressure on the Construction Company to obtain the Planning Permit and to pay the bribe,” Cognizant’s president directed the VP of Administration “to freeze and withhold all future payments to the Construction Company until it had obtained all necessary permits.” The contractor then allegedly paid the bribe, and Cognizant allegedly released the amounts it owed and arranged to reimburse the contractor for the amount of the bribe.

II. DOJ’S DECISION TO AWARD COGNIZANT A DECLINATION

Cognizant first announced in September 2016 that it was conducting an internal investigation regarding potential FCPA violations relating to facilities in India and that it had “voluntarily notified” both

¹ Available at <https://www.justice.gov/criminal-fraud/file/1132666/download>.

² Available at <https://www.justice.gov/usao-nj/press-release/file/1132701/download>.

DOJ and the SEC and was “cooperating fully with both agencies.”³ According to DOJ’s declination letter, this “voluntary self-disclosure” occurred “within two weeks of the Board learning of the criminal conduct.” And over the next two-plus years, according to the declination letter, Cognizant conducted a “thorough and comprehensive investigation;” provided “full and proactive cooperation;” and engaged in “full remediation,” including firing and disciplining personnel involved in the misconduct.

Under the FCPA Corporate Enforcement Policy, these steps—voluntary self-disclosure, full cooperation, and timely and appropriate remediation—are prerequisites for a company to qualify for the “presumption” of a declination.⁴ But by themselves, they are not enough to ensure that a company will receive a declination. In particular, as set forth in the policy, “[a]ggravating circumstances that may warrant a criminal resolution,” as opposed to a declination, “include, but are not limited to, involvement by executive management of the company in the misconduct.” Understanding why DOJ agreed to a non-criminal resolution with Cognizant notwithstanding the direct participation of management reaching the top of the company requires close review of the remaining factors listed in the declination letter. These additional factors included:

- “the fact that, as a result of the Company’s timely voluntary disclosure, the Department was able to conduct an independent investigation and identify individuals with culpability for the corporation’s malfeasance;”
- “the existence and effectiveness of the Company’s pre-existing compliance program,” as well as steps taken to enhance its program and internal accounting controls;
- Cognizant’s lack of prior criminal history and the “nature and seriousness of the offense;” and
- the company’s parallel resolution with SEC (including a civil penalty of \$6 million) and agreement to disgorge the full amount of its cost savings from the bribery (more than \$19 million).

III. KEY TAKEAWAYS

The DOJ’s action with respect to Cognizant reveals four takeaways for companies considering whether to pursue a declination under the FCPA Corporate Enforcement Policy.

First, notwithstanding the presence of aggravating factors, a company is still eligible to benefit by receiving a declination under the policy. DOJ’s application of the policy is likely to evolve over time, and the facts of any one matter can expand or contract interpretation; however, the Cognizant case is a strong signal that DOJ is seeking to be inclusive in efforts to reward companies that meet the trifecta of requirements under the FCPA Corporate Enforcement Policy. And, it bears reminding that the Fraud Section also has applied the principles of the FCPA-specific policy to other corporate matters, declining to prosecute Barclays in 2018 based on the bank’s voluntary self-disclosure, full cooperation, and timely and appropriate remediation.⁵

Second, despite recent revisions to the Yates Memo, there will be no change to prosecutors’ paramount focus—to charge and convict culpable individuals. Often, a company’s cooperation can provide

³ See Form 8-K, Cognizant Technology Solutions Corp. (Sept. 27, 2016), <https://www.sec.gov/Archives/edgar/data/1058290/000119312516726679/d263091d8k.htm>.

⁴ See JM § 9-47.120, FCPA Corporate Enforcement Policy, <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>.

⁵ Available at <https://www.justice.gov/criminal-fraud/file/1039791/download>.

valuable assistance to prosecutors' efforts in this regard. DOJ is likely to continue to acknowledge companies for their provision of actionable information and admissible evidence that can support an indictment of culpable individuals or materially assist the government's investigation. And, as this action makes clear, the Department's determination that executives at the highest levels have engaged in wrongdoing will not necessarily result in corporate liability.

Third, a pre-existing, suitable compliance program can go a long way to reassuring DOJ about the risk of recidivism and demonstrating a company's genuine commitment to honest business practices and good corporate citizenship. Particularly where high-level management is complicit in misconduct, quality compliance programs can be an important factor in dispelling the perception that the company has a systemic problem that requires more significant intervention by DOJ.

Fourth, the cost of any FCPA investigation, whether disclosed to authorities or not, often is not insubstantial. In the case of Cognizant, the company paid approximately \$28 million to the SEC and DOJ in fines and disgorgement, but reported that it has incurred \$79 million in legal fees—both to investigate the conduct and negotiate the settlement, as well as to defend against related shareholder class actions since it began the internal probe in September 2016.⁶ Given the relatively small financial nature of the alleged scheme (a \$2 million payment for a benefit of \$20 million), it is possible that the fine Cognizant would have received attendant to a criminal resolution might not have been significantly different from what it paid in connection with the declination it received. Of course, the monetary value of a declination is unique to each company, and voluntary disclosure, cooperation, and remediation often will be in a company's best interest regardless of the form a resolution with the government ultimately takes. But once a company has begun to pursue a resolution, it should evaluate at every step the return it can expect to receive from additional investment in the process.

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⁶ Form 10-K at 21, Cognizant Technology Solutions Corp. (Feb. 19, 2019), <https://www.sec.gov/Archives/edgar/data/1058290/000105829019000009/ctsh20181231-10k.htm>.