



A TALE OF TWO RECENT CORPORATE FCPA RESOLUTIONS: STERICYCLE VS. COGNIZANT

by Gregory A. Brower

The U.S. Department of Justice (“DOJ”) recently announced resolution of a Foreign Corrupt Practices Act (“FCPA”) enforcement action against Stericycle, a U.S.-based international medical-waste management company. The parties entered into a deferred prosecution agreement (“DPA”) requiring Stericycle to make a high eight-figure payment and be subject to a corporate monitorship for two years. This was a markedly different result than the agreement Cognizant Technology Solutions Corporation reached in 2019, under which DOJ declined to prosecute for violating the FCPA even though two of Cognizant’s senior executives were charged. As discussed below, these very different outcomes despite very similar corporate conduct seem to be more about a difference in key facts than about any changes at DOJ between 2019 and 2022.

The Stericycle DPA. According to the DPA, Stericycle admitted to conspiring to pay more than \$10 million in bribes to foreign government officials in Argentina, Brazil, and Mexico for the purpose of obtaining and retaining business from various government agencies in those countries. The bribery scheme apparently touched every level of the company’s operations, including the executive ranks. The ultimate form, amount, and other details of the resolution were the result of DOJ’s evaluation of various factors which can be summarized as follows:

- (a) *Voluntary disclosure.* The company received no credit because it did not voluntarily disclose the relevant conduct in a timely manner.
- (b) *Cooperation with the government.* The company received full credit for cooperating with DOJ’s investigation, including the disclosure of previously unknown evidence.
- (c) *Sharing all facts about individual wrongdoers.* DOJ acknowledged that the company did share all relevant information concerning the conduct of individuals acting for or on behalf of the company, suggesting full credit.
- (d) *Remediation.* The company did receive partial credit for instituting some remedial compliance measures after the misconduct came to light, but its failure to completely implement its remedial measures and its lack of an adequate pre-investigation compliance program prevented the company from receiving full credit.
- (e) *Severity and pervasiveness of the misconduct.* DOJ apparently considered the company’s misconduct, including the involvement of senior management, to be severe and pervasive, thus depriving the company of any credit for the opposite.
- (f) *Company history.* The DPA notes some history of civil and regulatory settlements, but also acknowledges the company’s lack of any criminal history, apparently leading to full credit to the company for not being a repeat offender.
- (g) *Future cooperation.* The company’s agreement to resolve a related enforcement action by the SEC as well as its agreement to continue to cooperate in any ongoing investigation allowed it to receive full credit.

For Stericycle, the relevant facts were a mixed bag, with some allowing the company to receive full credit, others depriving the company of any credit. The resolution form and details seem to reflect this reality.

Gregory A. Brower is Chief Global Compliance Officer for Wynn Resorts. He also serves on WLF Legal Policy Advisory Board and is the *WLF Legal Pulse* blog’s Featured Expert Contributor, White Collar Crime and Corporate Compliance.

The Cognizant Declination. DOJ resolved its investigation into Cognizant’s foreign bribery activity with a decision to decline prosecution in exchange for the company’s agreement to pay a civil penalty and disgorgement of profits, and to cooperate in related investigations. This was an outstanding result for the company especially given the indictment of two of its senior executives. DOJ’s declination letter included an evaluation of essentially the same factors discussed in the Stericycle DPA. That evaluation can be summarized as follows:

- (a) *Voluntary disclosure.* DOJ gave full credit to the company for its voluntary disclosure of the misconduct to the government within two weeks of the company’s board of directors learning of it.
- (b) *Cooperation with the government.* According to the declination letter, the company conducted a “thorough and comprehensive investigation,” thus receiving full credit.
- (c) *Sharing all the facts about individual wrongdoers.* The company apparently received full credit for sharing facts which led to the indictment of two former executives.
- (d) *Remediation.* DOJ credited the company for the existence and effectiveness of its pre-existing compliance program and for steps taken to enhance the same after its investigation.
- (e) *Severity and pervasiveness of the misconduct.* While the declination letter doesn’t discuss this factor in detail, it can be assumed that DOJ did not withhold credit from the company because of the severity and pervasiveness of the misconduct.
- (f) *Company history.* The declination letter simply references the company’s lack of prior criminal history, suggesting full credit for this factor.
- (g) *Future cooperation.* The company received full credit for cooperation with ongoing investigations.

In addition to the above factors, DOJ’s declination letter also included one other—*adequacy of other remedies*—with the company receiving credit for its agreement to pay a civil fine and disgorgement. Unlike Stericycle, Cognizant received full credit for each of the factors considered by DOJ thus leading to a declination.

Analysis. Can the difference in outcomes for the two companies really be as simple as Cognizant having better facts or was something else going on here? While much has been said about the Biden Administration’s DOJ taking a more aggressive approach to corporate crime, recent history doesn’t really support this as the reason for the different outcomes in the two matters. In fact, in 2020, the last full year of the Trump Administration, DOJ (and the SEC) collected an all-time record \$2.78 billion in fines, penalties, disgorgements, and interest in FCPA corporate resolutions. 2019 and 2018 were also big years for FCPA enforcement. Therefore, while the current administration may well pursue a more aggressive approach to corporate crime, including FCPA enforcement, the more likely explanation for the divergent results in these two cases is the key factual differences. First, while DOJ believed that Cognizant self-disclosed the company’s misconduct fully and as early as was practical, DOJ clearly did not believe the same about Stericycle. The second key difference was DOJ’s view of the facts relating to each company’s compliance and remediation efforts. Because DOJ concluded that Stericycle’s pre-investigation compliance program was inadequate and its post-investigation remedial efforts were incomplete, the company did not get full credit for either. The opposite was true with respect to Cognizant, which DOJ found to have both an adequate pre-existing compliance program and satisfactory post-investigation remedial actions.

Under DOJ’s FCPA Corporate Enforcement Policy, both voluntary self-disclosure and appropriate remediation, along with full cooperation, are prerequisites for, but not guarantees of, a declination. While Stericycle had two of the three working in its favor, Cognizant had the complete trifecta, and that clearly made a difference in how DOJ determined the correct resolution. Cognizant achieved this result despite the involvement of executive management in the underlying misconduct, an aggravating circumstance that DOJ policy weighs in favor of criminal resolution. That Cognizant could obtain a declination despite this aggravating circumstance strongly suggests just how important these other factors can be.

Conclusion. The significant difference between these two corporate FCPA resolutions seems to have a lot more to do with the factual differences between the two matters than with the changes at DOJ between 2019 and 2022. While we can likely expect that DOJ will continue to aggressively prioritize corporate enforcement actions, including FCPA investigations, in the months ahead, it’s the facts that ultimately determine the likely outcome of any such matters. As always, good facts can make a positive resolution likely, while bad facts will make such a result more difficult to achieve. The never-ending challenge for corporate compliance leaders is to create and maintain as many good facts as possible so that due credit will be received when DOJ has a reason to examine the facts.