# D&B declination suggests leeway in DOJ voluntary disclosure credit

Clara Hudson 02 May 2018

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The US Department of Justice declined to prosecute data services company Dun & Bradstreet (D&B) on 23 April, crediting its "prompt voluntary self-disclosure" over possible bribery carried out by its two subsidiaries in China, Shanghai Huaxia Dun & Bradstreet Business Information Consulting and Shanghai Roadway D&B Marketing Services.

The declination was the first of its kind under the new corporate enforcement policy, a permanent and revised version of the Foreign Corrupt Practices Act pilot programme.

Lawyers tell GIR Just Anti-Corruption that D&B's declination has raised questions about when a company that reports misconduct to the authorities is eligible for voluntary disclosure credit.

While the DOJ offered scant details of D&B's disclosure to authorities, the US Securities and Exchange Commission provided more information in a related $9 million settlement that resolved violations of the books and records and internal controls provisions of the FCPA.

The SEC alleged that D&B's Chinese subsidiaries "made unlawful payments" to customers, including government entities, in exchange for commercial data. It added that D&B "failed to devise and maintain sufficient internal accounting controls" to detect or prevent the payments. The agency also noted that D&B self-reported possible bribery violations to US authorities in 2012, shortly after Chinese police raided Roadway's offices in connection with an investigation into data privacy violations.

Under the corporate enforcement policy, companies can receive a DOJ declination if they, among other measures, self-report potential

misconduct “prior to an imminent threat of disclosure or government investigation” and within a “reasonably prompt time after becoming aware of the offense”.

Cadwalader Wickersham & Taft partner Jodi Avergun said D&B's disclosure is "not quite voluntary if you look at the definition in the corporate enforcement policy".

Avergun said that what she has concluded – "and it's a guess" – is that self-reporting prior to an imminent government investigation refers specifically to US authorities. She said this is a “reasonable interpretation” and may be clarified later by the DOJ. She also noted that the SEC alleged the company had knowledge of potential issues at HDBC several years before its self-report, which raises questions over the disclosure’s timeliness.

In its administrative order, the SEC said that in 2006, when reviewing a joint-venture with HDBC, D&B’s management in China understood that its business partner “routinely obtained information through agents and the agents obtained information by making improper payments to government officials”. This arrangement was disclosed in due diligence analysis that was circulated among D&B executives, according to the SEC.

“What I am completely mystified by, or what seems unclear to me, is that the company didn’t disclose that conduct [at HDBC] when they discovered it,” said Avergun, who felt the declination was unusual. “I can’t really discern why this was seen as voluntary when there are at least a couple of indications that it wasn’t fully voluntary. There are probably some extenuating circumstances that we don’t see.”

Ryan Rohlfsen, a partner at Ropes & Gray who handled one of the first declinations under the FCPA pilot programme in 2016, said the declination may indicate that companies have some leeway if they report to the US following a raid in another country. He said that the company was given full credit for the self-disclosure as the US may not have been able to find out about the potential conduct any other way.

“What I think the DOJ is trying to say is, ‘if we already know about an investigation, regardless of how we know about it, then you’re not going to get credit,’" he said. "In this case, it is unclear whether the DOJ would

have known about the conduct other than through the company's self-report."

He added that in situations such as this the DOJ will have to "make judgment calls" on whether to give a company self-reporting credit.

Lawyers also said that cementing the corporate enforcement policy in November 2017 may have made it easier for D&B to secure a declination.

While most lawyers GIR Just Anti-Corruption spoke to said D&B probably would have been given the declination under the pilot programme, updating the language from a potential declination to a "presumed" declination may have helped.

Karen Popp, global chair of the Women's White-Collar Defence Association, said that, while every case will be different, companies now have a better chance of insisting on a declination if they made a disclosure, even following a raid from a non-US authority. Popp said that if the Chinese raid was over conduct that the DOJ was unaware of or did not have jurisdiction over, the company's self-disclosure to the US would warrant credit.

"A company should be able to ask for a declination when they've made a disclosure that the government doesn't know about, notwithstanding a raid in another country by another authority," she said.

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