CLIENT ALERT

DOJ Adopts "FCPA Corporate Enforcement Policy"

Promises No Prosecution/No Fines for Self-Disclosers Absent Aggravating Circumstances

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The Department of Justice ("DOJ") announced today the implementation of a new policy on corporate enforcement under the Foreign Corrupt Practices Act ("FCPA"). The new "FCPA Corporate Enforcement Policy" effectively allows companies that self-disclose FCPA violations to avoid any criminal resolution absent aggravating circumstances. The new policy—which DOJ plans to incorporate into the official manual that guides all federal criminal FCPA investigations and prosecutions—marks a significant departure from the prior "pilot program" in effect since April 5, 2016. Under the prior pilot program, DOJ provided more limited incentives for self-disclosure, merely assuring companies that they might receive a range of benefits, but still might have to pay a fine (albeit with the possibility of a discount).

Under the new policy, "[w]hen a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth [in the policy], there will be a presumption that a company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender." The company typically would still have to "pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue," but would avoid fines absent aggravating circumstances. Aggravating circumstances that could result in a criminal resolution include, among other factors, (1) "involvement by executive management of the company in the misconduct"; (2) "a significant profit to the company from the misconduct"; (3) "pervasiveness of the misconduct within the company"; and (4) "criminal recidivism."

The policy states that even where aggravating circumstances are present, companies that self-disclose, cooperate, and remediate fully will (1) receive an automatic "50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist," and (2) "generally" not be required to appoint an independent compliance monitor as long as the company has "an effective compliance program" "at the time of resolution." The new policy also affords companies that do not self-disclose a 25% fine reduction as long as they cooperate and remediate issues fully. The prior pilot program authorized similar incentives, but the new policy crystalizes the incentives to a greater degree by creating a presumption in favor of a declination for self-disclosers that meet the relevant standards and granting automatic penalty reductions to companies that cooperate and remediate misconduct.

DOJ implemented the new policy after obtaining substantially greater self-disclosure rates under the pilot program. In the eighteen months preceding the pilot program's inception, eighteen companies self-disclosed FCPA issues. In contrast, in the eighteen months following the pilot program's inception, thirty companies self-reported FCPA issues. Under the pilot program, DOJ issued seven declinations, including four against non-issuers. The non-issuers each agreed to disgorge profits as a condition of receiving a declination. Previously, when DOJ issued declinations, it would not require disgorgement or publicly announce the declination.

The new policy specifically defines the terms "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation"—the criteria that must be met to qualify for a declination. "Voluntary self-disclosure" requires a company to disclose "all relevant facts" prior to "an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense." "Full cooperation" requires "proactive cooperation," including timely disclosing relevant facts, preserving relevant documents, and, if requested, making witnesses available for interviews. "Timely and appropriate remediation" requires a company to remediate the root causes of the underlying misconduct, to discipline relevant employees, and to implement an effective compliance and ethics program.

DOJ announced the new policy in a speech by Deputy Attorney General Rod Rosenstein at an FCPA conference in the Washington, D.C. area. Overall, DOJ still retains considerable leeway in crafting FCPA resolutions. Deputy Attorney General Rosenstein made a point of stating that the "new policy does not provide a guarantee," specifying that "prosecutorial discretion" remains "central to ensuring the exercise of justice." However, the policy marks a significant development in FCPA corporate enforcement and represents an important effort to boost self-disclosures in the FCPA context. Because the new FCPA Corporate Enforcement Policy becomes effective immediately, companies that discover potential FCPA issues should consider a potential voluntary disclosure in the context of these more significant potential benefits. The Securities and Exchange Commission, which has authority for civil enforcement of the FCPA in relation to issuers of securities on U.S. exchanges, has not implemented a similar policy, though it continues less formally to seek to assure companies that it will reward voluntary disclosures, cooperation, and remediation.

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