White Collar Update: Deputy Attorney General Rod Rosenstein Announces New FCPA Corporate Enforcement Policy Establishing a Category of Presumptive Declinations

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On November 29, 2017, Deputy Attorney General Rod Rosenstein announced a new Department of Justice FCPA Corporate Enforcement Policy, in his remarks at the 34th International Conference on the Foreign Corrupt Practices Act near Washington, D.C. The policy has been added to the U.S. Attorneys' Manual and modifies elements of the Department's FCPA Pilot Program enacted in April 2016.

Most notably, the new policy establishes a presumption that a company will receive a declination from the Department if it satisfies the policy's specified voluntary self-disclosure, cooperation, remediation, and disgorgement requirements. In his speech, Mr. Rosenstein made clear that this presumption "may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist." Where the presumption is overcome and a criminal resolution of some form is warranted, the Department will accord a 50% reduction off the low end of the U.S. Sentencing Guidelines, except in the case of a criminal recidivist, and generally will not require appointment of a monitor if the company has implemented an effective compliance program. The policy also provides for more limited reduction where a company has not voluntarily self-disclosed, but engages in full cooperation and timely and appropriate remediation. In addition to clarifying the potential benefits available to companies, the policy also sets out in detail the steps companies must take in order to receive credit for voluntary self-disclosure, cooperation, and remediation.

Mr. Rosenstein also continued to emphasize the Department's focus on individual liability and said, "[i]t makes sense to treat corporations differently than individuals," and that the Department, "expect[s] the new policy to reassure corporations that want to do the right thing." Mr. Rosenstein stated that the Pilot Program had proven to be "a step forward in fighting corporate crime," and characterized the revised policy as an "opportunit[y] for improvement" that "will increase the volume of voluntary disclosures, and enhance [the Department's] ability to identify and punish culpable individuals."

The FCPA Corporate Enforcement Policy

The new FCPA Corporate Enforcement Policy (the "Policy") appears at Section 9-47.120 of the U.S. Attorneys' Manual and clarifies the benefit to companies from voluntarily disclosing misconduct, fully cooperating with the government's investigation, and engaging in timely and appropriate remediation.

Mr. Rosenstein made clear in his remarks that the Policy, consistent with other internal Department policies, is not enforceable in court and does not create private rights for companies disclosing misconduct to the government. Nevertheless, it seeks to provide "greater clarity about [the Department's] decision-making process" and makes "enhancements" to the Pilot Program framework in order to further "motivate[] and reward[] companies that want to do the right thing."

For companies that voluntarily self-disclose misconduct in an FCPA matter, fully cooperate with the Department, and engage in timely and appropriate remediation, the Policy establishes a presumption that a company will receive a declination. This presumption may be overcome if aggravating circumstances involving the seriousness of the offense or nature of the offender are found, which include, but are not limited to, "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the conduct within the company; and criminal recidivism."

For a company that complies with the Policy's voluntary self-disclosure, cooperation, and remediation requirements, but does not receive a declination because aggravating circumstances warrant a criminal resolution, the company will receive, or the Department will recommend, a 50% downward reduction from the low end of the U.S. Sentencing Guidelines (the "Guidelines") fine range unless the company is a criminal recidivist. Also, the Department generally will not impose a corporate monitor if the company has implemented an effective compliance program at the time of the resolution.

For a company that does not voluntarily disclose misconduct to the Department, but does comply with the Policy's cooperation and remediation requirements, the company will receive, or the Department will recommend, up to a 25% downward reduction from the low end of the Guidelines fine range.

Critically, in order to qualify for credit under the Policy, "[a] company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue."

In addition to clarifying the credit available to companies that satisfy the Policy's requirements, the Policy also "specifies what [the Department] mean[s] by voluntary disclosure, full cooperation, and timely and appropriate remediation."

Voluntary Self-Disclosure

To receive credit for a voluntary self-disclosure under the Policy, a company must disclose "all relevant facts known to it, including all relevant facts about all individuals involved in the violation of the law." Such a disclosure must be made "prior to an imminent threat of disclosure or government investigation," and "within a reasonably prompt time after becoming aware of the offense, with the burden being on the company to demonstrate timeliness."

Full Cooperation

To receive credit for full cooperation, a company must comply with the provisions contained in the Principles of Federal Prosecution of Business Organizations and must comply with several additional provisions set out in the Policy, as described below. The Policy explicitly states that eligibility for full cooperation credit is not predicated upon waiver of the attorney client privilege or work product protection, and none of the cooperation provisions require such waiver.

- ***Disclose on a timely basis "all facts relevant to the wrongdoing at issue."*** A company must make timely disclosures of all relevant facts gathered during the course of an independent internal investigation, attribute those facts to specific sources when possible without violating the attorney-client privilege, timely disclose all facts related to criminal activity by the company's officers, employees or agents and, where applicable, related to potential criminal activity by third parties, and provide timely updates on its internal investigation.
- ***Engage in "proactive cooperation, rather than reactive [cooperation]."*** A company must disclose relevant facts even when not specifically asked to do so, and must identify opportunities to obtain relevant evidence when those opportunities are not otherwise known by the Department.
- ***Make "[t]imely preservation, collection, and disclosure of relevant documents and information relating to their provenance."*** When applicable, a company must disclose documents located overseas, facilitate production of documents by third parties, and provide

translations of foreign-language documents when requested. If disclosure of documents or information is blocked by foreign law, "the company bears the burden of establishing the prohibition" and "should work diligently to identify all legal bases to provide such documents."

- ***De-conflict witness interviews and other investigative steps.*** When requested, a company must de-conflict its internal investigation with the investigative steps the Department intends to take as part of its own investigation – *e.g.*, postponing interviews of company employees.
- ***Make company officers, employees and agents available for interviews by the Department.*** When requested, a company must make company officers and employees available for interviews by the Department. When possible, a company must also make available overseas officers, employees and agents; former officers and employees; and facilitate third-party witnesses.

<u>Timely and Appropriate Remediation in FCPA Matters</u>

The Policy sets forth several requirements to receive credit for timely and appropriate remediation:

- ***Demonstrate a thorough analysis of the causes of the underlying conduct.*** Where appropriate, a company must also engage in "remediation to address the root causes" of the misconduct.
- ***Implement an "effective compliance and ethics program."*** The Policy's criteria for assessing whether a compliance and ethics program is "effective" may "vary based on the size and resources of the organization," but may include: the company's culture of compliance, resources dedicated to compliance, the quality and experience of compliance personnel, the authority and independence of compliance personnel, the compensation and promotion of compliance personnel, the reporting structure of compliance personnel, the effectiveness of a company's risk assessment and tailoring of its compliance program to that assessment, and the auditing of the compliance program to ensure its effectiveness.
- ***Discipline employees responsible for the misconduct.*** As appropriate, a company must discipline employees, "including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred."
- ***Retain and prohibit the improper destruction of business records.*** As appropriate, a company must retain and prohibit the improper destruction of business records. This includes prohibiting employees from using software that "generates but does not appropriately retain business records or communications."
- ***Take additional steps where necessary.*** Finally, in order to receive credit, a company must take any additional steps necessary to "demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risks of repetition of such misconduct, including measures to identify future risks."

Potential Impact on FCPA Enforcement

In his remarks announcing the new Policy, Mr. Rosenstein acknowledged the success of the Pilot Program in encouraging voluntary self-disclosures, citing the increase in the number of self-disclosures made to DOJ following its introduction. The Department received 30 self-disclosures in the 18 months the Pilot Program was in effect, as compared to only 18 self-disclosures in the 18 months preceding the Pilot Program. Importantly, of the 30 self-disclosures made under the Pilot Program, only two resulted in a corporate criminal resolution (both were resolved through non-prosecution agreements, and neither resolution required a compliance monitor), while seven resulted in public declinations.

Through this lens, it may be that the Policy's declination presumption simply formalizes the *de facto* policy that had emerged under the Pilot Program. Nevertheless, there is value in its clear statement of principles, and in Mr. Rosenstein's own words, the goal of the new Policy is "to reassure corporations that want to do the right thing," and "incentivize responsible corporate behavior."

While the Policy's ultimate impact on criminal FCPA resolutions remains to be seen, companies should take steps to ensure that they are well-positioned to take advantage of the credits available under the new Policy. To that end, companies should continue to pay particular attention to the specific components of an effective compliance and ethics program identified by the **Department**, and additionally consider whether they have policies and procedures in place to effectively identify and assess potential misconduct promptly, in order to preserve the opportunity to make an adequate voluntary self-disclosure under the Policy.

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