

DOJ Announces Revised FCPA Corporate Enforcement Policy

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In a speech yesterday at the 34th International Conference on the Foreign Corrupt Practices Act, U.S. Deputy Attorney General Rod Rosenstein announced the Department of Justice's (DOJ) revised Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy. He explained that the revised policy is based on the DOJ's determination that the FCPA Pilot Program in place for the last 18 months was a "step forward" in fighting corporate crime but also could be improved in certain respects. The revised policy, while similar in many respects to the Pilot Program, seems designed to further encourage voluntary disclosures of FCPA-related misconduct, including by conferring a presumption in favor of a declination for those companies that meet the revised policy's requirements.

Under the Pilot Program, announced on April 5, 2016, companies were eligible for a range of mitigation credit if they voluntarily disclosed all relevant facts (including with respect to individual misconduct); fully cooperated with the DOJ's investigation; preserved and disclosed documents (both foreign and domestic); made employees available for interviews; and appropriately remediated, including by implementing an effective compliance program and by disciplining culpable employees. Mitigation credit ranged from a declination of prosecution accompanied by disgorgement of ill-gotten gains, to up to 50 percent off the fine amount at the low end of the applicable U.S. Sentencing Guidelines calculation and potentially avoiding the appointment of a monitor. To date, seven companies received declinations in connection with the Pilot Program.

The Pilot Program, as intended, appears to have incentivized companies to voluntarily disclose FCPA-related misconduct to the DOJ. In yesterday's remarks, Deputy Attorney General Rosenstein related that the number of voluntary disclosures to DOJ during the Pilot Program nearly doubled — 30 voluntary disclosures were made in the 18-month program, compared to 18 voluntary disclosures during the previous 18-month period.

In light of the program's success, Rosenstein announced the implementation of the new FCPA Corporate Enforcement Policy, which has been incorporated into the United States Attorneys' Manual, that articulates the DOJ's requirements for voluntary disclosure of FCPA violations, full cooperation, and timely and appropriate remediation. He emphasized the importance of transparency, so that corporate officers and board members can better understand the costs and benefits of cooperation. He also emphasized the importance of certainty for companies assessing whether to cooperate, stating that while "we cannot eliminate all uncertainty ... with this new policy we strike a balance in favor of greater clarity about our decision-making process."

The key aspects of the revised FCPA policy are:

First, when a company satisfies the standards for voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the DOJ will resolve the company's case through a declination. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, such as where the offender is a criminal recidivist.

Second, if a company voluntarily discloses wrongdoing and satisfies all other requirements, but aggravating circumstances compel an enforcement action, the DOJ will accord, or recommend to a sentencing court, a 50 percent reduction off the low end of the U.S. Sentencing Guidelines fine range and will not require appointment of a monitor if the company has implemented an effective compliance program.

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Third, the policy provides details about how the DOJ evaluates an appropriate compliance program, which will vary depending on the size and resources of a business, and notes that hallmarks of an effective compliance and ethics program include fostering a culture of compliance, dedicating sufficient resources to compliance activities, and ensuring that experienced compliance personnel have appropriate access to management and to the board.

Fourth, even if a company did not voluntarily disclose the misconduct to the DOJ, but later fully cooperated and timely and appropriately remediated in accordance with the policy's requirements, the DOJ will accord, or recommend to a sentencing court, up to a 25 percent reduction off the low end of the U.S. Sentencing Guidelines fine range.

Rosenstein noted that companies are free to choose not to comply with the revised policy, and in that event, the DOJ will proceed pursuant to the existing Principles of Federal Prosecution of Business Organizations, and in the event of a charge, likely will seek penalty ranges under the U.S. Sentencing Guidelines without reductions.

The revised policy differs from the Pilot Program in two key ways. First, the revised policy provides that those companies that self-disclose, fully cooperate and appropriately remediate are presumptively entitled to a declination, whereas the Pilot Program provided that under those circumstances the DOJ would "consider" a declination. Second, for companies that meet the revised policy's requirements but do not receive a declination,

the revised policy directs prosecutors to accord, or recommend to a sentencing court, a 50 percent reduction off the low end of the U.S. Sentencing Guidelines fine range, whereas under the terms of the Pilot Program, whether to recommend such a reduction was within the DOJ's discretion. Notably, the requirement for disgorgement has carried over from the Pilot Policy to the revised policy; to meet the DOJ's requirements, companies must pay disgorgement resulting from the misconduct at issue.

The revised policy suggests that the DOJ has a strong interest in encouraging voluntary disclosure and cooperation, and is willing under appropriate circumstances to decline prosecution, or to accord, or recommend to a sentencing court, a 50 percent reduction in the fine amount in order to obtain it. Furthermore, in yesterday's speech announcing the revised policy, Rosenstein stated in connection with the policy's approach to declinations that "[i]t makes sense to treat corporations differently than individuals, because corporate liability is vicarious; it is only derivative of individual liability." This statement may suggest a greater willingness to decline prosecution in appropriate cases where the company satisfies the revised policy's requirements with respect to disclosure and cooperation, and where the DOJ cannot establish liability on the part of specific employees. The statement also may reflect a continued DOJ focus on individual accountability, consistent with Rosenstein's prior statements that while the Yates memorandum is under review, any changes will reflect the DOJ's continued resolve to hold individuals accountable for corporate wrongdoing.

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