DOJ Announces New FCPA Corporate Enforcement Policy

NOVEMBER 29, 2017

Today, “[d]ue to the unique issues presented in FCPA matters,” Deputy Attorney General Rod Rosenstein announced a new FCPA corporate enforcement policy published in a revision to the United States Attorneys' Manual. The new policy effectively makes permanent the FCPA Pilot Program originally announced in April 2016 and increases the incentives for corporate self-disclosure by adding a “presumption” that DOJ will issue declinations when a company's self-disclosure, cooperation, remediation, and disgorgement meet certain standards.

The new policy states that, except where there are aggravating circumstances, DOJ will presumptively resolve all FCPA voluntary self-disclosures through a declination where a company meets all standards of disclosure, full cooperation, and timely and appropriate remediation, as well as paying all disgorgement, forfeiture, and/or restitution. Declinations under the policy will be public.

The new policy does not define “aggravating circumstances,” but does cite examples, including executive management involvement in misconduct, significant profits gained from misconduct, pervasive misconduct within an organization, and criminal recidivism. Because “aggravating circumstances” are not comprehensively defined, particularly with regard to DOJ's views regarding the “seriousness of the offense or the nature of the offender,” companies will still face difficult decisions as to whether to voluntarily disclose in specific situations. Also, as was the case under the existing Pilot Program, because the SEC does not have an equivalent program, companies will have to grapple with the risk that DOJ might decline but the SEC could still go forward with an expensive and burdensome enforcement action.

The new policy also states that if a criminal resolution is warranted based on aggravating circumstances, but a non-recidivist company has otherwise met the self-disclosure, cooperation, and remediation standards, DOJ will recommend a 50% reduction from the low end of the Sentencing Guidelines fine range and generally will not impose a monitorship. Companies that did not self-disclose to DOJ but nonetheless cooperated fully and engaged in timely and appropriate remediation will receive a 25% reduction off of the low end of the Sentencing Guidelines fine range. These monetary components are consistent with the existing Pilot Program.

The new policy does define the standards for “voluntary self-disclosure,” “full cooperation,” and

“timely and appropriate remediation” that companies must meet in order to receive a declination or fine reduction pursuant to the new policy, in some cases expanding how these concepts are articulated in DOJ's Principles of Federal Prosecution of Business Organizations. For instance, among other things, “full cooperation” means disclosure of all facts gathered in an investigation with “attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts,” provision of translated documents in foreign languages where requested, a company's diligence in identifying all available legal bases to provide documents which may otherwise be protected by foreign data privacy statutes, and a company's agreement to defer, in certain circumstances, internal fact development steps it might otherwise take (such as witness interviews) while DOJ pursues specific aspects of its investigation. As part of the definition of “timely and appropriate remediation,” the new policy also identifies how DOJ will evaluate corporate compliance programs, including an evaluation of resources, risk assessments, the quality of compliance personnel, auditing, and the authority and independence of the compliance function.

With regard to “de-confliction” of a company's internal investigation with DOJ's investigation (such as by delaying company interviews), the policy states for the first time that such de-confliction requests by the Department will be made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose. When the justification dissipates, DOJ will lift its request. This provision presumably was a response to calls from companies and defense counsel for clarifications of the Department's position on use of de-confliction requests, which have been criticized as interfering with a company's ability to expeditiously gather relevant facts.

Another issue that has been raised in connection with the Pilot Program has been whether “declinations” include only matters where DOJ could have brought a case but elected not to, or whether declinations also include other cases where DOJ may have faced jurisdictional or proof challenges that may have limited their ability to bring a case at all. The new policy clarifies that issue, stating that a declination under the policy “is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy.”

In announcing the new policy, Deputy Attorney General Rosenstein stated that it will allow “corporate officers and board members to better understand the costs and benefits of cooperation” and, by encouraging self-disclosure, will “enhance [DOJ's] ability to identify and punish culpable individuals.”

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