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Expert Analysis

New DOJ FCPA Enforcement Policy Raises Difficult Questions for Companies Considering Voluntary Disclosures

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U.S. Department of Justice building in Washington, D.C.

Enforcement of the U.S. Foreign Corrupt Practices Act (FCPA), which prohibits bribing foreign officials to gain business advantages, is still a high priority for the Department of Justice (DOJ) and Securities and Exchange Commission (SEC). Financial penalties potentially in the hundreds of millions of dollars for companies and jail terms and fines for individuals create substantial risks for international business participants.

On Nov. 29, 2017, Deputy Attorney General Rod Rosenstein announced a new FCPA Corporate Enforcement Policy (the Policy). The Policy, incorporated into the U.S. Attorneys' Manual as Policy 9-47.120, is based on the 2016 FCPA Pilot Program, which first attempted to formalize the DOJ's treatment of self-disclosure, cooperation, and remediation in the FCPA enforcement context. In announcing the new Policy, Rosenstein explained the DOJ's view that the Pilot Program had been successful, significantly increasing self-disclosure rates.

Due to "unique issues" surrounding FCPA matters, the Policy aims to provide "additional benefits to companies based on their corporate behavior once they learn of misconduct." As the Pilot Program explained, FCPA enforcement is becoming ever-more likely, given the DOJ's increased investment in prosecutorial resources and collaboration with foreign counterparts. And considering this increased likelihood of enforcement, Rosenstein explained that the Policy is intended to "reassure corporations that want to do the right thing."

The Policy, however, is a somewhat mixed bag for companies struggling to decide whether to voluntarily disclose misconduct. On one hand, the new presumption of declination offers companies hope they can avoid damaging criminal proceedings. On the other hand, the Policy contains ambiguities and pitfalls that create uncertainty about whether the DOJ will actually

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exercise its discretion and grant a declination under various circumstances. Furthermore, even if a declination is granted under the Policy, a company can still face significant financial consequences and a public airing of its misdeeds. These concerns must be carefully analyzed by FCPA practitioners and their clients.

The Policy

The Policy's primary incentive is the presumption of a declination if a company satisfies three elements: (1) voluntarily self-disclosure, (2) full cooperation, and (3) timely and appropriate remediation. In addition, to "qualify" for a declination under the Policy, the company must pay "all disgorgement, forfeiture, and/or remediation resulting from the conduct." Even if the requirements of the Policy are met, however, the presumption of declination will not apply if there are "aggravating circumstances" warranting a criminal resolution.

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If the DOJ determines a criminal resolution is merited, a corporation satisfying the elements described above will still receive a 50 percent reduction off the low end of the U.S. Sentencing Guidelines fine range so long as it is not "a criminal recidivist." Furthermore, the criminal resolution "generally will not require appointment of a monitor" if the corporation has an effective compliance program at the time of resolution.

If a corporation does not voluntarily self-disclose, but still satisfies the cooperation and remediation elements, the Department will recommend "up to a 25% reduction" off the low-end of the fine range.

The Elements. To get credit for self-disclosure, a company must act "prior to an imminent threat of disclosure or government investigation," must be "reasonably prompt" in self-disclosing, and must disclose "all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law."

As defined by the Policy, full cooperation requires "disclosure on a timely basis of all facts relevant to the wrongdoing at issue." Furthermore, cooperation must be proactive, rather than reactive, meaning companies must disclose information without being asked and actively notify the DOJ of opportunities "to obtain relevant evidence not in the company's possession." Finally, companies must assist the DOJ with its investigation. This includes preserving, collecting, and disclosing relevant documents, along with "information relating to their provenance." Additionally, where requested, the corporation must make officers and employees available for interviews by the DOJ and "de-conflict" internal investigations from DOJ investigations.

To satisfy the element of timely and appropriate remediation, a company must demonstrate: "thorough analysis of causes of underlying conduct;" "implementation of an effective compliance and ethics program;" "appropriate discipline of employees;" and "appropriate retention of business records."

Aggravating Circumstances. The Policy provides a non-exhaustive list of aggravating circumstances to rebut the presumption of declination, including "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism." If aggravating circumstances are present, a company can at best receive a 50 percent reduction in its fines.

Analysis

Importantly, the Policy's definition of aggravating circumstances allows for substantial prosecutorial discretion. The list is explicitly non-exhaustive, and numerous undefined terms may be dispositive in the DOJ's decision to exercise that discretion. As discussed in a recent NYLJ article by Elkan Abramowitz and Jonathan Sack, prosecutorial discretion plays a large, if not outsized, role in current white-collar enforcement, particularly regarding the FCPA. Thus, depending on how prosecutors implement the Policy, the exception could swallow the rule.

For example, while the Policy refers to executive management involvement, it does not explain what level of management or the extent of the involvement required. As often

happens in white collar investigations, senior managers may be copied on troubling communications, but it can be difficult to say how involved, if at all, they were. Also, the Policy refers to "significant profit" to the company from the wrongdoing, but "significant" is not quantified. While one could sensibly speculate that hundreds of millions of dollars in profits from bribery would be "significant" under the Policy, would tens of millions be significant for a multi-billion-dollar company? Under the Pilot Program, the largest profit disgorgement in connection with a declination was approximately $11 million. There is no indication if that number is at or near the ceiling.

Moreover, because the list of aggravating factors is non-exhaustive, one can imagine many other factors a prosecutor might consider "aggravating." Perhaps even more significantly, the nature and extent of the conduct and the relevant actors, as well as the profits, if any, obtained from wrongdoing, are often not known for months or even years after an investigation starts. Given the Policy's requirement that a voluntary disclosure be made reasonably promptly, companies and their counsel often will not have the opportunity to sufficiently investigate the facts before making a disclosure decision.

"Criminal recidivism" also is an aggravating circumstance, but the term is undefined. One must wonder whether repeat self-disclosers (who presumably are disclosing just as the Department would hope under the new Policy) will be entitled to declinations for subsequent disclosures. In other words, does "criminal recidivism" include misconduct that did not result in charges? Relatedly, if a company makes a voluntary disclosure and then discovers different, but potentially related, misconduct, do the Policy's proactive cooperation requirements render disclosure of the newly discovered conduct not voluntary (and thus not eligible for a declination)?

The Policy's robust requirements for exhaustive and proactive cooperation and thorough remediation also raise questions as to whether some companies operating in good faith would satisfy the DOJ's standards. In several recent cases, the DOJ has declined to give companies full cooperation credit when the DOJ concluded those companies did not provide all the information the DOJ expected, asserted privilege claims the DOJ viewed as overbroad, or provided information too late in the view of the DOJ.

Finally, with respect to public companies, because the FCPA is enforced by both the DOJ and SEC, there is a substantial risk that a public company may voluntarily disclose an FCPA issue and receive a declination from the DOJ while still being charged by the SEC (which might never have learned about the case absent the company's disclosure). This has in fact happened frequently since the DOJ's adoption of the Pilot Program and is not surprising given the SEC's lower standard of proof and overall greater likelihood of bringing cases than the DOJ. There are no indications that the SEC is contemplating a similar policy.

Even if a company is not charged by the SEC (in the SEC's discretion or because the company is not within the SEC's jurisdiction), as discussed above, the Policy requires payment of disgorgement and/or forfeiture, and declinations under the Policy will be made public. Thus, even if a company achieves a sought-after declination and no criminal charge, the reputational and financial impact of the matter for the company may be substantial, particularly if the government was not likely to discover the matter without the company's voluntary disclosure.

Conclusion

The creation of the FCPA Corporate Enforcement Policy appears to be a good faith effort by the DOJ to provide more concrete guidance on its treatment of voluntary disclosures, and we have no doubt that the vast majority of federal prosecutors and DOJ leadership will attempt to apply its terms in a commonsense fashion. All that said, the above discussion highlights only a few of the uncertainties and potential pitfalls that may await a company deciding whether to take the significant step of voluntarily disclosing criminal conduct to prosecutors.