

INSIGHTS

DOJ Issues New Policy Encouraging Self-Reporting FCPA Violations

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On November 29, 2017 the Deputy Attorney General of the U.S. Department of Justice (DOJ), Rod J. Rosenstein, announced a new FCPA enforcement policy¹ that seeks to incentivize voluntary self-reporting by providing companies with more certainty regarding potential outcomes of FCPA investigations. This new policy builds on and formalizes the FCPA Pilot Program that was launched by DOJ in 2016 to encourage voluntary disclosures of FCPA violations. In remarks announcing the policy at the 34th International Conference on the FCPA, Deputy Attorney General Rosenstein stated that it “provide[s] transparency about the benefits available if [disclosing companies] satisfy the requirements. We want corporate officers and board members to better understand the costs and benefits of cooperation. The policy therefore specifies what we mean by voluntary disclosure, full cooperation, and timely and appropriate remediation.”²

The policy, which has been incorporated into the U.S. Attorney’s Manual,³ offers increased incentives to companies that satisfy three requirements. To qualify, companies must (1) voluntarily self-disclose the potential violation; (2) fully cooperate with the government’s subsequent investigation; and (3) timely and appropriately remediate identified issues.⁴ In addition, the company must pay disgorgement, forfeiture, and/or restitution resulting from the violation. If the company satisfies these requirements, there is a presumption that the company will receive a declination. If, however, DOJ determines that there are “aggravating circumstances involving the seriousness of the offense or the nature of the offender,” then the company will not necessarily receive a declination.⁵ In those instances, the new policy dictates that DOJ will recommend a 50% reduction off of the low end of the U.S. Sentencing Guidelines fine range, unless the company is a repeat offender, and will not require that the company appoint a monitor if it has implemented an effective compliance program. If the company does not self-report, but later fully cooperates and remediates, DOJ will recommend up to a 25% reduction off of the low end of the U.S. Sentencing Guidelines fine range.

Takeaways

Even under the Pilot Program, the decision to self-report was not always obvious and at times included significant unknowns. The policy is a step towards certainty that may offer real incentives and predictability for companies that self-report FCPA violations. It also spells out more clearly for companies the limitations of voluntary disclosure and cooperation. It remains to be seen, for example, how broadly DOJ will interpret the “aggravating circumstances” carve-out – a expansive application would lessen the potential benefits of self-reporting and cooperation with DOJ investigations. In addition, the Securities and Exchange Commission (“SEC”), which has civil FCPA enforcement authority over public companies and their employees, is not bound by the new enforcement policy and may pursue an enforcement

action even if DOJ has resolved the matter with a declination. Thus, while the policy does not provide guarantees to self-disclosing companies, it offers a clearer and more certain picture for companies when evaluating whether to self-disclose violations and cooperate with DOJ investigations.

¹ The new policy is available [here](#).

² Deputy Attorney General Rosenstein's full remarks are available [here](#).

³ The U.S. Attorney's Manual is used by DOJ prosecutors to guide the investigation and prosecution of criminal cases. The U.S. Attorney's Manual is available [here](#).

⁴ As previewed by Deputy Attorney General Rosenstein, these requirements are also defined in some detail in the U.S. Attorney's Manual.

⁵ The policy lists the following as potential aggravating circumstances: "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."