Investigations, Compliance and Defense

DOJ Formalizes FCPA Enforcement Policy -- Reinforcing Incentives for Disclosure and Cooperation Under the FCPA Pilot Program and Creating a "Presumption" in Favor of a Declination of Prosecution for Companies that Voluntarily Disclose Misconduct

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On November 29, 2017, the Department of Justice (DOJ) announced a new Foreign Corrupt Practices Act (FCPA) enforcement policy that formally adopts the enforcement principles outlined in the Fraud Section's "Foreign Corrupt Practices Act Enforcement Plan and Guidance," commonly referred to as the "FCPA pilot program," issued by then-Fraud Section chief Andrew Weissmann in April 2016. The original FCPA pilot program sought to encourage corporations to voluntarily disclose FCPA violations by promising that if they did so, they would face a more lenient resolution, possibly including a complete declination of prosecution, as long as they also fully cooperated with DOJ, remediated their controls and compliance programs, and disgorged any illicit profits resulting from the violation. The new policy, which will be inserted into the US Attorney's Manual as official DOJ policy, draws its structure and much of its language from the pilot program, continuing to provide the promise of beneficial treatment for companies meeting the requirements.

DOJ Uses New Policy and Announcement to Highlight Benefits to Self-Disclosure and Cooperation

After the pilot program's implementation, many in the defense bar argued that the benefits of voluntary disclosure were too uncertain because the initial policy promised only that DOJ would "consider" a declination of prosecution and because the government's financial calculations in settlement negotiations were viewed as unreasonably high. The new policy is intended to underscore the advantages of companies' self-disclosure of wrongdoing by detailing the benefits that companies have received under the pilot program over the past 18 months, and by increasing the certainty that companies meeting the program's requirements will receive those benefits.

In his speech announcing the new policy, Deputy Attorney General (DAG) Rod Rosenstein made two important points. First, he provided new details about the pilot program's track record. During the first year of the program, between April 2016 and April 2017, DOJ received 22 voluntary disclosures from companies, compared to only 13 during the prior year. And during the 18 months that the pilot program was in effect, DOJ received a total of 30 such disclosures, compared to only 18 during the prior 18-month period. These statistics, though representing a small sample size, suggest that the program may in fact have served its stated purpose of encouraging voluntary disclosures. In addition, DAG Rosenstein suggested that participation in the program was beneficial for companies. He revealed that nine matters involving voluntary disclosures had been resolved under the pilot program since April 2016: seven of those resulted in declinations of prosecution; and the other two resulted in non-prosecution agreements without any requirement for a corporate monitor. By contrast, of the other 15 corporate FCPA matters resolved since the beginning of 2016, 12 resulted in criminal convictions or deferred prosecution agreements, and in 10 of those cases, the company was required to appoint a corporate compliance monitor. Of course, those same statistics indicate that 21 voluntary disclosures under the program have not yet been resolved by DOJ, including a minimum of four such disclosures made during the program's first year. Whether those cases are ultimately resolved in a similar manner

as the first nine voluntary disclosure cases—and how long it takes to resolve them—will be an important barometer for the benefits of participating in the program.

Second, DAG Rosenstein explained two ways in which the new policy builds on the pilot program by providing further certainty to companies about the benefits of disclosing potential wrongdoing—changes he anticipated would "reassure corporations that want to do the right thing." The new policy explicitly states that, if a company meets the requirements of self-disclosure, cooperation, remediation, and disgorgement, prosecutors will be required to apply a presumption that DOJ should decline prosecution. This presumption can be overcome only if specified aggravating factors are present, such as especially serious or pervasive misconduct, or a history of similar violations. As noted above, the prior policy promised only that DOJ would "consider" such a declination.

Additionally, the new policy commits DOJ to providing specific fine reductions for companies meeting the policy's requirements, unless the company at issue is a recidivist. The policy states that if aggravating factors overcome the presumption of a declination, the company will still receive a 50 percent discount off the low end of the fine recommended under the U.S. Sentencing Guidelines, and "generally" not be required to appoint a corporate compliance monitor. Under the prior policy, companies in that category were promised only a discount of "up to" 50 percent. Companies that fully cooperate, remediate, and disgorge profits, but do not self-disclose their misconduct will be entitled to a maximum of a 25 percent discount from the low end of the guidelines fine range.

The New Policy's Requirements for Declination and Mitigation Credit Largely Track Those Under the Pilot Program

The new policy closely tracks the approach and structure of the pilot program. The policy specifies the four requirements for a presumption in favor of a declination and receiving full mitigation credit:

1. "Reasonably prompt" self-disclosure of an FCPA violation by a company, made prior to any imminent threat of government investigation or disclosure by a third-party;
2. "Full cooperation" with the government's subsequent investigation. Notably, as with the pilot program, the requirements for cooperation here include not only the baseline DOJ requirements for cooperation credit in other corporate fraud cases (such as providing all relevant facts about individuals involved in the misconduct), but also enhanced requirements, such as agreeing to deconflict a company's own internal investigation with the government's investigation (*i.e.*, complying with DOJ's requests that companies defer investigative steps, such as interviews of company employees or third parties), attempting to provide relevant evidence located abroad and working around foreign data-privacy rules, and cooperating "proactively" rather than "reactively";
3. Remediating flaws in the company's preexisting compliance program after conducting a "root cause analysis"; and
4. Disgorging any ill-gotten profits resulting from the violation (although disgorgement to a regulator such as the Securities and Exchange Commission can satisfy this requirement).

Key Takeaways from the New Policy

Comparing the new policy to the pilot program and past DOJ enforcement practice reveals a few important takeaways:

- **Continuity with existing enforcement practice.** The policy's goals, carrot-and-stick incentive structure, and even most of its language are drawn directly from the pilot program. This continuity reinforces DOJ's statements earlier this year that it is committed to maintaining FCPA enforcement priorities despite speculation that the new administration would take a different approach.

- **Explicit recognition that a company can obtain credit without meeting all cooperation requirements.** Although the new policy, like the pilot program, includes more stringent requirements for cooperation than those required for corporate cooperation credit elsewhere in DOJ policy, the new policy makes clear that a company that fails to meet these heightened requirements under the FCPA enforcement program may still receive reduced credit for meeting the standard

cooperation requirements. This new statement reflects existing DOJ practice: in recent years, DOJ has frequently credited incomplete but still substantial cooperation with a slightly lesser reduction off the US Sentencing Guidelines' recommended fine—so long as the baseline requirement of providing all relevant information about individuals involved in the misconduct is met.

- **Improved predictability as to benefits of disclosure and cooperation, but some uncertainty remains.** By providing for a clear presumption in favor of declination and commitment to recommending 50 percent fine reductions for companies meeting the policy's requirements, DOJ has attempted to address many of the defense bar's criticisms that the pilot program did not provide certainty about the benefits of disclosure and cooperation. The policy also provides more concrete guidance about deconfliction of internal investigations and when declinations will become public, two other areas that lacked clarity under the pilot program. Uncertainty remains, however, regarding the criteria DOJ will use to assess the timeliness of disclosure and, in particular, what DOJ means when it demands "reasonably prompt" self-disclosure. Likewise, the change in policy does not address the defense bar's concern that DOJ's financial calculations are unreasonably high, such that even a 50 percent reduction in recommended fine amount may entail a significant financial penalty.

- **No explicit recommitment to enhanced enforcement resources.** When DOJ announced the pilot program, it also emphasized that it was substantially increasing FCPA enforcement resources by adding prosecutors and FBI agents dedicated to investigating foreign bribery and FCPA cases. Yesterday's announcement of the new policy came with no comparable commitment of resources. In the current environment, with promised budget cuts and hiring freezes, DOJ likely will not receive additional FCPA-enforcement resources, and it is unclear at this time if it will maintain its current capacity. Ultimately, the availability of enforcement resources may have an equal or greater impact on FCPA enforcement than the formal policy.

For more details on the specifics of the new enforcement policy or its potential effects on FCPA enforcement, contact any of the lawyers listed below or in our Investigations, Compliance, and Defense practice. The policy is available on the DOJ website here: https://www.justice.gov/criminal-fraud/file/838416/download.

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