DOJ Releases New FCPA Corporate Enforcement Policy, Extending Pilot Program Indefinitely

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In remarks at the 34th International Conference on the Foreign Corrupt Practices Act (FCPA), Deputy Attorney General Rod Rosenstein announced the Department of Justice's (DOJ's) new official "FCPA Corporate Enforcement Policy," which in part extends and codifies the DOJ's Pilot Program for encouraging voluntary disclosures of FCPA violations. The new policy will be included as a section of the United States Attorneys' Manual.

When announcing the new policy, Rosenstein emphasized the Pilot Program's effectiveness at prompting companies to disclose potential FCPA violations, noting that the FCPA Unit had received 30 voluntary disclosures during the year-and-a-half the program has been in effect, compared to just 18 during the previous 18-month period.

In fact, the DOJ appears so impressed by this uptick in voluntary disclosures under the Pilot Program that the new FCPA Corporate Enforcement Policy strengthens the program's incentives for organizations to bring their FCPA matters to the DOJ. Previously, the DOJ promised to "consider" a declination for organizations that voluntarily disclosed FCPA violations to the DOJ. Now, the DOJ promises a "presumption" of declination for all such companies, which may be overcome only if there are "aggravating circumstances." While making a disclosure is still a difficult decision for any organization, this presumption provides some certainty regarding what companies may expect as a consequence of that disclosure.

Like the 2016 Pilot Program, the 2017 FCPA Corporate Enforcement Policy sets forth three conditions companies must satisfy to reap the full benefits of self-disclosure: voluntary self-disclosure, full cooperation, and timely and appropriate remediation. Both the Pilot Program and the new Corporate Enforcement Policy contain detailed criteria for evaluating each of these three conditions. For the self-disclosure to be truly voluntary, it must be made "within a reasonably prompt time after becoming aware of the offense," and "prior to an imminent threat of disclosure or government investigation." Similarly, full cooperation requires timely disclosure of all facts relevant to the wrongdoing—including all facts gathered during an independent investigation—as well as timely preservation of all relevant documents. True remediation, in its turn, will require implementation of an effective compliance and ethics program and appropriate discipline of employees.

In addition, declinations decided pursuant to the policy will be made public. The implication of this language is that if the DOJ declines to prosecute a matter and that decision is not announced, the decision will have been based on other factors, such as lack of jurisdiction, the running of the applicable limitations period, or failure to satisfy the statutory elements of a violation. This may allow for more accurate tracking of actual declination decisions by the DOJ.

Rosenstein emphasized that the new policy would "[p]reserve[e] a measure of prosecutorial discretion ... central to ensuring the exercise of justice." Accordingly, the policy sets forth "aggravating factors" that may overcome the presumption of a declination. These include: involvement by executive management, significant profit earned from the misconduct, pervasiveness of misconduct within the company, and criminal recidivism. In addition, the new policy makes clear that the company is required to pay "all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue," which could result in significant penalties even if no criminal fines are imposed.

The seriousness with which the DOJ takes the requirement of voluntary disclosure was made clear in the agency's settlement with the Dutch oil-platform services company SBM Offshore, fortuitously announced within a few hours of Rosenstein's remarks. SBM appears to have fully satisfied two of the conditions under the Pilot Program in that it cooperated and remediated. However,

SBM apparently did not provide a complete disclosure for about one year, which, in the eyes of the DOJ, meant that it had not satisfied the criteria for true voluntary self-disclosure. Accordingly, the DOJ was only willing to grant a 25 percent reduction off the bottom of the Sentencing Guidelines range, the maximum possible reduction for cooperation under current DOJ policy for companies that do not properly disclose. Taking into account the company's ability to pay, this resulted in a criminal penalty of $238 million and a Deferred Prosecution Agreement. This resolution, as well as additional analysis of the DOJ's FCPA Corporate Enforcement Policy, will be covered in our FCPA Winter Review.

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