

ALERT

DOJ's New FCPA Corporate Enforcement Policy: Offers Increased Guidance But No Guarantees

December 18, 2017

WHAT: The U.S. Department of Justice (DOJ) announced a revised FCPA Corporate Enforcement Policy aimed at increasing voluntary disclosure of FCPA violations.

WHEN: The new policy was announced on November 29, 2017.

WHAT DOES IT MEAN FOR INDUSTRY: The Corporate Enforcement Policy amends, clarifies, and solidifies the FCPA Pilot Program introduced in 2016. While the new policy seeks to further incentivize voluntary disclosures, companies should proceed cautiously. The new guidelines are nonbinding, concern only DOJ enforcement actions, and leave the Government with significant discretion. There is no guarantee that a company will receive a declination under the policy, even where it appears that DOJ's criteria have been met.

OUR ANALYSIS:

Announcing the revised FCPA Corporate Enforcement Policy on November 29, 2017, Deputy Attorney General Rod Rosenstein explained that the policy is intended to provide "greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing." The policy provides a "presumption" that a company will receive a declination if the company voluntarily self-discloses its FCPA misconduct, fully cooperates with DOJ, "timely and appropriately" remediates, and there are no "aggravating circumstances" present. If aggravating factors exist and a declination is not appropriate, DOJ may still recommend a reduced fine and "generally" will not require a compliance monitor if the company has

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implemented an effective compliance program. Although the revised policy provides further—much needed—clarification on how the DOJ Fraud Section evaluates FCPA cases, successfully completing the checklist of criteria for obtaining a declination or reduced fine does not guarantee a favorable result under the policy.

First and foremost, the policy is nonbinding. Not part of any law or regulation, the policy has, however, been codified in the U.S. Attorney's Manual (USAM)—DOJ's internal guidance handbook—available at <https://www.justice.gov/criminal-fraud/file/838416/download>. While inclusion in the USAM certainly adds permanence to the 2016 Fraud Section guidance, whether to bring an FCPA action remains, as always, at the discretion of the Fraud Section's prosecutors. Compounding the difficult nature of any self-reporting decision, the updated guidance still leaves plenty of room for interpretation. For example, the definition of "timely and appropriate remediation" includes "implementation of an *effective* compliance and ethics program" and "*appropriate* discipline of employees." These terms do little to define the steps a company must take to meet one of the core criteria for a declination. Further, the policy provides only a nonexclusive list of "aggravating factors," including "involvement by executive management" and "a *significant* profit to the company." These terms are not themselves defined in the policy. Thus, as with the Pilot Program, the contours of the Corporate Enforcement Policy will remain largely undefined until DOJ begins to implement it in specific enforcement actions, and makes public more declinations, providing benchmarks from which companies can assess their unique situations.

Companies should also keep in mind that, declination aside, voluntary disclosure often results in myriad other consequences. Having introduced the concept of "declination with disgorgement," in the Pilot Program, DOJ now solidifies that practice by including it in the USAM, but now explicitly requires "disgorgement, *forfeiture, and/or restitution*" in order to qualify for the benefits of the new program. Determining the adequacy of those payments remains at DOJ's discretion, and will likely be a heavily negotiated issue in any resolution. Furthermore, the Corporate Enforcement Policy is solely a DOJ policy. It has no effect on the authority or prerogative of the Securities and Exchange Commission (SEC) to bring its own enforcement actions where it has jurisdiction, though credit will be given for disgorgement, forfeiture or restitution paid to the SEC or another "relevant regulator." Foreign authorities with whom DOJ cooperates over the course of an FCPA investigation may also—and increasingly are—exercising their own authority against a company that has engaged in resolution negotiations with DOJ.

In sum, the Corporate Enforcement Policy helps solidify DOJ's framework for enforcing the FCPA, granting declinations, and reducing or recommending reduced fines. Its "presumption" language certainly provides companies a structure with which they can argue for a declination or reduced fine. However, the policy remains discretionary, and companies need to understand that the self-reporting decision cannot be seen as automatic, given that there are no guarantees how DOJ or other regulators will view the many factors enumerated in DOJ's latest enforcement policy.