

DOJ Announces Revised FCPA Corporate Enforcement Policy

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During his keynote speech at the 34th International Conference on the Foreign Corrupt Practices Act (“FCPA”), U.S. Deputy Attorney General Rod J. Rosenstein announced a new FCPA Corporate Enforcement Policy (the “Policy”), which is now incorporated in the [United States Attorneys’ Manual](#) (“USAM”).¹ According to Deputy Attorney General Rosenstein, the goal of the Policy is to “provide[] guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing.”²

The Policy formalizes many aspects of the Fraud Section’s *Foreign Corrupt Practices Act Enforcement Plan and Guidance*, which DOJ introduced, on a pilot basis, in April 2016 (the “Pilot Program”).³ However, the Policy makes two key changes to the Pilot Program in situations involving voluntary disclosure:

- First, it establishes, in the absence of “aggravating circumstances,” a presumption of a declination for a company that (i) voluntarily discloses misconduct in an FCPA matter,⁴

¹ U.S. Dep’t of Justice, U.S. Attorney’s Manual § 9-47.120 (2017).

² U.S. Dep’t of Justice, *Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2017), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign>.

³ U.S. Dep’t of Justice, Criminal Division, Fraud Section, *The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), available at <https://www.justice.gov/opa/file/838386/download>. Our client alert on the Pilot Program is available [here](#).

⁴ While the Policy generally incorporates the Pilot Program’s standards for assessing whether a company should receive credit for voluntary disclosure, it differs in one interesting respect. The Pilot Program stated that “the Fraud Section will determine whether the disclosure was already required to be made,” and that “[a] disclosure that a company is required to make, by law, agreement, or contract, does not constitute voluntary self-disclosure for purposes of [the Pilot Program].” The Policy does not include any similar statements, which begs the question whether this is an abrogation of the Pilot Program policy by omission.

(ii) fully cooperates, (iii) timely and appropriately remediates, and (iv) agrees to disgorge profits resulting from the misconduct and pay restitution.

- Second, the Policy commits DOJ to recommending a 50% reduction off of the low end of the U.S. Sentencing Guidelines (the “Guidelines”) fine range in those cases (except cases involving recidivists) in which a company does not qualify for a declination but otherwise voluntarily discloses the conduct, fully cooperates, and remediates. The Policy also makes clear that, in cases where a company qualifies for a 50% reduction, DOJ “generally will not require appointment of a monitor” if the company has implemented an effective compliance program at the time of the resolution.

This incremental shift in Department policy should prove helpful in predicting likely outcomes from voluntary disclosures and in navigating DOJ’s expectations for cooperation and remediation in FCPA investigations. But questions still abound surrounding how the Department will approach FCPA cases in the coming years and whether the Policy will have a broader impact throughout the Department on other types of corporate prosecutions. It also remains true that, even with the presumption of a declination in an FCPA case that is voluntarily disclosed, DOJ still will require disgorgement of ill-gotten gains. So, while the Policy makes the benefits of self-reporting a little more certain, companies still will incur a potentially substantial cost—one that must be balanced against the benefits of not self-reporting but remediating any improper conduct and then fully cooperating if the Department comes calling, which is what many companies do today.

We explore the details of the new Policy in more detail below.

Presumption of a Declination

In the Pilot Program, DOJ made clear that a voluntary disclosure was necessary for a company to receive a declination, along with full cooperation, and remediation.⁵ But under the Pilot Program, DOJ was required only to “consider” a declination when such circumstances existed; as we previously cautioned, the discretionary nature of the benefit meant that companies could not predict with any degree of certainty whether a declination was likely. This uncertainty, in turn, affected the calculus of when to voluntarily disclose. Under the Policy, that “consideration” of a declination has been converted to a “presumption,” assuming all of the prerequisites are met. Even with the touted success of the Pilot Program (22 voluntary disclosures in the first year of the Pilot Program, as compared to 13 the year before), this shift to a presumption of a declination reflects the Department’s effort to further encourage self-reporting by providing greater certainty surrounding the likely outcome.

This increased certainty in outcomes is mitigated by the prosecutorial discretion that DOJ reserves for itself under the Policy. Here, this discretion takes the form of the “aggravating circumstances” exception, which, if present, would allow DOJ prosecutors to resolve the matter through a non-prosecution agreement, deferred prosecution agreement, guilty plea, or even indictment. The non-exhaustive list of “aggravating circumstances” includes “involvement by

⁵ By “declination,” we are referring to the situation in which DOJ could pursue charges under the FCPA but elects not to do so based on the exercise of prosecutorial discretion, rather than a decision not to pursue charges which is based on some factual or legal deficiency in DOJ’s case. Declinations pursuant to the Policy, like the Pilot Program, will require disgorgement of profits, forfeiture, and/or restitution.

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.”

We will be watching to see how DOJ interprets the “aggravating circumstances” exception in practice. For example, with respect to “involvement by executive management,” will DOJ be focused on parent-level executives, or will misconduct by executives in country-level subsidiaries qualify as “aggravating circumstances”? Similarly, how will DOJ interpret and apply the “significant profit” exception? Will the significance of the profit turn on the sheer magnitude of the profit; will DOJ consider the profits relative to the company’s scale and financial performance more generally; and how will this factor be applied in cases where the misconduct may not be tied to specific revenue streams but is nonetheless significant in a company’s commercial strategy and operations?

While these questions remain open, we are hopeful that DOJ will apply the “aggravating circumstances” exception sparingly. To this point, in his speech, Deputy Attorney General Rosenstein noted that of the 17 DOJ FCPA corporate resolutions since 2016, only two involved voluntary disclosures under the Pilot Program, and both of those cases were resolved via a non-prosecution agreement, without the imposition of a compliance monitor.⁶ If these statistics are indicative of the direction of the Policy, we can expect that going forward, it will be the rare case where DOJ will depart from the presumption of a declination. Because declinations under the Policy will be made public, as they were under the Pilot Program, we expect that with time, a richer data set will be available, allowing for even greater predictability of outcomes.

DOJ “Will Accord” a 50% Reduction to Companies That Do Not Receive Declinations

The Policy also seeks to incentivize voluntarily disclosures even in those situations where “aggravating circumstances” exist and a declination is not offered. DOJ does so by promising that it “will accord” or recommend a 50% reduction off the low end of the Guidelines fine range for companies that voluntarily disclose the misconduct, fully cooperate, and remediate. By comparison, under the Pilot Program, DOJ left itself discretion, stating that it “may accord” a company up to 50%. There is one exception under the new Policy—namely, a company that is a recidivist is not eligible for the full 50% reduction.

Clarification on Cooperation and Remediation

Consistent with the Pilot Program, the Policy accords companies that fully cooperate and remediate—but do not voluntarily disclose the underlying conduct—the opportunity to obtain up to a 25% reduction off of the low end of the Guidelines range. The Policy elaborates what is

⁶ While Deputy Attorney General Rosenstein did not identify these matters by name, it appears that he was referring to DOJ’s 2016 resolutions with General Cable Corporation and BK Medical. As we have [observed previously](#), the latter case is notable in that the company did not receive full credit for *cooperation* under the Pilot Program because of an allegedly defective *voluntary disclosure*, resulting in a 30% reduction off the bottom end of the Guidelines range, rather than the maximum 50% available under the Pilot Program.

required to obtain full cooperation and remediation credit, drawing largely from the descriptions in the Pilot Program. However, the Policy differs from the Pilot Program in certain respects.

First, the Policy provides greater guidance on DOJ's use of "de-confliction" requests, i.e., situations in which DOJ asks a company to defer an investigative step—typically, interviewing employee witnesses—until after the government has an opportunity to do so. As in the Pilot Program, compliance with de-confliction requests is a requirement of full cooperation in the Policy. Both in public comments and in our interactions with DOJ, we have raised concerns that de-confliction requests can put a company in a challenging position, in which its ability to conduct an investigation and take remedial action expeditiously (and thus satisfy directors' and officers' fiduciary duties, as well as other regulatory obligations) may be in tension with a desire to accede to DOJ's request (and thus earn full cooperation credit).⁷ While the Pilot Program provided no guidance on how DOJ intended to use these requests, the Policy seems to credit these concerns by making clear that de-confliction requests will be "narrowly tailored" and employed only for a "limited period of time." Moreover, under the new Policy, DOJ is obligated to notify the company "[o]nce the justification [for de-confliction] dissipates."

Second, the Policy incorporates certain new content that, while absent in the Pilot Program, exists in guidance published by DOJ in February 2017 titled *Evaluation of Corporate Compliance Programs*.⁸ Specifically, the Policy identifies two new requirements of full remediation that also appear (and are discussed in greater detail) in the February 2017 guidance:

- conducting a root cause analysis and "where appropriate, remediation to address the root causes"; and
- the "availability of compliance expertise to the board."

As we previously observed, by requiring a root cause analysis, DOJ will expect companies to be prepared to provide reports or presentations about the processes used to identify the root causes of the improper conduct and to determine whether there were opportunities to prevent the conduct from occurring.

Third, as part of the requirements for full remediation, the Policy requires "[a]ppropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications." Exactly what DOJ expects of companies on this front is unclear from this language, including, for example, whether a company must have a written policy regarding its document retention, and whether companies must flatly prohibit employees from using certain messaging platforms. This area is one that we will be watching

⁷ See Lanny A. Breuer and Mark T. Finucane, *DOJ 'Deconfliction' Requests: Considerations and Concerns*, Law360 (Mar. 1, 2017), available at https://www.cov.com/-/media/files/corporate/publications/2017/03/doj_deconfliction_requests_considerations_and_concerns.pdf

⁸ See U.S. Dep't of Justice, Criminal Division, Fraud Section, *Evaluation of Corporate Compliance Programs* (Feb. 8, 2017), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>. Our analysis of this guidance can be found [here](#).

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with keen interest, as it may pose challenges for companies seeking to balance privacy and data security concerns with a desire to position their compliance programs to meet the Policy.

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