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DOJ Announces Revised FCPA Corporate Enforcement Policy

美国司法部宣布修订后的《反海外腐败法》公司执法政策

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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]
在第 34 届反海外腐败法（"FCPA"）国际会议上，美国司法部副部长 Rod J. Rosenstein 发表了主题演讲，并宣布了新的《反海外腐败法》公司执法政策（"政策"），该新政策已被纳入《美国检察官指南》（"USAM"）[3]。据美国司法部副部长 Rosenstein 称，政策旨在"为纠结于是否自愿披露不当行为的公司提供指南和更大程度的确定性"。[4]

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

[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] 美国司法部《美国检察官指南》（2017）第 9-47.120 部分。

[4] 美国司法部副部长 Rosenstein 在第 34 届反海外腐败法国际会议上发表的演讲（2017 年 11 月 29 日），*相关信息可访问* https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign。

"Pilot Program").[5] However, the Policy makes two key changes to the Pilot Program in situations involving voluntary disclosure:
对于美国司法部于 2016 年 4 月通过其欺诈司引入的试行《反海外腐败法执法计划和指南》（"**试点项目**"）[6]，政策正式落实其中的多个方面。但是，政策相对试点项目涉及自愿披露的情况作了两个关键变更：

- 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, [7] (ii) fully cooperates, (iii) timely and appropriately remediates, and (iv) agrees to disgorge profits resulting from the misconduct and pay restitution.
  首先，在不存在"加重情节"的情况下，其确立推定不起诉适用的条件为公司（i）自愿披露违法 FCPA 的不当行为[8]，（ii）全面合作，（iii）及时适当补救，和（iv）同意上缴违法所得利润并支付赔偿金。

- 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.
  其次，政策表明，对于公司不符合不起诉条件但是另行自愿披露相关行为、全面合作并进行补救的案件（不包括涉及累犯的案件），美国司法部将建议在《美国量刑指南》（"指南"）罚金幅度下限下调 50%。政策还明确，如果公司符合减少 50%罚金的条件，且公司在案件解决之时已经实施有效的合规项目，则美国司法部"一般不会要求指定监管员"。

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[5] 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.

[6] 美国司法部刑事部欺诈司《反海外腐败法执法计划和指南》（2016 年 4 月 5 日），*相关信息可访问* https://www.justice.gov/opa/file/838386/download。可点击此处，获取本所关于试点项目的电子期刊。

[7] 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.

[8] 尽管政策广泛采纳试点项目中评估公司自愿披露是否可以从宽处理的标准，政策较之于试点项目又有一个有趣的不同点。试点项目指出，"欺诈司将确定是否已要求做出披露"，以及"就[试点项目]而言，一家公司依据法律、协议或合同做出的披露不构成自愿自行披露。"政策不包含类似声明，这令人不禁产生疑问，这是否是以忽略来废止了试点项目中的政策。

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.
这一司法部政策的进一步变动应有助于预测自愿披露的可能结果以及探测司法部对于 FCPA 调查中关于合作和补救的期望。但是关于司法部接下来几年如何处理 FCPA 案件以及新政策是否将影响司法部其他类型的公司起诉，很多疑问仍然存在。事实上，即使一个 FCPA 案件中因自愿披露而推定不起诉，司法部仍将要求上缴非法所得。所以，当政策使得自行报告的优势显得更确定了一些，公司仍将付出可观代价 -- 此种代价必须与现今很多公司做法所带来的益处相平衡，这些公司并不自行报告但对不当行为进行补救，然后应司法部要求提供全面合作。

We explore the details of the new Policy in more detail below.
下面我们详细介绍新政策。

Presumption of a Declination
不起诉推定

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.[9] 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.
在试点项目中，美国司法部明确表示公司获得不起诉决定的必要条件是自愿披露，连同全面合作及进行补救。[10]但是在试点项目下，若符合前述条件，美国司法部仅需“考虑”不起诉；我们之前已提及，不起诉具有裁量性质，这意味着公司根本无法确定地预测美国司法部是否会作出不起诉

[9] 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.

[10] 在本文中，“不起诉”指美国司法部依照《反海外腐败法》本可提起指控，但是基于行使起诉裁量权而选择不起诉的情况，而非指美国司法部基于案件事实或法律方面的某些不足而决定不起诉。依照诸如试点项目等政策作出的不起诉决定将要求上缴违法所得利润以及没收财物和/或支付赔偿金。

决定。因此，这种不确定性对何时进行自愿披露产生了影响。在新政策下，“考虑”不起诉已转变为一个“推定”，假设所有的条件得到满足。即使在标榜试点项目的成功之下（试点项目实施的第一年收到 22 起自愿披露，而前一年仅收到 13 起自愿披露），这种向推定不起诉的演变反映了司法部通过对可能结果提供更大的确定性的方式进一步鼓励自行报告。

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 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.”
美国司法部在新政策下为其保留的起诉裁量权削减了这种结果上的更大确定性带来的益处。其裁量权通过“加重情节”例外情况来实现。如果存在此种例外情形，司法部检控官可以通过不起诉协议，延缓起诉协议，认罪书或甚至起诉书来解决案件。该政策以非穷尽的方式列举了“加重情节”，包括“不当行为牵涉公司的高级管理层；公司因不当行为获得可观利润；不当行为在公司内部普遍存在；以及存在刑事累犯情况”。

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 ?
我们将继续关注美国司法部在实践中如何解释“加重情节”例外情况。例如，对于“牵涉高级管理层”的情况，美国司法部是否会关注母公司层面的高级管理人员，或者各国子公司高级管理人员的不当行为是否构成“加重情节”？类似地，美国司法部如何解释并适用关于“可观利润”的例外情况？利润的可观性是否体现在利润的绝对数量上？美国司法部会否在更广泛的层面上考虑与公司规模和财政状况相关的利润，以及在不当行为可能不涉及具体收益流但在公司商业策略和运营中起重要作用的情形下如何适用该等因素？

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.[11] If these statistics are

[11] 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

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.
虽然上述问题仍待解决，我们满怀希望的是，美国司法部将谨慎地使用“加重情节”的例外情况。为此，美国司法部副部长 Rosenstein 在其演讲中表示，自 2016 年起与美国司法部达成的 17 起 FCPA 公司和解中，仅两起涉及试点项目下的自愿披露，而这两起案件均通过不起诉协议得以解决，且未指定合规监管员。[12] 如果这些统计数据暗示了政策的方向，我们则可以预计，日后美国司法部背离不起诉推定的情况将极其罕见。由于新政策下的不起诉决定将予以公示，就如同试点项目下的相关公示，我们期望今后会有更多的数据信息，有助于更好的预测结果。

DOJ “Will Accord” a 50% Reduction to Companies That Do Not Receive Declinations
司法部“将授予”未获得不起诉决定的公司 50%的罚金减免

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.
政策还力图激励自愿披露，即使是存在加重情节的情况下未决定不起诉。为此，司法部承诺其“将授予”或建议给予自愿披露不当行为、全面合作并作出补救的公司在指南下限基础上 50%的罚金减免。作为对比，在试点项目下，司法部给自己保留裁量权，称其“可授予”一家公司最高 50%的罚金减免。在新政策下有一个例外，即累犯的公司没有资格获得全部 50%的罚金减免。

Clarification on Cooperation and Remediation
关于合作和补救的说明

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 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.
与试点项目一致，政策授予全面合作和作出补救（但未自愿披露相关行为）的公司获得在指南下限基础上最多 25%罚金减免的机会。该政策详述了取得全面合作和补救从宽处理的要求，主要采纳了试点项目中的相关说明。但是，该政策在某些方面不同于试点项目。

30% reduction off the bottom end of the Guidelines range, rather than the maximum 50% available under the Pilot Program.

[12] 虽然美国司法部副部长 Rosenstein 并未指明这些案件，但是其似乎指的是美国司法部 2016 年与美国通用电缆公司以及 BK Medical 达成的和解。如我们之前所述，后一案件极其引人瞩目，原因是该公司因被指*自愿披露存*在缺陷而未获得试点项目下的全面*合作*从宽处理，导致减少的罚金仅为指南罚金幅度下限的 30%，而非试点项目下可获得的最大 50%的比例。

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).[13] 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."
首先，政策对于司法部对"冲突排解"要求的使用（即司法部要求一家公司推迟调查步骤，通常指与员工证人面谈，直至政府有机会开展调查）给予了更详细的指引。如试点项目中所述，遵守冲突排解要求是政策中全面合作的要求。在公开意见和我们与司法部的沟通中，我们均提出了冲突排解要求可能让公司处于棘手境地的担忧，其迅速开展调查和采取补救行动（从而履行董事和高管受托义务以及其他监管责任）的能力可能与同意司法部要求（从而获得充分合作从宽处理）的愿望有冲突。[14] 虽然试点项目对于司法部拟如何使用这些要求未提供指引，政策似乎考虑到这些顾虑，明确冲突排解要求将"视具体情形而定"，而且只在"有限的时间段内"使用。而且，根据新政策，"一旦[冲突排解的]正当理由不复存在"，司法部有义务通知公司。

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*.[15] Specifically, the Policy identifies two new requirements of full remediation that also appear (and are discussed in greater detail) in the February 2017 guidance:
其次，政策采纳了司法部于 2017 年 2 月发布的题为《公司合规项目评估》[16]所含相关指引中存在但在试点项目中没有的某些新内容。具体而言，政策列确定了充分补救的两项新要求，这些要求也见于 2017 年 2 月的指引（且在其中有更详细的说明）中：

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[13] *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

[14] 参见 Lanny A. Breuer 与 Mark T. Finucane，《司法部"冲突排解"要求：考量和顾虑》，法律 360（2017 年 3 月 1 日），网址 https://www.cov.com/-/media/files/corporate/publications/2017/03/doj_deconfliction_requests_considerations_and_concerns.pdf

[15] *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.

[16] 参见美国司法部刑事部欺诈司《公司合规项目评估》（2017 年 2 月 8 日），网址 https://www.justice.gov/criminal-fraud/page/file/937501/download。请点击此处，参阅我们关于该文件的分析。

- conducting a root cause analysis and "where appropriate, remediation to address the root causes"; and
  进行根本原因分析，并"在适当时进行补救以解决根本原因"；和

- the "availability of compliance expertise to the board."
  "董事会可否获得专业合规帮助"。

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.
如我们之前所述，通过要求根本原因分析，司法部希望公司准备好就确定不当行为根本原因及确定是否有机会防止不当行为发生的程序提供报告或演示。

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 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.
第三，作为充分补救要求的一部分，政策要求"适当保留业务记录，禁止不当地销毁或删除业务记录，包括禁止员工使用生成但不适当保留业务记录或通讯的软件。"从该措辞来看，司法部在这方面希望公司怎么做并不明确，比如，公司是否必须制定关于文件保留的书面政策，以及公司是否必须坚决禁止员工使用某些消息发送平台。这是我们十分感兴趣的一个领域，因为对于设法在隐私和数据安全之间达成平衡而又希望其合规项目能满足政策要求的公司，这可能会构成挑战。

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