Client Update

DOJ Announces a Revised FCPA Corporate Enforcement Policy

On November 29, 2017, Deputy Attorney General Rod Rosenstein of the U.S. Department of Justice ("DOJ") announced a revised Policy on Corporate Enforcement of the Foreign Corrupt Practices Act ("FCPA"). The revised Policy—now memorialized in the United States Attorneys' Manual—closely tracks the DOJ's April 2016 Pilot Program, including the incentives for self-disclosure and cooperation with DOJ's investigations.

Most significantly, the Policy introduces a presumption that DOJ will offer declinations (albeit with mandatory disgorgement) to companies that self-disclose, fully cooperate, and timely and appropriately remediate the underlying issues. According to the Policy, this presumption will be operative absent certain aggravating circumstances, including involvement by executive management in the misconduct, a significant profit obtained from the misconduct, and pervasiveness of the misconduct within the company.

Although the Policy provides welcome guidance and greater certainty about how DOJ will reward self-disclosure, it will be important to monitor carefully how DOJ actually applies this presumption and the extent to which the presumption ultimately trumps aggravating circumstances. The Policy likely improves predictability of outcome when reporting smaller matters to DOJ, but without materially changing the self-reporting calculus as to more significant matters. For issuers of U.S. securities, the likelihood of a parallel investigation by the U.S. Securities and Exchange Commission ("SEC") persists. Additionally, with enhanced anti-corruption enforcement worldwide, companies must consider how such declinations by DOJ may trigger or influence anti-corruption investigations abroad, especially given the extent of international coordination and cooperation.

SELF-DISCLOSURE INCENTIVES

In addition to the presumption of a declination, the Policy states that even where a declination is not appropriate, DOJ will recommend a reduction of 50% off the low end of the U.S. Sentencing Guidelines' fine range, for companies that voluntarily self-disclose, fully cooperate, and remediate. DOJ also will generally not require appointment of a monitor for a self-disclosing

and cooperating company, as long as the company has, at the time of resolution, implemented an effective compliance program. The Policy makes clear that neither a declination nor a 50% discount will be available to repeat offenders.

The Policy states unequivocally that any company receiving a declination under the Policy must pay all disgorgement, forfeiture, or restitution resulting from the misconduct. This may be through a parallel SEC action or separately. Significantly, this indicates that the "declinations with disgorgement" introduced with the Pilot Program are here to stay.

Consistent with the Pilot Program, the Policy offers only a reduction of up to 25% off the low end of the U.S. Sentencing Guidelines' fine range to companies that do not self-disclose, but still fully cooperate and remediate.

Overall, the incentives to self-disclose are stronger under this Policy than under the Pilot Program, which only provided that, in comparable circumstances, companies "*may*" receive "*up to*" a 50% penalty reduction and that DOJ would "*consider*" a declination of prosecution.

Despite these incentives, the decision to self-disclose should still be made on a case-by-case basis and in consultation with counsel. It is also important to keep in mind that, consistent with DOJ's prior positions, it is not enough for a company to inform DOJ of misconduct. For companies to receive credit, self-disclosure has to be voluntary, and it must: (i) occur "prior to an imminent threat of disclosure or government investigation"; (ii) be made "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and (iii) involve disclosure of "all relevant facts," including about all individuals involved in the potential violation.

IMPLICATIONS FOR FUTURE FCPA ENFORCEMENT

This development offers important insight into the current administration's stance on FCPA enforcement. In announcing the revised Policy, Mr. Rosenstein restated DOJ's commitment to robust enforcement of the FCPA, described the United States' "central role in the worldwide fight against corruption," and expressed DOJ's intent to continue collaborating with international partners to combat corruption. His strong emphasis on the salutary effects of anti-corruption enforcement puts to rest any speculation that the Trump administration would retreat from its predecessors' approaches to FCPA enforcement.

Mr. Rosenstein's references to recent enforcement statistics indicate that DOJ views self-reporting as integral to bolstering its FCPA docket. For instance, Mr. Rosenstein cited that since the introduction of the Pilot Program, the FCPA Unit received 30 voluntary disclosures, which is a significant increase from 18 disclosures in the previous 18-month period. At the same time, he acknowledged that only two of the 17 FCPA resolutions DOJ had secured since 2016 were voluntary disclosures under the Pilot Program.

The new Policy takes the Pilot Program's attempt to incentivize self-disclosure one step further by more clearly delineating the benefits of self-reporting and creating the presumption of a declination for such companies barring aggravating factors. The inclusion of the revised Policy in the U.S. Attorneys' Manual also brings some added comfort that the Policy will be implemented consistently across DOJ. But only time will tell whether the incentives are enough.

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