The DOJ Announces New FCPA Corporate Enforcement Policy

On November 29, 2017, the Department of Justice ("DOJ") announced a revised Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy that will be incorporated as formal guidance in the United States Attorneys' Manual.[1] This new policy seeks to build upon the DOJ's FCPA Pilot Program ("Pilot Program"), which was launched in 2016 to incentivize companies to voluntarily self-report FCPA violations, by further enhancing incentives for self-reporting. Key features of these enhanced incentives are summarized briefly below.

I. Background

On April 5, 2016, the Fraud Section of the DOJ's Criminal Division issued an "Enforcement Plan and Guidance" memorandum establishing the temporary Pilot Program.[2] Under the Pilot Program, companies could receive mitigation credit in FCPA matters – over and above any credit available pursuant to the Principles of Federal Prosecution of Business Organizations and the United States Sentencing Guidelines – for (i) voluntarily self-disclosing FCPA-related misconduct, (ii) fully cooperating with an investigation by the Fraud Section, and (iii) timely and appropriately remediating flaws in their controls and compliance programs.[3] At the DOJ's discretion, companies that complied with the Pilot Program's criteria were eligible for a reduction in criminal penalties of up to 50 percent below the bottom end of the applicable Sentencing Guidelines fine range, the government foregoing the imposition of a compliance monitor, and a declination of prosecution.[4]

By basing the new, formalized FCPA Corporate Enforcement Policy on the Pilot Program, the DOJ is underscoring the continued importance of self-reporting to its enforcement efforts.

II. Key Revisions of the New FCPA Policy

The DOJ made several important revisions from the Pilot Program. First, the FCPA Corporate Enforcement Policy retains the Pilot Program's threshold requirements of self-disclosure, cooperation, and timely and appropriate remediation if a company is to receive credit under the policy. But particularly as to the remediation prong, the new policy provides additional detail as to what the DOJ expects a company's response to consist of:[5]

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[1] Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign; *see* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL INSERT § 9-47.120, https://www.justice.gov/criminal-fraud/file/838416/download.

[2] 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), https://www.justice.gov/archives/opa/blog-entry/file/838386/download; *see also* Anirudh Bansal, Bradley J. Bondi, et al., *DOJ Launches New FCPA Self-Reporting Pilot Program*, CAHILL GORDON & REINDEL LLP (Apr. 12, 2016), http://cgrnysps1/Firm%20Memos/DOJ%20Launches%20New%20FCPA%20Self-Reporting%20Pilot%20Program.pdf (describing in detail Pilot Program's requirements and mitigation credit).

[3] ENFORCEMENT PLAN AND GUIDANCE, *supra* note 2, at 2-3.

[4] *Id.* at 8-9.

[5] U.S. ATTORNEYS' MANUAL INSERT, *supra* note 1, § 9-47.120(3)(c).

- A thorough analysis of the root causes of the underlying conduct and remediation to address those causes.
- Implementation of an effective, tailored compliance and ethics program that is periodically updated and includes features which are appropriate for the size and resources of the organization. These features may include an effective risk assessment process that shapes the compliance program and the auditing of the compliance program to ensure its effectiveness, among others.
- Appropriately disciplining responsible employees, both those who participated in the misconduct and those who supervised the area where the misconduct occurred.
- Appropriately retaining business records.
- Taking additional steps to demonstrate that the company understands the seriousness of its misconduct and to reduce the risk that the misconduct will be repeated.

Second, whereas the Pilot Program set forth that the Fraud Section would "consider" a declination of prosecution,[6] the new policy provides the "presumption" that a company meeting all standards of self-disclosure, full cooperation, and remediation *will receive* a declination, absent any "aggravating circumstances."[7] The new policy does not define "aggravating circumstances," but cites several examples of situations which could make a company ineligible for a declination, including: "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."[8]

Third, the new policy contemplates a full 50 percent reduction by intentionally omitting the qualifier "up to" preceding "50% reduction off of the low end of the U.S. Sentencing Guidelines" in its list of possible mitigation credits.[9] Thus, in situations where a criminal resolution is warranted, the government typically will recommend to a sentencing court that companies that satisfy the new policy's standards should receive a full 50 percent reduction, as opposed to the sliding scale available under the Pilot Program.

Fourth, the new policy explains that, to receive cooperation credit, a company must delay interviewing its own employees in an investigation if the government requests to interview those employees first.[10] However, the new policy states that such requests by the DOJ must be for a "limited period of time and will be narrowly tailored to a legitimate investigative purpose."[11]

III. Significance of the New FCPA Policy

The DOJ's announcement generally reflects a long-term FCPA enforcement strategy that both incentivizes voluntary self-disclosure of potential FCPA misconduct and that values appropriate remediation of FCPA compliance programs. This guidance contains exceptions and caveats as to the circumstances in which companies will not benefit from this guidance, and the new policy affords much discretion to the DOJ in determining whether a company has met the program's criteria, such as whether a company has cooperated "fully." As such, it remains to be seen how this policy will affect companies in practice. Even so, because the

[6] ENFORCEMENT PLAN AND GUIDANCE, *supra* note 2, at 9.

[7] U.S. ATTORNEYS' MANUAL INSERT, *supra* note 1, § 9-47.120(1).

[8] *Id.*

[9] *Id.*; *see* ENFORCEMENT PLAN AND GUIDANCE, *supra* note 2, at 8.

[10] U.S. ATTORNEYS' MANUAL INSERT, *supra* note 1, § 9-47.120(4).

[11] *Id.*

new FCPA Corporate Enforcement Policy enhances incentives for companies that self-disclose potential misconduct and brings further clarity to the contours of what the DOJ considers to be an effective compliance program, this new policy should be a central part of discussions among outside counsel, corporate management, and the board of directors when confronted with a potential FCPA issue and when contemplating steps for enhancing an organization's anti-corruption compliance program.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Brockton B. Bosson at 212.701.3136 or bbosson@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Kimberly Petillo-Décossard at 212.701.3265 or kpetillo-decossard@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Celia Belmonte at 212.701.3721 or cbelmonte@cahill.com.