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Two attorneys with Seyfarth Shaw LLP examine the recently-issued revised FCPA Corporate Enforcement Policy from the Justice Department. The authors discuss how the policy is aimed at incentivizing—and providing substantially more certainty to—the voluntary disclosure process associated with FCPA corporate wrongdoing.

DOJ Inserts Certainty Into the FCPA Prosecutorial Process By Issuing a Revised FCPA Corporate Enforcement Policy



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On Nov. 29, 2017, Deputy Attorney General Rod Rosenstein announced a new and significant shift in the U.S. Department of Justice's Enforcement Policy for the Foreign Corrupt Practices Act. The Policy, which will be written into the U.S. Attorneys' Manual, is designed to provide more certainty to companies regarding the benefits of cooperating with federal enforcement officials investigating corrupt business activities abroad. Importantly, the Policy creates a "presumption that [a] company will receive a declination absent aggravating circumstances" where it has "voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated." Significantly, a "declination" under the Policy is a case that would have been prosecuted or criminally resolved but for the company's full and complete satisfaction of the Policy's criteria. Regardless of whether a company qualifies for a declination or some reduced sentence short of a full declination under the Policy, any corporate participant in the Policy is "required to pay all disgorgement, for-

feiture, and/or restitution resulting from the misconduct at issue." Under the Policy, all declinations (and, of course, any other form of a criminal resolution) will be made public.

Voluntary Disclosure

Defining what constitutes "voluntary disclosure," the new Policy states that such disclosure must occur *prior* to an imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the offense. The disclosure must also include all relevant facts known to the company, including facts about individuals involved in the violation of law.

Full Cooperation

The Policy also expounds upon the meaning of "full cooperation," stating that a company must timely disclose all relevant facts gathered during its independent investigation, with attribution of facts to specific sources where it does not violate attorney-client privilege. Companies are encouraged to make rolling productions of information and disclose all facts related to wrongdoing by officers, employees, agents, third party companies, and anyone else. Cooperation must be proactive rather than merely reactive and include timely notifications of any known opportunities for the government to obtain relevant evidence not in the company's possession. Document preservation and disclosure are also prioritized, with facilitation of overseas and third-party document production being favored. As part of their corporate cooperation efforts, companies should help make employees and former employees available to the government for interviews and make

sure that their own internal investigations do not conflict with government investigations.

Remediation

In terms of timely remediation, companies are expected to demonstrate a thorough analysis of the root causes giving rise to the misconduct and address remediation to those causes. Companies should also implement effective compliance programs, which will be gauged by a variety of factors including resources devoted, quality of personnel, and authority and independence. In addition, it is important that companies appropriately discipline employees and implement document retention programs, including by prohibiting employees from using software that generates but does not retain business records or communications. The DOJ will look at any and all steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of recidivism.

Staggered Punishments

Because some foreign bribery crimes are just so serious and aggravating that they do not lend themselves to a declination, under the Policy, a declination is not guaranteed, even for a fully cooperative company that voluntarily self-discloses its misconduct. In cases where a company has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Policy leaves open the possibility of charges where there are aggravating circumstances, such as involvement by executive management in the misconduct, a significant profit to the company from the misconduct, pervasive misconduct within the company, or criminal recidivism. But even in those circumstances, the Policy still seeks to incentivize cooperation—and preordain certainty—by stating that the DOJ will recommend a 50 percent reduction off the low end of the applicable U.S. Sentencing Guidelines fine range and generally not require appointment of a monitor, assuming in the case of the latter that the company has an effective compliance program in place at the time of the resolution. In those cases where a company does not make a voluntary self-disclosure to the government, but otherwise fully cooperates with the government in its investigation and upholds the other standards of the Policy, the DOJ will recommend a sentencing reduction of up to 25 percent off of the low end of the applicable Guidelines range.

Importantly, culpable corporate executives and other individuals are not covered by the DOJ Policy and can still expect to be investigated and prosecuted for FCPA wrongdoing.

Conclusion and Parting Thoughts

Overall, the DOJ's new FCPA Corporate Enforcement Policy is a breath of fresh air. It continues the government's movement towards incentivizing cooperation and corporate compliance and providing more certainty to what has often been criticized as an opaque, shadowy process. Companies doing business internationally should proactively consult with experienced, knowledgeable counsel to make sure that they have effective compliance programs in place and, when faced with a potential FCPA violation, the mechanisms to appropriately investigate, disclose, cooperate, and remediate (or at least fully weigh all of their options). So doing will exponentially increase a company's chances of obtaining a presumed declination under the DOJ's new Policy and reduce the likelihood that the new clear path forward will be derailed.

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