ALERT MEMORANDUM

DOJ Releases FCPA Corporate Enforcement Policy

December 1, 2017

On November 29, 2017, the U.S. Department of Justice ("DOJ" or the "Department") announced a new FCPA Corporate Enforcement Policy (the "Enforcement Policy")[1] applicable to investigations of companies under the Foreign Corrupt Practices Act ("FCPA"). The Enforcement Policy builds on the FCPA Pilot Program (the "Pilot Program")[2] that has been in effect since April 2016, and provides additional transparency regarding the credit the Department will provide to companies that self-report FCPA violations and then cooperate with the resulting investigation. By and large, the new policy, which is now part of the U.S. Attorney's Manual ("USAM"), makes key provisions of the Pilot Program permanent, and significantly, it also promises additional benefits to companies that qualify. The Enforcement Policy signals a further effort by DOJ to encourage companies to self-report and cooperate, although the policy also leaves the Department with considerable leeway in assessing key threshold questions for eligibility even for companies that do self-report.

If you have any questions, concerning this memorandum, please reach out to the authors or any of the partners and counsel listed under Anti-Corruption and Compliance, White-Collar Defense and Investigations or Litigation and Arbitration located in the "Our Practice" section of our website.

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1 https://www.justice.gov/criminal-fraud/file/838416/download.

2 https://www.justice.gov/archives/opa/blog-entry/file/838386/download. For Cleary Gottlieb's alert memorandum regarding the pilot program, see https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/alert-memo-pdf-version-201643.pdf.

Background: The Pilot Program

The Pilot Program was DOJ's initial effort to provide transparency in its decision-making with respect to the determination of FCPA resolutions, beyond the general Principles of Federal Prosecution of Business Organizations in the USAM[3], with the goal of increasing self-reporting. Among other things, a company that (1) voluntary self-disclosed wrongdoing before "an imminent threat" that the government would learn of the matter; (2) provides "full cooperation," including by proactively producing documents and other information, and making available witnesses located in the U.S. and abroad to the Department; and (3) engages in "timely and appropriate" remediation, would be considered for a declination of prosecution[4], subject to "countervailing interests" such as recidivist behavior, or the involvement of senior management or large sums of money in the offense. If a fine is sought, the DOJ "may" grant a reduction of up to 50% off the bottom end of the U.S. Sentencing Guidelines ("U.S.S.G.") fine range. Likewise, the Department would "generally" not require an independent compliance monitor. For companies that did not meet the self-reporting criteria, they would only be eligible for up to a 25% reduction off the bottom of the Guidelines fine range.

Credit for Companies That Qualify Under The Enforcement Policy

The Enforcement Policy enhances the credit that companies will receive for "voluntarily self-disclos[ing] misconduct in an FCPA matter, fully cooperat[ing], and timely and appropriately remediat[ing]": there is now a presumption that companies that satisfy these criteria, as now defined in the Enforcement Policy, will receive a declination so long as there are no "aggravating circumstances." The list of possible aggravating circumstances is similar to the "countervailing interests" identified in the Pilot Program and includes pervasiveness of wrongdoing, involvement by executive management in the misconduct, significant profit from the misconduct and recidivism.

The Enforcement Policy also modestly improves the outcome for companies that voluntarily disclose, fully cooperate and timely and appropriately remediate, but that, due to aggravating circumstances, do not qualify for a declination. Such companies (except for "criminal recidivist[s]") are now promised a 50% reduction off the low end of the Sentencing Guidelines fine range (the Pilot Program provided for only up to a 50% reduction). In addition, as in the Pilot Program, eligible companies "generally" will not be required to appoint an independent compliance monitor, assuming the company has implemented an "effective compliance program" at the time of a resolution.

Lastly, the new policy adopts the practice outlined in the Pilot Program of recommending up to a 25% reduction off the low end of the U.S.S.G. fine range for companies that do not self-report but fully cooperate and timely and appropriately remediate.

The new policy maintains the requirement that a company "pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue" to qualify for credit under the Enforcement Policy, in addition to any fines, although disgorgement paid in connection with a settlement with another agency (such as the Securities and Exchange Commission) will be counted. In addition, declinations made pursuant to the policy will be made public.

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[3] https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

[4] In his remarks announcing the Enforcement Policy, Deputy Attorney General Rosenstein stated that since 2016, seven matters brought to the DOJ through voluntary disclosure were resolved through declinations under the Pilot Program. Rod J. Rosenstein, Deputy Attorney General, DOJ, American Conference Institute's 34th Annual International Conference on Foreign Corrupt Practices Act, Oxon Hill, MD (Nov. 29, 2017). For a list of the companies that have received such declinations, see https://www.justice.gov/criminal-fraud/pilot-program/declinations.

Self-Reporting and Cooperation Requirements

The Enforcement Policy largely follows the criteria outlined in the Pilot Program for a company to receive full credit for voluntary disclosure and cooperation, with minor distinctions. With respect to self-reporting, companies must do so before an "imminent threat of disclosure or government investigation," and within a "reasonably prompt time" after learning of the conduct. However, the Enforcement Policy did not keep the Pilot Program's guidance that "disclosure that a company is required to make, by law, agreement, or contract, does not constitute voluntary self-disclosure." It remains to be seen whether this is a meaningful omission or whether the DOJ in practice will continue to disqualify those companies who disclose under such circumstances.

With respect to "full cooperation," companies must provide "all relevant facts" gathered during an "independent investigation," including with respect to individual and third-party company misconduct; attribute those facts to specific sources; provide regular updates on the progress of the investigation; and provide "proactive cooperation" by disclosing facts "even when not specifically asked to do so." While the new policy continues to make full cooperation credit contingent on, where requested, de-confliction with the DOJ investigation (in other words, requiring the company to defer investigative steps to the DOJ investigation), the DOJ has signaled that it intends to exercise restraint in such requests for de-confliction. The new policy includes language that de-confliction "will be made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose," and that the DOJ will inform the company when it lifts its request.

New Criteria for Full Remediation

Again, key elements of what is required for full remediation credit as described in the Pilot Program are included in the Enforcement Policy. In particular, this includes the criteria by which a company's compliance program will be judged at the time of the resolution, based on the resources and size of the organization – such as whether the company has (i) a "culture of compliance"; (ii) sufficient, appropriately experienced personnel dedicated to compliance; (iii) an independent compliance function, with such expertise available to the board; (iv) conducted an effective risk assessment and tailored its program based on that assessment; (v) appropriately compensated and promoted compliance personnel; and (vi) an appropriate reporting structure for compliance personnel within the company. Remediation also requires disciplining responsible employees, including supervisors.

In addition, however, the Enforcement Policy integrates the requirement that a company conduct a root cause analysis of the misconduct to demonstrate appropriate remediation. The DOJ previously introduced this concept in the February 2017 guidance published by the Fraud Section on its "Evaluation of Corporate Compliance Programs."[5] The root cause analysis process, which can be time-consuming and difficult, is designed to ensure that companies understand the underlying causes of the misconduct and then use that understanding to enhance remediation efforts.

Conclusion

The Enforcement Policy provides additional transparency and certainty for companies in understanding the benefits (and potential hurdles) of self-reporting, and is likely to make the decision to self-report under certain circumstance more attractive. It remains to be seen how the new policy will work in practice – notably, it is unclear how the DOJ will define "voluntary disclosure" (and what constitutes an "imminent threat" of disclosure), and how expansively the DOJ will define the aggravating circumstances that limit the possibility of a declination. And, of course, any decision to self-report raises additional questions that have to be considered, particularly with respect to

[5] https://www.justice.gov/criminal-fraud/page/file/937501/download.

potential investigations by other authorities in the U.S. (such as the SEC) and abroad, the potential for multiple, overlapping penalties, and other collateral consequences.

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