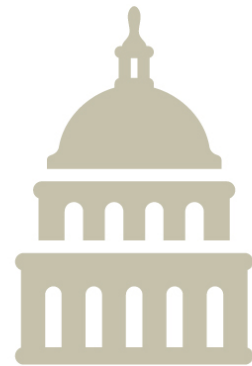


FCPA/Antibribery Alert

December 1, 2017

Key Points

- The voluntary disclosure of a Foreign Corrupt Practices Act (FCPA) violation, “full cooperation” in an ensuing investigation, and timely and appropriate remediation, will create a presumption that the disclosing company receive a declination absent “aggravating circumstances.”
- Voluntary disclosures involving “aggravating circumstances” may still result in up to a 50 percent reduction off the low end of the U.S. Sentencing Guidelines fine range.
- Full cooperation and timely and appropriate remediation absent voluntary disclosure may still result in up to a 25 percent reduction off the low end of the U.S. Sentencing Guidelines fine range.
- Either declination or a fine reduction will require the disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.
- The promise to resolve voluntarily disclosed investigations within one year of disclosure has apparently been rescinded.



DOJ Deputy Attorney General Rod Rosenstein Announces FCPA Corporate Enforcement Policy

On November 29, 2017, Deputy Attorney General Rod Rosenstein **announced** the addition of an FCPA Corporate Enforcement Policy to the U.S. Attorneys’ Manual (USAM). The Policy largely codifies upon the Department of Justice’s (DOJ) 2016 FCPA Pilot Program, but makes some modifications.

Background

On April 5, 2016, the DOJ Criminal Division’s Fraud Section released its FCPA Enforcement Plan and Guidance **memorandum**, which included the launch of a new, one-year **FCPA Pilot Program**. Together with DOJ Fraud Section Chief Andrew Weissmann’s statement in February 2016 that the Fraud Section would seek to complete FCPA investigations within one year of a company’s voluntary self-disclosure, the FCPA Pilot Program represented the DOJ’s latest attempt to encourage companies to voluntarily disclose potential FCPA violations.

In his November 29 remarks, delivered at the 34th International Conference on the Foreign Corrupt Practices Act, Mr. Rosenstein stated that the DOJ considered the Pilot Program a success, increasing the number of voluntary disclosures from 13 in the year prior to 22 during the first year of the Pilot Program. Mr. Rosenstein further commented that of the 17 FCPA-related corporate cases brought to resolution by

the DOJ since January 2016, only two were voluntary disclosures under the Pilot Program, both of which were resolved through non-prosecution agreements that did not require the company to engage an independent compliance monitor.

The New Policy

In an effort to continue the encouragement of voluntary disclosures, Mr. Rosenstein announced the addition of section [9-47.120 - FCPA Corporate Enforcement Policy](#) to the USAM. The new Policy outlines several benefits of voluntary disclosure and cooperation in an investigation and remediation of an FCPA violation.

Most importantly, the new Policy creates a presumption that those companies that voluntarily disclose a FCPA violation, fully cooperate with the DOJ in an ensuing investigation, and timely and appropriately remediate, will receive a declination from the DOJ, absent “aggravating circumstances.” The Policy includes examples of such “aggravating circumstances,” including involvement by the executive management of the company in the misconduct; the pervasiveness of the misconduct within the company; the finding of significant profit resulting from the misconduct; and criminal recidivism.

Even if aggravating circumstances exist, the Policy provides that companies that voluntarily disclose, fully cooperate, and timely and appropriately remediate, may still receive up to a 50 percent reduction off the low end of the requisite U.S. Sentencing Guidelines fine range. Moreover, the Policy notes that DOJ will generally not require the appointment of an independent compliance monitor, if the company has, at the time of resolution, implemented an effective compliance program.

Also, the Policy provides that even absent a voluntarily disclosure, companies that fully cooperate and timely and appropriately remediate, may still receive up to a 25 percent reduction off the low end of the requisite U.S. Sentencing Guidelines fine range.

The Policy further outlines the aspects considered by the DOJ in its evaluation of compliance programs (as part of the definition of “timely and appropriate remediation”) to better enable companies to understand the Department’s expectations.

Notably, the Policy provides that qualification for the above benefits will be conditioned upon the disgorgement, forfeiture and/or restitution of profits resulting from the misconduct at issue.

Differences Between the FCPA Corporate Enforcement Policy and the FCPA Pilot Program

The most important difference between Section 9-47.120 and the Pilot Program is that the new policy creates a *presumption* that declination will result following voluntary disclosure, full cooperation, and timely and appropriate remediation. This is a stronger standard than the Pilot Program, which merely promised consideration of declination following a voluntary disclosure. The change in language appears to be intended to signal greater certainty of outcomes and could be attractive to companies considering

voluntarily disclosure. Practitioners will be interested to see how the DOJ applies the new presumption in particular cases.

On the other hand, in announcing the Policy, Rosenstein did not mention any expedited timeline (such as the one-year goal previously articulated by Weissmann) for resolving investigations following a voluntary disclosure. Experience would suggest that any company considering a voluntary disclosure must be prepared for a potentially lengthy investigation whose scope and duration cannot necessarily be predicted at the outset.

Takeaways

The decision whether to voluntarily disclose a potential FCPA issue has long been one of the most difficult choices faced by a company. Historically the DOJ has strongly encouraged voluntary disclosure, but the benefits of this approach have not always been clear. The new Policy suggests that the DOJ is seeking to build upon the FCPA Pilot Program and establish more predictable and reliable benefits for self-reporting. It remains to be seen how the DOJ handles these cases in practice and how companies and the defense bar react to the revised DOJ guidance in this area.

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