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DOJ Formalizes Corporate Enforcement Policy Regarding FCPA Violations

On November 30, 2017, the Department of Justice ("DOJ" or "the Department") amended its policy concerning the prosecution of business organizations, adding provisions directed at affording companies the possibility of greater leniency in matters involving alleged violations of the U.S. Foreign Corrupt Practices Act ("FCPA").[1]

The new policy, which is found at Section 9-47.120 of the U.S. Attorneys' Manual ("USAM") and is titled "The FCPA Corporate Enforcement Policy," provides that a company that voluntarily self-discloses a potential violation of the FCPA, fully cooperates in the ensuing investigation, and timely and appropriately remediates the issues that contributed to the violation, will enjoy a "presumption" that the Department will decline to prosecute it, absent certain aggravating factors.[2] The non-exclusive list of aggravating factors includes the involvement of "executive management"[3] in the misconduct, significant profit to the company from the misconduct, pervasiveness of the misconduct throughout the company, and recidivism. The policy also provides that even if a company is not eligible for a declination, it can still receive a 50% reduction off the low-end of the U.S. Sentencing Guidelines range, as long as it is not a recidivist and satisfies the other stated criteria of self-disclosure, cooperation and remediation.[4] Companies that only partially fulfill the requirements of the policy may also be eligible for up to a 25% reduction in fines.[5]

Section 9-47.120 also states that the Department "generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program." As has been the case in the past, the Department retains discretion to evaluate what constitutes "an effective compliance program." Moreover, although the policy provides some guidance on how prosecutors will evaluate a compliance program, the guidance is largely a reaffirmation of past guidance and statements.[6] Nevertheless, the policy appears to give companies the opportunity to improve their compliance program up until resolution of a matter in order to avoid imposition of a monitor. It remains to be seen whether this signals a shift away from the recent uptick in the number of FCPA matters where monitors were required. In that regard, it bears mention that this language is identical to that in the 2016 FCPA Pilot Program, which was issued last year by DOJ's Criminal Division, but the use of monitors actually increased in 2016.

Speaking at the International Conference on the Foreign Corrupt Practices Act on Wednesday, November 29, 2017, Deputy Attorney General Rod Rosenstein previewed the policy with insight into the Department's goals, including "reassur[ing] corporations that want to do the right thing."[7] Rosenstein stated that the new policy was issued as a result of an analysis of the FCPA Pilot Program, launched by the DOJ in April 2016,[8] which utilized an incentive system to motivate and reward companies that disclose misconduct, and reportedly increased the number of self-disclosures. The new policy, which effectively formalizes and expands the pilot program, seeks to provide greater clarity to companies as they weigh whether or not to self-report problematic conduct. Rosenstein commented that the policy would also guide prosecutors' exercise of discretion and combat the perception of arbitrary enforcement.[9]

Rosenstein emphasized that participation in the program is voluntary, and that companies may choose not to voluntarily self-disclose problematic conduct. "A company needs to adhere to the policy only if it wants the Department's prosecutors to follow the policy's guidelines," commented Rosenstein. He also cautioned that the policy does not provide a guarantee, noting that preservation of prosecutorial discretion is central to the Department's mission to exercise justice.[10] For example, in assessing whether aggravating factors exist, prosecutors still retain discretion to look at other non-identified criteria to make a case-by-case assessment about whether criminal prosecution is warranted (as opposed to declination). Similarly, prosecutors continue to be the arbiter of whether a corporation's compliance program is effective and whether the circumstances warrant imposition of a monitor.[11] While the U.S. Attorneys' Manual does enumerate some additional guidance concerning compliance programs, it recognizes that the attributes of a company, including its industry, size, geographic scope of operations, and government touchpoints, and the related risks in its business, will still necessitate individual assessment by compliance professionals when designing a compliance program, which in turn also requires discretionary evaluation by prosecutors.

Section 9-47.120 is a more formal statement of FCPA enforcement policy than what we have seen from the DOJ in recent years and is the first time that specific criteria for prosecution of FCPA cases have been incorporated into the U.S. Attorneys' Manual. It also appears to formalize aspects of the stand-alone guidance provided by the Department in the "Evaluation of Corporate Compliance Programs" issued early in 2017,[12] by mentioning certain core elements of an effective compliance and ethics program in the U.S. Attorneys' Manual.[13] The policy reiterates previous guidance in the following areas:

- **Reaffirmation of Recurring DOJ Focal Points Such as Organizational Culture.** One of the aggravating circumstances sufficient to rebut the presumption of a declination is "involvement by executive management of the company in the misconduct."[14] This policy reaffirms the importance of a robust "tone at the top" in a company's compliance culture. The other aggravating circumstances include the pervasiveness of the misconduct within the company and criminal recidivism, both of which echo preexisting factors in the Principles of Federal Prosecution of Business Organizations used to assess the degree of organizational culpability.[15]
- **Robust Definition of Cooperation.** The policy reaffirms the robust definition of cooperation found in previous Department guidance, including the Yates memorandum.[16] In this regard, the policy puts the burden on companies to provide "all relevant facts gathered during a company's investigation." The policy reiterates the requirement in the FCPA Pilot Program that "sources" of information must be identified, unless doing so would violate the attorney-client privilege (but the policy provides no guidance on the Department's view of the application of the privilege in such contexts and creates the possibility that prosecutors may encroach on the corporate privilege). The policy requires "proactive" cooperation, meaning that a company must disclose relevant facts in the investigation before requested to do so. The policy also requires companies to make every effort to provide

documents collected from overseas, and places the burden on companies to demonstrate an inability to provide documents from other countries due to legal hurdles such as data privacy statutes and blocking statutes.

- **Narrow Definition of Voluntary Self-Disclosure.** The policy reiterates the requirement under the U.S. Sentencing Guidelines that a disclosure will be considered voluntary only if made "prior to an imminent threat of disclosure or government investigation." See USSG 8C2.5(g)(1). In addition, the disclosure must be made within a reasonable time of becoming aware of the misconduct and the disclosure should include "all relevant facts" known to the company, including about individuals.[17]
- **Heightened Scrutiny of Compliance Programs.** Section 9.47-120 also formalizes recent guidance on the criteria used to assess a compliance program. Whereas historically the Department has focused on the efficacy of the program generally and the corporation's culture of compliance, the new policy expressly provides that prosecutors may assess the quality of the compliance personnel, their compensation, resources given to the compliance department, its independence, the board's compliance oversight role, and the efficacy of the company's risk assessment program, among other factors.[18]

Several elements distinguish the new FCPA Corporate Enforcement Policy from last year's FCPA Pilot Program, the Department's last effort to provide greater transparency about how the Department exercises its authority to enforce the FCPA against companies.

- **Presumption of a Declination for Self-Reporting and Cooperation.** The most notable new aspect of the policy is the clear signal from the Department that companies that voluntarily self-disclose, cooperate fully, and timely, and appropriately remediate should, absent aggravating factors, see their cases with the Department resolved by way of a declination of prosecution.[19] Although the FCPA Pilot Program also offered the possibility of a declination, it did not create a presumption in favor of one.
- **50% Reduction in Payments for Qualifying Corporations.** In cases involving criminal resolutions with companies that have self-disclosed, cooperated and remediated, but do not qualify for a declination due to an aggravating circumstance, the policy nonetheless states that the Department "*will* accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines fine range, except in the case of a criminal recidivist" (emphasis added).[20] Notably, the policy is framed in affirmative and mandatory language, presumably an effort to provide additional clarity and certainty to companies.[21] Although the 2016 Pilot Program provided for the same potential benefit, it gave prosecutors more discretion to decide whether to award it.
- **Disgorgement as Part of Remediation:** The new policy makes clear that disgorgement is still required, even in cases involving declinations, but that it may be satisfied through civil disgorgement to the SEC.[22] The 2016 Pilot Program did not make this clear, and uncertainty about disgorgement may have deterred some companies from self-disclosing. Unfortunately, the new policy does not provide any guidelines for how disgorgement will be assessed and this remains an area where there is a dearth of guidance and less transparency.
- **Limits on the DOJ's Increasing Requests for De-Confliction.** To qualify for full cooperation, a company must "de-conflict" its investigation from the Department's. De-confliction is a term used to explain the Department's "requests to defer investigative steps," such as when a company is conducting its own internal investigation while cooperating with the Department, and the Department requests that a company forego or delay an interview of an employee or third-party, in order for the DOJ to have the "first chance" at the potential witness. In its comment on the new section, the U.S. Attorneys' Manual states that de-confliction requests will only be "made for a limited time and will be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department's

investigation)."[23] Furthermore, the Department must inform the company when it has lifted that request.[24] This is a step forward from the 2016 Pilot Program, which seemed to give prosecutors unfettered discretion to demand "de-confliction."

- **Public Release of Declination.** Finally, the new policy clarifies that declinations awarded under the program will be made public.[25] It differentiates such declinations from those that would not have been prosecuted or criminally resolved even without the company's voluntary disclosure and cooperation, which are not made public.

The new policy represents the Department's latest attempt to provide companies with greater clarity on criminal enforcement of the FCPA by clearly outlining benefits available for cooperating companies and identifying necessary hallmarks of an effective compliance program, an important factor in the Department's assessment of FCPA liability against a company. The policy continues what appears to be a stated goal of Department leaders to encourage self-disclosure and cooperation so that prosecutors can focus their resources on truly egregious corporate misconduct and on holding individuals accountable under the FCPA. The extent to which the policy actually provides further transparency and clarity concerning FCPA enforcement will ultimately depend on the Department's implementation of the policy over the coming years.

1. *See* U.S. Attorneys' Manual §9-47.120 ("FCPA Corporate Enforcement Policy").
2. *See* U.S. Attorneys' Manual §9-47.120, Section 1.
3. It is not clear why the policy uses the term "executive management," rather than the traditional term of "senior management" used in previous DOJ guidance, and whether this is meant to be a reference to management at the C-suite level of the corporation.
4. *See* U.S. Attorneys' Manual §9-47.120, Section 1.
5. *See* U.S. Attorneys' Manual §9-47.120, Section 2.
6. *See* U.S. Attorneys' Manual §9-47.120, Section 3.
7. Rod Rosenstein, U.S. Dep't of Justice, *Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2017) ("DAG Rosenstein Remarks"), available at: https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.
8. *See* Weil Client Alert, *New DOJ FCPA Enforcement Plan Raises Stakes, Creates Further Uncertainty* (Apr. 11, 2016), available here: https://www.weil.com/~/media/files/pdfs/160294_white_collar_alert_april2016_v5.pdf.
9. DAG Rosenstein Remarks.
10. DAG Rosenstein Remarks.
11. *See* U.S. Attorneys' Manual §9-47.120, Section 1.
12. *See* Weil Client Alert, *New DOJ Guidance on Corporate Compliance Programs* (Feb. 2017), available here: https://www.weil.com/~/media/files/pdfs/2017/170180_white_collar_alert_feb2017_v5.pdf. The DOJ Fraud Section's "Evaluation of Corporate Compliance Programs" guidance is available here: https://www.justice.gov/criminal-fraud/page/file/937501/download.
13. *See* U.S. Attorneys' Manual §9-47.120, Section 3.
14. *See* U.S. Attorneys' Manual §9-47.120, Section 1.
15. *See* generally, U.S. Attorneys' Manual, §9-28.300 ("Principles of Federal Prosecution of Business Organizations").
16. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dept. of Justice, to the Assistant Attorney General, Antitrust Division, et al., Individual Accountability for Corporate Wrongdoing (September 9, 2015) at 2, available at https://www.justice.gov/archives/dag/file/769036/download.
17. *See* U.S. Attorneys' Manual §9-47.120, Section 3.
18. *See* U.S. Attorneys' Manual §9-47.120, Section 3.
19. *See* U.S. Attorneys' Manual §9-47.120, Section 1.
20. *See* U.S. Attorneys' Manual §9-47.120, Section 1.
21. Affirmative language is also used to state that "if a company did not voluntarily disclose its misconduct… but later fully cooperated and timely and appropriate remediate… the company *will* receive, or the Department *will* recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range." U.S. Attorneys' Manual §9-47.120, Section 2.
22. *See* U.S. Attorneys' Manual §9-47.120, Section 3.
23. *See* U.S. Attorneys' Manual §9-47.120, Section 4.
24. *See* U.S. Attorneys' Manual §9-47.120, Section 4.
25. *See* U.S. Attorneys' Manual §9-47.120, Section 4.

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