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KIRKLAND ALERT

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DOJ Solidifies and Sharpens FCPA Enforcement Guidance

Overview

On November 29, 2017, the U.S. Department of Justice ("DOJ") released a new enforcement policy for cases brought under the U.S. Foreign Corrupt Practices Act ("FCPA"), the primary U.S. law governing bribery of foreign government officials. The new FCPA Corporate Enforcement Policy is largely a continuation of the FCPA pilot program, which was launched in April 2016 and provided incentives for companies to self-disclose FCPA violations, cooperate with government investigations and remediate misconduct. However, the new policy goes further than the pilot program in several respects in its efforts to encourage companies to self-disclose FCPA misconduct.

The new FCPA Corporate Enforcement Policy is largely a continuation of the FCPA pilot program, which was launched in April 2016 and provided incentives for companies to self-disclose FCPA violations, cooperate with government investigations and remediate misconduct.

There are a few key takeaways from the new policy. *First*, the new policy removes the temporariness of the pilot program and codifies it. *Second*, the new policy takes the pilot program further in important respects, including the fact that self-disclosing companies now have a presumption in favor of a declination of prosecution, although there are important qualifications on that presumption, such that it may not be operative in some cases, particularly larger ones or at companies that have a prior FCPA resolution. *Third*, regardless of the criminal resolution, companies are still required to disgorge profits tied to the misconduct. Traditionally, the government has taken a broader view of what constituted profits than disclosing parties have. *Fourth*, the new policy reflects the DOJ's continuing commitment to pursuing individual wrongdoers. *Finally,* despite the discussion in the new policy of the DOJ's flexibility in awarding cooperation credit, the DOJ still expects extensive cooperation from companies, which can be quite onerous.

The 2016 Pilot Program — Construct and Results

Launched on April 5, 2016, the FCPA enforcement pilot program was a one-year program incentivizing companies to self-disclose FCPA violations to U.S. authorities. Under the program, the DOJ would "consider a declination of prosecution" against self-disclosing companies, and those companies could also avoid the imposition of a monitor. The pilot program also stressed that self-disclosure itself was not enough — to reap the program's benefits, companies would also need to (1) cooperate fully with the DOJ's investigation and (2) remediate misconduct in a timely and appropriate manner.

However, if the DOJ decided that a criminal penalty was warranted and the company was not awarded a declination, a self-disclosing company was eligible for a

50 percent reduction off the bottom end of the applicable fine range under the U.S. Sentencing Guidelines. Even in the absence of self-disclosure, a company could obtain up to a 25 percent discount off the bottom end of the applicable fine range if it fully cooperated and remediated the misconduct.

On March 10, 2017, the DOJ announced that the pilot program would continue past its one-year anniversary and that the DOJ was evaluating the efficacy of the program.

In announcing the new policy on November 29, 2017, Deputy Attorney General Rod Rosenstein stated that the government viewed the pilot program as a success. Rosenstein pointed out that, in the 18 months of the pilot program, the DOJ received 30 voluntary disclosures, compared to 18 during the previous 18-month period, an increase of 67 percent.

Takeaways From the New Policy

While the new policy is largely a continuation of the pilot program, there are several key takeaways.

Codification. Most fundamentally, the new policy is codified in the U.S. Attorneys' Manual, which removes any uncertainty over the continuity of the pilot program and sharpens the calculus for companies that are evaluating their options in the face of potential FCPA violations.

Same Core Principles. The new policy rests on the same three core principles as the pilot program: (1) timely and complete self-disclosures to the government; (2) extensive and fulsome cooperation with the DOJ's investigation; and (3) timely remediation, including a detailed analysis of root cause, implementation of an effective compliance program, and employee discipline. The need for a root-cause analysis — which was implicit in the pilot program's guidance — is now expressly referenced in the new policy.

Additional Provisions, Including a Rebuttable Presumption of Declination. The new enforcement policy goes further than its predecessor in a couple of respects. First, while the pilot program allowed the DOJ to *"consider* a declination of prosecution" where a party meets the requirements of self-disclosure, full cooperation and timely remediation, the new policy creates a *presumption,* albeit a rebuttable one, that the self-disclosing party will receive a declination. Additionally, in the event a criminal fine is imposed, the new policy states that the DOJ *"will"* recommend a 50 percent reduction off the bottom end of the sentencing guidelines for self-disclosing parties. The pilot program was less definitive, stating that the DOJ "*may*" recommend a 50 percent discount for self-disclosing companies.

Significant Limitations on the Presumption of Declination. Even if a party self-discloses, cooperates and remediates (and thereby earns a presumption of declination), the declination is far from automatic. As under the pilot program, there are several factors that could warrant the imposition of a criminal fine. According to

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the policy, "[a]ggravating circumstances that may warrant a criminal resolution include, but are not limited to, 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 [i.e., the company is a repeat offender]."

As with the pilot program, companies are still required to disgorge — without a discount — any profits arising out of the misconduct.

These exceptions still afford prosecutors substantial discretion, as there is no specific guidance on how, for example, the DOJ defines "pervasive [] misconduct" and "significant profit[s]." On the issue of the significance of profits, the cases the DOJ declined under the pilot program involved disgorgement amounts averaging $4.5 million. It is unclear if the DOJ would decline a case — and forego the imposition of a fine — where the profits approached the tens of millions or more.

Disgorgement. As with the pilot program, companies are still required to disgorge — without a discount — any profits arising out of the misconduct. Disgorgement is owed regardless of a declination or a criminal prosecution — in the case of a criminal fine, the disgorgement is an additional payment. Critically, the exercise of calculating tainted profits is subjective and is the focus of considerable negotiation with the DOJ (and the SEC), often involving experts. Unsurprisingly, the government's calculation of "profits" often exceeds that of the disclosing party, and the government has substantial leverage to impose its conclusion.

Focus on Individuals. The policy offers benefits to companies only, not individuals. The text and structure of the new policy suggest that it is designed to enable the DOJ to sharpen its focus on individual wrongdoers. Deputy Attorney General Rod Rosenstein underscored this point when announcing the policy, stating that it "will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals." In essence, by incentivizing companies to self-disclose and potentially earn a declination, the DOJ is freeing resources to pursue individuals. This in turn puts pressure on self-disclosing and cooperating companies to identify culpable individuals and provide fulsome disclosures regarding their conduct.

Full Cooperation as Defined by the Government. While the new policy largely reiterates the pilot program's requirements for cooperation, it is worth reviewing how extensive those requirements are. They include, for example: timely, proactive and complete disclosure of relevant facts, including those relating to individuals and third parties; disclosure of documents located overseas; facilitating the provision of documents from third parties; and identifying external evidence the government can pursue. These requirements also include "de-confliction," a process of deferring to the DOJ to allow the DOJ to take investigative steps before the company where parallel steps by the company and the DOJ may conflict. While the DOJ attempted to be more reasonable in its formulation of de-confliction in the new policy, it remains an expectation for cooperating companies.

As with the pilot program, a party that cooperates (but does not self-disclose) is eligible for a 25 percent reduction off the bottom end of the applicable fine range,

which is still a significant benefit. The new policy provides some further nuance on cooperation, asserting that the DOJ will be more flexible and consider a company's financial resources when assessing the extent and quality of cooperation. The DOJ also stated that it would credit partial cooperation, rather than treating cooperation credit as all-or-nothing.

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