DOJ Makes the Pilot Program Permanent and Announces FCPA Corporate Enforcement Policy

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The US Department of Justice ("DOJ") had announced a pilot program[1] ("Pilot Program") on April 5, 2016, which created new mitigation opportunities for companies that (i) voluntarily self-disclosed, (ii) cooperated fully, and (iii) took timely and appropriate remedial actions in FCPA matters that fell within the Fraud Section's mandate. The Pilot Program was to remain in effect for 1 year, starting from the day of its announcement. On March 10, 2017, the Acting Assistant Attorney General, Kenneth A. Blanco, announced in a speech that the Pilot Program would continue in full force until the DOJ reached a final decision on whether to extend it, and what revisions, if any, should be made to it.[2] The evaluation period of the Pilot Program ended on November 29, 2017, when Deputy Attorney General Rod Rosenstein announced the new FCPA Enforcement Policy ("Policy"), which effectively makes the Pilot Program permanent with some revisions. According to Deputy Attorney General Rosenstein, the FCPA Unit received 30 voluntary disclosures during the time period that the Pilot Program was in force, as opposed to 18 voluntary disclosures that were received during the previous 18-month period. The Policy has been incorporated into the United States Attorneys' Manual in order to "be readily understood and easily applied by busy prosecutors" as opposed to being promulgated in memorandum format.[3]

Deputy Attorney General Rosenstein highlighted a few key aspects of the new Policy during his speech on November 29. Accordingly, there will be a presumption that, if a company duly engages in voluntary self-disclosure, full cooperation, and timely and appropriate remediation, then that company will be granted a declination decision. However, this presumption may not be applicable in certain cases, depending on the seriousness of the offense and whether the company is a recidivist (i.e., whether it has previously engaged in such misconduct.) Furthermore, in case a company satisfies all of the requirements of the Policy, but aggravating circumstances exist that necessitate an enforcement action, then the DOJ will recommend a 50% fine reduction off of the low end of the fine range that is set forth in the Sentencing Guidelines. The new Policy also helps to concretize and shed light on the elements of an effective compliance program, by putting

[1] For more information regarding the Pilot Program, please see ELIG's previous article at: http://www.mondaq.com/turkey/x/490980/White+Collar+Crime+Fraud/DOJ+Launches+FCPA+Pilot+Program+For+Voluntary+SelfDisclosure+What+Does+It+Offer

[2] See https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national

[3] See https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign

forth specific conditions, such as the compliance department being provided with sufficient resources and the compliance personnel having access to the management team and the board of directors of their companies. Deputy Attorney General Rosenstein also stated that the Policy is aimed at clarifying the DOJ's decision-making processes. He also declared that the Policy concerns the internal operating policies of companies and noted that it did not create any private rights.

I. What Advantages Does the New Policy Bring?

The advantages brought about by the Policy are similar to those provided under the Pilot Program; however, they are stated in clearer and more concrete language. Under the Policy, the DOJ will act under the presumption that it will give a declination decision for those who (i) voluntarily self-disclose, (ii) cooperate fully, and (iii) take timely and appropriate remedial actions. This section of the Policy differs significantly from the Pilot Program, where there was no presumption of a declination decision but only a promise. As opposed to the a priori nature of a presumption, a promise is a weaker potential decision.

However, if a particular case requires a criminal resolution, then the DOJ will "*(i) accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines ("USSG") fine range, except in the case of a criminal recidivist; and (ii) generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program."*[4]

Furthermore, companies have to make all disgorgement, forfeiture and/or restitution payments resulting from the misconduct in order to qualify for the Policy, as was the case with the Pilot Program.

Similar to the Pilot Program, the Policy continues to provide advantages for companies that fail to voluntarily self-disclose, but nevertheless (i) cooperate fully and (ii) remediate in a timely and appropriate fashion. These companies will be awarded up to a 25% reduction off of the low end of the fine range that is provided by the US Sentencing Guidelines ("USSG").

II. How Can Companies Become Eligible for the Policy?

In order to benefit fully from the Policy, companies have to (i) voluntarily self-disclose, (ii) cooperate fully, and (iii) take timely and appropriate remedial actions with regard to FCPA matters.

[4] United States Attorneys' Manual, 9-47.120.

1. Voluntary Self-Disclosure

The DOJ will require the fulfillment of the following criteria for a company to receive credit for voluntary self-disclosure of wrongdoing: "*(i) The voluntary disclosure qualifies under USSG Section 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation"; (ii) the company discloses the conduct to the DOJ "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness and (iii) the company discloses all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law*."[5]

2. Full Cooperation in FCPA Matters

The following are the criteria that must be met for a company to be considered "fully cooperative" under the Policy, similar to the Pilot Program:

"*(i) Disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such sources does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);*

(ii) Proactive cooperation, rather than reactive; that is, the company must timely disclose facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession and not otherwise known to the Department, it must identify those opportunities to the Department;

(iii) Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;

[5] Ibid.

(iv) Where requested, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation; and

(v) Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses."[6]

According to the Policy, if a company claims that it cannot disclose overseas documents due to data privacy rules and regulations, blocking statutes or other reasons related to foreign law, the burden falls upon the company to establish and provide evidence for such a prohibition.

3. Timely and Appropriate Remediation in FCPA Matters

The following are the criteria that must be fulfilled in order for a company to receive full credit for timely and appropriate remediation, similar to the Pilot Program:

"*(i) Demonstration of thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and, where appropriate, remediation to address the root causes;*

(ii) Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but may include:

(a) The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
(b) The resources the company has dedicated to compliance;
(c) The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
(d) The authority and independence of the compliance function and the availability of compliance expertise to the board;
(e) The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
(f) The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;

[6] Ibid.

(g) The auditing of the compliance program to assure its effectiveness; and
(h) The reporting structure of any compliance personnel employed or contracted by the company.

(iii) Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;

(iv) Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications; and

(v) Any additional 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 repetition of such misconduct, including measures to identify future risks."[7]

In general, we observe that the Pilot Program and the new Policy do not differ with respect to their substances or contents, but in their promises. As can be understood from the speech given by Deputy Attorney General Rosenstein on November 29, 2017, the Policy, which will henceforth be in permanent effect, aims to provide more clarity as to how the DOJ will act with respect to companies that have engaged in misconduct, but have also duly satisfied three essential criteria, namely: (i) voluntary self-disclosure, (ii) full cooperation, and (iii) timely and appropriate remediation.

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[7] Ibid.