CLIENT ALERT

DOJ Creates Presumption of Corporate Declination in FCPA Cases

Nov.30.2017

On November 29th, the Department of Justice unveiled a revised Foreign Corrupt Practices Act (FCPA) Enforcement policy that provides significant incentives for corporations to voluntarily self-disclose potential FCPA violations. The new policy makes permanent many aspects of a pilot program started under the Obama Administration with one a significant enhancement: a presumption of a corporate declination of criminal charges if a company voluntarily self-discloses misconduct and cooperates early and fully.

Specifically, the new policy creates a rebuttable *presumption* that an investigation will be resolved through declination of criminal prosecution and disgorgement of profits if a company voluntarily self-discloses the violation, cooperates fully with the government, remediates the problems that led to the FCPA violation, and identifies the individuals responsible for the misconduct. It also provides for up to a 50% reduction off the low end of the U.S. Sentencing Guidelines fine range in cases where a company self-discloses and cooperates but aggravating circumstances rebut the presumption and compel criminal enforcement. The new policy also explicitly provides that DOJ will generally not require appointment of a corporate monitor as long as the company has implemented an effective compliance program at the time of resolution of the case. Recidivist corporate offenders, however, may not be eligible for the presumption of declination.

While enhancing the incentives for corporate disclosure and cooperation, DOJ is also ramping up its focus on individuals, which includes increased pressure on companies to give up culpable individuals. This builds on a DOJ policy announced in 2015 entitled, "Individual Accountability for Corporate Wrongdoing," which has come to be known as the "Yates Memo." In the Yates Memo, DOJ outlined six "key steps" to combat corporate misconduct by "seeking accountability from the individuals who perpetrated the wrongdoing." The following year in 2016 DOJ rolled out the FCPA pilot program aimed at further gaining corporate corporation through full and timely self-disclosure and cooperation, a program that the Deputy Attorney General has now made permanent.

In announcing the updated policy at an FCPA conference in Maryland, Deputy Attorney General Rod Rosenstein stated, "[w]e expect the new policy to reassure corporations that want to do the right thing. It will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals."

While Deputy Attorney General Rosenstein was careful to note that nothing in the enforcement policy mandates that companies self-disclose a potential violation and cooperate fully with a DOJ investigation, he also shared the Department's recent enforcement efforts. All but three of the fifteen corporate resolutions that did not involve voluntary disclosure were resolved with guilty pleas. In ten of those cases, the company was required to engage an independent compliance monitor. Those investigations where companies did not cooperate were juxtaposed with seven matters, over the same time period, which were brought to the DOJ's attention through a voluntary disclosure. Each of those matters originating with a voluntary disclosure was resolved through declinations with the payment of disgorgement.

The bottom line for companies is that the stakes for reporting FCPA violations have gone up – the benefits of disclosure and cooperation have increased and can be substantial; the risks of failing to detect and voluntarily disclose FCPA violations, however, can be similarly steep.

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