Simpson Thacher

Memorandum

U.S. Department of Justice Announces Revised FCPA Corporate Enforcement Policy

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On November 29, 2017, Deputy Attorney General Rod J. Rosenstein announced a revised U.S. Department of Justice ("DOJ") Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy, designed to further incentivize companies to self-report potential FCPA violations. Building on the framework announced in a DOJ pilot program last year, the new policy offers companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate substantial cooperation credit—including the presumption of a declination from DOJ criminal prosecution (absent certain aggravating circumstances). Companies will still be required to pay all disgorgement, forfeiture, and/or restitution resulting from any misconduct at issue. The policy has been added to the U.S. Attorneys' Manual, which guides prosecutors on when and how to exercise discretion in reaching charging decisions. Importantly, the policy has no impact on other enforcement authorities in the U.S., including the U.S. Securities and Exchange Commission ("SEC"), or abroad.

Background on the DOJ's Original FCPA Pilot Program

In April 2016, DOJ announced a new one-year pilot program (temporarily extended in April 2017) designed to encourage companies to self-report potential FCPA violations and to cooperate with the DOJ's Fraud Section. Under the program, companies that voluntarily self-disclosed potential FCPA violations and met all cooperation and remediation requirements (i) were eligible for a 50% reduction off the bottom end of the U.S. Sentencing Guidelines fine range; (ii) likely would not be required to appoint a monitor; and (iii) would be *considered* for declination, absent certain "countervailing interests" (including the seriousness of the offense; involvement of senior management; whether there was significant profit from misconduct (taking into account the company's overall revenues and profitability); and any history of non-compliance). By DOJ's measure, the new pilot program had an impact on companies' self-disclosure decisions: during the 18 months the pilot program was in effect, DOJ's FCPA unit received 30 voluntary self-disclosures, compared to 18 in the previous 18-month period.

DOJ's Revised FCPA Corporate Enforcement Policy

Requirements

The DOJ's new policy turns this consideration for declination into a presumption. Specifically, it is presumed that a company that (i) voluntarily self-discloses misconduct in an FCPA matter, (ii) fully cooperates, and (iii) timely and appropriately remediates, will receive a declination from criminal prosecution by the U.S. DOJ, absent "certain aggravating circumstances."

Closely tracking the "countervailing interests" articulated under the pilot program, these "aggravating circumstances" include:

- Involvement by the company's executive management in the misconduct;
- Significant profit resulting from the misconduct;
- Pervasive misconduct within the company; or
- Whether the company is a repeat offender.

Companies that are not eligible for full declination because one or more aggravating circumstances are present can still receive substantial cooperation credit:

- The DOJ will grant or recommend a reduction of 50% off the low end of the U.S. Sentencing Guidelines fine range (except for repeat offenders);
- The DOJ will generally not require appointment of a monitor if the company has, at the time of resolution, implemented an effective compliance program.

Consistent with the original pilot program, a company that does not voluntarily disclose misconduct but later cooperates and remediates will receive (or DOJ will recommend) up to a 25% reduction off the low end of the U.S. Sentencing Guidelines fine range.

Limitations

DOJ's policy includes several important limitations. *First*, the presumption of declination only applies to criminal prosecution; eligible companies are still required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue. *Second*, the policy provides no protection for individuals. Indeed, a principal purpose of the policy is to enable the DOJ to utilize the cooperation of self-reporting companies to build cases against culpable individuals—an enforcement priority DOJ has emphasized in recent years, including in its 2015 Yates Memo and other recent public statements. *Third*, the policy also does not bind other enforcement authorities in the United States, including the SEC, which has civil enforcement jurisdiction over the FCPA, or abroad. As noted in in the U.S. Attorneys' Manual, FCPA cases are "inherently international" in character; any misconduct is likely to fall within the jurisdiction of one or

more regulators abroad. *Fourth,* the policy—while added to the United States Attorneys' Manual—does not have the binding force of law: it merely guides the exercise of DOJ prosecutorial discretion.

Implications of the Revised Policy

The revised policy is a significant development in FCPA enforcement. By formalizing the basic structure of the pilot program in the U.S. Attorneys' Manual—and adding an explicit presumption in favor of issuing a declination—DOJ appears to be offering companies greater certainty of the benefits available to them when self-reporting potential FCPA violations.

Still, the policy may not dramatically change the calculus for companies deciding whether to self-report potential FCPA violations. While the possibility of a predictable and lenient resolution with DOJ is undoubtedly a powerful incentive to self-report, a self-reporting company that receives a DOJ declination may still be responsible for substantial monetary payments to the DOJ (in the form of disgorgement); regulatory actions by the SEC (for U.S. listed companies) and foreign prosecutors; potential debarment and other collateral consequences; and significant reputational harm. The aggravating circumstances that make a company ineligible for declination under the revised policy, moreover, often drive decisions of whether to self-report.

With respect to the SEC, it is notable that the DOJ has issued public declinations under the pilot program for three U.S. "issuers," and yet the SEC nevertheless brought actions in all three cases (in all three cases for disgorgement and prejudgment interest, and in one, for a civil penalty). The SEC has no analogous *FCPA-specific* program. While the SEC has a more general framework (as articulated in the "Seaboard Report") that provides cooperation credit for self-reporting, remediation, and cooperation with law enforcement authorities on a case-specific basis, and SEC officials have emphasized in public appearances since the implementation of DOJ's original pilot program that companies that self-report may receive reduced charges and penalties, the real benefit of that credit is often not clear.

In addition, most self-reporting companies also have exposure in the country or countries where the corruption occurred, and possibly others. Potential misconduct that is self-reported to the DOJ under the revised policy will often become public, possibly leading to interest from foreign enforcement authorities with no guarantee of a positive outcome. DOJ explicitly notes that declination pursuant to the policy will be made only where DOJ would have otherwise prosecuted or criminally resolved the case—and will make that decision public.

These recent changes to DOJ's FCPA enforcement program bring it closer to another, parallel program that was similarly designed to incentivize self-reporting and cooperation: the DOJ Antitrust Division's Leniency Program. DOJ Antitrust's program goes substantially further, offering both companies and individuals involved in antitrust crimes immunity from convictions, fines, and jail time when they are the first to self-

report such crimes and comply with all other program requirements. DOJ's Antitrust Division's Leniency Program is mirrored by similar programs in several foreign jurisdictions, which developed after DOJ Antitrust launched its program. In the wake of this latest FCPA enforcement guidance, it remains to be seen whether other jurisdictions adopt similar, parallel programs in the anticorruption space.

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