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Foreign Corrupt Practices Act Alert

Deputy Attorney General Rod Rosenstein Announces Revised FCPA Corporate Enforcement Policy

During a speech delivered Wednesday at the International Conference on the Foreign Corrupt Practices Act (“FCPA”) in Oxon Hill, Maryland, Deputy Attorney General Rod Rosenstein announced a revised Department of Justice (“DOJ”) FCPA corporate enforcement policy. The policy states that when a company meets the policy’s standards for voluntary self-disclosure, cooperation, and remediation, a presumption will arise that the matter will be resolved through a declination, rather than an enforcement action (although the company still will be responsible for paying any applicable disgorgement, forfeiture, and/or restitution). The presumption of a declination can only be overcome by a showing of aggravating circumstances regarding the nature and seriousness of the violation (including the involvement of company executives in the corrupt conduct, the fact that the company made a significant profit from the misconduct, and the pervasiveness of the misconduct), or that the company is a repeat criminal offender.

In situations where aggravating circumstances are sufficient to overcome the presumption, the DOJ still will recommend a 50% reduction in penalty from the low end of the Sentencing Guidelines fine range, assuming that the company has otherwise satisfied the self-disclosure, cooperation, and remediation requirements of the policy (although Rosenstein noted that recidivists may be excluded from eligibility for this potential reduction in fine). Additionally, even if a company does not voluntarily disclose misconduct, benefits will still be available for satisfying the cooperation and remediation requirements of the new policy, up to a 25% reduction from the bottom of the Sentencing Guidelines range.

According to Rosenstein, the adoption of the new policy was motivated by several factors, including a desire (i) to encourage responsible corporate behavior; (ii) to reduce uncertainty and skepticism among corporations regarding the benefits of voluntary disclosure, cooperation, and remediation, by being more

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transparent about those benefits; and (iii) to further increase the number of companies that self-report, cooperate, and remediate, which Rosenstein said was important to ensuring that the DOJ is able to efficiently investigate corruption and punish guilty individuals. Rosenstein stated that the policy has been formally incorporated into the U.S. Attorneys' Manual, as part of an effort to ensure that policies are stated concisely and are readily available to prosecutors.

As Rosenstein noted during his speech, the new policy represents an effort to extend and improve upon the FCPA Pilot Program, which was announced in April 2016 and officially extended in March 2017, and which Rosenstein characterized as successful, having resulted in a significant increase in voluntary disclosures by companies. The Pilot Program expanded upon earlier DOJ guidance by describing with increased specificity the criteria that companies need to satisfy to be eligible for fine reductions, with specific factors relating to self-reporting, cooperation, and remediation.

Those factors are largely the same as in the new policy, although the new policy includes an additional remediation factor relating to the retention of business records and prevention of employees from using software that inadequately retains records, and additional language clarifying that any de-confliction with a government investigation that the DOJ requires (a factor considered under the cooperation rubric) will be for a limited time and only imposed where it serves an investigative goal. The new policy also omits language from the Pilot Program that provided that disclosure pursuant to law, agreement, or contract did not qualify as voluntary self-reporting.

Like the new policy, the Pilot Program offered the potential for a 50% reduction from the low end of the Sentencing Guidelines range for a company that fully satisfied all requirements, and up to a 25% reduction where the company did not self-report its misconduct, but otherwise fully cooperated and remediated. The Pilot Program also contemplated the possibility of a declination in certain circumstances, but did not explicitly provide for the presumption of a declination upon satisfaction of the Pilot Program's requirements, as the new enforcement policy announced today does.

The new policy and Rosenstein's speech, which included several remarks relating to the DOJ's commitment to vigorous enforcement of the FCPA, indicate that the FCPA continues to be an important focus of the DOJ under the new administration. The new policy and speech also suggest that the prosecution of culpable individuals remains a top priority.

For a perspective from our partners, click [here](#) to listen to a podcast discussing the DOJ's policy.

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