Blogs
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The DOJ recently took another step to encourage corporate self-disclosure for FCPA violations through the announcement of a new FCPA Enforcement Policy based on the eighteen month FCPA Pilot Program.

The DOJ's Pilot Program proved to be successful—the FCPA Unit received over 30 voluntary disclosures in the 18-month period the Pilot was in place—compared to only 18 voluntary disclosures in the previous 18-month period, according to Deputy Attorney General Rosenstein. The new Enforcement Policy contains many of the same incentives as the Pilot Program, with a few added benefits to sweeten the deal for corporations hoping to avoid hefty FCPA fines. **Presumption of Declination.** Building on the cooperation credit offered under the Pilot Program—and barring aggravating circumstances—corporations will receive a presumption that the DOJ will resolve the case through a declination if they 1) voluntarily self-disclose; 2) fully cooperate; and 3) timely and

appropriately remediate. The Enforcement Policy delineates the DOJ's expectations as to each of these requirements, many of which track the Pilot Program. Evaluation of compliance programs, for example, will vary depending on the size and resources of a business and includes factors such as fostering a culture of compliance; dedicating sufficient resources to compliance activities; and ensuring that experienced compliance personnel have appropriate access to management and to the board. **Aggravating Circumstances.** In situations with "aggravating circumstances," corporations which self-disclose, cooperate, and remediate will not receive a presumption of a declination, but the DOJ:

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    - will recommend a 50% reduction off of the low end of the U.S. Sentencing Guidelines fine range; and
    - generally will not require the appointment of a monitor if the company has implemented an effective compliance program**.**

The Enforcement Policy does not define "aggravating circumstances," but offers a few examples of what may qualify, including involvement of 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. Notably, the Enforcement Policy directs prosecutors to offer these reduced penalties, while the reduction was within the DOJ's discretion under the Pilot Program. **Disgorgement, forfeiture, and/or restitution.** Corporations hoping to benefit from the Enforcement Policy must still pay all applicable disgorgement, forfeiture, and/or restitution resulting from the misconduct. This requirement may be satisfied by a parallel resolution with a relevant regulator, which is particularly helpful to corporations who face scrutiny from regulators—such as the Securities and Exchange Commission—that do not have similar self-disclosure policies in place. **Cooperation and remediation without self-disclosure.** Corporations that choose not to voluntarily self-disclose but that otherwise cooperate fully with the DOJ and engage in timely and appropriate remediation will receive (or the DOJ will recommend) up to a 25% reduction off of the low end of the U.S. Sentencing Guidelines fine range. During Deputy Attorney General Rosenstein's announcement, he emphasized that unlike previous policies issued through memos, the Enforcement Policy would be implemented directly into the United States Attorneys' Manual, indicating a permanence to the program and underscoring the DOJ's resolve to incentivize corporate self-disclosures. As Rosenstein noted, "it makes sense to treat corporations differently than individuals, because corporate liability is vicarious; it is only derivative of individual liability."

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On its face, the prospect of a strong presumption of a DOJ declination may be enticing for companies grappling over whether to self-disclose an FCPA violation. But even in today's environment of robust corporate compliance programs, many FCPA violations contain elements of what the DOJ might consider as "aggravating circumstances"?i.e., significant profits, long-term or wide-spread violations, repeat conduct, or even the imputation of knowledge at senior management levels. And with such conduct, so goes the presumption of a declination. Even if a company does meet all the hurdles to obtain a declination, the policy is non-binding, and there is no guarantee the matter will be resolved confidentially. To the contrary, the DOJ has publicized several declinations achieved under the Pilot Program, and will continue to do so under the new Enforcement Policy if the conduct would have warranted prosecution in the absence of a voluntary disclosure and full cooperation. Moreover, any company seeking to obtain full cooperation credit should anticipate that they may be required to provide all relevant facts about individuals involved in the misconduct?as underscored by Deputy AG Rosenstein's anticipation that the new Enforcement Policy will "enhance [the DOJ's] ability to identify and punish culpable individuals." Such expectations left many uneasy with the ushering in of the Yates Memo on individual accountability, and similarly, the new Enforcement Policy may make companies wary of being required to "turn against" their management. Though it contains many of the same attributes of the FCPA Pilot Program, the new Enforcement Policy underscores the DOJ's commitment to make the self-disclosure process

more transparent and predictable. There are many circumstances under which self-disclosure may be an appropriate response to the discovery of a FCPA violation, and the new Enforcement Policy sheds light on the path to potential resolution.

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