



Deputy Attorney General Rod Rosenstein Announces Revised FCPA Corporate Enforcement Policy

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On November 29, 2017, Deputy Attorney General Rod Rosenstein delivered remarks at the 34th International Conference on the Foreign Corrupt Practices Act ("FCPA"), in which he announced a revised FCPA Corporate Enforcement Policy. According to Mr. Rosenstein, the Department of Justice's ("DOJ's") new FCPA Corporate Enforcement Policy—an extension of the FCPA Pilot Program rolled out eighteen months prior—is designed both to aid the DOJ's ability to identify and punish criminal conduct efficiently and also to provide "guidance and increased certainty to companies struggling with the question of whether to make voluntary disclosures of wrongdoing." Remarks at 3.

The new policy formalizes the practice of rewarding companies that, in the context of FCPA-related wrongdoing, voluntarily disclose bad acts, fully cooperate with the government's investigation, and remediate internal policies and behaviors to prevent future wrongdoing. Mr. Rosenstein stated that he expects the new policy to "increase the volume of voluntary disclosures, and enhance [the DOJ's] ability to identify and punish culpable individuals." *Id.* Acknowledging that the DOJ's internal policies do not create private rights and are not enforceable in court, Mr. Rosenstein reiterated that the program is intended to promote consistency by the DOJ's attorneys. *Id.*

Mr. Rosenstein announced three key points about the new Enforcement Policy:

- (1) "[W]hen a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination." *Id.* at 4. Mr. Rosenstein explained that the "presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist." *Id.*
- (2) If a company satisfies these requirements but there are aggravating circumstances that "compel an enforcement action," Mr. Rosenstein stated that the DOJ still "will recommend a 50% reduction off the low end of the Sentencing Guidelines fine range." However, Mr. Rosenstein cautioned that such a recommendation would not be made on behalf of recidivists. *Id.*
- (3) The policy provides "details" about the DOJ's evaluation of compliance programs, specifying "some of the hallmarks of an effective compliance and ethics program." *Id.*

Mr. Rosenstein acknowledged that participation in this program is optional for companies, but cautioned "appropriate action" would be taken in light of crimes that "come to [the DOJ's] attention through whistleblowers or other means." To further highlight this point and encourage self-disclosure, Mr. Rosenstein noted only two of the seventeen corporate criminal resolutions related to the FCPA since 2016 were the result of voluntary disclosures, and that in both of those instances the cases were resolved through non-prosecution agreements that did not require monitors to be put into place. Of the other fifteen instances, Mr. Rosenstein noted, all but three resulted in guilty pleas, deferred prosecution agreements, or a combination, and in ten instances a monitor was required. During that same time frame, according to Mr. Rosenstein, seven additional cases were raised through voluntary disclosures and resolved through declinations and disgorgement payments. *Id.*

Mr. Rosenstein's remarks—and the recent history of corporate FCPA enforcement that he highlighted therein—are certainly intended to provide additional motivation for corporations that uncover wrongdoing to come forward to the DOJ to disclose, cooperate, and remediate. However, it still falls short of providing true certainty, as there are a number of subjective standards embedded within the new Enforcement Policy that, understandably, build in considerable discretion for the DOJ. Until more facts are known about the DOJ's approach across a broader range of cases, the decision of whether to self-disclose will undoubtedly remain one of the most challenging and fact-specific decisions a company can be faced with in the context of any given investigation.

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