

DOJ Expands and Codifies Policy Incentivizing Corporations to Voluntarily Self-Disclose FCPA Violations

The revised FCPA Corporate Enforcement Policy signals DOJ's emphasis on corporate voluntary self-disclosure, rewarding cooperating companies with a presumption in favor of declination and reductions in penalties.

Key Points:

- Under the new policy, DOJ will apply a presumption in favor of declination for companies that voluntarily self-disclose and fully satisfy DOJ's requirements regarding cooperation and remediation.
- In cases that originate with a voluntary self-disclosure but do not receive a declination, prosecutors will recommend a flat 50% reduction from the low end of the penalty range.
- DOJ will make declinations under the new policy publicly available.

On November 29, 2017, Deputy Attorney General Rod J. Rosenstein announced that the US Department of Justice (DOJ) has implemented a permanent, revised version of the Foreign Corrupt Practices Act (FCPA) Pilot Program.¹ The Pilot Program — which was launched as a one-year trial in April 2016 by then-Assistant Attorney General for the Criminal Division (and now Latham partner) Leslie Caldwell — was extended indefinitely in April 2017 to allow DOJ to evaluate the program's efficacy.² Rosenstein announced that the enhanced policy — now called the [FCPA Corporate Enforcement Policy](#) (FCPA Policy) — will be incorporated into the United States Attorneys' Manual (USAM). Like its predecessor, the FCPA Policy aims to encourage companies to make timely and voluntary disclosures of wrongdoing under the FCPA, while providing additional concrete incentives rewarding corporations for cooperation.

This policy announcement is likely the first of several DOJ policy changes and/or enhancements under the new administration. As detailed in Latham's [October 2017 Client Alert](#), Rosenstein recently announced that DOJ was reviewing a wide range of existing corporate enforcement policies, including the Pilot Program, DOJ's policy on "Individual Accountability for Corporate Wrongdoing" (the Yates Memo), and other DOJ policies and memoranda — with the intention of ultimately incorporating the revised policies into the USAM.

New FCPA Corporate Enforcement Policy: 4 Key Changes

The new FCPA Policy includes four key changes from the predecessor Pilot Program, all of which provide further incentive for corporations to voluntarily self-disclose FCPA violations to the DOJ.

1. The FCPA Policy states that when a company meets DOJ's expectations with respect to a voluntary self-disclosure (including full cooperation and timely and appropriate remediation), there will be a *presumption* that DOJ will resolve the matter through a declination. (Latham's [March 2017 Client Alert](#) provides a detailed overview of DOJ's expectations regarding cooperation.) The predecessor Pilot Program, on the other hand, only instructed prosecutors to *consider* issuing a declination to companies that met these same conditions. The FCPA Policy's new presumption standard is not a guarantee of a declination, however, and companies will not receive a declination if there are aggravating circumstances related to the nature and seriousness of the offense, or if the company is a repeat offender.

2. Under the new FCPA Policy, if a company voluntarily discloses wrongdoing and satisfies all other requirements, but aggravating circumstances compel an enforcement action, DOJ will still recommend a flat 50% reduction off the low end of the US Federal Sentencing Guidelines fine range. (Criminal recidivists may not be eligible for such credit.) The Pilot Program, by contrast, provided less certainty, allowing prosecutors to award *up to* a 50% reduction.

3. The new FCPA Policy also provides additional details regarding how DOJ evaluates an appropriate anti-corruption compliance program. Under the FCPA Policy (like under the predecessor Pilot Program), prosecutors consider a company's compliance program when evaluating whether the company engaged in timely and appropriate remediation. As such, additional color regarding effective compliance programs will help cooperating companies meet the DOJ's expectations. The FCPA Policy identifies eight core elements of an effective compliance program, three of which were highlighted by Rosenstein:

- Fostering a culture of compliance
- Dedicating sufficient resources to compliance activities
- Ensuring that experienced compliance personnel have appropriate access to management and to the board

These elements echo the "hallmarks" of effective compliance programs laid out in the DOJ/SEC's 2012 [Resource Guide to the U.S. Foreign Corrupt Practices Act](#), as well as 2016 guidance from DOJ regarding its compliance program expectations detailed in its [Evaluation of Corporate Compliance Programs](#).

4. Lastly, DOJ will now publicize all FCPA declinations awarded under the new FCPA Policy. Historically, DOJ has been reluctant to announce publicly any decisions not to pursue charges. As a result, the government has had difficulty promoting the full value of self-disclosure and cooperation. Similarly, companies have struggled to assess the advantages for themselves. DOJ gradually has increased its release of declination letters, and will be expanding this practice formally under the new FCPA Policy. This change should improve transparency and confidence in the program by providing companies with more tangible examples of the benefits of self-disclosure.

Success of the Pilot Program

DOJ's codification of the FCPA Policy reflects DOJ's belief that the Pilot Program successfully incentivized and rewarded companies that voluntarily disclosed misconduct. Rosenstein praised the success of the Pilot Program when introducing the FCPA Policy, explaining that during the 18-month period of the Pilot Program, the FCPA Unit received 30 voluntary disclosures, compared to 18 voluntary disclosures during the previous 18-month period.³

While the Pilot Program seems to have increased self-reporting to DOJ, it also appears to have yielded positive results for participating companies. According to Rosenstein, since 2016, DOJ Fraud Section's

FCPA Unit secured criminal resolutions in 17 FCPA-related corporate cases, only two of which originated from voluntary disclosures under the Pilot Program. Rosenstein highlighted the following takeaways:

- In the two cases that did not result in a declination, the matters were resolved through a non-prosecution agreement, and neither involved the imposition of a compliance monitor.
- For the 15 corporate resolutions that *did not* originate from a voluntary disclosure, all but three were resolved through guilty pleas, deferred prosecution agreements, or some combination of the two; and 10 imposed an independent compliance monitor.
- During that same time period, seven matters stemming from voluntary self-disclosures were resolved under the Pilot Program through declinations paired with disgorgement payments.⁴

As Rosenstein noted, however, companies should not equate declinations with immunity, as DOJ will continue to require companies to disgorge any profits from the unlawful conduct, as appropriate.

Conclusion

DOJ's adoption of the FCPA Policy should signal to corporate actors DOJ's continued — and growing — emphasis on voluntary self-disclosure. A company's analysis of whether to self-disclose a potential FCPA violation remains a complex, fact-sensitive inquiry, but the FCPA Policy's expanded and concrete benefits undeniably alter the calculus. Companies should be mindful, however, that the FCPA Policy is limited to the DOJ, and does not bind the US Securities and Exchange Commission, which expressly opted out of the original Pilot Program. In addition, companies should be aware that information they voluntarily disclose to the DOJ may be shared by the DOJ with foreign regulators, who would not be required to provide the benefits stipulated by the FCPA Policy.

Companies should carefully weigh the benefits of voluntary disclosure under the FCPA Policy against these and other risks. Companies also should continue to monitor how the FCPA Policy, and in particular its enhancements from the prior Pilot Program, impact corporate resolutions in the FCPA space.

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Endnotes

¹ Remarks as prepared for delivery by Rod J. Rosenstein, Deputy Attorney General, 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-34th-international-conference-foreign/>.

² Remarks as prepared for delivery by Kenneth A. Blanco, Acting Assistant Attorney General, American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), *available at* <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national>.

³ See n.1.

⁴ *Id.*