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Department of Justice Announces Policy Shift for FCPA Investigations

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On November 29 — during a speech given at the 34th International Conference on the Foreign Corrupt Practices Act — Deputy Attorney General Rod Rosenstein announced a new DOJ policy concerning voluntary disclosures of corporate wrongdoing in FCPA enforcement actions. The "FCPA Corporate Enforcement Policy" is intended to incentivize voluntary disclosures and provide federal prosecutors with detailed guidance when dealing with companies that choose to cooperate with FCPA investigations.

Background

The new DOJ policy carries a presumption that the government should decline to prosecute in cases where companies meet DOJ standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation. The policy provides detailed, explicit definitions of these standards, although prosecutors are still afforded discretion in how they prosecute FCPA cases, thus leaving some uncertainty for companies weighing whether they should come forward.

For companies that partially satisfy the DOJ's standards, the new guidelines offer reduced incentives as part of the government's efforts to increase efficiency in prosecutions and decrease repeat FCPA violations. Companies that do not qualify for a declination (often due to the presence of aggravating factors) but voluntarily disclose will still be eligible for a 50 percent reduction from the bottom of the Sentencing Guidelines fine range, along with the probable avoidance of a corporate monitor. Companies that decline to self-report but still cooperate and remediate their compliance programs will be eligible for up to a 25 percent reduction from the bottom of the Sentencing Guidelines fine range.

The new standards are not applicable in cases where the company in question is a repeat offender.

New FCPA Guidelines a Result of Former DOJ Pilot Program

The new DOJ policy shift comes after the end of a year-and-a-half pilot program that rewarded voluntary self-disclosures and cooperation in FCPA enforcement actions under a similar set of guidelines. Under the pilot program, the number of voluntary disclosures in DOJ-resolved FCPA cases increased to 30 (compared with 18 in the year and half prior to the program), while the number of declinations issued by the DOJ — instances where the government investigates FCPA cases but does not carry out enforcement actions — decreased.

Notably, under the pilot program, the DOJ vigorously imposed monitorships in cases resolved pursuant to either a nonprosecution or deferred prosecution agreement where a company did not self-report, requiring companies to appoint monitors in 9 out of 11 such cases during the first year of the program's implementation.

Conclusion

The new policy, which has been written into the United States Attorneys' Manual (rather than being released within a policy memorandum, which is more typical of the DOJ), is limited to FCPA enforcement actions and does not extend to any other corporate criminal liability.

"We expect that these adjustments, along with adding the FCPA Corporate Enforcement Policy to the U.S. Attorney's Manual, will incentivize responsible corporate behavior and reduce cynicism about enforcement," DAG Rosenstein said.

Rosenstein further remarked, "Criminals try to evade law enforcement. But they also need to evade internal controls and compliance programs, if those internal controls and programs exist. Honest companies pose a meaningful deterrent to corruption."

In conclusion, companies must vigorously monitor potential FCPA issues arising from their business dealings. If any such issues surface, they need to consult with counsel to determine how best to proceed, bearing in mind the new DOJ policy as well as other potential consequences of action or inaction.

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