DOJ Announces New FCPA Policy to Further Incentivize Corporate Voluntary Self-Disclosure and Cooperation

Written by Anthony D. Mirenda, Gwendolyn Wilber Jaramillo

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The U.S. Foreign Corrupt Practices Act turned forty this year. The Department of Justice is marking that anniversary by announcing a new Corporate Enforcement Policy specific to FCPA matters. The new Policy makes explicit that when a company has voluntarily self-disclosed misconduct, fully cooperated in the government's ensuing investigation, and appropriately remediated the situation and made restitution or otherwise disgorged all illicit profits, there is a now an express presumption – absent certain identified aggravating factors – that DOJ will affirmatively decline to prosecute the company at all. Declinations granted under the Policy will be disclosed publicly.

Background

This new Policy is an evolutionary step forward in enforcement – not a radical change. For many years, DOJ has been encouraging voluntary self-disclosure and cooperation in FCPA matters with a variety of carrots and sticks. Companies and their counsel have been pressing DOJ to provide more guidance and transparency. Five years ago, the DOJ and the SEC combined forces to issue a long-awaited "Resource Guide" to the FCPA. By the use of real-world examples and detailed hypotheticals, the Guide provided more concrete direction about the key FCPA issues than was previously available.

Since that time, DOJ has provided additional guidance on a case-by-case basis as FCPA matters are made public – providing meaningful examples by incorporating factual details and identifying more factors material to the government's decision-making in the particular charging documents, plea agreements, deferred prosecution agreements and non-prosecution agreements used to resolve FCPA matters.

Eighteen months ago, DOJ initiated a Pilot Program intended to provide more clarity as to the benefits that a company would receive for making a voluntary disclosure of misconduct and cooperating. Under the Pilot Program, DOJ publicly announced a handful of cases in which a company made a voluntary disclosure and received a declination. This past week, Deputy Attorney General Rod Rosenstein touted the success of the Pilot Program and announced the new Policy.

Four important points stand out. First, the new Policy is more specific and concrete about the benefits of voluntary self-disclosure and cooperation than prior practices. While not absolutely formulaic, the new Policy creates a "presumption" of specific results, like a declination, or a particular percentage discount off of the otherwise-applicable fine. Second, the new Policy incorporates many features reinforcing DOJ's oft-stated objective – that effective deterrence of corporate corruption requires prosecution of culpable individuals. Third, the new Policy contains a number of examples demonstrating that meaningful cooperation must include tangible assistance in evidence gathering, especially of foreign evidence. Finally, DOJ explicitly requires restitution or disgorgement, and notes that payments in response to the actions of other regulators (like the SEC) may count towards this requirement. In some recent cases, DOJ has resolved matters in concert with regulators in other countries as well, and plainly indicated that payments to those countries were negotiated as part of the overall resolution.

Here are five important questions addressed by the new Policy.

1. What counts as a "Voluntary Self-Disclosure"?

The Policy identifies three critical elements, all of which are familiar:

1. Self-disclosure must occur prior to an imminent threat of disclosure or governmental investigation – in other words, to get credit,

the self-disclosure must happen **before** the company is facing an imminent threat from a whistleblower or the government is about to knock on the company's door for some other reason. DOJ continues to put a premium on coming forward sooner rather than later.

2. It must occur within a reasonably prompt time after becoming aware of the misconduct – no surprise here in that, while this signals flexibility to allow a company some time to investigate a situation before making an initial disclosure, the Policy expressly puts the burden on the company to demonstrate timeliness.
3. It must be fulsome – the company must disclose all relevant facts known to it. The Policy puts particular emphasis on disclosure of facts about all individuals involved in the misconduct, which is one of several strong signals that part of the motivation for the Policy as written is to enhance DOJ's ability to prosecute individuals.

2. What counts as "Full Cooperation"?

Cooperation comes in many forms, and DOJ retains latitude to evaluate the scope, quantity, quality and timing of cooperation based on the circumstances presented by each individual situation. That said, the Policy identifies five factors:

1. Fullness – DOJ looks for disclosure on a timely basis of all relevant facts, including attribution of those facts to particular sources (so long as attribution does not violate the attorney-client privilege), along with periodic updates and the rolling disclosure of information. DOJ also expects disclosure of all facts related to the involvement of company officers, employees and agents as well as any third party entities and their officers, employees and agents.
2. Being Proactive – DOJ rewards proactive, rather than reactive, cooperation. The company must disclose relevant information even when not asked specifically, and must identify opportunities for the government to obtain evidence not in the company's possession.
3. Evidence Collection – DOJ expects timely preservation, collection and disclosure of information, including documents that are overseas or are in the possession of third parties, and including document translations where appropriate.
4. De-confliction –DOJ may request that the company alter the timing or scope of the company's investigative steps so as to avoid conflicts with the government's investigation. The Policy indicates that such requests will be narrowly tailored and time-limited. Historically, this has been an area where having an ongoing dialog with the government has enabled some reasonable balancing of the needs of the government investigation with the company's need to understand and properly remediate the situation.
5. Witness Access – DOJ expects the company to make witnesses available for interviews, including officers and employees located overseas, and to facilitate access to third-party witnesses.

Here again, there is a heavy emphasis on disclosure of facts relevant to prosecuting individuals. In addition, several factors expressly touch on international evidence collection, suggesting that part of the motivation for the Policy as written is to help DOJ overcome one of the greatest obstacles to bringing FCPA cases – the challenges inherent in prosecuting cases where much of the critical evidence is located outside the jurisdiction of U.S. law enforcement's ability to collect it. DOJ expects a cooperating company to make affirmative efforts lawfully to work around blocking statutes, data privacy considerations, and other similar obstacles to gathering foreign evidence.

3. What counts as "Timely and Appropriate Remediation"?

The Policy identifies five criteria:

1. Undertake a thorough root cause analysis of the misconduct and address the identified root causes in remediation.
2. Implement an effective compliance and ethics program, recognizing that the program may vary depending on the size and resources of the organization. DOJ will look for a demonstration that the company fosters a culture of compliance; conducts an effective risk assessment and tailors its compliance program based on that assessment; devotes adequate resources to compliance; staffs the compliance function with properly compensated, competent personnel having sufficient authority and independence to be effective; and audits the compliance program to assure its effectiveness.
3. Impose appropriate disciplinary action on those who directly participated in the misconduct as well as those with supervisory responsibility.
4. Retain appropriate business records and prohibit the improper destruction of records, including "prohibiting employees from using software that generates but does not appropriately retain business records or communications."

5. Demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility, and implementation of measures to reduce the risk of future misconduct.

Three items stand out here. First is the introduction of the "root cause analysis" language. This is a familiar concept in other contexts (e.g., workplace safety), and here it suggests the value of demonstrating thoughtful remediation that addresses any structural factors contributing to the misconduct. Second is the explicit expectation of disciplinary action not only on those who directly participated in the misconduct, but also on those who may not have directly participated but had supervisory responsibility over those who did. Finally, there is the express expectation that the company take affirmative steps to prevent the use of certain popular, but "off-the-record", communications technologies.

4. What "Aggravating Circumstances" may disqualify a company from receiving a declination?

Not surprisingly, DOJ does not provide an exhaustive list, so there remains some uncertainty, but the Aggravating Circumstances it does identify are telling:

1. Executive management involvement in the misconduct.
2. Significant profit to the company from the misconduct.
3. Pervasiveness of the misconduct within the company.
4. Recidivism.

In a case where a declination is unwarranted due to one or more of these Aggravating Circumstances, DOJ will require a criminal resolution, ranging from a guilty plea to some alternative resolutions such as a deferred prosecution agreement. However, even in these circumstances, he Policy indicates that a company making voluntary self-disclosure, cooperating, and remediating will still merit a 50% reduction off the low end of the Sentencing Guideline fine range (except for recidivists – not surprisingly, repeat offenders should expect to be treated more harshly). In addition, if the company has implemented an effective compliance program as part of its remediation efforts, then DOJ will not require appointment of an independent monitor.

5. Is any credit available absent a voluntary self-disclosure or with less than full cooperation?

DOJ still provides some incentives in both circumstances. For a company that does not make a voluntary self-disclosure, but fully cooperates and remediates after discovery, the Policy presumes a 25% reduction off the low end of the Sentencing Guideline fine range. For a company that provides less than full cooperation (for example, by coming late to the decision to cooperate) the Policy does not provide any specific presumption, but states that generally there will be some credit (although the credit will be "markedly less than full").

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