DOJ Announces New FCPA Enforcement Policy

On November 29, 2017, Deputy Attorney General Rod Rosenstein announced a new Department of Justice Foreign Corrupt Practices Act ("FCPA") enforcement policy (the "Policy") designed to increase the incentive for companies to develop robust internal controls and cooperate with authorities investigating potential foreign bribery violations committed by their employees.

The Policy has been incorporated into the United States Attorneys' Manual ("USAM"), effective immediately, and turns on three key standards: (i) voluntary self-disclosure; (ii) full cooperation; and (iii) appropriate remediation. The new Policy codifies that if a company satisfies each of these standards, the Department's presumptive resolution to each case will be a declination to prosecute, which may only be overcome if there are aggravating circumstances such as involvement by executive management, significant profit to the company from the misconduct, or pervasiveness of misconduct within the company.

To obtain self-disclosure credit, a company must report the wrongdoing "prior to an imminent threat of disclosure or government investigation," within a reasonably prompt time after becoming aware of the offense, and must disclose all relevant facts – including "all relevant facts about all individuals who may have been involved in the violation of the law." (USAM § 9-47.120(3)(a).)

Self-disclosure alone will not be enough. To obtain cooperation credit, the company must engage in "proactive, rather than reactive," cooperation with the authorities, by providing facts relevant to the investigation "even when not specifically asked to do so." (USAM § 9-47.120(3)(b).) Moreover, when a company "is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession," the company "must identify those opportunities to the Department." (USAM § 9-47.120(3)(b).)

Finally, the company seeking credit must demonstrate that it has conducted timely and appropriate remediation regarding the violations. To receive credit, a company must demonstrate it has conducted a thorough, "root cause analysis" and that it has implemented an effective compliance and ethics program (which must be periodically updated). (USAM § 9-47.120(3)(c)). To that end, the Policy provides guidelines for prosecutors to consider when evaluating corporate compliance and ethics programs, which include whether the policy has fostered a culture of compliance, if there are sufficient resources dedicated to compliance activities, and whether there are sufficiently experienced compliance personnel with appropriate access to management and the board. (USAM § 9-47.120(3)(c).) To the extent a company seeks to receive the benefits of the new Policy, it must keep these guidelines in mind.

As an additional benefit for cooperators, the Policy provides that even when there are aggravating factors associated with a violation, the Department will nevertheless recommend a 50% reduction off of the low end of the Sentencing Guidelines when the three standards have been met. (USAM § 9-47.120(1).)

The new Policy thus bestows major advantages on compliant companies, and therefore provides substantial incentives to be compliant.

Of course, as Mr. Rosenstein emphasized in his announcement, each company is different, and the adequacy of a company's compliance program will depend on the size, resources, and nature of its business. Indeed, the Department has long emphasized that all FCPA compliance programs must be tailored to the company's specific needs, risks, and challenges, and that simplistic "check-the-box" approaches are ineffective. Curtis professionals have substantial experience assisting clients in developing precisely these sorts of tailored anti-corruption compliance programs.

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