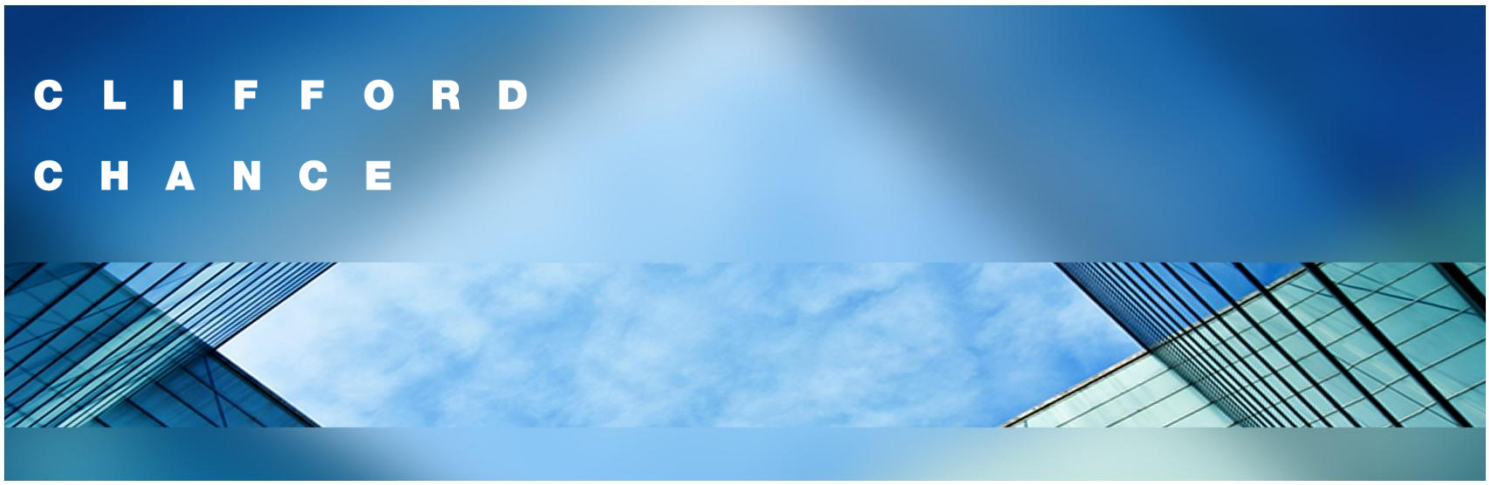

DOJ ANNOUNCES NEW FCPA CORPORATE ENFORCEMENT POLICY, 'DOUBLES DOWN' ON VOLUNTARY SELF-DISCLOSURE

On November 29, 2017, the US Department of Justice ("DOJ") announced a revised Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy that amends the voluntary disclosure terms in DOJ's FCPA Pilot Program. The new policy includes for the first time a "presumption that the company will receive a declination" in FCPA matters where the company has timely and voluntarily self-disclosed misconduct, fully cooperated, and appropriately remediated.[1] In the event that a declination is not appropriate due to "aggravating circumstances," such as involvement by executive management or pervasiveness of the misconduct, DOJ will recommend a 50% reduction from the low end of the fine range provided in the US Sentencing Guidelines and "generally will not" require appointment of a monitor. The new policy also details the criteria DOJ will examine in order to determine whether the company receives credit for timely and voluntary self-disclosure, full cooperation, and appropriate remediation, and lists components of an effective compliance and ethics program. The policy leaves in place the requirement that companies disgorge all profits from the relevant conduct.

The new policy clearly is intended to further incentivize companies to make voluntary self-disclosures and may alter the risk calculus for companies deciding whether to disclose.

[1] US Attorneys' Manual § 9-47.120, https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977.

BACKGROUND

For the past several years, DOJ has issued a series of policy statements designed to encourage companies to make timely and fulsome voluntary disclosures and to fully cooperate with DOJ in its investigation of the disclosed conduct in exchange for an expectation of more lenient treatment—and, by contrast—under the threat of harsher treatment in the absence of disclosure and cooperation.

In September 2015, then-Deputy Attorney General Sally Yates issued a memorandum outlining principles for enhancing DOJ's enforcement efforts against corporate misconduct generally. The so-called "Yates Memo" was intended to encourage companies to turn over relevant information, particularly information concerning any culpable individuals. The memo required that all relevant information be disclosed—"full cooperation"—to receive any credit for that cooperation.

In April 2016, DOJ announced a one-year FCPA Pilot Program. The stated goal of the program was to motivate voluntary disclosure, full cooperation, and remediation of any flaws in a company's compliance program. When a company performed such actions, DOJ would consider declining to prosecute at its discretion. If criminal prosecution was still warranted, a company taking these actions could receive a reduction of up to 50% off the low end of the fine range provided in the US Sentencing Guidelines and generally no appointment of an outside compliance monitor. The reduction was up to 25% if the company did not self-disclose but later cooperated and remediated. The Pilot Program required disgorgement of all profits resulting from the FCPA violation as a condition to consideration for resolution under the program. DOJ extended the Pilot Program in March 2017 while it continued to assess its effectiveness. During the year-and-a-half that the Pilot Program was in effect, DOJ's FCPA Unit received 30 voluntary disclosures, compared to 18 during the previous 18-month period, and issued 7 declinations.[2]

Also in 2016, DOJ issued a memorandum providing "Guidance Regarding Voluntary Self-disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations." The stated purpose of the memorandum was to encourage corporations to voluntarily self-disclose any practices that may constitute criminal violations of statutes implementing US export control and sanctions regimes. The requirements for voluntary self-disclosure, cooperation, and remediation set forth in the memorandum are largely identical to those in the FCPA Pilot Program.

Please read our previous briefings on the Yates Memo, the FCPA Pilot Program, and the "Guidance Regarding Voluntary Self-disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations" on the Clifford Chance website.[3]

---

[2] US Department of Justice, Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act, Nov. 29, 2017, https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[3] Self-Reporting of Corporate Wrongdoing: The Yates Memo seven months on; DOJ Issues New Guidance on Reduced Penalties for Voluntary Disclosure of Export Control and Sanctions Violations.

DOJ ANNOUNCES NEW FCPA CORPORATE ENFORCEMENT POLICY, 'DOUBLES DOWN' ON VOLUNTARY SELF-DISCLOSURE

CLIFFORD
CHANCE

KEY ASPECTS OF DOJ'S REVISED FCPA CORPORATE ENFORCEMENT POLICY

The new FCPA Corporate Enforcement Policy, announced by Deputy Attorney General Rod Rosenstein on November 29, 2017 at an industry conference just outside Washington, DC, effectively makes permanent the FCPA Pilot Program while increasing incentives for self-disclosure.

First, the new policy's "presumption" of a declination where a company has timely and voluntarily self-disclosed, fully cooperated, and appropriately remediated in accordance with the standards outlined in the policy is designed to give companies greater certainty of the benefits of making disclosure than existed under the previous policy of leaving it in the full discretion of DOJ. This presumption will apply unless aggravating circumstances are present, including involvement in the misconduct by executive management, significant profit derived from the misconduct, pervasiveness of the misconduct, or criminal recidivism.

Second, in cases where a criminal resolution is deemed appropriate, the new policy takes a firmer stance regarding reductions from the low end of the fine range provided for in the US Sentencing Guidelines. The FCPA Pilot Program provided that DOJ "*may* accord *up to*" a 50% reduction off the low end of the Sentencing Guidelines fine range, and "generally *should* not" require a monitorship if the company has implemented an effective compliance program. Under the new Corporate Enforcement Policy, DOJ "*will* accord, or recommend to a sentencing court" a 50% reduction off of the low end of the Sentencing Guidelines fine range, and "generally *will* not" require a monitorship if the company has implemented an effective compliance program. The new policy retains the 25% reduction from the low end of the fine range for companies that do not initially self-disclose but later cooperate and remediate.

Third, the new policy details the criteria DOJ will examine to determine whether the company receives credit for timely voluntary self-disclosure, full cooperation, and appropriate remediation, expanding on those concepts as articulated in DOJ's Principles of Federal Prosecution of Business Organizations. [4]

- Voluntary self-disclosure must occur prior to imminent threat of disclosure or imminent government investigation; be within a reasonable amount of time after the company discovered the offense; and include all relevant facts (including those related to individuals involved in the misconduct).
- Full cooperation must include timely preservation, collection, and disclosure of relevant documents; timely disclosure of relevant facts; honoring "de-confliction" requests to defer interviewing employee witnesses until the government has had an opportunity to do so; and making available company officers and employees who have relevant information.
- Timely and appropriate remediation must include a thorough analysis of the causes of the misconduct and actions to address it; implementation of a right-

[4] US Attorneys' Manual § 9-28.000, https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

sized and effective compliance program; appropriate discipline of employees and oversight of the business area in which the misconduct occurred; retention of business records; and other steps that demonstrate the company's recognition of the misconduct, acceptance of responsibility, and efforts to reduce the risk of recurrence.

The new policy continues to stress providing information that will facilitate the prosecution of individuals; for example, the timely disclosure of all relevant facts includes providing all facts related to individuals' involvement in any criminal activity and attributing facts to specific sources.

Fourth, the new policy provides DOJ's criteria for an effective compliance and ethics program, including the company's culture of compliance, resources dedicated to compliance, expertise of compliance personnel, and auditing of the compliance program to ensure its effectiveness. The policy complements previous direction on compliance programs found in a variety of sources, such as the Fraud Section's Evaluation of Corporate Compliance Programs.

Deputy Attorney General Rosenstein's remarks accompanying the announcement of the new policy emphasized continued robust enforcement of the FCPA and focus on individual responsibility. Mr. Rosenstein listed several of DOJ's recent successful cases against individuals; noted "the Department's commitment to hold individuals accountable for criminal activity"; and reiterated that effective deterrence for corporations "requires prosecution of culpable individuals. We should not just announce large corporate fines and celebrate penalizing shareholders."[5] According to Mr. Rosenstein, the new policy will allow corporate officers "to better understand the costs and benefits of cooperation" and, by encouraging disclosure, will help identify and punish individuals.

Significantly, the new Corporate Enforcement Policy has been included in the US Attorneys' Manual, in order to provide concrete guidance for companies and US prosecutors, rather than being embodied in a separate memorandum as per past practice.

IMPLICATIONS

By clarifying and increasing the potential incentives for self-disclosure, DOJ's new FCPA Corporate Enforcement Policy may alter the self-disclosure calculus. Companies nevertheless also need to carefully consider the risks associated with making a voluntary disclosure, which may outweigh the potential benefits.

Among other considerations is the risk of other enforcement actions by DOJ, other US authorities, or non-US authorities that increasingly are taking firm enforcement actions. DOJ and other US authorities may use the disclosure to enforce statutes other than the FCPA, such as those relating to antitrust, cyber crime, insider trading, accounting fraud, and others. In addition, the US Securities and Exchange Commission ("SEC") may have parallel FCPA jurisdiction but is not bound by DOJ's policy. In fact, at the same conference at which DOJ announced its new FCPA Corporate Enforcement Policy, Steven Peikin, Co-Director of the

[5] US Department of Justice, Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act, Nov. 29, 2017, https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

DOJ ANNOUNCES NEW FCPA CORPORATE ENFORCEMENT POLICY, 'DOUBLES DOWN' ON VOLUNTARY SELF-DISCLOSURE

CLIFFORD
CHANCE

SEC's Enforcement Division, stated that DOJ's new policy will not change SEC's approach at this time; instead, SEC will examine the policy to determine whether any changes to its own policies are necessary.

Companies choosing to self-disclose should follow the standards outlined in the FCPA Corporate Enforcement Policy to ensure they meet DOJ's expectations. Finally, regardless of whether a company faces significant exposure due to an apparent violation of the FCPA, it should in the ordinary course of business evaluate the robustness of its compliance programs to ensure it conforms to DOJ's standards outlined in the FCPA Corporate Enforcement Policy.

CONTACTS

David DiBari
Partner

T +1 202 912 5098
E david.dibari
@cliffordchance.com

Steve Nickelsburg
Partner

T +1 202 912 5108
E steve.nickelsburg
@cliffordchance.com

Megan Gordon
Partner

T +1 202 912 5021
E megan.gordon
@cliffordchance.com

Glen Donath
Partner

T +1 202 912 5138
E glen.donath
@cliffordchance.com

Joshua Berman
Partner

T +1 202 912 5174
E joshua.berman
@cliffordchance.com

Christopher Morvillo
Partner

T +1 212 878 3437
E christopher.morvillo
@cliffordchance.com

Daniel Silver
Partner

T +1 212 878 4919
E daniel.silver
@cliffordchance.com

Rebecca Hekman
Associate

T +1 202 912 5539
E rebecca.hekman
@cliffordchance.com

Susan Foster
Associate

T +1 202 912 5129
E susan.foster
@cliffordchance.com

Gannam Rifkah
Law Clerk

T +1 202 912 5974
E gannam.rifkah
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 2001 K Street NW, Washington, DC 20006-1001, USA

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.