

DOJ Makes Major Move to Expand Leniency for Companies That Disclose Foreign Bribery

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The department laid out a bold new policy providing “presumption” of non-prosecution for companies that self-report FCPA violations and meet other conditions.

Deputy Attorney General Rod J. Rosenstein announced on Wednesday the rollout of a US Department of Justice (DOJ) policy that offers companies the ultimate incentive to self-report corruption and bribery and cooperate with government agency investigations: full protection from prosecution. The policy makes permanent and expands upon the Obama administration’s Foreign Corrupt Practices Act (FCPA) Pilot Program, which began in April 2016 and offered reduced penalties for self-reporting.

The new program, called the FCPA Corporate Enforcement Policy, has been incorporated into the US Attorney’s Manual and takes effect immediately. The policy goes further than the Obama-era FCPA Pilot Program with a “presumption” that companies will not be prosecuted if they meet certain conditions. Under the pilot program, the DOJ was only required to “consider” declining to prosecute companies that met those conditions.

Rosenstein stated as justification for the policy that it “makes sense to treat corporations differently than individuals,” and that the DOJ should focus on prosecuting and holding accountable culpable individuals rather than simply imposing large fines on companies that ultimately penalize shareholders.

Rosenstein said that in order to fully avoid penalties, companies must voluntarily self-report the issue, cooperate fully with prosecutors, and identify and remediate the root causes and gaps in compliance controls that led to the problem. Companies must also help government investigators identify the individuals responsible for the misconduct, he said. The presumption of declination may be overcome only if there are aggravating circumstances related to the nature of the offense, or if the company is a repeat offender. The US Attorney’s Manual lays out several examples of aggravating circumstances, including involvement by executive management in the misconduct, “significant profit” to the company from the misconduct, and pervasiveness of the misconduct within the company.

Even if aggravating circumstances compel an enforcement action, companies that satisfy the conditions will be eligible under the policy for a 50% reduction off the low end of the fine range in the Federal Sentencing Guidelines. Repeat offenders, however, may not be eligible for such credit.

Rosenstein said the new policy also provides details on how the DOJ will evaluate an appropriate compliance program, which will vary depending on the size and resources of a company. While language providing general guidance on implementation of an effective compliance and ethics program has been added to the FCPA section of the US Attorney's Manual, this guidance is under a sub-section titled "Timely and Appropriate Remediation in FCPA Matters." Thus, it is unclear at this point whether the DOJ, under the new policy, will consider a company's preexisting compliance program (and gaps or deficiencies therein) or whether implementation of an effective program after the fact will be deemed sufficient.

Rosenstein emphasized that the new policy does not provide a guarantee for companies, and that the DOJ is unable to "eliminate all uncertainty" in prosecutorial discretion, but said that he believes the policy strikes a balance "in favor of greater clarity about our decision-making process."

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