



## *Client Alert USA*



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### ***DOJ Issues New FCPA Policy Offering Incentives to Encourage Disclosure of Foreign Bribery and Corruption Misconduct***

***By Rohan A. Virginkar, David W. Simon, Jaime B. Guerrero, John E. Turlais, and Hayley K. Wells***

On November 29, 2017, Deputy Attorney General Rod Rosenstein announced that the U.S. Department of Justice (DOJ) was issuing a new enforcement policy covering its enforcement of the Foreign Corrupt Practices Act (FCPA). The new “FCPA Corporate Enforcement Policy” formalizes prior internal guidance and makes permanent aspects of the DOJ’s 2016 “pilot program” for corporate cases involving potential violations of the foreign bribery and anti-corruption law. The new policy encourages companies to voluntarily self-disclose misconduct to enforcement authorities by creating certainty about the potential outcomes of FCPA investigations and enforcement actions.

Specifically, the new policy creates a rebuttable presumption that DOJ will decline to prosecute companies that voluntarily self-disclose potential violations of the FCPA, “fully” cooperate with the DOJ investigation, and “timely and appropriately” remediate.

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The new policy defines each of those elements, detailing the government's expectations for cooperation and remediation. Previously, declinations had been among the potential outcomes for cooperating companies that self-disclosed misconduct, but the new policy's inclusion in the U.S. Attorney's Manual makes the prior guidance mandatory. Prosecutors nevertheless retain discretion in how to evaluate a company's cooperation and remediation, and other "aggravating factors" described in the policy could still take declinations off the table in certain cases. However, the new policy states that prosecutors will be required to agree to a 50-percent reduction to the minimum fines required in such cases. Previous DOJ guidance had left more discretion to prosecutors, stating that they "may" have agreed to such penalty reductions. The new policy also formalizes the notion that full cooperation with the government's investigation may include "deconfliction" – requests by the government that a company's legal team step back during an investigation in order to allow the government to interview witnesses first. The earlier pilot program had introduced deconfliction, but the new policy explains that such requests from the government must be limited in duration and narrowly tailored to a legitimate investigative purpose.

Although it remains to be seen how DOJ will implement the new policy, the formalization of prior guidance and practice, along with the additional certainty of outcomes, means that companies that identify potential misconduct have additional considerations to take into account when deciding whether to disclose to enforcement authorities.

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## *The text of the policy is as follows:*

9-47.120 - FCPA Corporate Enforcement Policy

### ***1. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters***

Due to the unique issues presented in FCPA matters, including their inherently international character and other factors, the FCPA Corporate Enforcement Policy is aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct. When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender.

Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

- 1.** will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and
- 2.** generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.

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***2. Limited Credit for Full Cooperation and Timely and Appropriate Remediation in FCPA Matters Without Voluntary Self-Disclosure*** In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing:

If a company did not voluntarily disclose its misconduct to the Department of Justice (the Department) in accordance with the standards set forth above, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth above, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.

### ***3. Definitions***

#### **a. Voluntary Self-Disclosure in FCPA Matters**

In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing:

- 1.** The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring “prior to an imminent threat of disclosure or government investigation”;
- 2.** The company discloses the conduct to the Department “within a reasonably prompt time after becoming aware of the offense,” with the burden being on the company to demonstrate timeliness; and
- 3.** The company discloses all relevant facts known to it, including all relevant facts about all individuals involved in the violation of law.

#### **b. Full Cooperation in FCPA Matters**

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations, see USAM 9-28.000, the following items will be required for a company to receive credit for full cooperation for purposes of USAM 9-47-120(1) (beyond the credit available under the U.S.S.G.):

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1. As set forth in USAM § 9-28.720, disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);
2. Proactive cooperation, rather than reactive; that is, the company must timely disclose facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession and not otherwise known to the Department, it must identify those opportunities to the Department;
3. Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;
4. Note: Where a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents;
5. Where requested, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation; and
6. Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

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### c. Timely and Appropriate Remediation in FCPA Matters

The following items will be required for a company to receive full credit for timely and appropriate remediation for purposes of USAM 9-47-120(1) (beyond the credit available under the U.S.S.G.):

1. Demonstration of thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and, where appropriate, remediation to address the root causes;
2. Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but may include:
3. The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
4. The resources the company has dedicated to compliance;
5. The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
6. The authority and independence of the compliance function and the availability of compliance expertise to the board;
7. The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
8. The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
9. The auditing of the compliance program to assure its effectiveness; and
10. The reporting structure of any compliance personnel employed or contracted by the company.
11. Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;
12. Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications; and

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- 13.** Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

#### **4. Comment**

Cooperation Credit: Cooperation comes in many forms. Once the threshold requirements set out at USAM § 9-28.700 have been met, the Department will assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company's cooperation under the FCPA Corporate Enforcement Policy.

"De-confliction" is one factor that the Department may consider in determining the credit that a company will receive for cooperation. The Department's requests to defer investigative steps, such as the interview of company employees or third parties, will be made for a limited period of time and will be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.

Where a company asserts that its financial condition impairs its ability to cooperate more fully, the company will bear the burden to provide factual support for such an assertion. The Department will closely evaluate the validity of any such claim and will take the impediment into consideration in assessing whether the company has fully cooperated.

As set forth in USAM 9-28.720, eligibility for full cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver. Nothing herein alters that policy, which remains in full force and effect. Furthermore, not all companies will satisfy all the components of full cooperation for purposes of USAM 9-47.120(2) and (3)(b), either because they decide to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies will be eligible for some cooperation credit if they meet the criteria of USAM § 9-28.700, but the credit generally will be markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.

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**Remediation:** In order for a company to receive full credit for remediation and avail itself of the benefits of the FCPA Corporate Enforcement Policy, the company must have effectively remediated at the time of the resolution.

The requirement that a company pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue may be satisfied by a parallel resolution with a relevant regulator (e.g., the United States Securities and Exchange Commission).

**Public Release:** A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy. Declinations awarded under the FCPA Corporate Enforcement Policy will be made public.

(added November 2017)

<https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977>

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