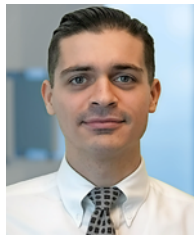


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BRIBERY

Three Ropes & Gray LLP attorneys discuss the recent announcement by the Justice Department regarding companies that self-disclose violations of the Foreign Corrupt Practices Act. The authors examine the decision-making process each company must follow, noting that a even if the DOJ decides not to prosecute, the Securities and Exchange Commission may still bring its own charges.

Difficult Choices: Self-Reporting in Light of New DOJ FCPA Policy on Presumption of Declination



BY NICHOLAS BERG, CALEB DULIS, AND DANIEL FLAHERTY

Corporations uncovering evidence of wrongdoing under the Foreign Corrupt Practices Act (FCPA) have always faced difficult choices. Chief among them is the decision whether to voluntarily disclose such evidence to regulators in hopes of securing reduced penalties, or even avoiding prosecution altogether. Historically, a corporation could not always predict what the result of self-disclosure would be—if it was securing leniency for itself or handing the government a ready-made case for prosecution. Recent developments help to clarify that decision with respect to one federal regulator, but difficult choices remain.

On Wednesday, Nov. 29, 2017, in remarks at the 34th International Conference on the Foreign Corrupt Practices Act, Deputy Attorney General Rod J. Rosenstein announced a revised FCPA Corporate Enforcement Policy (FCPA Policy), to be incorporated into the Department of Justice's (DOJ) United States Attorneys'

Manual. The revised FCPA Policy essentially makes permanent elements of DOJ's FCPA Pilot Program and clarifies DOJ's approach to corporate prosecutions under the FCPA. The announced policy creates strong incentives toward self-disclosure by companies who have identified a violation of the FCPA. It explicitly commits DOJ to decline prosecution in cases where companies fully disclose, cooperate, and remediate, and reinforces DOJ's prioritization of individual prosecutions over corporate prosecutions.

Decision to Self-Disclose

But the decision to self-disclose is not black and white. The Securities and Exchange Commission (SEC), as well as enforcement authorities in other countries, many of whom have begun aggressively prosecuting international bribery cases, have not made similar firm commitments to declinations and remain focused on corporate prosecution. In an era of cross-border co-

operation and information-sharing between enforcement authorities, companies should not assume that a DOJ declination means the end to their potential criminal and civil liability. In fact, such a self-report may quickly trigger investigations both in the U.S. and abroad. Moreover, even without prosecution by DOJ or another regulator, a company's disclosure of wrongdoing in and of itself can result in reputational damage, loss of goodwill, and for publicly traded companies, a sharp decline in shareholder value.

Rosenstein announced that, under the FCPA Policy, when a company voluntarily self-discloses potential wrongdoing, fully cooperates, and remediates wrongdoing timely and appropriately, there is a presumption that the DOJ will decline to prosecute. The presumption can only be overcome "if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist." The FCPA Policy also establishes that where a company self-discloses and meets the other requirements, if prosecution is compelled by aggravating circumstances, the DOJ will recommend a reduction by half off the "low end" of sentencing guidelines. Finally, the FCPA Policy will include details on the DOJ's view of an "appropriate" compliance program. Rosenstein specifically mentioned "fostering a culture of compliance; dedicating sufficient resources to compliance activities; and ensuring that experienced compliance personnel have appropriate access to management and to the board" as relevant components. Going forward, all declinations will be publically disclosed, a change from past practice.

Rosenstein also explicitly tied the FCPA Policy's approach to declination and cooperation to a desire to "enhance [DOJ's] ability to identify and punish culpable individuals." The DOJ clearly expects that increased cooperation and disclosure by potential corporate defendants will be a source of evidence making individual prosecutions easier to pursue.

SEC's Policy

But the decision to self-disclose remains a difficult and momentous choice. The SEC also has jurisdiction over FCPA violations and has not committed to declination in cases of self-disclosure or prioritized individual prosecution over corporate prosecution as DOJ has. Indeed, recent statements by the co-director of the SEC's Enforcement Division indicate that the agency has not

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emphasized individual prosecutions to the same degree as the DOJ. On Nov. 9, 2017, Co-Director Steven Peikin gave a speech at New York University School of Law about the SEC's priorities in enforcing FCPA cases. He noted that since 2010, the SEC has brought FCPA actions against 101 entities and 38 individuals. He also described the "particular challenges" of individual prosecutions in the FCPA context, noting that they were not always possible. Peikin did assert the importance of individual prosecution, but described it as a tool to drive corporate compliance rather than the primary method of deterring violations of the FCPA.

Likewise, Peikin made no statements about the effects of self-disclosure and cooperation. And recent cases, including situations in which the DOJ has declined prosecution under the Pilot Program, demonstrate that the SEC does not view a DOJ declination as a bar to its own enforcement action. For example, in the Halliburton case (resolution announced July 27, 2017), the DOJ advised the company it would take no action and close the investigation. After an anonymous allegation in 2010 initiated an internal investigation, Halliburton self-disclosed possible violations arising from payments to a company owned by the friend and neighbor of an Angolan official, under a contract to satisfy local content regulations. The DOJ did not issue a formal declination but closed its investigation without taking action. Nonetheless, the SEC alleged violations under the FCPA's books-and-records and internal-accounting-controls provisions. Halliburton settled those charges via an SEC administrative order and paid a civil penalty of \$14 million, in addition to disgorgement plus pre-judgment interest totaling \$15.2 million. While the overall liability the company faced was undoubtedly reduced by its decision to self-disclose, the principle remains that the SEC may bring an action despite a declination from the DOJ.

International Cooperation

The same principle may apply with respect to foreign regulators because the DOJ increasingly seeks to assist such authorities in collateral enforcement actions against the targets of FCPA investigations. For example, in October 2016, the DOJ announced that it had entered into a deferred prosecution agreement with Brazilian aircraft manufacturer Embraer S.A. that resolved charges related to bribery of government officials in the Dominican Republic, Saudi Arabia, and Mozambique. That settlement resulted in a criminal penalty of more than \$107 million. But that was not the end of Embraer's liability. The DOJ's press release on the settlement notes the assistance that it provided to Brazilian authorities leading to an additional settlement of \$20 million for the company and charges in Brazilian courts for 11 individual Embraer employees.

The trend of such cooperation is readily apparent in other recent enforcement actions. For example, in April 2017, Brazilian company Oderbrecht S.A. was sentenced to pay \$2.6 billion to resolve charges arising from bribes in 12 mostly Latin American countries. The company was ordered to pay \$93 million to the U.S., \$116 million to Switzerland, and \$2.39 billion to Brazil. Investigators and prosecutors from each country worked together to investigate and coordinate resolution of the case. And in January 2017, Rolls-Royce Plc, a British company, agreed to pay \$800 million in the

global resolution of charges related to an international bribery scheme designed to obtain government contracts in countries including Thailand, Brazil, and Kazakhstan. The settlement included penalties paid to authorities in the U.S., the United Kingdom, and in Brazil. Recently, in remarks at the FCPA/Organization for Economic Cooperation and Development Anniversary Conference on Nov. 9, 2017, Acting Assistant Attorney General Kenneth A. Blanco cited each of these cases as exemplars of international cooperation in foreign bribery enforcement and demonstrative of the type of cooperation the DOJ envisions as a model going forward. Likewise, on the same day Rosenstein announced the FCPA Policy, the DOJ announced that Dutch oilfield company SBM Offshore had entered into a deferred prosecution agreement under which it paid \$238 million in penalties, fines, and disgorgement to resolve allegations that it had paid bribes to secure contracts around the world, including bribes paid to Brazilian state-controlled oil company Petrobras. In 2016, SBM made payments totaling \$162.8 million to settle charges by Brazilian regulators regarding the same scheme.

And of course, the above risks are compounded by the potential for reputational damage and loss of good-

will in the event a company discloses wrongdoing. A 2014 study by the Searle Civil Justice Institute at George Mason University correlated the initial announcement of a potential FCPA violation with an average 2.9 percent reduction in the target's market capitalization. (Searle Civil Justice Institute, *The Foreign Corrupt Practices Act: Economic Impact on Targeted Firms at 2* (June 2014), available at [http://masonlec.org/site/rte_uploads/files/FCPA%20II%20Final%20\(6.4\).pdf](http://masonlec.org/site/rte_uploads/files/FCPA%20II%20Final%20(6.4).pdf)).

Thus, the potential for significant harm even outside the context of a formal prosecution is quite high.

Conclusion

Ultimately, Rosenstein's FCPA Policy announcement helps to clarify decision-making for companies facing liability under the FCPA. The DOJ's FCPA Policy clearly sets out and formalizes the obligations a company must meet to avoid DOJ prosecution. Yet, at the same time, companies must remain aware that a DOJ declination is not the end of the story, it may only be the beginning.