**Rachel G. Skaistis**
+1-212-474-1934
rskaistis@cravath.com

**John D. Buretta**
+1-212-474-1260
jburetta@cravath.com

**Benjamin Gruenstein**
+1-212-474-1080
bgruenstein@cravath.com

**David M. Stuart**
+1-212-474-1519
dstuart@cravath.com

**Evan Norris**
+1-212-474-1524
enorris@cravath.com

# U.S. Department of Justice Announces New FCPA Corporate Enforcement Policy

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Yesterday, Deputy Attorney General Rod J. Rosenstein announced that the U.S. Department of Justice is implementing a new FCPA Corporate Enforcement Policy to replace the closely watched FCPA Pilot Program launched last year. Although the new policy retains many of the features of the FCPA Pilot Program, it looks to increase the rate at which companies self-report potential violations of the Foreign Corrupt Practices Act. It does so by creating a "presumption" that companies will receive a full declination of prosecution if they voluntarily self-disclose, remediate misconduct and cooperate with the DOJ's investigation. The new policy is incorporated into the U.S. Attorneys' Manual and is available at: https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

### FCPA Pilot Program

The DOJ launched its FCPA Pilot Program under the Obama Administration in April 2016 to great interest from corporate counsel and FCPA practitioners. The Pilot Program formalized what had long been the practice of the DOJ to reward companies for voluntarily self-disclosing and remediating misconduct and cooperating with the government during FCPA investigations. Under the Pilot Program, full cooperation and remediation could result in a reduction of up to 25% off the bottom of the applicable Sentencing Guidelines fine range, and voluntary self-disclosure could result in an additional 25% reduction off the bottom of the Guidelines range. Those companies that voluntarily self-disclosed would also generally not be required to implement a monitor, assuming they had implemented an effective compliance program at the time of resolution, and could be eligible for a declination depending on the seriousness of the offense and their history of misconduct. Notably, to qualify for any benefit under the Pilot Program, a company would be required to disgorge all profits resulting from the FCPA violation.

When it was initially launched, the DOJ announced that the Pilot Program would operate for a year, at which time the DOJ would determine whether to extend or modify the program. Shortly before that one-year period ended in April 2017, however, the DOJ announced that it was extending the program indefinitely until it finished evaluating its effectiveness.

### FCPA Corporate Enforcement Policy

In a speech yesterday, Deputy Attorney General Rosenstein announced that the DOJ had concluded its review of the Pilot Program and determined that the program "motivates and rewards companies that want to do the right thing" and has "proved

to be a step forward in fighting corporate crime".[1] Specifically, Deputy Attorney General Rosenstein noted that during the 18 months in which the Pilot Program was in effect, the DOJ "received 30 voluntary disclosures, compared to 18 during the previous 18-month period".[2] After reviewing the Pilot Program, however, the DOJ decided to increase the incentives provided to companies that voluntarily self-disclose, cooperate and remediate. To that end, the DOJ has now replaced the Pilot Program with the new FCPA Corporate Enforcement Policy.

Under the new policy, companies that voluntarily self-disclose, cooperate and remediate will be afforded a rebuttable presumption that their case will be resolved with a declination of prosecution. This presumption may be overcome, however, in cases with "aggravating circumstances involving the seriousness of the offense or the nature of the offender".[3] According to the policy, "[a]ggravating 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".[4] In such cases, a company will receive, or the DOJ will recommend to a sentencing court, a 50% reduction off the bottom of the applicable Sentencing Guidelines fine range (rather than an *up to* 50% reduction under the Pilot Program), unless it is determined to be a "criminal recidivist".[5] And the company will generally not be required to implement a monitor, assuming it has implemented an effective compliance program at the time of resolution (consistent with the Pilot Program).[6]

For companies that cooperate and remediate but do not voluntarily self-disclose, the policy leaves in place the existing Pilot Program benefit of an up to 25% reduction off the bottom of the applicable Sentencing Guidelines fine range. And, notably, the new policy continues to require that companies pay disgorgement of ill-gotten gains, as well as forfeiture and restitution, to qualify for leniency. Such payments can be a condition of the declination or of a parallel SEC resolution in the case of a U.S. issuer, and are intended to put the company back in the position in which it would have been had it not engaged in misconduct. Finally, the new policy provides that all declinations pursuant to the policy will be made public, thus formalizing a practice the DOJ had begun following in the case of select declinations under the Pilot Program.

**Conclusion**

The DOJ's new FCPA Corporate Enforcement Policy should be a welcome development for companies that are committed to corporate compliance and willing to take proactive steps to remediate misconduct when it is discovered. Nevertheless, the DOJ will retain vast discretion in providing credit under the new program, as the presumption of declination will be rebuttable in the case of "aggravating circumstances". While the policy provides a non-exhaustive list of factors to be considered as part of this analysis, those factors will be highly case-specific. Companies that hope to avail themselves of the new FCPA Corporate Enforcement Policy will certainly be subject to thorough investigation by the DOJ and careful consideration of whether the circumstances of the company and its misconduct warrant the significant benefits afforded by this new policy.



**New York**
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
+1-212-474-1000

**London**
CityPoint
One Ropemaker Street
London EC2Y 9HR
+44-20-7453-1000

www.cravath.com

[1] Rod J. Rosenstein, Deputy Attorney Gen., Dep't of Justice, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

[2] *Id*.

[3] Dep't of Justice, U.S. Attorneys' Manual § 9-47.120(1), *available at* https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

[4] *Id*.

[5] *Id*.

[6] Deputy Attorney General Rosenstein stated in a speech this past October that the DOJ is currently reviewing its practices with respect to corporate monitors. See Rod J. Rosenstein, Deputy Attorney Gen., Dep't of Justice, Keynote Address on Corporate Enforcement Policy (Oct. 6, 2017), *available at* https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/.