

New FCPA Corporate Enforcement Policy

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An McV International & Cross Border Transactions Alert

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On November 29, 2017, the U.S. Department of Justice (the “Department”) issued a new Foreign Corrupt Practices Act (“FCPA”) Corporate Enforcement Policy, in an effort to encourage companies to voluntarily disclose FCPA violations. The new policy incorporates and enhances the self-disclosure incentive benefits of the FCPA Pilot Program, launched on April 5, 2016.

The new policy, unlike the Pilot Program, provides for the presumption that, absent aggravating circumstances, a company will receive a declination of prosecution if it complies with the requirements of (1) “voluntarily self-disclosure,” (2) “full cooperation,” and (3) “timely and appropriate remediation” (as such are defined by the policy). Examples of aggravating circumstances that may warrant criminal prosecution include, but are not limited to, the involvement of executive management, a misconduct that yields a significant profit, and pervasiveness of the misconduct and criminal recidivism.

In the event that a company complies with these requirements, but aggravating circumstances warrant an enforcement action, the policy provides for a 50% reduction from the low end of the applicable U.S. Sentencing Guidelines (“USSG”) fine range. Additionally, the policy provides that companies that fail to voluntarily self-disclose, but later satisfy the requirements of “full cooperation” and “timely and appropriate remediation,” may receive a reduction of up to 25% from the low end of the applicable USSG fine range. These fine reduction measures were essentially incorporated from the FCPA Pilot Program.

Deputy Attorney General Rod Rosenstein commented on the new policy at the 34th International Conference on the FCPA, stating that the new policy “provides guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing.” According to Rosenstein, “[t]he advantage of the policy for businesses is to provide transparency about the benefits available if they satisfy the requirements.”

Lastly, it is important to note that the new policy is an internal operating policy intended to guide the discretion of prosecutors. The policy, therefore, does not create any privileges, benefits or rights that are legally enforceable.

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