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More carrots, fewer sticks: DOJ's revised FCPA Corporate Enforcement Policy

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In November 2017, Deputy Attorney General Rod Rosenstein announced that the U.S. Department of Justice (DOJ) would expand and codify the Obama-era Foreign Corrupt Practices Act (FCPA) pilot program. This policy, which is now embedded in the U.S. Attorneys' Manual, not only makes the most generous statement to date on what "credit" companies can receive for voluntary disclosure, cooperation, and remediation, but also sets forth additional criteria defining what the government means by an "effective" compliance program. In this regard, the policy builds upon concepts articulated in former DOJ compliance attorney Hui Chen's memo on the hallmarks of an effective compliance program. This memo, released a year ago, encourages companies to focus on root cause analysis, culture, and the quality and independence of their compliance functions.^[1]

New policy brings clarity

In announcing the policy, Rosenstein acknowledged that many companies want to "do the right thing" when it comes to legal compliance. Voluntary self-disclosure allows the government to pursue its goal of rooting out non-compliance, which might otherwise go undetected. Based on Rosenstein's comments, the DOJ believes that the FCPA pilot program provided companies the right incentives to voluntarily disclose suspected non-compliance. During the 18 months the pilot program ran, voluntary disclosures nearly doubled — 30 disclosures during the pilot versus 18 in the prior year and a half. This is evidence that the "carrot" approach does effectively support the DOJ's goals.

The new policy clarifies key aspects of DOJ's enforcement policy that have been somewhat ambiguous to the corporate community in the past. Under the U.S. Federal Sentencing Guidelines, companies may be eligible for sentencing "credit" in exchange for cooperating and maintaining an effective compliance program.^[2] However, the corporate community has had some reservation about whether this credit provides any real benefit.^[3] In fact, there has been some support to suggest that companies who self-disclose face increased penalties.^[4] The new enforcement policy clarifies what credit is available to cooperating companies and provides significant incentives.

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