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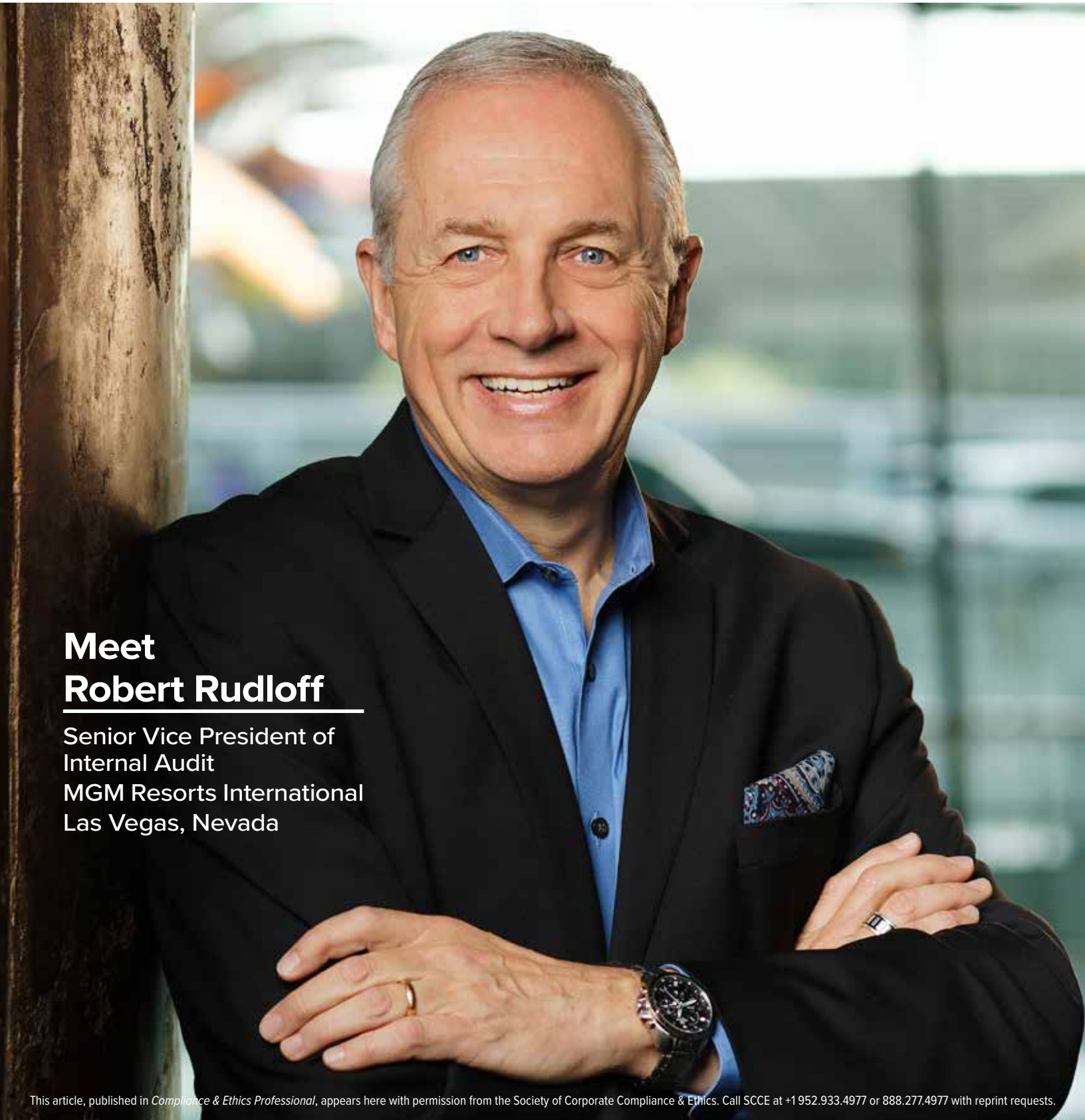

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More carrots, fewer sticks: DOJ's revised FCPA Corporate Enforcement Policy

» The Department of Justice has announced it will extend and codify the 2016 Foreign Corrupt Practices Act pilot program.

» Under this new enforcement policy, there is a "presumption" of a declination for companies that voluntarily disclose suspected non-compliance, cooperate with the government in the investigation, and remediate.

» Even companies that do not voluntarily self-disclose may be entitled to leniency based on cooperation and remediation efforts.

» Remediation includes implementing an effective compliance program, with an emphasis on root cause analysis, culture and independence of the compliance function.

» These new incentives will likely re-shape the way companies design, implement, and measure their compliance programs.

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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]

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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.

Self-disclosure may result in a declination

Under the new enforcement policy, when a company voluntarily self-discloses, fully cooperates, and timely remediates FCPA matters, there will be a presumption that the company will receive a declination. This presumption can only be overcome by aggravating factors, such as the involvement of executive management in the misconduct. In this instance, so long as the company has self-disclosed, cooperated, and remediated, the government will still recommend a 50% reduction off the low end of the sentencing guideline fine, unless there is criminal recidivism. The presumption of a declination and the recommendation for reduced sentencing in these cases are enhancements to the pilot program approach. Additionally, the government will not recommend the appointment of a compliance monitor, so long as the company has an effective compliance program in place.[5]

Even companies that do not voluntarily disclose may still be eligible for some cooperation credit. In this instance, the DOJ will recommend up to a 25% reduction off the low end of the Federal Sentencing Guidelines' fine range.[6] This clearly underscores the government's view that corporate cooperation in an FCPA investigation is highly valued and encouraged.

The new policy reiterates that cooperation does not require the waiver of attorney-client or work product privilege, which have been topics of concern in the corporate community. The policy also does not change the Department's focus on holding individuals accountable for misconduct. However, the policy does require that companies who want to take advantage of the cooperation credit must disgorge profits related to the misconduct. Previously, a disgorgement demand was not mandatory. So although the new policy offers generous upside for cooperation, there can still be significant costs for a company.

The new policy sets forth appropriate remedial steps, which include:

- A thorough root cause analysis of the underlying conduct;
- Appropriate discipline of employees involved in the misconduct and/or their supervisors;
- Appropriate retention of business records, including prohibiting employees from using software that does not retain such communications (such as instant messaging); and
- Implementation of an effective compliance program.

Implications for the design and measurement of compliance programs

Companies have additional criteria to consider when assessing the effectiveness of their compliance programs. The criteria adopt the hallmarks of an effective compliance program articulated in the "Evaluation of Corporate Compliance Programs" memo released in February 2017. When these criteria were initially released, they were intended to

help assess whether a compliance program was risk-based and effective or merely a "paper" compliance program. Factoring these hallmarks in the DOJ's enforcement decision will likely change the way compliance programs are designed, implemented, and measured.

First, the importance of root cause analysis is viewed as essential to an effective compliance program. Based on this, companies will need to ensure that they have appropriate investigation procedures as well as strong investigation teams. Second, the enforcement policy places an emphasis on maintaining an ethical culture, "including an awareness among employees that any criminal conduct…will not be tolerated."[7] Companies should evaluate how they define, drive, and measure their cultures to meet these criteria. Third, the new enforcement policy makes clear that the quality of compliance personnel as well as their authority, independence, and resources will be important indicators of the effectiveness of the compliance program and management's support of it. The experience and independence of compliance personnel, as well as their compensation and reporting structure, may be subject to analysis in this evaluation. Having said that, the policy recognizes that compliance programs are not "one size fits all," and prosecutors are encouraged to consider the size of the company in evaluating whether the program is fit for purpose. As a result, companies may want to more regularly benchmark their compliance programs against peers.

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Conclusion

The DOJ's new enforcement policy is designed to encourage self-disclosure and endorses the value of cooperation, remediation, and maintaining an effective compliance program, even in the absence of voluntary disclosure. This is good news for the corporate community—including boards of directors and senior management—who lead ethically. By codifying the importance of key factors, such as root cause analysis, culture, and resourcing, to measure a compliance program's effectiveness, the government is supporting the normalization of Compliance 2.0. This is good news for the compliance and ethics community. ✳

1. Hui Chen's memo. Available at https://bit.ly/2lEphmk.
2. United States Sentencing Commission: "Chapter 8, Sentencing of Organizations" *2016 Guidelines Manual*. November 1, 2016. Available at https://bit.ly/2L36H18.
3. Matthew Stephenson: "Do Companies Benefit from Self-Disclosing FCPA Violations?" *The Global Anticorruption Blog*, March 27, 2014. Available at https://bit.ly/2KkwQY8.
4. Bruce Hinchey: "Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements" *Public Contract Law Journal*, 2011;40:293.
5. United States Department of Justice: "Section 9: 47.120, FCPA Corporate Enforcement Policy" *U.S. Attorneys' Manual*, November 2017. Available at https://bit.ly/2BaFRRX.
6. Idem
7. Idem