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The FCPA Pilot Program One Year Later

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Deputy Assistant Attorney General Kenneth A. Blanco on Jan. 20, 2017. *PHOTO: GETTY IMAGES*

(*This is a quarterly analysis of trends in anti-bribery enforcement by The Foreign Corrupt Practices Act Clearinghouse, a database operated by Stanford Law School. The views presented here are those of the author alone, not those of Dow Jones or the Wall Street Journal.*)

By KRISTEN SAVELLE

On March 10, 2017, Acting Assistant Attorney General Kenneth A. Blanco announced that the U.S. Department of Justice would temporarily extend a Foreign Corrupt Practices Act pilot program that was set to expire on April 5, 2017, while the DOJ evaluates the program's "utility and efficacy."

The pilot program was first announced on April 5, 2016, as a one-year initiative designed to "promote greater accountability for individuals and companies that engage in corporate crime" by increasing transparency around what is required of companies that seek mitigation credit from the government and the type of credit that companies can receive.

Eligibility for the full range of mitigation credit available under the program requires that companies voluntarily self-disclose FCPA-related misconduct, fully cooperate with the government's investigation, and, where appropriate, remediate flaws in their controls and compliance program.

Companies that satisfy all three requirements and agree to disgorge profits resulting from an FCPA violation are eligible for credit that ranges from a declination of prosecution to a maximum 50% reduction off the bottom end of the U.S. Sentencing Guidelines fine range and no appointment of an independent compliance monitor. Companies that fully cooperate and remediate but that do not voluntarily disclose their FCPA misconduct can receive a limited reduction of no more than 25% off the bottom of the Sentencing Guidelines fine range.

During the first year of the pilot program, the DOJ resolved FCPA claims that had been alleged against 18 entity groups. A list of those entity groups and the mitigating factors referenced in their respective resolutions is reproduced in Figure 1, which can be downloaded here. For purposes of this analysis, declinations and declinations with disgorgement that are attributed to the pilot program are counted as FCPA resolutions.

Of the 18 entity groups that resolved FCPA claims with the DOJ during the first year of the pilot program, seven (or 39%) voluntarily disclosed their FCPA-related misconduct to the government. Fourteen of the 18 entity groups (78%) cooperated in the government's FCPA investigation and four entity groups (22%) partially cooperated. Similarly, 14 of the 18 entity groups (78%) voluntarily remediated flaws in their internal controls and compliance policies, while four entity groups (22%) partially remediated those flaws.

The DOJ required nine of the 18 entity groups (50%) to retain an independent compliance monitor as a term of the settlement. None of the entity groups that was required to retain a monitor had voluntarily disclosed potential FCPA violations to the government.

Figure 2 illustrates the types of dispositions employed by the DOJ to resolve FCPA claims against entity groups that self-disclosed potential FCPA violations and entity groups that did not self-disclose violations.

Self-Disclosure Rewarded

Consistent with the terms of the pilot program, only companies that self-disclosed FCPA-related misconduct to the DOJ were permitted to resolve their claims through a declination or declination with disgorgement.

Non-prosecution agreements, on the other hand, were not subject to a voluntary disclosure requirement. Las Vegas Sands and J. P. Morgan Securities (Asia Pacific) Ltd. each settled FCPA claims through an NPA although neither company self-disclosed its FCPA violations to the government. Both companies did cooperate and undertake voluntary remedial measures.

Companies that voluntarily disclosed FCPA-related misconduct also received the largest penalty reductions. General Cable received a 50% discount off the bottom of the Sentencing Guidelines range and BK Medical ApS received a 30% reduction. Companies that did not self-report received reductions of between 15% and 25% off the bottom of the Sentencing Guidelines.

Foreign companies were implicated in 10 of the 18 entity groups prosecuted by the DOJ during the first year of the pilot program. Only one foreign company (which was a subsidiary of a U.S. company) received credit for voluntarily disclosing potential FCPA-related misconduct, compared to six domestic companies. Independent monitors were also imposed more frequently in resolutions involving foreign companies. Six foreign companies were required to retain an independent compliance monitor, compared to three domestic companies.

The resolutions reached during the pilot program's tenure shed additional light on the DOJ's policies around mitigation credit. Whether the government will retain those policies, revise them, or scrap them entirely remains an open question. At the very least, the DOJ's decision to temporarily extend the program provides a degree of transparency and consistency to companies that are considering whether to disclose potential FCPA violations.

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The Foreign Corrupt Practices Act Clearinghouse (FCPAC) is a free public database. The FCPAC was developed by researchers at Stanford Law School in collaboration with attorneys at Sullivan & Cromwell LLP. The database is available at http://fcpa.stanford.edu.

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