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Foreign Corrupt Practices Act

DOJ Launches FCPA Enforcement "Pilot Program"

SUMMARY

The U.S. Department of Justice ("DOJ") yesterday announced that its Criminal Division's Fraud Section would be implementing a "pilot program" designed to provide additional guidance for prosecutors investigating potential violations of the Foreign Corrupt Practices Act ("FCPA") and to motivate companies to disclose voluntarily potential misconduct, cooperate with the DOJ in its investigation, and take appropriate remedial steps with respect to the companies' anti-corruption compliance policies. The pilot program expands upon earlier DOJ guidance in describing what the DOJ considers to be necessary and complete voluntary self-disclosure, cooperation, and remediation. The announcement also lists the criteria that companies must satisfy to be eligible for fine reductions and other incentives, and quantifies certain of those incentives. The DOJ's announcement makes clear that the pilot program and accompanying guidance expand on and clarify, rather than modify or supplant, existing principles of prosecution, including the Principles of Federal Prosecution of Business Organizations articulated in the United States Attorneys' Manual and in previous publicly released memoranda from the DOJ, including the so-called "Yates Memo" regarding liability of individuals, which was issued in September 2015.

DISCUSSION

The "pilot program" announcement sets out a number of requirements.

First, to receive credit for voluntary disclosure, a company's disclosure must be both timely and complete. A disclosure will be considered timely only if it is made "prior to an imminent threat of disclosure or government investigation, as well as reasonably promptly after the company becomes aware of the potential offense," and will be deemed voluntary only if disclosure was not otherwise required by law or agreement. In addition, a company will receive credit for voluntary disclosure only if the company

provides "all relevant facts known to it," including all relevant facts regarding the individuals involved in the potential violation.

Second, full cooperation credit will be available only if the company satisfies a number of factors: (1) "proactive," rather than "reactive," cooperation; (2) provision of all facts relevant not only to possible wrongdoing by individuals affiliated with the company but also possible wrongdoing by third-party companies and individuals; (3) coordination of the company's internal investigation with the government investigation, as requested, and timely factual updates regarding the investigation; (4) provision where possible of available officers and employees for interviews – including former officers and employees and those located overseas; (5) preservation and production of documents, including the identification of documents located overseas and facilitation of third-party production of documents from foreign jurisdictions; and (6) provision of translations of relevant documents in foreign languages. Companies will be eligible for partial cooperation credit if they satisfy some, but not all, of the listed requirements, although this partial credit will be "markedly less" than full cooperation credit. The announcement reiterates prior DOJ statements that a company's eligibility for cooperation credit does not require waiver of the attorney-client privilege or work product protection. The announcement directs the Fraud Section to "assess the scope, quantity, quality and timing of the cooperation based on the circumstances of each case." For example, the DOJ does not expect that companies of different sizes and profitability necessarily will conduct investigations of the same scope and speed. In addition, the announcement states that the DOJ does not expect "a company to investigate matters unrelated in time or subject matter" in order to qualify for full cooperation credit. Instead, the DOJ requires "[a]n appropriately tailored investigation," but notes that the company may "for its own business reasons seek to conduct a broader investigation." Thus, the DOJ indicates that, "absent facts to suggest a more widespread problem, evidence of criminality in one country" will not alone "lead to an expectation that the investigation would need to extend to other countries."

Third, to receive credit for remediation under the pilot program, a company must implement an effective compliance program. The DOJ's evaluation of a compliance program will examine "whether the company has established a culture of compliance," "the independence of the compliance function," and "how a company's compliance personnel are compensated and promoted compared to other employees." In addition to an effective compliance program, the DOJ will consider the extent to which the company has appropriately disciplined employees involved in the misconduct and taken additional remedial steps, such as acceptance of responsibility by the company and the implementation of "measures to identify future risks." The announcement also notes that a company will not be eligible for remediation credit if it has not satisfied the requirements for cooperation credit.

The announcement states that a company that satisfies the requirements for voluntary disclosure, cooperation, and remediation will receive a discount of up to 50% off the bottom of the fine range indicated by the U.S. Sentencing Guidelines. The DOJ will also not require an independent compliance

monitor if the company has put in place at the time of the resolution a compliance program the DOJ considers effective. The DOJ also will consider declining to prosecute in appropriate cases where the disclosure, cooperation, and remediation requirements all are met. The announcement notes, however, that in considering whether a declination would be warranted, the DOJ will take into account "countervailing interests," such as the seriousness of the conduct, any involvement by the company's executive management, the extent of any profit to the company from the activities, and the company's compliance history. A company that does not voluntarily disclose, but does cooperate consistently with the DOJ's standards, can expect no more than a 25% reduction from the Sentencing Guidelines fine range.

The pilot program is scheduled to last for one year, following which the DOJ's Fraud Section will determine whether to extend or modify the program. The pilot program applies to companies that voluntarily disclose or cooperate in FCPA matters during the pilot program period, even if the pilot program ends before the matter is resolved. The announcement also explicitly states that the program applies only to FCPA actions, and not to fraud actions more generally.

The DOJ also noted that the Fraud Section is "substantially increasing its FCPA law enforcement resources," including by increasing its FCPA enforcement personnel by more than 50% with ten new prosecutors and three additional squads of FBI special agents. In addition, the DOJ announced that it is continuing to strengthen its ties and cooperation with enforcement authorities around the world and noted several recent enforcement actions that had benefited from international cooperation.

IMPLICATIONS

Although the DOJ previously has made clear in published guidance that it expects and takes into account in its enforcement determinations in FCPA matters timely and voluntary disclosure, cooperation, and remedial actions, yesterday's announcement marks the first time that the DOJ has set forth each of the specific requirements and criteria that a company must satisfy to be eligible to receive credit. It is also the first time the DOJ has quantified the potential reduction a company might receive for satisfying the specified criteria. The framework set out in the announcement therefore provides a useful roadmap for companies seeking credit in connection with the resolution of FCPA-related misconduct, but also sets a high bar for receiving such credit and makes clear that eligibility for full credit requires satisfaction of *all* of the criteria set out in the announcement. The new announcement represents perhaps the strongest statement yet by the DOJ as to the importance of self-reporting.

The announcement also appears to reflect an effort on the part of the DOJ to respond to criticisms about the scope and costs of company investigations of FCPA matters and uncertainty concerning whether voluntary disclosure, cooperation, and remediation offer tangible, quantifiable benefits to settling companies.

It remains to be seen how the new framework will play out in practice, but yesterday's announcement, coupled with September's Yates Memo and the announcement of the DOJ's expansion of its FCPA enforcement resources, reaffirms both that the DOJ remains as committed as ever to robust enforcement of the FCPA and that the DOJ expects much from companies seeking leniency for cooperation.

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