

Evaluating FCPA Pilot Program: Lessons And Expectations

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On April 5, 2016, the U.S. Department of Justice released a nine-page memorandum launching a one-year pilot program to reward companies that voluntarily self-report violations of the Foreign Corrupt Practices Act.

*Now that a year has passed and the DOJ is reviewing the results (the program continues during this process), Law360 is publishing a series of guest articles examining the impact and potential future of the FCPA pilot program. This **Expert Analysis** series includes commentary from attorneys who worked on cases in which declinations were issued under the program.*

In April 2016, the U.S. Department of Justice's Fraud Section introduced the "Foreign Corrupt Practices Act Enforcement Plan and Guidance,"[1] which included a one-year pilot program meant to encourage companies to voluntarily disclose, fully cooperate with DOJ investigations of, and demonstrably remediate, FCPA violations in exchange for cooperation credit, a reduction in financial penalties under the sentencing guidelines, and more lenient charges or even a declination.

Through the rest of 2016, the Justice Department settled many cases under the principles of the pilot program,[2] offering substantial discounts off the bottom of the sentencing guidelines range, and in some cases declining to prosecute altogether. In so doing, the DOJ also further defined what full cooperation and remediation looks like, refusing to provide full credit in instances in which companies failed to live up to its standards.

Last month, the acting assistant attorney general for the DOJ's Criminal Division, Kenneth Blanco, said the program would temporarily stay in place past its April 5 sunset date, during which time the department would consider the program's record and whether and how it might be revised.

One year has now officially passed, and time has come to take stock of the pilot program. So how has it done?

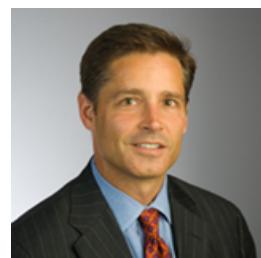
The Pilot Program's Goals

In the 2016 guidance, the DOJ explained that the principal goal of the pilot program was "to promote greater accountability for individuals and companies," through:

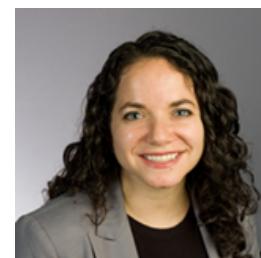
- "serv[ing] to further deter individuals and companies from engaging in FCPA violations in the first place";
- "encourag[ing] companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations"; and



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- “increas[ing] the Fraud Section’s ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.”[3]

Under the pilot program, an organization that voluntarily discloses, fully cooperates, and timely and appropriately remediates may obtain a reduction of up to 50 percent off the bottom end of the sentencing guidelines fine range and may potentially avoid a monitor or, if the company additionally disgorges all ill-gotten gains, receive a declination of prosecution. Some aspects of the pilot program are non-negotiable; credit is only available if a company meets the mandates in the guidance, including reporting relevant facts about the individuals involved in the wrongdoing, one of the key components of DOJ’s 2015 Yates memorandum.[4]

Notable Settlements

Even before the introduction of the pilot program, the DOJ often declined nonpublicly to prosecute companies that may have violated the FCPA, and also provided substantial discounts off the calculated sentencing guidelines fine range in corporate FCPA settlements where companies cooperated and remediated, and in some cases voluntarily disclosed. Under the program principles, the results have varied greatly, depending on the level of cooperation and remediation, and whether or not the conduct was voluntarily disclosed.

On one end of the spectrum, the Justice Department cited the pilot program in issuing five declinations in the last year and began a new practice of publicly releasing declination letters sent to companies that had been the targets of FCPA investigations. In three letters issued in the summer of 2016, the DOJ declined to prosecute Nortek Inc., Akamai Technologies Inc. and Johnson Controls Inc. for conduct by their subsidiaries’ employees in China, citing their “fulsome cooperation” and voluntary disclosure, including the identification of all individuals involved in the misconduct.[5] As a result, the companies did not pay criminal fines, but did disgorge related profits to the U.S. Securities and Exchange Commission.

In two additional letters issued in September 2016, the DOJ declined to pursue charges against NCH Corporation and HMT LLC, again citing the factors outlined under the pilot program, including the companies’ “full cooperation.”[6] However, unlike the three prior declinations under the program, which all had a concomitant SEC resolution and disgorgement, NCH Corp. and HMT LLC — companies that are not issuers subject to SEC jurisdiction — were required to disgorge to the DOJ all profits related to improper payments. Under the pilot program, the payment of disgorgement counts as a factor in the DOJ’s declination decisions, and this new form of declination with both disgorgement and a lengthier description of alleged conduct, while still superior to an NPA or DPA, is a harsher result than prior declinations.

In the middle of the spectrum, General Cable Corporation received a fine 50 percent below the bottom of the guidelines range and successfully avoided a compliance monitor. General Cable received full credit (although not a declination) under the program for voluntary self-disclosure, full cooperation and extensive remedial measures, including terminating involved employees and business relationships with third parties.[7]

On the other end of the spectrum, at least one company received a fine above the bottom of the guidelines range, and others only received discounts of 15 or 20 percent below the range. In reaching those resolutions, the DOJ determined that, in its view, there had been factors such as no timely voluntary disclosure or only partial cooperation or inadequate remediation.[8]

These resolutions raise a number of unanswered questions. First, while both the guidance and the publicly issued letters have increased the transparency around the factors the department considers in deciding to decline prosecution, it is unclear that the pilot program has increased the number of declinations. While there was an uptick from the number of publicly announced declinations issued in 2015 to 2016, the increase is commensurate on a percentage basis with the overall increase in resolutions in 2016. Second, despite increased transparency around the reasons why the department may decline in certain instances, the bases and standards for disgorgement in this new type of declination action remain unclear. Third, although the department is articulating its bases in more detail under the program, it is still impossible to tell why one cooperating company might receive a 15 percent discount and another cooperating company might receive a 20 percent discount. And, perhaps more importantly, the publicly resolved cases do not provide clear indications as to why one company might receive a penalty discount but another company might receive a declination of prosecution, which is of course a far more favorable result.

Greater Definition of Disclosure, Compliance and Remediation

Though the ultimate impact the pilot program may have on corporate behavior is still unclear, the program has provided a basis by which companies can measure the likely outcome of an FCPA investigation:

What “Voluntary Disclosure” Really Means

The DOJ’s pilot program guidance specifies that a company will only receive credit for disclosure if it occurs “prior to an imminent threat of disclosure or government investigation,” “within a reasonably prompt time after becoming aware of the offense,” and includes all relevant facts, including those about individuals involved in any FCPA violation. The disclosure must be truly voluntary and not required by law or contract. The guidance states that without voluntary self-disclosure, a company can only receive up to 25 percent off the bottom of the guidelines fine range (as compared to 50 percent with disclosure).

As a result, it has become easier for companies to predict what type of credit they will receive for a voluntary disclosure, and where the DOJ might push back on arguments that disclosure was truly voluntary. Complete voluntarily disclosure has been a prerequisite for receiving a declination under the program, though some companies were able to secure NPAs in instances where they voluntarily disclosed (General Cable; BK Medical ApS).[9] in instances where the department viewed the voluntary disclosure as incomplete (PTC).[10] and in instances where they did not voluntarily disclose at all (JPMorgan).[11]

A company's decision to disclose or not may still be difficult, especially where the underlying facts are unclear. The wise course may be to undertake an internal investigation and self-remediate, rather than placing the company's faith in the DOJ and hope to be granted credit for voluntary disclosure and cooperation. Anecdotally, former Criminal Division Chief Leslie Caldwell said the pilot program was having an effect and that the DOJ had seen an uptick in the number of companies voluntarily disclosing potential FCPA violations.[12] When Lennox International reported in October 2016 a potential improper payment of a mere \$475 to a Russian government official, commentators suggested it was an example of the influence the pilot program has had.[13]

Why Companies Do or Do Not Receive Cooperation Credit

The pilot program guidance also delineates what is required for a company to receive full cooperation credit. In general, the requirements for cooperation focus on (1) proactively disclosing all relevant facts; (2) preserving and disclosing documents; (3) making individuals available for interviews; and (4) conducting transparent and timely internal investigations.

Between the guidance and the DOJ resolutions in the last year, certain pitfalls have also emerged. Teva Pharmaceuticals lost cooperation credit because, according to the DOJ, it made vastly overbroad assertions of privilege and failed to produce documents on a timely basis. BK Medical and PTC failed, in the department's view, to proactively disclose certain relevant facts. Och-Ziff Capital Management Group LLC, according to the DOJ, failed to produce certain relevant documents. By contrast, companies that received significant credit were praised for providing the government with timely productions that did not implicate foreign data privacy laws (JPMorgan, General Cable), translating documents (Olympus), and facilitating travel of overseas employees for interviews (JPMorgan).

The Increasing Expectations for Compliance Programs

At the core of the DOJ's remediation credit is an effective corporate compliance program. In November 2015, the DOJ hired its first full-time compliance expert, who was tasked with helping to develop benchmarks for evaluating corporate compliance and remediation measures. When the pilot program was announced, the guidance included a brief list of attributes an effective compliance and ethics program should include. In February 2017, the Fraud Section released a more comprehensive "Evaluation of Corporate Compliance Programs," which lists questions the Fraud Section considers in making individualized determinations about the adequacy of a company's program. While the document did not break substantially new ground, it serves as a useful compendium of previous guidance in the U.S. Attorney's Manual, FCPA guide, sentencing guidelines and best practices as recognized by individual settlements.

The Importance of Personnel Remediation

Notwithstanding the small number of individual criminal FCPA enforcement actions in the past year, the DOJ is incentivizing companies to hold senior officials accountable as part of corporate remediation. The emphasis on personnel remediation reflects language in the U.S. Attorney's Manual about a corporation's willingness to discipline

wrongdoers.[14] The department expects companies to discipline those who either knew or should have known about employee misconduct resulting in FCPA violations. For example, in the Embraer SA case, the DOJ withheld remediation credit because, according to the DOJ, the company failed to discipline one senior executive who likely knew or should have known about the ongoing bribery scheme. By contrast, JPMorgan received credit for its extensive disciplinary actions.

What We Can Expect Going Forward

Conventional wisdom suggests that the Justice Department will retain many elements of the pilot program after it finishes its evaluation, and that the principles it outlined over the past year will continue to guide the department's work. Nonetheless, some changes can be expected, and some uncertainty may remain.

The Program May Be Further Clarified in Forthcoming Guidance From DOJ

Given the positive reception recent guidance documents have received in the legal community, we expect that the department may further its efforts to clarify the pilot program. As elements of the program become more permanent fixtures, the department may provide additional, permanent guidance about what constitutes full disclosure, full cooperation and full remediation, and how companies and individuals can earn credit or even declinations.

Basis for and Future of Disgorgement Element of Pilot Program Remains Unclear

Perhaps the most innovative component of the program is the use of disgorgement in connection with declinations. Historically, the DOJ's primary mechanism for disgorging ill-gotten gains has been civil or criminal forfeiture, which statutorily requires a filed charge or complaint. Because there is no court-filed document associated with a declination, the legal basis for the DOJ to nevertheless collect disgorged profits remains murky. Additionally, the U.S. Supreme Court, in Kokesh v. SEC, is set to rule on a circuit split as to whether disgorgement is subject to a five-year statute of limitations.[15] The case hinges on whether disgorgement is considered a "punitive" or "nonpunitive" remedy. The Justice Department may offer more clarity on its position on disgorgement after a ruling in Kokesh, but given that the pilot program revolves around discretionary factors used by the DOJ, the DOJ could potentially require the payment of all profits, regardless of timing, in order for a company to obtain a declination, even if the DOJ could not seek the same amount of profits in a litigated case.

Continued Crackdown on "Paper" Compliance Programs

As the DOJ extends the contract of its compliance expert and continues to hone and escalate the requirements of an effective compliance program through the pilot program and other guidance, we expect that the department will remain vigilant in criticizing "paper" compliance programs and encouraging the development of comprehensive and effective ones.

Continued Rise of Criminal Internal Controls Cases and the Return of the Monitor

While the DOJ faces a high burden of proving beyond a reasonable doubt that an issuer knowingly failed to devise or maintain an adequate system of internal controls, 2016 saw a remarkable increase in the department's use of the criminal FCPA internal controls charge. Embraer, LATAM Airlines Group, Teva, Odebrecht SA/BraskemSA, General Cable and Och-Ziff all resolved criminal internal controls cases and all but General Cable accepted monitors in connection with their resolutions. This trend has continued into 2017, with internal controls charges in resolutions with Las Vegas Sands Corp., SQM and Zimmer Biomet.

Conclusion

The DOJ's pilot program appears to have proven effective in encouraging self-disclosure, cooperation and remediation in exchange for leniency at sentencing and flexibility in charging decisions. While we have entered a new administration with new leadership in the enforcement bodies, and thus do not know if priorities or policies may change, it appears that the pilot program's principles are likely to continue to guide the DOJ in its approach to corporate resolutions, and we expect the department to offer further guidance as it makes certain components permanent fixtures of its anti-bribery enforcement regime.

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DISCLOSURE: Jay Holtmeier and Erin Sloane represented Johnson Controls in the matter mentioned above.

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[1] US Department of Justice Criminal Division, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), <https://www.justice.gov/criminal-fraud/file/838416/download>; WilmerHale, DOJ Launches FCPA Pilot Program to Encourage Corporate Voluntary Disclosure and Cooperation (Apr. 8, 2016), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179881469>.

[2] Because the Pilot Program technically applied only to investigations commenced after the adoption of the Program, the DOJ's settlements thus far have applied the principles of the Program even though the Program itself was not applicable to those cases.

[3] US Department of Justice Criminal Division, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), <https://www.justice.gov/criminal-fraud/file/838416/download>.

[4] Sally Quillian Yates, Former Deputy Attorney General, US Department of Justice, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download>.

[5] US Department of Justice Letter from Daniel Kahn to Luke Cadigan, Esq. re: Nortek Inc. (June 3, 2016), <https://www.justice.gov/criminal-fraud/file/865406/download>; US Department of Justice Letter from Daniel Kahn to Josh Levy, Esq. and Ryan Rohlfson, Esq. re: Akamai Technologies, Inc. (June 6, 2016), <https://www.justice.gov/criminal-fraud/file/865411/download>; US Department of Justice Letter from Daniel Kahn to Jay Holtmeier, Esq. and Erin Sloane, Esq., re: Johnson Controls, Inc. (June 21, 2016), <https://www.justice.gov/criminal-fraud/file/874566/download>.

[6] US Department of Justice Letter from Daniel Kahn to Paul Coggins, Esq. and Kiprian Mendrygal, Esq. re: NCH Corporation, at 1 (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899121/download>; US Department of Justice Letter from Daniel Kahn to Steve Tyrell, Esq. re: HMT LLC, at 2 (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899116/download>.

[7] Non-Prosecution Agreement between US Department of Justice and General Cable Corporation (Dec. 22, 2016), <https://www.justice.gov/criminal-fraud/file/921801/download>.

[8] Deferred Prosecution Agreement, United States v. LATAM Airlines Group, S.A., No. 16-CR-60195, (S.D. Fla. July 25, 2016); Order Instituting Cease-and-Desist Proceedings, In the Matter of LAN Airlines S.A., Rel. No. 78402, File No. 3-17357, (July 25, 2016); Deferred Prosecution Agreement, United States v. Olympus Latin America, Inc., No. 16-CR-3525, (D.N.J. Mar. 1, 2016); Plea Agreement, United States v. Odebrecht S.A., Cr. No. 16-643 (RJD) (E.D.N.Y. Dec. 21, 2016); Deferred Prosecution Agreement, United States v. Och-Ziff Capital Management Group LLC, No. 16-CR-516 (E.D.N.Y. Sept. 29, 2016); Plea Agreement, United States v. OZ Africa Management GP, LLC, No. 16-CR-515 (E.D.N.Y. Sept. 29, 2016).

[9] Non-Prosecution Agreement between US Department of Justice and BK Medical ApS (June 21, 2016), <https://www.justice.gov/opa/file/868771/download>.

[10] Non-Prosecution Agreement between US Department of Justice and PTC Inc. (Feb. 16, 2016), <https://www.justice.gov/criminal-fraud/file/825576/download>.

[11] Non-Prosecution Agreement Between US Department of Justice and JPMorgan Securities (Asia Pacific) (Nov. 17, 2016), <https://www.justice.gov/opa/press-release/file/911206/download>.

[12] Leslie Caldwell, Assistant Attorney General, US Department of Justice, Remarks Highlighting Foreign Corrupt Practices Act Enforcement at The George Washington University Law School (Nov. 3, 2016),
[https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-highlighting-foreign.](https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-highlighting-foreign)

[13] Richard L. Cassin, Lennox International Discloses Alleged \$475 Russia Bribe, FCPA BLOG (Oct. 19, 2016, 8:18 AM), <http://www.fcpablog.com/blog/2016/10/19/lennox-international-discloses-alleged-425-no-zeroes-russia.html>; Dylan Tokar, Alleged \$475 Bribe Sparks Self-Report to US Authorities, GLOBAL INVESTIGATIONS REVIEW (Oct. 19, 2016), <http://globalinvestigationsreview.com/article/1104002/lennox%E2%80%99s-internal-fcpa-probe-spreads-to-poland>.

[14] USAM 9-28.1000

[15] Kokesh v. SEC, No. 16-529, 2017 WL 125673 (U.S. Jan. 13, 2017); circuit split with SEC v. Graham, 823 F.3d 1357 (11th Cir. 2016).