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DOJ Launches FCPA Pilot Program to Encourage Corporate Voluntary Disclosure and Cooperation

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On April 5, 2016, the Fraud Section of the Department of Justice's (DOJ) Criminal Division issued an enforcement plan and guidance (the Guidance) laying out three steps it is taking to intensify Foreign Corrupt Practices Act (FCPA) enforcement, including: (1) increasing FCPA law enforcement resources; (2) continuing to strengthen coordination with foreign law enforcement officials; and (3) implementing a one-year pilot program that rewards companies for voluntary disclosure and cooperation, including up to a 50% reduction off of the low end of the applicable U.S. Sentencing Guidelines fine range and, in certain circumstances, declination. While all of these enhancements are in keeping with statements by U.S. enforcement officials and trends in FCPA settlements over the last few years, this is the first time that the Fraud Section has provided a written framework detailing fine reductions and other incentives to encourage voluntary disclosure, cooperation and remediation.

In a statement issued the same day, Assistant Attorney General Leslie Caldwell said the pilot program is designed to motivate companies to voluntarily self-disclose and cooperate by providing greater transparency from the DOJ about the outcome of those decisions. Caldwell explained "transparency informs companies what conduct will result in what penalties and what sort of credit they can receive for self-disclosure and cooperation with an investigation. This in turn, enables companies to make more rational decisions when they learn of foreign corrupt activity by their agents and employees."

The pilot program is effective for one year as of April 5, 2016, and applies to all FCPA matters handled by the Fraud Section in which an organization either voluntarily self-disclosed or cooperated in an FCPA matter during the pilot program period. At the end of the one year period, the Fraud Section will determine whether the Guidance will be extended and whether it should be modified in light of the pilot experience.

This alert discusses the key elements of the new program and offers some observations regarding practical consequences and considerations for companies thinking about taking advantage of the program.

The Pros and Cons of Self-Disclosure, Cooperation and Remediation Under the Pilot Program

Taking a carrot and stick approach, the pilot program details the potential credit organizations can receive for voluntarily disclosing potential FCPA violations as well as the consequences of failing to do so. More specifically, the benefits to an organization that voluntarily discloses, fully cooperates, and timely and appropriately remediates may include: (1) up to a 50% reduction off the bottom end of the Sentencing Guidelines fines range if a fine is sought, (2) no appointment of a monitor if the company has an effective compliance program at the time of resolution, or (3) a declination of prosecution.

While the Guidance notes that companies are not required to self-disclose, Caldwell's April 5th statement warns, “[i]f a company opts not to self-disclose, it should do so understanding that in any eventual investigation that decision will result in a significantly different outcome than if a company had voluntarily disclosed the conduct to us and cooperated in our investigation.” According to the Guidance, however, if a company fails to voluntarily disclose, it may still receive some credit if it later fully cooperates and timely and appropriately remediates. In such cases, the Fraud Section's FCPA Unit may apply up to a 25% reduction off the bottom of the Sentencing Guidelines fine range.

Declinations Under the Pilot Program

One of the key incentives built into the pilot program is the possibility of a declination; unlike a non-prosecution agreement, declinations typically do not involve admissions of criminal conduct or a statement of facts. Indeed, with the notable exception of Morgan Stanley, there has historically been little publicly available information about the circumstances and bases for the DOJ's decisions to decline prosecution of companies who may have violated the FCPA. The pilot program appears to address this information gap by providing more transparency around what goes into the DOJ's analysis.

In considering whether a declination may be warranted in cases where a company has met all the requirements for full credit, the Guidance states that the Fraud Section prosecutors must also take into account countervailing interests, including the seriousness of the offense. Examples of countervailing interests that the Guidance states would likely warrant a criminal resolution include: (1) whether there has been involvement by executive management of the company in the FCPA misconduct, (2) a significant profit to the company from the misconduct in relation to the company's size and wealth, (3) a history of non-compliance by the company, or (4) a prior resolution by the company with the DOJ within the past five years.

Meeting the Criteria for Full or Partial Credit

As a threshold matter, the Guidance states that mitigation credit will be available only if a company meets the mandates set out in the Guidance, including the disclosure of all relevant facts about the individuals involved in the wrongdoing, a direct reference to the requirements set out in the Yates Memorandum. In addition, to be eligible for such credit, even a company that voluntarily self-discloses, fully cooperates and remediates will be required to disgorge all profits resulting from the misconduct.

The Guidance also makes it clear that to receive credit under the pilot program, the standards to qualify for having voluntarily disclosed, fully cooperated, and timely and appropriately remediated "are more exacting than those required under the Sentencing Guidelines." Those standards are detailed in the Guidance as follows:

1. **Voluntary Self-Disclosure**

The Guidance states that in evaluating self-disclosure during the pilot program, the Fraud Section will make a careful assessment of the circumstances of the disclosure. As such, the Guidance instructs prosecutors to require the following for a company to receive credit for voluntary self-disclosure (beyond the credit available under the Sentencing Guidelines):

- the disclosure was not already required to be made: a disclosure that a company is required to make, by law, agreement or contract, does not constitute voluntary self-disclosure for purposes of the pilot program;

- the voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation;"

- the company discloses the conduct to the DOJ "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and

- the company discloses all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.

Questions as to whether a disclosure was truly voluntary often arise. For example, a company may have reason to believe, but is not sure, that the government may learn of misconduct, or the threat of disclosure to the government is not "imminent." The voluntary nature of a self-disclosure may also be at issue if the company is involved in a pending investigation and voluntarily discloses conduct unrelated to the conduct under investigation. Those questions will continue to arise under the pilot program, and the answer (which is subject to the discretion of the DOJ) could result in a 25% difference in the financial penalty.

1. **Full Cooperation**

In addition to the Principles of Federal Prosecution of Business Organizations (the USAM Principles), which require companies to identify all individuals involved in or responsible for the misconduct at issue and provide all facts relating to that misconduct, the Guidance requires the following for a company to receive credit for full cooperation (beyond the credit available under the Sentencing Guidelines):

- disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the corporation's officers, employees or agents;

- proactive cooperation, rather than reactive; that is, the company must disclose facts that are relevant to the investigation, even when not specifically asked to do so, and must identify opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government;

- preservation, collection and disclosure of relevant documents and information relating to their provenance;

- provision of timely updates on a company's internal investigation, including but not limited to rolling disclosures of information;

- where requested, de-confliction of an internal investigation with the government investigation;

- provision of all facts relevant to potential criminal conduct by all third-party companies (including their officers or employees) and third-party individuals;

- upon request, making available for DOJ interviews company officers and employees who possess relevant information; this includes, where appropriate and possible, officers and employees located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights);

- disclosure of all relevant facts gathered during a company's independent investigation, including attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts;

- disclosure of overseas documents, the location in which such documents were found, and who found the documents (except where such disclosure is impossible due to foreign law, including but not limited to foreign data privacy laws);

- unless legally prohibited, facilitation of the third-party production of documents and witnesses from foreign jurisdictions; and

- where requested and appropriate, provision of translations of relevant documents in foreign languages.

In addition, in assessing cooperation, the Guidance notes that “cooperation comes in many forms,” and instructs the Fraud Section to assess the scope, quantity, quality and timing of cooperation on a case-by-case basis, keeping in mind the size and sophistication of the company. The Guidance states that “[a]n appropriately tailored investigation is what typically should be required to receive full cooperation credit,” and notes that investigation of matters unrelated in time or subject matter generally need not be done in order to receive credit, although companies may choose to review

such conduct for business reasons. The Guidance encourages companies to consult the Fraud Section should they need clarification as to whether the scope of an investigation is appropriately tailored.

While the cooperation factors in the Guidance are helpful (although not particularly new), issues in this area will continue to be challenging for companies. Any complex investigation will involve judgments as to how much investigating to do, what evidence is relevant to disclose, and other factors. Companies cooperating in good faith may make determinations that are different from what prosecutors may ask for or expect. If those choices, or even inadvertent, good faith misses, result in the loss of credit, or, perhaps more importantly, in public pronouncements that negatively comment on a company's cooperation efforts, the DOJ's efforts at transparency in the pilot program may backfire in terms of encouraging companies to voluntarily disclose and subject themselves to a government investigation.

1. **Timely and Appropriate Remediation**

As a threshold matter, the Guidance states that a company's remediation efforts will only be assessed under the pilot program if the Fraud Section finds that the company is eligible for cooperation credit. The Guidance explains, “a company cannot fail to cooperate and then expect to receive credit for remediation despite that lack of cooperation.” Recognizing that remediation is “difficult to ascertain and highly case specific,” the Guidance states that the following items generally will be required for a company to receive credit for timely and appropriate remediation (beyond the credit available under the Sentencing Guidelines):

- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but will include:
    - whether the company has established a culture of compliance, including an awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
    - whether the company dedicates sufficient resources to the compliance function;
    - the quality and experience of the compliance personnel such that they can understand and identify the transactions identified as posing a potential risk;
    - the independence of the compliance function;
    - whether the company has performed an effective risk assessment and tailored its compliance program based on that assessment;
    - how a company's compliance personnel are compensated and promoted compared to other employees;

- the auditing of the compliance program to assure its effectiveness; and
- the reporting structure of compliance personnel within the company.

- Appropriate discipline of employees, including those identified by the corporation as responsible for the misconduct, and a system that provides for the possibility of disciplining others with oversight of the responsible individuals, and considers how compensation is affected by both disciplinary infractions and failure to supervise adequately; and

- Any additional steps that demonstrate recognition of the seriousness of the corporation's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

Disgorgement

As noted above, the Guidance states that a company that self-discloses, cooperates and remediates must also "disgorge all profits from the FCPA misconduct at issue" in order to receive any mitigation credit under the pilot program. While seemingly straightforward, this requirement raises a number of issues and complications. In FCPA cases involving issuers, FCPA resolutions often involve settlements with the Securities and Exchange Commission (SEC) in addition to the DOJ, and SEC settlements usually have disgorgement as a component of the financial resolution. Although not stated in the Guidance, presumably disgorgement paid to the SEC would count for this purpose. It is not clear how this will be handled by the DOJ in cases where there is no SEC settlement (or there is an SEC settlement that contains only a civil penalty but no disgorgement) or where the DOJ and SEC might have different views as to the amount of profits subject to disgorgement.

The Guidance is also silent on how disgorgement interplays with a criminal fine. In the context of a deferred prosecution agreement or a non-prosecution agreement, the DOJ financial penalty is generally set based on a calculation of a criminal fine under the U.S. Sentencing Guidelines. That calculation includes a profits-related component, but it is ultimately a criminal fine based on a variety of factors (including the mitigation credit, if any, afforded by the pilot program) that may or may not be similar to the amount of profits when the calculation is completed. It is unclear whether the DOJ would expect disgorgement separate and apart from the criminal fine. Moreover, where the DOJ concludes that a declination is appropriate, it is unclear what legal mechanism would be used to compel the disgorgement, and it is unclear to whom the disgorgement would be paid. Such issues could dramatically impact the amount of a company's financial payment at the end of an investigation.

Conclusion

The pilot program appears to be another effort by the DOJ to answer calls for greater transparency in terms of the credit companies can obtain through voluntary disclosure and cooperation. Like

other public pronouncements by law enforcement, its effectiveness will depend on how it is implemented in practice. The Guidance gives the DOJ substantial flexibility, with significant discretion afforded to the DOJ in considering each of the relevant factors. In comparison to the substantial costs and risks of making a voluntary disclosure, it is not clear that the benefits of the program (which may not be any greater than some companies have already received in prior cases) will outweigh those costs and risks. The ability of the public to make an assessment of the program's effectiveness may depend on how many cases are brought (or declined) under the program in the next year, and the message the DOJ sends in those cases.

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