

# Client Alert.

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## FCPA: DOJ May Be Listening, But It Is Not Changing Its Approach

By Paul T. Friedman, Ruti Smithline, and Angela E. Kleine

As we wrote in our November 19, 2010 FCPA Client Alert, Assistant Attorney General Lanny Breuer, Criminal Division, Department of Justice, recently acknowledged that “some practitioners and others would like to see, in the FCPA area, an amnesty program similar to the one that exists in the realm of antitrust.”<sup>1</sup> In a hotel ballroom filled with FCPA defense attorneys and in-house counsel, Mr. Breuer stated that “we listen to considered suggestions of this kind.” But on November 30, 2010, in front of the Senate Judiciary Committee’s Subcommittee on Crime and Drugs, Acting Deputy Assistant Attorney General Greg Andres rejected the possibility of an amnesty program for FCPA cases.

Although seemingly inconsistent with Mr. Breuer’s suggestion that DOJ was willing to consider an amnesty program, Mr. Andres’s remarks at the Senate Hearing reinforced Mr. Breuer’s basic theme: *the DOJ’s aggressive enforcement of the FCPA is here to stay irrespective of extensive criticism.*

For months, critics of the recent approach to FCPA enforcement have urged regulators to adopt a leniency program modeled after one effectively used by DOJ’s Antitrust Division. Under the Antitrust Division’s Corporate Leniency Program, the first member of a price-fixing cartel that self-reports the violation—and agrees to cooperate fully with the government—can receive a free pass. The government’s rationale for granting amnesty is that, without a member of the cartel coming forward, it may be difficult or impossible for the government to discover and prosecute the illegal conduct.

Similarly in the FCPA context, advocates of a leniency program argue that, in the absence of self-disclosure, the government is not as likely to discover the FCPA violation.<sup>2</sup> International bribery investigations are lengthy and expensive, and the government has limited resources. The government often relies on companies to conduct their own internal investigations and report their findings. Critics of the government’s aggressive FCPA enforcement argue that companies should get amnesty, or the very least leniency, for self-reporting violations that regulators are otherwise unlikely to find.

Advocates of an FCPA amnesty program also point to the detrimental effects an FCPA conviction can have on a company, including debarment from federal programs.<sup>3</sup> By rewarding self-disclosure and cooperation, companies could be spared potentially devastating outcomes while still remediating and addressing the improper conduct. And, giving the company amnesty would not prevent the government from pursuing the individuals who perpetuated the illegal conduct.

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<sup>1</sup> Please see our Client Alert from November 19, 2010, available at <http://www.mofo.com/files/Uploads/Images/101118-FCPA-Enforcement.pdf>. A transcript of the speech is available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

<sup>2</sup> See transcript from October 27, 2010 Legal Reform Summit, sponsored by U.S. Chamber of Commerce.

<sup>3</sup> See Testimony of Michael Volkov before the Subcommittee on Crime and Drugs, Committee on the Judiciary, United States Senate, November 30, 2010, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4869>.

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Moreover, as one critic pointed out, an amnesty program would be a significant improvement to FCPA enforcement that regulators could implement quickly and without protracted legislative action. “[The Justice Department] could do it tomorrow” by making a new policy.<sup>4</sup>

Despite the advocacy for an amnesty program, Mr. Andres made clear that DOJ is not interested in making changes to its current enforcement practices. Mr. Andres stated that DOJ does not believe “that immunity is appropriate, just as [it] do[esn’t] believe that a bank robber could get immunity for disclosing that he robbed a bank.”<sup>5</sup> According to Mr. Andres, the fact that a company self-discloses a violation does not merit the company “getting a pass for those crimes.”

Mr. Andres also pointed out that companies already receive favorable treatment for self-reporting violations. According to Mr. Andres, DOJ has traditionally encouraged companies to self-report, promising credit for cooperation, and DOJ officials consistently assert that “a company that comes forward on its own will see a more favorable resolution than one that doesn’t.”<sup>6</sup> As a result, Mr. Andres said that, given the credit self-reporting companies already receive from DOJ, he was “not sure there’s a need for a formal amnesty program.”

However, just how much “credit” a company receives by self-reporting under the current enforcement regime is subject to vigorous debate. There is a widespread belief among practitioners that a company may not benefit at all by having reported the violation and, in some instances, it is in fact worse off. An amnesty program would at least give companies a concrete and transparent incentive to self-disclose a violation, governed by clear “rules of the road.”

## CONCLUSION

DOJ’s rejection of the amnesty program highlights two significant trends in FCPA enforcement:

One, it leaves companies in the same uncertain and uncomfortable position of deciding whether self-reporting is beneficial. The decision about whether to self-report is a difficult one, and the analysis needs to take into consideration more than just DOJ’s statements about cooperation credit currently available. The decision is necessarily informed by the specific facts and circumstances, and should be made only after consideration of all relevant facts, in consultation with expert counsel.

Two, the government will continue its heightened prosecution of FCPA cases regardless of mounting criticism. While the government may be “willing to listen” to constructive criticism and suggestions, thus far it has not been convinced that any change to its increasingly aggressive enforcement policies is warranted.

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<sup>4</sup> See *id.*

<sup>5</sup> See Testimony of Deputy Assistant Attorney General Greg Andres before the Subcommittee on Crime and Drugs, Committee on the Judiciary, United States Senate, November 30, 2010, available at [http://judiciary.senate.gov/hearings/hearing\\_cfm?id=4869](http://judiciary.senate.gov/hearings/hearing_cfm?id=4869).

<sup>6</sup> See transcript from Lanny Breuer’s November 2010 speech, available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

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