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Client Alert Commentary

Latham & Watkins White Collar Defense & Investigations Practice March 24, 2017 | Number 2103

DOJ Announces Continuation and Ongoing Review of FCPA Pilot Program

The extension of the program — which emphasizes voluntary self-disclosure of FCPA violations, raises considerations for corporate entities and individual executives.

The Department of Justice (DOJ) recently announced that the Fraud Section's Foreign Corrupt Practices Act (FCPA) "Pilot Program" — which is set to expire on April 5, 2017 — will remain in place as the DOJ evaluates the program's efficacy.[1] This announcement indicates that the program will continue for an indefinite period.

The Pilot Program seeks to encourage fulsome corporate self-disclosure of FCPA violations in exchange for reductions in penalties or potential declination of prosecution.[2] The Pilot Program is part of a multi-faceted approach that the DOJ has been using for roughly a year in response to criticisms of the government's anti-corruption program and implementation . Other efforts have included devoting additional DOJ investigative resources, addressing individual accountability, hiring a dedicated compliance resource in the Fraud Section, and issuing guidance on compliance program requirements. Government investigators have lauded the Pilot Program for providing clear guidance to prosecutors and corporations regarding FCPA cooperation and enforcement. Whether the program has actually increased disclosure and provided a mechanism for corporate entities to have certainty and reduced penalties in the investigative process, however, remains a matter of debate. As the DOJ's new senior leadership evaluates the merits of the Pilot Program, they will gain an opportunity to reflect upon the manner in which the Pilot Program fits into the overall anti-corruption enforcement landscape.

The first section of this *Client Alert* provides an overview of the Pilot Program and outlines its requirements of voluntary self-disclosure, full cooperation, and timely and appropriate remediation. The second section identifies and analyzes key considerations and practical implications for corporate entities relating to the Pilot Program and attendant DOJ policies. In particular, this *Client Alert* addresses an increased focus on individual accountability, additional incentives for corporations to investigate FCPA violations, the importance of internal investigations and compliance programs, and the consequences of cooperation in a global context.

An Overview of the Pilot Program

The Pilot Program's stated goal is to "promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs." The program is part of a group of DOJ policies addressing voluntary disclosure and corporate compliance in the FCPA arena. These policies include the former Deputy Attorney General's 2015 Memorandum on Individual Accountability for Corporate Wrongdoing,[3] as well as the

DOJ's 2016 statement and 2017 guidance on evaluating corporate compliance programs. All of these policies aim to encourage the early detection and disclosure of FCPA violations by corporations, as well as subsequent cooperation with government investigations.

The Pilot Program incentivizes voluntary disclosure by allegedly offering significant reductions in potential penalties for FCPA violations. Specifically, the program proclaims it will offer companies that meet its requirements up to 50% reductions from the low end of the fines listed in the US Sentencing Commission Guidelines Manual (Sentencing Guidelines), as well as potential avoidance of an independent monitor requirement or declination of prosecution. These requirements are: voluntary self-disclosure, full cooperation and appropriate remediation. The burden of proving these elements is on the cooperating company throughout the process. However, the guidance acknowledges "[c]ooperation comes in many forms … the Fraud Section does not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company." Thus far, under the Pilot Program, the DOJ has announced the issuance of five letters of declination to corporations that disclosed, cooperated and remediated.

Voluntary Self-Disclosure

Government guidance requires that voluntary self-disclosure under the Pilot Program be timely, fully comprehensive and prior to the imminent threat of government investigation. Though voluntary disclosure is already a factor under the US Attorneys' Manual (USAM) rules for prosecuting corporations, full credit under the Pilot Program is predicated on self-disclosure. The Pilot Program does not provide full credit for disclosures that are made pursuant to law, agreement or contract. The program requires that disclosures made under imminent threat of a government investigation or outside of a "reasonably prompt time" after the corporation became aware of the offense be treated as non-voluntary.

Full Cooperation

Full cooperation is an onerous requirement under the Pilot Program. To have "fully" cooperated, the corporation must not only disclose its actions relating to the violation, but also the actions of any individuals involved — including its officers and employees, as well as third parties. Full cooperation also requires both the preservation and collection of all relevant documents, including those located overseas, as well as the translation of foreign documents. The program also requires proactive disclosure of any relevant facts and potential opportunities for the government to uncover relevant facts. De-confliction and disclosure of any internal investigation are also required.

Timely and Appropriate Remediation

Remediation under the Pilot Program is "highly case specific" but generally encompasses: 1) an effective compliance program, and 2) actions addressing the misconduct. Relating to remediation, prosecutors must consider the company's existing compliance culture, the personnel and resources that have been dedicated to compliance, the reporting structure and independence of the compliance program, and the compliance program's effectiveness. Regarding actions taken in response to the misconduct, the guidance requires that the company discipline the responsible employees and any supervisors who failed to adequately oversee those employees. Finally, the program includes a catch-all remediation requirement of "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." However, the guidance notes that the relative size and resources of the company affect all of these factors. The Fraud Section's Compliance Officer is frequently involved in evaluating the quality and effectiveness of the company's remediation.

Credit for Cooperation

For full cooperation credit, corporations must meet all the "stringent" threshold requirements of self-disclosure, full cooperation and remediation. In the instances in which all these requirements are met, the Fraud Section's FCPA Unit **may** award up to a 50% reduction off the bottom end of the Sentencing Guidelines' fine range and decline to require an independent monitor. Further, if all the program's conditions are met, the prosecutors are instructed **to consider** issuing a letter of declination. When determining if declination is appropriate, prosecutors are to consider "countervailing factors" such as executive involvement in the misconduct, the scale of the misconduct in relation to the size of the company, and the company's history of non-compliance (especially if there was a prior resolution within the last five years). Partial cooperation credit, including up to a 25% reduction of any penalty, is available for corporations that do not voluntarily self-disclose but still fully cooperate and timely remediate.

Crucially, in order to receive any credit under the Pilot Program, the corporation must have fully identified **all** individuals involved in the violation. Additionally, both full and partial credit require that the company "disgorge all profits from the FCPA misconduct at issue."

Key Considerations and Implications

Corporations are Increasingly Incentivized to Assume not Only an Investigatory Role, but Also to Proactively Self-Disclose Findings

The continuation of the Pilot Program represents another DOJ step to encourage corporations to aid the government; not only by investigating FCPA allegations but also by proactively sharing the results of their internal investigations with the government. Beginning with its 2015 guidance on individual accountability, the DOJ increased the pressure on cooperating corporations to conduct the investigations into potential illegal conduct. The DOJ began requiring total disclosure of **all** facts about individuals involved in the alleged violation as a prerequisite to a company receiving **any** cooperation credit under the USAM. Then, in 2016, the Pilot Program provided the carrot to that stick by making the disclosure of those same facts a part of the eligibility for further reductions in penalties.

The Pilot Program seeks the assistance of companies to enforce the FCPA. Enforcement agencies have limited resources, and the program allows corporate entities to fill that resource gap. Timely locating violations, thoroughly investigating them (including the individuals involved), disciplining the employees, and implementing appropriate remediation are all functions that most corporations (and their external counsel) have historically performed. By adding self-disclosure and government-imposed remediation to the cooperation requirement, the Pilot Program purportedly expands and formalizes the incentive to proactively conduct such investigations and to subsequently self-disclose to government authorities.

From the corporation's perspective, cooperation and full disclosure can be a favorable method for resolving FCPA issues. Separate from the government incentives, given the global marketplace and the integration of compliance considerations into the fabric of corporate governance over the past decade, most companies are incentivized to implement robust and effective compliance programs that identify and address alleged misconduct. Understanding the monetary impact of disclosing information to the government is critically important. Paying a disgorgement plus a 50% reduced penalty, or potentially no penalty at all, may be a meaningful and appropriate consideration that causes a corporate entity to pursue disclosure to the government. Similarly, if the government does not require the imposition of a monitor, that may be a significant benefit for the company because it could minimize costs and the often unnecessary intrusion of a monitor into company operations, while maximizing the corporation's internal development of an effective compliance program.

Still, uncertainty remains. A DOJ declination letter to the corporation is not guaranteed. Rather, when all the program requirements are met, the Fraud Section "will consider" a declination of prosecution. There is also no guarantee that the DOJ will dispense with the independent monitor requirement; indeed, over the past few years monitors have been prominently included in FCPA settlements with the DOJ. Although the SEC has invoked disgorgement in anti-corruption investigations, it has not been a traditional penalty that criminal enforcement authorities have imposed. The specifics regarding how the DOJ will consistently implement disgorgement remain unclear. More fundamentally, the manner in which the DOJ calculates penalties has been subject to sharp criticism. Companies not only remain concerned about the drastic increase in settlement amounts in DOJ anti-corruption matters, but also by the seeming vagaries of the calculations involved in settlement negotiations with the US government, which purportedly rely upon the Sentencing Guidelines. So, while corporate decision-makers may welcome the 50% reduction articulated in the DOJ voluntary disclosure guidance, concerns remain regarding the underlying calculation of the original penalty to which that percentage reduction is applied. The 25% cap for companies that cooperate but do not self-disclose may also limit the incentive for the corporation to extend the scope (geographical and/or subject matter) of the internal investigation because of the restrictive ceiling imposed.

Cooperation in the Global Context: Crucial Disclosure Considerations

Cooperation and disclosure calculations are compounded by the global nature of FCPA investigations and the DOJ's broad assertion of jurisdiction. The DOJ has long touted its goal of collaborating with parallel agencies abroad (and the SEC domestically). Recent anti-corruption enforcement actions involving corporate settlements with multiple non-US anti-corruption enforcement agencies, together with the DOJ, have demonstrated that this possibility should not be underestimated. Among other concerns, the potential for overlapping government investigations creates serious concerns regarding a "pile on" problem, in which a single company is punished by multiple agencies, in multiple countries, for the same underlying conduct and subject to a vastly inflated settlement amount.

The DOJ has clarified that it will refer disclosed violations to enforcement agencies in other countries. Multilateral development banks have indicated that they will generate referrals to criminal enforcement authorities not only in the United States, but across the globe. Incentives for whistleblowers to contact US enforcement officials and regulators remain in place. Cooperating companies must carefully contemplate to whom they disclose, what they disclose, and when they disclose the alleged corporate misconduct. Companies increasingly should understand, for instance, the non-US jurisdiction's enforcement practices and history of joint resolutions with US investigations, lest the company unintentionally expose itself to additional punishments for the same conduct through its cooperation because DOJ cannot control the nature and extent of the non-US jurisdiction's investigation.

DOJ Policies May Create Tensions Between Individual Accountability, Corporate Investigations, and Self-Disclosure

The Pilot Program's continued focus on full and proactive disclosure as a requirement of cooperation strengthens the need for effective internal investigations. A corporation cannot make good judgments about the risks associated with cooperation without understanding the relevant facts. In order to make informed decisions, senior leadership should seek to understand who was involved in the alleged violation, which individuals knew or should have known, the jurisdictions impacted, as well as the amounts of money spent and gained. Without this information, corporate leaders cannot know the company's likely exposure and, therefore, the associated benefits and risks of self-disclosure.

However, the corporation's attempt to fully understand the facts may be at odds with the DOJ's aggressive desire to prosecute individuals, including senior corporate officers. Given the DOJ's continued focus on individual accountability, and Latham's experience this past year regarding implementation of

DOJ policy, senior corporate officers can seek (and have sought) to obtain individual counsel at much earlier stages of the internal investigation. While some of these corporate officers may continue to cooperate with the internal investigation and participate in interviews, others may decline (and have declined) to participate. Moreover, the insertion of individual counsel at much earlier stages of the investigative process, may slowdown (and has slowed down) fact-gathering. This can place internal and external corporate counsel in difficult positions, due to the pressures of disclosing to the DOJ before the corporate disclosure could be branded as non-voluntary. Also, the desire to voluntarily disclose the facts to DOJ may impact (and has impacted) the working relationships of individuals involved in joint defense agreements. The practical reality may be that the DOJ's policy initiatives promoting corporate disclosure and individual accountability are actually working at cross-purposes.

Evaluation of the Pilot Program under the New Administration

The duration of the Pilot Program's review period, as well as its final manifestation post-review, remain unclear. The government has not provided specifics regarding the review that the program will undergo, while still emphasizing that the Pilot Program provides transparency in the cooperation process.

Arguably, the DOJ that reviews the Pilot Program will be a very different DOJ from the one that created it. The same day the continuation of the Pilot Program was announced, DOJ leadership requested the resignations of all 46 remaining presidentially-appointed US attorneys. The FCPA and Pilot Program are primarily led by DOJ's Criminal Division, rather than by the US attorney community, but transition is also occurring in senior leadership in the Criminal Division. So, how the DOJ will evaluate the Pilot Program remains to be seen. At the very least, the Pilot Program will continue in its current form for the duration of this review period.

Conclusion

The extension of the FCPA Pilot Program serves to continue the status quo as a means for the DOJ to incentivize corporate voluntary self-disclosure. How long this option continues to exist and what form it ultimately takes are still unknown. Corporations should continue to consider carefully whether this policy, in its current form, impacts strategies relating to investigations, internal compliance, and the benefits and risks associated with voluntary self-disclosure.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Benjamin A. Naftalis
benjamin.naftalis@lw.com
+1.212.906.1713
New York

Barry M. Sabin
barry.sabin@lw.com
+1.202.637.2263
Washington, D.C.

Ryan T. Andrews*
ryan.andrews@lw.com
+1.202.637.1039
Washington, D.C.
*Admitted in Virginia only. All work supervised by a member of the D.C. Bar.

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Endnotes

1 Remarks as prepared for delivery by Kenneth A. Blanco, Acting Assistant Attorney Gen. Kenneth A. Blanco Speaks at the American Bar Association National Institute on White Collar Crime (Mar. 10, 2017), available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-american-bar-association-national.

2 U.S. Dep't of Justice, Criminal Division, Fraud Section, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), available at https://www.justice.gov/criminal-fraud/file/838416/download.

3 Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, regarding Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), previously available at http://www.justice.gov/dag/file/769036/download.