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DOJ Pilot Program: A Cap on Cooperation Credit?

DOJ Seeks to Promote Greater Accountability and Increase Transparency

Fresh on the heels of the highly publicized guidance on "Individual Accountability for Corporate Wrongdoing" (the "Yates Memo"),[1] the Department of Justice last week announced a "Pilot Program" for FCPA cases handled out of the Fraud Section's FCPA Unit.[2] Launched on April 5, 2016, the Pilot Program is the Criminal Division's latest – and clearest – step in its ongoing effort to increase law enforcement transparency and accountability.

The Pilot Program represents something of a first for the Fraud Section: companies considering self-reporting potential FCPA violations now know the outer limits of the financial incentives for cooperating with – and without – self disclosure. Specifically, if a fine is sought, companies that meet the Pilot Program's requirements could receive a reduction of up to 50% off the bottom of the Sentencing Guidelines fine range, rather than a maximum of 25% without self-disclosure. Whether a company self-reports may also affect the disposition of the matter, both in terms of the nature of the resolution and imposition of a monitor.

Viewed in tandem with the "Yates Memo," the Pilot Program reflects DOJ's increased efforts to encourage companies to self-disclose overseas corruption, potentially leading to "more prosecutions of the individuals responsible for those crimes."[3] In order to receive the maximum reduction in fines, the Pilot Program requires companies to demonstrate:

- **Voluntary self-disclosure** within a "reasonably prompt time" of criminal conduct, "prior to an imminent threat of disclosure or government investigation," and outside of any other duty to make such a disclosure;

- **Proactive full cooperation** with DOJ, including, among other things (1) disclosure of *all* relevant facts, (2) provision of timely updates on the company's internal investigation, (3) making employees available for DOJ interviews, and (4) disclosure of overseas evidence; and

- **Timely and appropriate remediation** through implementation of an effective compliance and ethics program, discipline of responsible employees, and other efforts to reduce the risks of similar misconduct repeating itself in the future.

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Though a primary goal of the Pilot Program is to encourage companies to self-report, the Pilot Program leaves open the possibility that mitigation credit can be achieved even if a company does not self-disclose, so long as it fully cooperates and timely and appropriately remediates. In those instances, the maximum credit a company may receive is a 25% reduction off the lowest Sentencing Guidelines fine. The Program emphasizes that, despite any mitigation credit, companies will "still" be required to disgorge profits resulting from any FCPA violation, a forfeiture procedure not generally imposed by DOJ in prior FCPA matters. By the end of the one-year Pilot Program, the Fraud Section will determine whether to extend or modify it in any way.

Bargain Basement Pricing: The Rewards of Self-Disclosure

For a number of years, members of the business community and defense bar have urged DOJ towards greater transparency regarding the rewards of self-disclosure. To organizations faced with the difficult decision of whether or not to self-disclose, it is difficult to choose to voluntarily invite a potentially expensive and burdensome government inquiry unless DOJ clearly defines the benefits of doing so. A frequent criticism has been that FCPA enforcement considerations have been difficult to discern with any particularity – a concern that is only exacerbated by the lack of judicial precedent in the area. The Department has increasingly acknowledged these calls for transparency, with top officials publicizing the Department's desire to "hold ourselves accountable and provide increased transparency by explaining our decision making when we can and setting forth our expectations with respect to corporate cooperation in our investigations."[4]

The Pilot Program formalizes that commitment by specifying the outer bounds of cooperation credit with – and without – voluntary disclosure. All else being equal, assuming full cooperation, a company that self-discloses an FCPA violation will be 25% better off than one that does not, at least in terms of the ultimate fine imposed. This increased specificity is important, and will certainly aid companies and their attorneys in discussing the calculus of whether or not to bring an internal issue to the government's attention.

The specificity of the fine differential is certainly new, and is a welcome development, but the Department may sell itself short when it suggests that, before the Pilot Program, "these fine reductions and other incentives have not previously been articulated in a written framework."[5] In recent years, nearly all of DOJ's corporate plea agreements and deferred prosecution agreements have included a detailed calculation of the Sentencing Guidelines range, an indication of the ultimate fine, and a discussion of the company's efforts (if any) to self-disclose and/or cooperate. Although those efforts increased transparency, the wide-ranging factors in play (both public and non-public) for any corporate resolution made it difficult to ascertain which factors the government found to be particularly compelling in arriving at a settlement figure. With the advent of the Pilot Program, there is clear, written guidance regarding how voluntary disclosure could impact the maximum credit awarded.

…But Will it Matter?

When viewed in the context of recent settlements, however, one wonders whether the new Program contains enough incentives to change the calculus of voluntary disclosures. Indeed, several companies have recently resolved cases with DOJ under terms equally or more favorable than those prescribed by the Program. As recently as February of this year, VimpelCom received an eye-popping 45% reduction from the bottom of the Guidelines range, *without* self-disclosure.[6] Hewlett-Packard Russia and Alcoa received discounts of 33% and 53%, respectively, and neither involved voluntary disclosures.[7] Whether the Pilot Program's new caps of 25% and 50% will materially change the landscape is thus an open issue. Depending on the particulars of DOJ resolutions in the coming months, it seems just as possible that putative corporate defendants will see the Program as imposing a *ceiling* for the credit they could receive, and therefore view it as an unhelpful development.

The specificity of the 25% and 50% ranges is also limited in significance by the very nature of settlement negotiations with DOJ in these cases. Determining the Sentencing Guidelines range (to which the new deductions will apply) is not a scientific exercise, and is often the result of lengthy negotiation. The significance of any set percentage "discount" is therefore limited by the awkward reality that profits, loss, pervasiveness, duration, and other factual issues critical to the Guidelines calculation are often difficult to determine with any degree of certainty.

For companies seeking more definitive guidance on whether or not to self-report, the Pilot Program may be somewhat disappointing. The Program's specificity starts and stops with the 25-50% differential. Aside from that calculation, the Program discusses factors surrounding cooperation that have long been familiar to the white collar bar, and are well publicized in prior DOJ publications, including the US Attorney's Manual and the DOJ/SEC DOJ FCPA Guidance from 2012.

This is perhaps as it should be. Determining the extent of a company's cooperation, the manner of disclosure, and the efficacy of remediation – and balancing those factors against the seriousness of the misconduct and other aggravating factors – is not a clinical exercise that is readily evaluated by a written matrix of fines and penalties. Every case will of course present its own unique circumstances, and the Pilot Program is careful to preserve DOJ's discretion to take each case as it finds it. However, the Pilot Program appears to only preserve DOJ's discretion in one direction: prosecutors may agree to reduce a fine by up to 25% or 50%, depending on self-disclosure, but the written guidelines do not give them discretion to do more. What would have happened to VimpelCom had it resolved the matter just a couple of months later? Should mere timing have impacted the fine by 20%? How such potential unintended consequences play out in practice will be carefully watched in the year ahead.

Also left unaddressed by the Program is the extent to which self-disclosing companies will be considered for outright declinations of prosecution, rather than deferred- or non-prosecution agreements. Those hoping for something more concrete from DOJ regarding the extent to which self-reporting will impact the likelihood of a declination (or an SEC-only resolution) will be disappointed. The Program makes only limited reference to declinations, observing that when companies self-report, fully cooperate, and timely remediate, DOJ "will consider a declination of prosecution," subject to the factors traditionally considered, such as the seriousness of the conduct and the involvement of executive management. The Program does not address whether declination will remain possible absent self-disclosure, but where a company otherwise fully cooperates and remediates. Indeed, one could be left wondering whether an outright declination is now less likely than it was previously, given the new percentage limit on the extent to which cooperation will be rewarded without self-disclosure.

If You See Something, Say Something: The Risks of Silence

The Program is not all about rewards – it is also another reminder of the risks of failing to self report. The Department has not been shy in recent years about touting aggressive enforcement, even going so far as to compare corporations to the Mafia.[8] In detailing the new Pilot Program, DOJ lays out three steps in the "new enforcement strategy," only one of which focuses on the "carrot" of increasing transparency of the rewards. The other two steps focus on the "stick":

- "As the first and most important step in combatting FCPA violations, the Department is intensifying its investigative and prosecutorial efforts by substantially increasing its FCPA law enforcement resources. These new resources will significantly augment the ability of the Criminal Division's Fraud Section and the Federal Bureau of Investigation (FBI) to detect and prosecute individuals and companies that violate the FCPA. Specifically, the Fraud Section is increasing its FCPA unit by more than 50% by adding 10 more prosecutors to its ranks. At the same time, the FBI has established three new squads of special agents devoted to FCPA investigations and prosecutions."

- "Second, the United States is not going at this alone. The Department is strengthening its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable."

By focusing a significant amount of discussion on increasing investigative resources, DOJ seeks to frame the issue as starkly as possible. The clear implication: the alternative to self-disclosure and the 50% bonus prize is that the government will find out about it, and will pursue the matter with every available resource.

Time will of course tell if the increasing enforcement resources will in fact significantly change the number of FCPA cases that are not the result of voluntary self-disclosures.

Conclusion

As one of a series of concerted Department efforts to increase transparency, encourage self-disclosure, and reduce skepticism about its enforcement approach to FCPA cases, the Pilot Program is an important factor for multinational businesses to consider when designing and updating their anti-corruption compliance programs, conducting internal investigations into possible corruption issues, and analyzing the potential risks and benefits of voluntary self-disclosure. The change is a welcome one – but what remains the same is the unavoidable reality that every case will be different, and every organization that finds itself in the crosshairs of potential enforcement action will necessarily have to evaluate its own unique situation and circumstances.

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[1] Memorandum of Deputy Attorney General Sally Quillian Yates, *Individual Accountability for Corporate Wrongdoing* (September 9, 2015), *available at* https://www.justice.gov/dag/file/769036/download.
[2] Department of Justice, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (the "Pilot Program"), *available at* https://www.justice.gov/opa/file/838386/download.
[3] *Criminal Division Launches New FCPA Pilot Program, Courtesy of Assistant Attorney General Leslie R. Caldwell of the Justice Department's Criminal Division* (April 5, 2016), *available at* https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.
[4] Remarks of Assistant Attorney General Leslie R. Caldwell at the Compliance Week Conference (May 19, 2015). https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-compliance-week-conference.
[5] Pilot Program, *supra* note 2, at 3.
[6] Deferred Prosecution Agreement, *United States v. VimpelCom Ltd., available at* https://www.justice.gov/criminal-fraud/file/828301/download.
[7] *See* Plea Agreement, *United States v. ZAO Hewlett Packard, available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/04/09/hp-russia-plea-agreement.pdf; Plea Agreement, *United States v. Alcoa World Alumina, available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/15/01-09-2014plea-agreement.pdf.
[8] *See* Speech of Principal Deputy Assistant Attorney General Marshall Miller, *available at* https://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller.