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DOJ's New FCPA Pilot Program Will Have Only Marginal Impact

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On April 5, 2016, Assistant Attorney General Leslie Caldwell, who heads the Criminal Division of the U.S. Department of Justice, announced a new “FCPA pilot program” designed to motivate companies to voluntarily self-disclose Foreign Corrupt Practices Act-related misconduct. In making the announcement, AAG Caldwell disclosed a newly released policy document authored by Fraud Section Chief Andrew Weissmann titled “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance.”[1]

According to the guidance, during a one-year pilot period effective April 5, 2016, companies that voluntarily disclose improper conduct to the Fraud Section’s FCPA Unit, fully cooperate in accordance with the Principles of Federal Prosecution of Business Organizations and the Yates memo, appropriately remediate, and otherwise pass muster under the “stringent requirements” of the pilot program may receive up to a 50 percent reduction off the bottom of the U.S. sentencing guidelines fine range and generally will not be required to retain an independent compliance monitor. Companies that do not voluntarily disclose improper conduct, but that do “fully cooperate[] and timely and appropriately remediate[],” will be accorded “at most a 25% reduction off the bottom of the Sentencing Guidelines fine range.”

Our Take

The department deserves credit for engaging in an effort to provide more clarity in the self-disclosure process and greater certainty in the results. But there is a natural tension between the department’s understandable desire to maintain its discretion to resolve each case based on its own facts and circumstances, and the business community’s equally reasonable desire for certainty and finality. In the end, the DOJ’s need to build flexibility into the pilot program limits its ability to provide the greater certainty that the business community wants, as the guidance’s promises to provide benefits are qualified with words like “may,” “generally” and “will consider.”

As such, the guidance represents a step forward on the path to greater transparency and certainty, but not as great a step forward as it might have been. In fact, there is not much that is new in the guidance, which notes that the Fraud Section has “historically provided” reductions below the low end of the sentencing guidelines to companies that self-report, cooperate and remediate. Moreover, self-disclosure, cooperation and an effective compliance program have long been factors that have militated against the imposition of an independent monitor requirement.

Interestingly, however, there are possible hints that a bolder version of the guidance was once contemplated. Although the guidance states an intention to “set[] forth ... the manner” in which the additional credit earned pursuant to the pilot program “should be determined, whether it be in the type of disposition, the extent of reduction in fine, or the determination of the need for a monitor,” it actually focuses exclusively on the latter two issues, suggesting that a bolder approach — such as limiting the availability of nonprosecution agreements to self-reporting companies — may have been considered but ultimately rejected. Whether a bolder approach will eventually be pursued and whether it might have a greater impact on the self-disclosure discussion will remain to be seen. In the meantime, the current pilot program will likely only have a marginal overall impact on a given company’s overall approach to voluntary disclosure.

Background

The guidance is the latest effort by the leadership of the Criminal Division and the Fraud Section to encourage voluntary disclosures through greater transparency, including by taking steps to provide better explanations of the benefits of self-reporting. In the past year, for example, AAG Caldwell and Fraud Section Chief Weissmann have cited efforts to: (1) increase transparency regarding the division’s charging decisions in corporate prosecutions; (2) increase the speed with which voluntary disclosures are investigated and either resolved or declined; (3) focus on “bigger, higher impact cases” rather than “smaller cases”; and (4) increase and publicize declinations.

In announcing the new pilot program, AAG Caldwell reiterated that one of her priorities at the Criminal Division has been to “ensure that we have a robust and transparent enforcement program targeting violations of the Foreign Corrupt Practices Act.” Before discussing the pilot program, AAG Caldwell’s press release highlighted the enhancements made to the enforcement program over the past year, including increasing the size of the FCPA Unit by more than 50 percent (announced in November 2015), establishing three new squads of FBI special agents devoted to FCPA investigations and prosecutions (announced in March 2015), and strengthening coordination with foreign law enforcement counterparts.

AAG Caldwell explained that, in seeking to promote transparency and accountability, this new one-year pilot program serves two goals: (1) to offer guidance to Fraud Section prosecutors in resolving corporate FCPA cases; and (2) to motivate companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate, and remediate flaws in their controls and compliance programs. Consistent with these stated goals, the guidance states that it seeks to provide “greater transparency about what we require from companies seeking mitigation credit for voluntarily self-disclosing misconduct, fully cooperating with an investigation, and remediating, and what sort of credit those companies can receive if they do so consistent with these requirements.”

AAG Caldwell was clear in stating that this new pilot program is limited to just the FCPA Unit, and does not apply to other components of DOJ or even other units within the Fraud Section.

The Guidance and Its Requirements

Voluntary Self-Disclosure

The guidance explains that the Fraud Section will carefully review and assess the circumstances of the self-disclosure to determine whether it was “voluntary.” Disclosures required by law, agreement, or contract will not qualify as voluntary. FCPA prosecutors will also apply, as they have historically done, the criteria set forth in the U.S. sentencing guidelines for evaluating the voluntariness of such disclosures: (1) whether the disclosure occurred prior to an imminent threat of disclosure or government investigation; and (2) whether the company disclosed the conduct within a reasonably prompt time after being made aware of the offense. See U.S. Sentencing Guidelines § 8C2.5(g)(1)(A) and (B). In addition, the company must demonstrate that it has disclosed all relevant facts, including facts about individuals involved in any FCPA violation.

Full Cooperation

The guidance states that to receive full cooperation credit under the pilot program, a company must go beyond the requirements of the Principles of Federal Prosecution of Business Organizations. Among other things, companies that want credit for “full cooperation” must:

- disclose on a timely basis all facts relevant to the wrongdoing at issue, including about individuals (i.e., the Yates memo requirements);
- proactively cooperate;
- preserve, collect, and disclose relevant documents and information;
- provide timely updates on the internal investigation and rolling productions;
- where requested, de-conflict[2] an internal investigation with the government investigation;
- provide all facts relevant to potential criminal conduct by third parties (including the officers and employees of those companies);
- make available for interviews current and former company officers and employees with relevant information, wherever located;
- disclose all relevant facts gathered in a company’s independent investigation, including specific attribution of facts to specific witnesses, “where such attribution does not violate the attorney-client privilege”;[3]
- disclose documents located overseas unless prohibited from doing so;
- facilitate third-party production of documents and witnesses from foreign jurisdictions; and
- provide translations of relevant documents in foreign languages.

While the list is a helpful reminder, it reflects the long-held expectations of the DOJ when assessing a company’s cooperation. One potentially new item is the DOJ’s expressly placing the burden on the company to establish that disclosure of foreign documents is prohibited under a blocking statute or data privacy law.

Timely and Appropriate Remediation

A company's remedial efforts will be considered only if it fully cooperates — "in other words, a company cannot fail to cooperate and then expect to receive credit for remediation." Once the threshold requirement of cooperation has been met, the guidance lists three factors that generally will be required for a company to receive remediation credit:

- implementation of an effective compliance and ethics program;
- appropriate discipline of the responsible employees and their supervisors; and
- additional steps that demonstrate the company's recognition of the seriousness of its misconduct, its acceptance of responsibility, and the implementation of measures to reduce the risk of repeating the misconduct.

The guidance sets out eight criteria to be considered in determining the effectiveness of the company's compliance and ethics program: (1) whether the company has established a culture of compliance; (2) whether the company dedicates sufficient resources to the compliance function; (3) the quality and experience of compliance personnel; (4) the independence of the compliance function; (5) whether the company's compliance function has performed an effective risk assessment and tailored the compliance program based on that assessment; (6) how a company's compliance personnel are compensated and promoted as compared to other employees; (7) the auditing of the compliance program to ensure its effectiveness; and (8) the reporting structure of compliance personnel within the company.

Interestingly, the guidance does not cite the FCPA Resource Guide's "Hallmarks of Effective Compliance Programs" or the corporate compliance program undertakings that accompany all DOJ FCPA enforcement actions (as Attachment B to NPAs and Attachment C to deferred prosecution agreements). Moreover, the guidance does not mention such features as third-party due diligence; a gift, travel, and entertainment policy; internal financial and accounting controls; or anti-corruption training.

Given the critical importance of these and other elements of effective anti-corruption compliance programs, and given the guidance's apparent focus on issues specifically relevant to compliance professionals, we believe that the eight criteria set out in the new guidance should be considered as supplementing, not superseding, the factors set out in the FCPA Resource Guide and Attachment B/C. Indeed, the factors set out in the guidance likely reflect the input of the Fraud Section's new compliance counsel, who was previously an in-house compliance professional at two different companies and is specifically mentioned in this section of the document. For example, we see the sixth factor, which requires prosecutors to evaluate the compensation and internal upward mobility of compliance professionals at companies, as a new factor.

Credit Given Under the Guidance

The guidance next explains that limited credit will be given to companies that do not voluntarily self-disclose, but that do cooperate fully (and in a timely manner) and remediate appropriately. This credit will be markedly less than that afforded to companies that also self-disclose. In this regard, the guidance specifically states that in cases where no voluntary self-disclosure has occurred, companies cannot expect more than a 25 percent reduction off the bottom of the sentencing guidelines fine range.[4]

Conversely, those entities that do voluntarily self-disclose, fully cooperate, and appropriately remediate will be eligible for the full range of mitigation credit. In defining the scope of the "full range" of available credit, the guidance states that in such cases the FCPA Unit may accord up to a 50 percent reduction off the bottom of the sentencing guideline fine range and generally should not require the appointment of a monitor. The guidance also suggests that where these conditions are met, the FCPA Unit will consider declining to prosecute.[5] However, it notes that there are a number of factors to consider in declining a matter, including the seriousness of the offense, involvement of management, and/or a history of noncompliance by the company, i.e., three of the Principles of Federal Prosecution of Business Organizations, which have long been factored into declination decisions. Importantly, the guidance also states that "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 FCPA violation."[6]

Hints of a Potentially Bolder Pilot Program?

Interestingly, the guidance states:

[T]he Guidance explains the credit that the Fraud Section will accord under this pilot to business organizations that voluntarily self-disclose, fully cooperate, and remediate. As set forth below, that credit may affect the type of disposition, the reduction in fine, or the determination of the need for a monitor.[7]

But, as noted above, the guidance never does address "the type of disposition" that a company might receive for complying with the pilot program. This may be an oversight — or it may be a hint that bolder measures were considered but ultimately left on the editing room floor. Indeed, an article published in November 2015 about a draft DOJ policy to increase FCPA self-reporting, combined with the passage of nearly five months before any such policy was officially announced, suggests that there may have been an earlier version of the guidance that was much more forward-leaning in the benefits to be offered to self-disclosing companies. It would not be surprising if the "type of disposition" language may have been a remnant of an earlier version of the policy that explicitly reserved more lenient forms of resolutions, such as NPAs, to self-disclosing companies, similar to the U.S. Securities and Exchange Commission's policy of requiring companies to "self-report misconduct in order to be eligible for the [Enforcement] Division to recommend a DPA or NPA to the Commission in an FCPA case."

Key Takeaways

Old News?

Like the Yates memo before it, much of the guidance reflects existing practice. The guidance notes that the Fraud Section has "historically provided" reductions below the low end of the sentencing guidelines to companies that self-report, cooperate, and remediate. Similarly, self-disclosure, cooperation, and an effective compliance program have long been factors that have militated against the imposition of an independent monitor requirement.[8] What is new about the guidance is the Fraud Section's attempt to specifically quantify the potential benefits of self-disclosure, cooperation, and remediation in one policy document.

Limited Certainty

As discussed above, there is a natural tension between the department's desire to maintain flexibility and the business community's desire for certainty. Not surprisingly, the DOJ ultimately sought to preserve its flexibility, but in doing so, it necessarily lessened the very thing the pilot program aspired to provide to the business community: greater certainty. With significant caveats built into the most important provisions (with words like "may," "generally" and "will consider"), even what may appear initially as a concrete benefit could well prove illusory in a specific case. So while the guidance may prove marginally helpful to companies deciding whether to voluntarily disclose a matter to the department, its overall impact will likely be limited.

No Finality

The guidance does not, because it cannot, provide companies with comfort regarding finality. In years past it was not unreasonable to believe that resolving a matter with the DOJ meant putting the matter behind the company. Now, however, a resolution with the DOJ often signals the beginning — not the end — of the ordeal. With increasing frequency, companies can expect follow-on criminal investigations in other jurisdictions, and given the guidance's discussion of the DOJ "strengthening its coordination with foreign counterparts," companies can anticipate that this will increase. Beyond criminal enforcement, companies today face the prospect of parallel civil litigation by shareholders, competitors and even purported "victims" of bribery. And while the DOJ can often coordinate with some of its foreign counterparts with parallel investigations, it cannot resolve these matters.

Takes Too Long and Costs Too Much

The guidance also does not, because it cannot, address another fundamental challenge related to voluntary disclosure: that the process typically lasts years and results in substantial costs to companies that often out shadow the ultimate penalties, if any. Nevertheless, the DOJ's leadership has taken meaningful steps to address these concerns by other avenues.

First, Fraud Section Chief Andrew Weissmann has stated publicly a desire to complete voluntary disclosure matters within a year. While likely more aspirational than realistic, it reflects an understanding that the speed with which matters are disposed does, in fact, have an impact on the calculus of whether to self-report.

Second, the department's recent efforts to increase the number of prosecutors, paralegals and special agents assigned to FCPA cases should help increase the efficiency with which they are investigated and resolved. Third, the DOJ leadership's focus on "bigger, higher impact cases" may also improve efficiency, as smaller, lower impact cases are declined more quickly.

Fourth, DOJ leadership has repeatedly tried to address the cost issue by reiterating that prosecutors do not expect companies to "boil the ocean" (or at least not to "aimlessly boil the ocean"), and the guidance continues that refrain, stating that prosecutors do not "generally expect a company to investigate matters unrelated in time or subject to the matter under investigation in order to qualify for full cooperation credit." Indeed, the guidance goes so far as to say "absent facts to suggest a more widespread problem, evidence of criminality in one country, without more, would not lead to an expectation that an investigation would need to extend to other countries." Of course, the DOJ says this while also saying the investigation must be thorough, appropriately tailored, and designed to provide evidence against all culpable individuals. Regardless, the DOJ no doubt recognizes that the costs of internal investigations, particularly when the result of a voluntary disclosure, are a real — and legitimate — concern of otherwise compliance-minded boards, CEOs and in-house counsel as they consider the best interests of their stakeholders in deciding whether to self-report conduct to the DOJ.

The issue of properly incentivizing companies to voluntarily disclose potential violations of the law is complex and affords no easy solutions. In many ways, the U.S. has been at the forefront of this approach to law enforcement as shown by the relatively recent consideration by other countries of some of the incentives offered by the U.S., such as deferred prosecution agreements, to reward companies for voluntary disclosure and cooperation. But a solution that properly balances such incentives while not unduly limiting the options available to enforcement agencies remains elusive.

Although the DOJ's latest announcement likely will not by itself assuage the business community's concerns about the duration, expense, and lack of certainty in the benefits of the voluntary disclosure process, the pilot program nevertheless reflects, at a minimum, the DOJ's recognition that these concerns have led many good, compliance-minded companies to refrain from coming forward. Moreover, while the DOJ's attempt to recalibrate the self-disclosure calculus may leave the business community understandably unsatisfied, it was still a considered effort by the Criminal Division, the Fraud Section and the FCPA Unit to meaningfully address this issue. In the meantime, the impact, or lack thereof, of the new pilot program remains to be seen.

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[1] The FCPA Unit is part of the Fraud Section, which in turn is part of the Criminal Division. The Fraud Section has been given the sole authority to investigate and prosecute criminal violations of the FCPA. See U.S. Attorney's Manual, Section 9-47-110. AAG Caldwell currently leads the Criminal Division, and the Fraud Section is led by Andrew Weissmann. The leadership of the FCPA Unit just recently changed; long-time FCPA prosecutor and former Assistant Chief Daniel Kahn is now running the FCPA Unit in an acting capacity.

[2] While there is no further elaboration about this item, we believe it is meant to cover situations in which DOJ or FBI request that the company refrain from certain internal witness interviews or other aspects of an internal investigation that might conflict with DOJ's and FBI's proactive criminal investigations.

[3] There is a potential tension between DOJ's desire for the specific attribution of facts to particular witnesses and its policy against requiring a waiver of the attorney-client privilege or work product doctrine. The caveated language here underscores that tension.

[4] In seeming contradiction to the Guidance, in a March 2016 FCPA enforcement action, DOJ awarded a total reduction of 45% to a company that did not self-disclose the alleged conduct. According to the resolution papers, the company received not only a 25% reduction for “full cooperation and remediation credit” but also an additional 20% reduction “for its prompt acknowledgment of wrongdoing . . . and [its] willingness to resolve promptly its criminal liability on an expedited basis[,]” a consideration that somewhat anomalously does not appear to be available under the pilot program. Clearly this policy document was already under consideration at the time of this resolution, which is likely why DOJ went to such lengths to “cap” the cooperation credit at 25% in the resolution, yet still added another 20% for promptly resolving the matter. It remains to be seen whether future companies that have not voluntarily disclosed FCPA misconduct will also be eligible for an additional “prompt-resolution” discount, or whether the March 2016 resolution was reached in the nick of time before the pilot program was announced.

[5] Although monitors and declinations are only discussed in the section discussing credit for self-disclosures, we do not read the Guidance to imply that the FCPA Unit will generally require the appointment of a monitor for companies that do not self-report or that declinations are unavailable to companies that do not self-report. Those would be dramatic policy shifts.

[6] This is a new policy statement. Typically, in a parallel FCPA enforcement action with the Securities and Exchange Commission (SEC), DOJ pursues a monetary penalty and SEC pursues disgorgement. In the case of companies that are not publicly traded and are therefore outside SEC’s jurisdiction, DOJ has historically sought a monetary penalty (based largely on profits) but, other than in a few instances, has not sought criminal forfeiture. The Guidance’s use of the term “disgorgement” may signal that DOJ intends to pursue both monetary penalties and the forfeiture of profits in DOJ-only cases. This may also complicate declinations, if DOJ requires civil forfeiture even when it declines to seek a monetary penalty from a company.

[7] Guidance at 3 (emphasis added).

[8] For example, the FCPA Resource Guide states that “companies are sometimes allowed to engage in self-monitoring, typically in cases when the company has made a voluntary disclosure, has been fully cooperative, and has demonstrated a genuine commitment to reform.”