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To Self-Report or Not to Self-Report, That Remains the Question After the Justice Department's Latest Effort to Encourage Self-Reporting

On April 5, 2016, the United States Department of Justice, Criminal Division, Fraud Section launched a one-year Pilot Program that invites companies to self-report potential violations of the Foreign Corrupt Practices Act (“FCPA”) to the FCPA Unit of the Justice Department in exchange for, among other things, up to a fifty percent reduction in criminal fines, declination and, where appropriate, settlements without a compliance monitor.¹ The Pilot Program follows, and is intended to compliment, the September 9, 2015 Deputy Attorney General Memorandum on Individual Accountability (“Yates Memorandum”).² Together, the Pilot Program, the government’s strengthening of its coordination efforts with foreign law enforcement officials, and the government’s increased personnel resources all reflect the Justice Department’s continued efforts to combat foreign bribery. As Assistant Attorney General Leslie R. Caldwell emphasized in her announcement of the Pilot Program, “[i]f a company opts not to [self-report], it should do so understanding that in any eventual investigation that decision will result in a significantly different outcome than if the company had voluntarily disclosed the conduct to [the Justice Department] and cooperated in our investigation.”

Although well-established leniency standards exist in other areas of federal criminal law, notably in antitrust cartel enforcement, this is the first time the Justice Department has published guidelines outlining the conditions under which it will grant cooperation credit in an FCPA investigation. Under the Pilot Program, the Justice Department will assess a company’s eligibility for cooperation credit based on whether the company voluntarily self-reported, cooperated fully with the ensuing investigation, and timely and appropriately remediated the potential violation. By publishing a guidance document professing to offer a defined formula for calculating cooperation credit, the Justice Department appears to be answering longstanding criticism of its perceived lack of transparency in reaching negotiated resolutions of FCPA cases.

While the Guidance is seemingly transparent about how much credit a company can expect based on its level of cooperation, it does not appear to deviate from the Justice Department’s current approach to calculating cooperation credit. Moreover, the Guidance does not supplant the broader principles articulated in the Principles of Federal Prosecution of Business Organizations (“Filip Memorandum”) or the Yates Memorandum that apply to all criminal prosecutions. Rather, the Pilot Program operates within the established framework, specifying the conditions under which prosecutors may offer reduced fines, a deferred prosecution agreement (“DPA”), a non-prosecution agreement (“NPA”), or a declination. It also sets out circumstances under which companies will generally not be required to engage a corporate compliance monitor.

The Pilot Program

Voluntary Self-Reporting

Voluntary disclosure is already an important factor in the Filip Memorandum, affecting the type of disposition prosecutors consider in FCPA matters. Consistent with the Filip Memorandum, the Pilot Program will first assess whether a company's self-reporting is truly voluntary, disqualifying any disclosure already required by law, agreement, or contract.³ In addition to this existing requirement, the Pilot Program requires that the following conditions be satisfied:

- the voluntary disclosure occurs prior to an imminent threat of disclosure or government investigation;⁴
- the company discloses the conduct to the Justice Department "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.

Because self-reporting is highly significant in determining what the government describes as mitigation credit under the Pilot Program, companies must carefully consider whether to take the initiative to bring potential violations to the government's attention. As discussed below, a finding that a company voluntarily self-reported can earn a company up to a 50% reduction in penalty below the bottom of the sentencing guidelines, assuming the company also provides full cooperation and remediation after self-reporting. Self-disclosure also weighs against the imposition of an independent compliance monitor.

Full Cooperation

In addition to satisfying the Filip Memorandum, companies seeking credit for full cooperation in FCPA matters must meet the following standards under the Pilot Program:

- as set forth in the Yates Memorandum, timely disclosure of all facts related to involvement in wrongdoing and criminal activity by the corporation's officers, employees, or agents;
- proactive cooperation, including disclosing facts that are relevant to the investigation, even when not specifically asked to do so, and identifying opportunities for the government to obtain relevant evidence;
- preservation, collection, and disclosure of relevant documents and information;
- provision of timely updates on a company's internal investigation, including rolling disclosures of information;
- provision of all facts relevant to potential criminal conduct by all third-parties;
- making available for interviews the company officers and employees who possess relevant information, including those located overseas as well as former officers and employees;
- disclosure of all relevant facts gathered during the independent investigation, including attribution of facts to specific sources rather than a general narrative of the facts;
- disclosure of overseas documents and their origins, unless they are subject to foreign data privacy laws; and

- facilitation of the third-party production of documents and witnesses from foreign jurisdictions.

The Guidance explains that the Fraud Section should “assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case.” For example, it should “not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company.” Any company, however, should consider whether the mitigation credit available for “full cooperation” is likely to be worth the consequences flowing from adherence to the cooperation standards.

Remediation

The Guidance notes that assessing remediation is “highly case specific” and that the Fraud Section is still “refining [its] benchmarks for assessing compliance programs.” Once the Fraud Section is satisfied that there has been full cooperation, it will consider offering remediation credit based on the following guidelines:

- implementation of an effective compliance and ethics program, including:
 - whether the company has established a culture of compliance, including an awareness among employees that criminal conduct will not be tolerated;
 - whether the company dedicates sufficient resources to the compliance function;
 - the independence of the compliance function;
 - whether the company’s compliance program has performed an effective risk assessment and tailored the 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 responsible for the misconduct and their supervisors; 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.

In making efforts to conform to these requirements, companies must remain vigilant in order not to run afoul of other applicable laws and regulations. Such a concern may arise, for example, in attempting to satisfy the Pilot Program’s requirement for “appropriate discipline of employees, including those responsible for the misconduct and their supervisors.” In the case of an employee who engages in misconduct and subsequently reports it to the company’s compliance department, the company must be wary of triggering any applicable whistleblower protections when disciplining the employee.

Mitigation Credit

Partial Credit

Where the Fraud Section finds that a company has not voluntarily self-reported its FCPA misconduct, but has fully cooperated and engaged in appropriate remediation, the Pilot Program allows up to a twenty-five percent reduction off the bottom of the Sentencing Guidelines range determined in that case.

Full Credit

If a company meets all three components of the Pilot Program in addition to the requirements of the Yates Memorandum and the Filip Memorandum, and the Fraud Section still finds that a criminal resolution is warranted, the guidelines call for a reduction of up to fifty percent off the bottom of the Sentencing Guidelines. Additionally, the Guidelines advise that a company meeting all of the above standards and instituting an effective compliance program “generally should not require appointment of a monitor.” Finally, where these conditions are met, the Guidance states that “the Fraud Section’s FCPA Unit will consider a declination of prosecution.” Importantly, any of these resolutions would still require the company to disgorge all illicit profits from the FCPA violation at issue.

Implications of the Guidance

While the Guidance states that the Pilot Program is looking to provide greater transparency about what the Justice Department requires from companies seeking mitigation credit, it should be noted that the language of the Guidance puts the burden on the company seeking mitigation credit to demonstrate that it has met the requirements outlined in the Guidance. For example, the Guidance’s discussion of the “full cooperation” requirement notes that “[c]ooperation comes in many forms,” and that “[o]nce the threshold requirements of the [Yates Memorandum] have been met, the Fraud Section should assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company’s cooperation under this pilot.”⁵ Furthermore, compliance with the requirements of the Guidance does not *guarantee* any particular outcome. How much credit, if any, the Justice Department will be prepared to give remains subject to its discretion. As such, companies need to keep a thorough and detailed record of the steps they take in compliance with the requirements of the Guidance so that they are able to demonstrate compliance worthy of the credit they seek. Companies should also regularly seek feedback from the Justice Department to confirm that the cooperation they are providing satisfies the requirements of the Guidance, and should take care to document this feedback and share such documentation with the Justice Department.

Moreover, it appears that, in certain circumstances, the Pilot Program is more restrictive in how it allocates mitigation credit. For example, in the recent settlement between the Justice Department and VimpelCom Ltd. (“VimpelCom”) where the company did not self-report, the Justice Department awarded VimpelCom a forty-five percent reduction off the bottom of the Sentencing Guidelines. According to the Justice Department, a forty-five percent reduction was warranted because of the company’s “extensive cooperation” and “willingness to promptly resolve [its] criminal liability on an expedited basis.” Because it did not self-report, however, the company would only have been eligible for a mitigation credit of up to twenty-five percent under the Pilot Program.⁶ Similarly, ZAO Hewlett-Packard A.O. (the Russian subsidiary of Hewlett-Packard Co, n/k/a HP Inc.) and Alcoa World Alumina LLC (a subsidiary of Alcoa Inc.) recently received sentencing discounts of thirty-three percent and fifty-three percent,

respectively, without self-reporting. Under the Guidance, the Justice Department will appear to have less flexibility in crafting the kinds of settlements it did in VimpelCom, ZAO Hewlett-Packard A.O., and Alcoa World Alumina LLC.

The Guidance appears to call for companies to conduct “independent” investigations. Clearly, not every FCPA investigation, whatever its size, requires an “independent” investigation complete with independent outside counsel and the involvement of a company’s board of directors. Presumably, the Justice Department (and the Securities and Exchange Commission (SEC)) would accept an investigation that is independent of the alleged wrongdoers and that is thorough, fair, and appropriately scoped. It, however, remains curious that the Guidance appears to be calling for companies to conduct independent investigations, which generally have the following characteristics:

- Conducted by outside law firm that does not count the company as a regular client;
- The law firm reports to an independent committee of outside directors, such as the audit committee or a special committee, and not to management or internal counsel.

There remains some concern about whether, in light of what passes for cooperation under the Guidance, companies would effectively be waiving their protections under the attorney-client privilege and work product immunity doctrine. For example, the Guidance calls for the disclosure of “all relevant facts gathered during the 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.” This requirement to tie facts to specific sources goes beyond the strictures of the Yates Memorandum, which simply requires “all relevant facts about individual misconduct.”⁷ To be sure, the Guidance reaffirms the Filip Memorandum’s position that “eligibility for full cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection.” Yet, requiring that a company disclose the specific source of information, which in all likelihood was learned in a privileged communication, such as a witness interview, would necessarily require that a company waive privilege and potentially work-product protection.⁸

The Guidance also appears to “encourage” the self-reporting of any potential FCPA violation without regard to the size of the potential violation or the level of individuals involved. Moreover, the Guidance does not draw a distinction between potential violations of the anti-bribery provisions and the internal controls and books and records provisions. The Guidance seems to want self-reporting of violations of either, regardless of magnitude. However, not every potential violation should prompt a call to the Justice Department. Instead, companies should consider a more nuanced approach to self-reporting that takes account of the nature of the potential violation, the magnitude of the potential violation, and the individuals alleged to have been involved in the potential violation. Those factors, along with whether the alleged violation is indicative of a systemic (rather than isolated) problem and whether the company is a recidivist should all be considered in deciding whether to self-report.

Lastly, while the SEC has not published specific guidance for obtaining cooperation credit in FCPA cases, the Director of its Enforcement Division in a speech last year outlined several factors the enforcement staff consider when allocating cooperation credit, emphasizing that the Enforcement Division will not recommend a DPA or NPA for a company absent self-reporting and significant cooperation, which include provision of factual chronologies, prompt production of documents and making foreign witnesses available for interviews.⁹

Conclusion

While the Guidance at first glance appears to incentivize cooperation by defining the benefits of self-reporting and cooperating, the Guidance reduces Justice Department's flexibility to reward cooperation as it has in recent settlements, is vague on what sort of cooperation is required, and still gives the Department significant latitude to deny cooperation credit to companies that self-report and cooperate. Companies nonetheless should carefully weigh whether it is still worth taking advantage of the Pilot Program's benefits now, even if they may be more limited than the benefits previously available, as the program is limited, at least preliminarily, to a period of one year, and it is unclear whether it will continue or what (if anything) might replace it.

- ¹ Press Release, Department of Justice Office of Public Affairs, "Criminal Division Launches New FCPA Pilot Program" (April 5, 2016) *available at* <https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program>; Andrew Weissman, Chief, Fraud Section, US Department of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (Apr. 5, 2016) (the "Guidance"), *available at* <https://www.justice.gov/opa/file/838386/download>.
- ² Sally Q. Yates, Deputy Attorney General, US Department of Justice, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015), *available at* <https://www.justice.gov/dag/file/769036/download>.
- ³ USAM 9-28.900
- ⁴ Federal Sentencing Guidelines require that, for self-disclosure to affect sentencing considerations, they must be truly voluntary—not made in anticipation of an imminent investigation. U.S.S.G. § 8C2.5(g)(1).
- ⁵ As another example, the Guidance provides that, "in considering whether declination" of prosecution "may be warranted, Fraud Section prosecutors must also take into account countervailing interests, including the seriousness of the offence: in cases where, for example, there has been involvement by executive management of the company in the FCPA misconduct, a significant profit to the company from the misconduct in relationship to the company's size and wealth, a history of non-compliance by the company, or a prior resolution by the company with the Department within the past five years, a criminal resolution may be warranted." See Andrew Weissman, Chief, Fraud Section, US Department of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (Apr. 5, 2016) *available at* <https://www.justice.gov/opa/file/838386/download>.
- ⁶ US Department of Justice, "VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme" (February 18, 2016), *available at* <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>.
- ⁷ Yates Memorandum, at 3.
- ⁸ Notwithstanding the Justice Department's refrain that it does not require waiver of attorney-client, the case law is abundantly clear that, where a company voluntarily self-reports a potential violation of law and provides the kind of full cooperation called for in the Guidance, it runs a great risk that a court will conclude that it has waived its attorney-client privilege and protections under the work product doctrine. See, e.g., *United States v. Ruehle*, 583 F.3d 600, 611-12 (9th Cir. 2009) (finding a waiver of attorney-client privilege where an employee knew that statements made to independent counsel could be disclosed to regulators); *Gruss v. Zwirn*, 2013 WL 3481350 at *12 (S.D.N.Y. July 10, 2013) (finding a waiver of work product protections where "attorneys' work product—the interview notes and summaries—were deliberately, voluntarily, and selectively disclosed to the SEC via the PowerPoint presentations"); *S.E.C. v. Vitesse Semiconductor Corp.*, 2011 WL 2899082 at *3 (S.D.N.Y. July 14, 2011) (finding that the company "effectively produced [witness interview] notes to the SEC through its oral summaries," and therefore waived work product protections).

⁹ Andrew Ceresny, Director, SEC Division of Enforcement, Keynote Address at the American Conference Institute's 32nd FCPA Conference (Nov. 17, 2015), available at <http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html>.

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