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New FCPA Self-Reporting Pilot Program Formalizes Rewards but Relies on Discretionary Implementation

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On April 5, 2016, the Department of Justice unveiled a one-year pilot program designed to encourage companies to self-report violations of the Foreign Corrupt Practices Act (the FCPA). Built upon the Department's September 9, 2015 Yates Memorandum and administered within the FCPA Unit of the Criminal Division's Fraud Section, the new pilot program is intended to reward voluntary reporting, cooperation and remediation by providing for substantially reduced fines, avoidance of a third-party corporate monitor or even declination of prosecution.

Assistant Attorney General Leslie R. Caldwell announced the release of the Fraud Section's new pilot program as part of the Department's ongoing enhancement of its FCPA enforcement strategy, which includes the intensification of the Department's investigative and prosecutorial efforts by substantially increasing its FCPA law enforcement resources, as well as the strengthening of its coordination with foreign law enforcement. The new program, hailed by the Department as increasing transparency regarding its FCPA enforcement strategy, is designed to promote greater accountability for individuals and companies potentially exposed to criminal enforcement 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 in return for mitigation credit. However, while the new pilot program is a significant step towards the creation of a publicly articulated benefits and rewards regime for self-reporting FCPA violations, its onerous "proactive disclosure" requirement and discretionary rewards protocol raise important questions about whether the program will actually succeed in encouraging self-disclosure.

Pilot Program Eligibility

To be eligible for any mitigation credit, companies must voluntary self-disclose FCPA violations.

In evaluating self-disclosure under the pilot program, the Fraud Section will make a careful assessment of the circumstances of the disclosure. Indeed, according to the Department, a company's disclosure pursuant to the pilot program must be truly voluntary. Thus, self-reporting that is required by law, agreement or contract would not suffice for the purpose of receiving credit under the pilot program. In addition, the disclosure must occur prior to an imminent threat of disclosure or government investigation and be within a reasonably prompt time after the company learns of the FCPA violation. Finally, mirroring the language of the Yates Memorandum, the new pilot program provides that a company that intends to qualify for the program's mitigation credit must disclose all relevant facts about individuals involved in the FCPA violation.

Full cooperation requires disclosure of facts, preservation of documents and availability for government interviews.

Consistent with the Department's guidance as set forth in the Yates Memorandum, a company may be eligible for the pilot program's benefits only if it timely discloses all relevant facts, including all facts related to involvement in the criminal activity by the company's officers, employees or agents. However, full cooperation under the pilot program also requires proactive disclosure, including the identification of relevant evidence not in the company's possession or overseas, document preservation and disclosure, translation of documents when requested, availability of officers and employees for interviews, and full disclosure of facts gathered during the company's independent investigation on a rolling basis, among other things. The pilot program also specifically requires the "facilitation" of "third-party production of documents and witnesses from foreign jurisdictions," although neither "facilitation" nor "third-parties" are defined, leaving numerous questions unanswered as to the expectations of cooperation. This burdensome disclosure requirement places significant demands on companies in terms of locating and translating documents not readily available or even in their possession, and ignores the rights of current and former employees by requiring their attendance at government interviews. The pilot program further assumes control over third-parties when such control simply may not exist.

Timely and appropriate remediation is required for mitigation credit.

According to the Department, eligibility under the new pilot program further depends on whether the company undertook timely and appropriate remediation measures such as implementing an effective compliance and ethics program, disciplining employees responsible for misconduct—and possibly those who failed to supervise the responsible employees—and taking any additional remedial measures necessary to identify future risks and reduce the repetition of misconduct. For instance, the Fraud Section will evaluate the independence of the compliance function, the quality and experience of the compliance personnel, the reporting structure of compliance personnel within the company, the auditing of the compliance program to assure effectiveness, and whether the company has established a culture of compliance. In addition, the Department will expect a company to recognize the seriousness of the misconduct and accept responsibility for it.

Potential Benefits for Self-Reporting

Under the new pilot program, a company that has voluntarily self-reported FCPA violations, fully cooperated with the Department, disgorged all profits from the FCPA-related misconduct, and met the additional requirements set forth above, may qualify for a full range of potential mitigation credit. In

particular, if a criminal resolution is warranted, the Fraud Section's FCPA Unit may reduce any applicable fine by up to 50 percent of the bottom end of the Sentencing Guidelines fine range. In addition, under the pilot program, the Department "generally should not" require appointment of a monitor if the company has, at the time of resolution, implemented an effective compliance program. Alternatively, the Department may decline entirely to prosecute a company that has fully satisfied each factor under the pilot program. Declination of prosecution, however, will be evaluated based on the balance between the importance of encouraging disclosure against the seriousness of the offense, thus taking into account the involvement by executive management in the FCPA misconduct, the size of the ill-gotten gains in relation to the overall revenue of the company, and any recent prior resolutions by the company with the Department.

Limited mitigation credit is available for partial compliance with the pilot program.

Finally, under the new program, partial mitigation credit is also available for companies that have failed to self-report FCPA violations if they later fully cooperate with the Department and take timely and appropriate remedial measures. The available credit, however, will be markedly less than that afforded to companies that self-disclose in accordance with the pilot program. Indeed, in circumstances where no voluntary self-disclosure has been made, the Fraud Section's FCPA Unit will accord no more than 25 percent of the low end of the Sentencing Guidelines fine range.

Discretionary Implementation and Implications

Because of its discretionary implementation, the pilot program provides no guarantee that self-reporting FCPA-related misconduct will lead to significant leniency or a declination.

While the pilot program's eligibility for a penalty reduction and the potential avoidance of a corporate monitor are certainly significant incentives to encourage self-disclosure, the granting of these and other rewards in return for self-reporting FCPA violations rests entirely within the discretion of the prosecutors investigating the misconduct at issue. Thus, while it is difficult to imagine a scenario in which the government would not award any mitigation credit to a company that fully meets the pilot program's requirements, the extent of the available benefits and the method of resolution of the case continues to be subject to a significant amount of variability.

Moreover, inconsistent prior case resolutions and a general lack of public information regarding the treatment of self-reporting companies make it difficult to assess the benefits of voluntary disclosure of FCPA violations. To be sure, there are cases where the traditional voluntary disclosure analysis, including evidence of intent, pervasiveness and sponsorship of illicit conduct, issuer status, risk of detection, statute of limitations and other factors, will certainly favor disclosure. But for closer cases, the discretionary component of the government's decision protocol must be an essential consideration. Indeed, various factors such as the completeness of the disclosure, the perceived seriousness of the underlying wrongful conduct, and the level of resources required for follow-up remedial measures, among others, play an important role in the prosecutors' subjective evaluation process in determining the proper outcome and any available benefits that would be accorded to a company that self-reports FCPA-related misconduct.

Finally, and importantly, the Department's new pilot program fails to address what type of resolution, such as a deferred prosecution, non-prosecution or guilty plea, may be required of a self-reporting company where the circumstances surrounding the FCPA violation do not warrant a declination of prosecution. This uncertainty, coupled with the relative unpredictability of the available rewards, as well as the strong likelihood that responses to additional government inquiries and investigations will be required of a disclosing company, should be taken into account while considering whether to disclose FCPA-related misconduct under the pilot program.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

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