

White Collar Defense and Investigations

DOJ Issues Guidance Regarding Enhanced FCPA Enforcement and Credit for Voluntary Disclosure, Cooperation, and Remediation

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On April 5, 2016, the Fraud Section of the Department of Justice (DOJ) issued a new guidance memo, entitled “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance” (Guidance) ([click here](#)), describing a new pilot program specifying how cooperation credit will be afforded for voluntary self-disclosure, cooperation with investigators, and remediation of violations of the Foreign Corrupt Practices Act. The Guidance also announces increased resources for FCPA enforcement. The Guidance comes about seven months after Deputy Attorney General Sally Quillian Yates issued her memo on Individual Accountability for Corporate Wrongdoing (Yates Memo), which announced that although cooperation credit for corporations depends on many factors, the one factor that is necessary even to be considered for cooperation credit is the disclosure to prosecutors of all relevant facts relating to potential culpability of individual employees. The Guidance goes further than the Yates Memo with respect to FCPA investigations, quantifying the potential benefits of voluntary disclosure, defining what constitutes voluntary disclosure and cooperation and defining what a corporation must do to obtain full credit for voluntary disclosure and cooperation.

DOJ’s Enhanced FCPA Enforcement Strategy

The Guidance states that the DOJ has enhanced its FCPA enforcement strategy in three ways: (1) increasing its FCPA law enforcement resources, (2) improving its coordination with foreign regulators, and (3) creating an FCPA enforcement pilot program.

Increased Enforcement Resources. The Guidance restates the DOJ’s announcement late last year that it would add 10 new prosecutors to its FCPA unit. See Department of Justice, “Assistant Attorney General Leslie R. Caldwell Delivers Remarks at American Conference Institute’s 32nd Annual International Conference on Foreign Corrupt Practices Act” (Nov. 17, 2015). The additional staffing represents a 50% increase from its previous total. The Guidance also mentions an earlier announced creation of three new FBI special agent squads dedicated to FCPA enforcement. See Federal Bureau of Investigation, “FBI Establishes International Corruption Squads Targeting Foreign Bribery, Kleptocracy Crimes” (Mar. 30, 2015).

Improved Coordination with Foreign Regulators. The Guidance notes that the DOJ and foreign regulators are increasing coordination by more effectively sharing leads regarding potential FCPA violations, documents, and witness testimony.

New FCPA Enforcement Pilot Program. The most significant new enforcement mechanism in the Guidance is the DOJ’s FCPA enforcement pilot program, a one-year program initiated on the date of the Guidance. According to the Guidance, the pilot program seeks to encourage voluntarily disclosure of violations, full cooperation with the DOJ, and corporate remediation of flawed controls and compliance programs, with the ultimate goals of further deterring individuals and companies from violating the FCPA, encouraging companies to implement strong anti-corruption compliance programs, and (consistent with the Yates Memo) increasing the DOJ Fraud’s Section’s ability to prosecute difficult-to-discover individual wrongdoing.

Increased Transparency for Mitigation Credit under the Pilot Program

The Guidance states that the DOJ seeks to increase transparency about the benchmarks that companies must meet in order to receive mitigation credit for full voluntary self-disclosure of violations, cooperation with investigators, and remediation of violations. Consistent with that aim, the Guidance details DOJ's expectations in each of those three areas.

Voluntary Self-Disclosure. According to the Guidance, the DOJ will consider the circumstances of a company's disclosure of a FCPA violation, but will not consider a disclosure "voluntary" if it was required by law, agreement, or contract. In order to receive consideration for self-disclosure mitigation credit under the pilot program, the DOJ will require that: (1) the disclosures be made "prior to an imminent threat of disclosure or government investigation," (2) the conduct at issue be disclosed within a reasonably prompt time after the company learns about the offense, and (3) the company discloses all relevant facts known to it about the FCPA violation, including (as also prescribed by the Yates Memo) relevant facts about involved individuals.

Cooperation with Investigators. Under the pilot program, the DOJ will offer full cooperation credit if all of the factors discussed below are met. If, however, not all factors are met, the DOJ will consider offering partial credit at best. The Guidance specifically notes the following factors in addition to the Principles of Federal Prosecution of Business Organizations as stated in the U.S. Attorneys' Manual (the USAM Principles) when assessing full or partial cooperation:

- disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including facts related to involvement by corporate officers, employees, or agents,
- the degree to which cooperation was proactive rather than reactive (the company must disclose relevant facts even when not specifically asked to do so),
- preservation, collection, and disclosure of relevant materials, and provision of timely updates regarding the company's internal investigation, including rolling disclosures of information
- coordination ("de-confliction") between internal and government investigations,
- provision of all facts relevant to potential third-party criminal activity,
- upon DOJ request, making officers and employees (including people overseas) available for DOJ interviews (subject to the individuals' Fifth Amendment protections),
- disclosure of all relevant facts gathered during a company's independent investigation (including attribution of facts to specific sources, where this does not violate the attorney-client privilege),
- disclosure of overseas documents and information about how those documents were collected,
- facilitation of third-party production of documents and witnesses from foreign jurisdictions (where not legally prohibited), and
- provision of translations of relevant foreign language documents where requested.

According to the Guidance, the DOJ will consider each case on an individual basis taking into account the scope, quantity, quality, and timing of cooperation based on the circumstances of each matter. If the company claims it is unable to comply with certain requests, for example because doing so would violate another country's privacy laws, the burden is on the company to explain to the DOJ why it is unable to comply with those requests in order to receive full credit for cooperation.

Remediation of Violations. The Guidance states that, in order to receive any credit for remediation efforts, a company must first be eligible for the cooperation credit noted above. If a company can satisfy the cooperation credit requirement, a company will receive further credit for remediation if it implements an effective compliance and ethics program appropriately tailored to its organization. According to the Guidance, the DOJ will assess programs taking into consideration whether the company:

- has an established culture of compliance, including an awareness among employees that criminal conduct is not tolerated,
- dedicates sufficient resources to compliance, including maintaining experienced and adequately compensated compliance personnel,
- maintains an independent compliance function,
- performs an effective risk assessment and tailors its compliance program based on the assessment,
- performs regular audits of its compliance function,
- maintains an appropriate structure of compliance personnel within the company,
- appropriately disciplines employees for violations and allows for the possibility of disciplining others with oversight of individuals responsible for violations, including consideration of how compensation should be effected by disciplinary violations, and
- considers any additional steps necessary to signal the importance of accepting responsibility for misconduct and measures to reduce misconduct risks.

Mitigation Credit under the Pilot Program. Over the last year, the DOJ has made assurances that the DOJ will provide “consistent” benefits for companies that cooperate with FCPA investigations and will increase transparency in that regard. In accord with those assurances, the DOJ’s recent settlement with VimpelCom Ltd. states that VimpelCom received a specific cooperation and remediation credit of 25% and another 20% reduction for promptly acknowledging wrongdoing, both applied to the bottom end of the Sentencing Guideline fine range. See *U.S. v. VimpelCom Ltd.*, Deferred Prosecution Agreement 16-cr-137 (ER) (S.D.N.Y. 2016). The Guidance continues these efforts to lend definition and consistency to the benefits of self-disclosure, cooperation and remediation. Specifically, the Guidance states that if a company voluntarily self-discloses FCPA misconduct, fully cooperates, and timely and appropriately remediates, all viewed in accordance with the factors described above, the DOJ may:

- grant up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought (at most, a 25% reduction will be granted if the voluntary self-disclosure requirements have not been met),
- not require the appointment of a monitor if the company has implemented an effective compliance program, and
- consider a declination of prosecution.

Conclusion

The DOJ’s announcement of new resources for FCPA enforcement is consistent with the ongoing emphasis on FCPA investigations and sends the message that FCPA enforcement will remain a significant priority. The centerpiece of the Guidance, however, is the description of the DOJ’s expectations for self-disclosure, cooperation and remediation and the attempt to quantify the benefits that may result. Corporations faced with decisions as to whether to self-disclose and cooperate have found it difficult to assess or quantify the potential benefits of self-disclosure and cooperation, partially because of insufficient transparency into how prior settlements were reached and partially because the unique circumstances of each case make it difficult to compare the penalties in cases that involve self-disclosure and cooperation with those in cases that do not.

The Guidance is an effort to address this issue and incentivize self-disclosure and cooperation by setting out a specific formula to quantify the potential benefits. Skeptics will likely suggest that the DOJ’s quantification principles actually provide minimal guidance since a 50% reduction off a Guideline range still provides DOJ with significant discretion to determine the Guideline range in the first instance and thus engineer a desired ultimate fine (in addition to demanding further forfeiture amounts). Thus, more than the effort at quantification itself, the most significant impact of the Guidance may be its message that failure to self-disclose will be viewed as a significant negative factor in negotiations with prosecutors, along with the Guidance’s specific description of what the DOJ expects from corporations that seek to benefit from self-disclosure, cooperation and remediation.

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