DOJ Launches New FCPA Self-Reporting Pilot Program

On April 5, 2016, the Fraud Section of the Department of Justice ("DOJ") released a Foreign Corrupt Practices Act ("FCPA") "Enforcement Plan and Guidance" memorandum ("Memo"), launching a one-year pilot program designed to incentivize business organizations to voluntarily self-report FCPA-related wrongdoing.[1] Part of the DOJ's ongoing effort to "deter individuals and companies from engaging in FCPA violations," the pilot program is intended to augment the Fraud Section's prosecutorial function by providing a greater degree of coherence and transparency to companies regarding the benefits of self-reporting and cooperating.[2]

The Memo sets forth a framework intended to provide clarity and guidance regarding circumstances in which a company can receive additional mitigation credit in FCPA matters – over and above any credit available pursuant to the Principles of Federal Prosecution of Business Organizations[3] ("USAM") and the United States Sentencing Guidelines.[4] To that end, companies are encouraged to "voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs."[5] While the Memo provides some additional objective criteria for companies to consider when they face decisions about potential self-disclosure, there remains a great deal of subjective assessment to be applied by the DOJ.

I. Overview

To fall within the ambit of the pilot program and qualify for the entirety of the available mitigation credit, a business organization must meet all the pilot program's three requirements: (1) voluntary self-disclosure of FCPA matters; (2) full cooperation in FCPA matters; and (3) timely and appropriate remediation of FCPA matters. Moreover, disgorgement of all illicit profits linked to the violation is a specific prerequisite to receipt of any mitigation credit regardless of compliance with the three requirements.[6] As discussed below, these are not new concepts but their application in practice has been somewhat inconsistent.

Organizations that strictly comply with the pilot program's criteria – described by the DOJ as "more exacting than those required under the Sentencing Guidelines"[7]– may see "up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range," could avoid having to retain a monitor, and, in certain circumstances, could receive a declination of prosecution.[8] Those organizations that fail to voluntarily self-

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[1] U.S. Department of Justice, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, *available at* https://www.justice.gov/opa/file/838386/download.

[2] Memo at 2.

[3] The United States Attorney's Manual lists ten factors that Prosecutors must consider in determining whether a criminal disposition against a business organization is warranted. U.S. Attorney's Manual ch. 9-28.300, *available at* https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.300.

[4] The United States Sentencing Guidelines lists two factors that diminish fines for business organizations. U.S. Sentencing Guidelines Manual § 8C2.5(f)-(g) (2004), *available at* http://www.ussc.gov/guidelines-manual/2015/2015-chapter-8#8c41.

[5] Memo at 2.

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.* at 8-9.

disclose but later fully cooperate and timely and appropriately remediate deficiencies may receive limited credit, according to the Memo.[9]

II. Requirements

Voluntary Self-Disclosure

Central to the pilot program is the "voluntary self-reporting of corporate wrongdoing."[10] For a disclosure to be deemed "voluntary" the following criteria should be met:[11]

- The disclosure must not be required – by law, agreement, or contract;
- The disclosure must occur prior to "an imminent threat of disclosure or government investigation";
- The company must show that the disclosure was made "within a reasonably prompt time after becoming aware of the offense"; and
- "The company discloses all relevant facts known to it," including those relating to any individuals involved.

These criteria memorialize the existing practices of the Fraud Section regarding self-disclosure and underscore the potential value of contacting the DOJ at the outset of identifying a potential FCPA violation problem before the problem has been fully investigated and remedied.

Full Cooperation

Qualification for mitigation credit also is predicated on a company cooperating with the DOJ, beyond what has been required by the USAM Principles.[12] The Memo states that cooperation under the pilot program will be assessed on an *ad hoc* basis, taking into account the specific "circumstances of each case" and, consistent with prior pronouncements, that the "full cooperation" credit is not conditioned on the "waiver of the attorney-client privilege or work product protection."[13]

Companies must meet the following requirements for "full cooperation" credit:[14]

- Timely disclosure of "all facts relevant to the wrongdoing at issue," including those relating to any individuals involved;
- Proactive cooperation, as opposed to reactive – taking initiative to disclose relevant facts and identifying "opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government";
- "Preservation, collection, and disclosure of relevant documents and information";

[9] *Id.* at 8.

[10] *Id.* at 4.

[11] The requirements are quoted or summarized from the Memo at 4.

[12] *Id.* at 5. Although the Memo states that these requirements are "in addition to the USAM Principles," the requirements in fact are congruent with the factors listed in the USAM – with the added benefit of detail and concrete criteria that to date has been lacking.

[13] *Id.* at 6.

[14] The requirements are quoted or summarized from the Memo at 5-6.

- "[T]imely updates on a company's internal investigation, including . . . rolling disclosures of information";
- "[D]e-confliction of an internal investigation with the government investigation" on request;
- Disclosure of facts relevant to "potential criminal conduct by all third-part[ies]";
- On request, making available for interviews relevant current and former officers and employees, regardless of their location;
- "Disclosure of all relevant facts gathered in a company's independent investigation, with attribution . . . to specific sources" where possible;
- Disclosure of overseas documents, including their location and the individual who found them, unless "disclosure is impossible due to foreign law";
- "Facilitation of the third-party production of documents and witnesses from foreign jurisdictions" unless legally prohibited; and
- "Where requested and appropriate, provision of translations of relevant [foreign] documents."

The Memo acknowledges that "cooperation comes in many forms and that 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 the pilot program."[15] For example, the Memo states that the Fraud Section "does not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company" nor does it "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."[16] Further, the memo states that companies may be afforded partial credit for partial compliance, albeit "markedly less than for full cooperation."[17]

These indicia are the typical hallmarks of cooperation and well-known to experienced FCPA counsel. Nevertheless, it is noteworthy that the DOJ makes specific mention of disclosing overseas documents, producing witnesses from foreign jurisdictions, and providing translations of foreign documents. Among other things, this highlights the DOJ's difficulty in obtaining evidence abroad and the importance to the DOJ of a company providing this information.

Timely and Appropriate Remediation

The Memo acknowledges that remediation is inherently "difficult to ascertain and highly case specific."[18] Remediation efforts only will be considered if "a company is eligible for cooperation credit."[19] Where the threshold requirement of cooperation credit has been satisfied, the following factors generally are required to warrant remediation credit:[20]

- Implementation of an effective compliance and ethics program, taking into consideration: (i) "whether the company has established a culture of compliance" and "an awareness among employees that any criminal conduct . . . will not be tolerated"; (ii) whether sufficient corporate resources are dedicated to the compliance function; (iii) "the quality and experience

[15] Memo at 6.

[16] *Id.*

[17] Memo at 7.

[18] *Id.*

[19] *Id.*

[20] The factors are quoted or summarized from the Memo at 7-8.

of the compliance personnel"; (iv) "the independence of the compliance function"; (v) the performance of effective risk assessments and tailoring of the compliance program based on that assessment; (vi) how compliance personnel are compensated and promoted; (vii) the auditing of the compliance program to assure its effectiveness; and (viii) "[t]he reporting structure of compliance personnel within the company";
- Appropriate discipline of responsible employees and their supervisors; and
- Any additional steps demonstrating a company's recognition of the seriousness of the misconduct, acceptance of responsibility, and the implementation of measures to reduce and preempt repetition of such misconduct.

Once again, these requirements memorialize typical Fraud Section positions as to what constitutes appropriate remediation. Of significance, however, is specific discussion of the DOJ's views of an effective ethics and compliance program, including the manner in which compliance personnel are compensated and promoted. These views are indicative of the Fraud Section's greater focus on compliance programs and echoes recent pronouncements, including the guidance DOJ published jointly with SEC in 2012, stating, among other things, that the "hallmarks" of an effective anti-corruption compliance program include, but are not limited to, a "commitment from senior management and a clearly articulated policy against corruption"; periodic risk-based reviews; providing incentives for compliance and disincentives (i.e., discipline) for non-compliance; and, mechanisms for the confidential reporting of misconduct.[21]

III. Credit for Business Organizations under the Pilot Program[22]

Mitigation credit will be tailored to the extent that a business organization complies with all the requirements and criteria set forth in the Memo. Voluntary self-disclosure, as indicated, is central to the pilot program, but where a company has failed to voluntarily self-disclose, eligibility for *limited* credit will be available if the company "later fully cooperates and timely and appropriately remediates." Any such credit would likely be less than that "afforded to companies that do self-disclose wrongdoing." Indeed, the Memo states that in such situations, companies will be accorded "at most a 25% reduction off the bottom of the Sentencing Guidelines fine range."

Conversely, companies that satisfy all the requirements of the pilot program are eligible for what the Memo calls the "full range of potential mitigation credit." In such cases, the Fraud Section:

- may grant up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range; and
- generally will not require appointment of an independent monitor if the company has implemented an effective compliance program at the time of resolution.

The Memo goes further, stating that in some circumstances, full compliance may result in a declination of prosecution. However, the presence of countervailing interests may militate against a declination where, for example, the offense is of a serious nature, senior management is implicated in the FCPA misconduct, the

[21] U.S. Department of Justice and the U.S. Securities and Exchange Commission, *Resource Guide to the U.S. Foreign Corrupt Practices Act*, 57-60 (2012). For further information on the role of the board of directors in addressing FCPA issues, please see Kelley and Bondi, *Gleaning Best FCPA Practices for Directors from Recent Government Actions*, Directorship Magazine (Jan. 8, 2016), *available at* https://www.nacdonline.org/Magazine/Article.cfm?ItemNumber=24292.

[22] This section is quoted or summarized from the Memo at 8-9.

company has a history of non-compliance, or profits flowing from the misconduct are significant relative to the company's size and wealth. These countervailing interests are also typical of past practice.

IV. Significance

The pilot program seeks to provide additional inducement for companies to voluntarily self-report potential FCPA misconduct and fully cooperate with the DOJ. It is an attempt to impart specific guidance and a formalized program outlining the DOJ's expectations and the attendant benefits associated with self-disclosure, full cooperation and remediation. However, while intending to aid the business community by furnishing additional objectivity, the prescriptions also include a number of caveats and qualifying language.[23] It remains to be seen whether the program in fact motivates companies to self-disclose at a greater rate than historical norms. In any event, the Memo will be an important part of future discussions among lawyers, management and Boards contemplating the risks and rewards of self-disclosure.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email David N. Kelley at 212.701.3050 or dkelley@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Bart Friedman at 212.701.3304 or bfriedman@cahill.com; Brian T. Markley at 212.701.3230 or bmarkley@cahill.com; Anirudh Bansal at 212.701.3207 or abansal@cahill.com; or Fria R. Kermani at 212.701.3159 or fkermani@cahill.com.

[23] For example, even where a company strictly complies with all of the requirements, the Fraud Section ***may*** grant a reduction in fines, or ***generally*** will not require appointment of a monitor (emphasis added).