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New DOJ FCPA Enforcement Plan Raises Stakes, Creates Further Uncertainty

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A pilot program designed to provide greater transparency regarding the benefits of voluntary disclosure, and presumably to encourage more such disclosures, is the latest U.S. Department of Justice (DOJ) initiative in its efforts to investigate and prosecute international bribery under the U.S. Foreign Corrupt Practices Act (FCPA). The one-year program was announced on April 5, 2016, in a DOJ memorandum entitled "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance[1]" (hereinafter "DOJ Plan") that also touted an increase in investigative and prosecutorial resources committed to enforcement of the FCPA and enhanced collaboration and information sharing between the DOJ and its foreign counterparts. While the second and third developments were consistent with recent statements by DOJ officials and do not come as a surprise, the launch of the pilot program merits attention because the criteria for full cooperation credit appear to be more stringent than those that have been traditionally articulated by the DOJ, and, unfortunately, appear to create significant uncertainty regarding their application.

The pilot program largely reduces to writing what has long been the practice of the DOJ in negotiating FCPA penalties. Historically, the DOJ has credited companies if they satisfied the factors for cooperation and remediation set forth in the Principles of Federal Prosecution of Business Organizations[2] and Chapter 8 of the U.S. Sentencing Guidelines ("Sentencing Guidelines"), which apply to business organizations. The DOJ has agreed to discounted penalties, often departing from the low end of the applicable Sentencing Guidelines range, for companies that have cooperated in the government's investigation of the alleged violations. Moreover, companies that voluntarily self-disclosed the alleged FCPA violations generally have received a greater percentage discount than companies that did not. The amount of the discount has varied from case to case, usually based on the DOJ's perception of the nature and extent of a company's cooperation. For example, in the DOJ's recent settlement with PTC Inc. and two of its subsidiaries, the DOJ only agreed to "partial cooperation credit of 15% off the bottom of the Sentencing Guidelines fine range." In doing so, the DOJ noted:

> The Companies did not receive voluntary disclosure credit because, although the Companies, through their parent corporation PTC Inc., reported to the Office in 2011 certain misconduct identified through a then-ongoing internal investigation, they did not voluntarily disclose relevant facts known to PTC Inc. at the time of the initial

> disclosure until the [DOJ] uncovered salient facts regarding the Companies' responsibility for the improper travel and entertainment expenditures at issue independently and brought them to the Companies' attention, after which the Companies disclosed information that they had learned as part of an earlier internal investigation.[3]

In contrast, in the Siemens matter, the DOJ agreed to a reduction of more than 65% off the bottom of the agreed-upon Sentencing Guidelines range based on the company's cooperation in the investigation of others, its "substantial compliance and remediation efforts," and its "extraordinary rehabilitation" (notably, the Siemens investigation did not start with a voluntary disclosure by the company).[4]

There are several noteworthy aspects of the pilot program. First, it fixes outer limits for the amount of the penalty discount the DOJ will offer in the form of cooperation credit. A company that does not voluntarily self-disclose alleged FCPA violations will only be eligible for a discount of up to 25% "off the bottom of the Sentencing Guidelines fine range." On the other hand, a company that does voluntarily self-disclose will be eligible for a discount of up to 50% off the bottom end of the Sentencing Guidelines range.[5] In both cases, the company also must fully cooperate in the government's investigation, timely and appropriately remediate the deficiencies in its policies, procedures, and/or internal controls that contributed to the alleged violations, and disgorge all related profits.[6] We note that while a 50% reduction from the low-end of the sentencing range may appear generous, in situations where the sentencing range has reached nine figures or more, as has happened in some FCPA cases, the limitation of a 50% discount may nevertheless result in a harsh and economically burdensome penalty.

Second, the pilot program lists the stringent requirements that must be met for a company to obtain a declination of prosecution. In that regard, the program requires that the company voluntarily self-disclose the alleged FCPA violations, fully cooperate in the investigation, timely and appropriately remediate the deficiencies in its policies, procedures and/or internal controls, and disgorge all profits derived from the alleged violations. Even if a company clears all of these hurdles, a declination may not be secured if senior managers were involved in the violations, the company derived significant profits from the violations, there is a history of non-compliance by the company, or the company had a prior settlement within five years of consideration of the new violations.[7] In short, the DOJ appears to have set a very high bar for declining prosecution, a decision that could thwart their efforts to encourage more voluntary disclosures.

Third, the program lists in a single document various considerations the DOJ will take into account in determining whether a company should receive credit for (1) "voluntary self-disclosure,"[8] (2) "full cooperation"[9], and (3) "timely and appropriate remediation," including disgorgement of all profits derived from the violations.[10] While most of these considerations have been cited in past settlements as factors the DOJ considered in agreeing to a specific kind of resolution, including a discounted penalty, they have never been presented as collective requirements to qualify for leniency. A brief discussion of what the DOJ now appears to require regarding each of these areas follows.

Voluntary Self-Disclosure

The question of whether a company has successfully made a voluntary self-disclosure is critical and could result in savings of tens of millions of dollars in a significant matter. Unfortunately, the pilot program provides no new guidance on this issue. Instead, it references existing imprecise standards regarding the timing of the disclosure, noting that the disclosure must occur "within a reasonably prompt time after becoming aware of the offense," and "prior to an imminent threat of disclosure or government investigation,"[11] and it places the burden of demonstrating timeliness on a company.[12] Moreover, echoing the language of the DOJ's recently issued Yates Memorandum,[13] the DOJ will require that a company disclose "all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation,"[14] in order to get credit for voluntary self-disclosure. This requirement seems to conflate voluntary disclosure of potential violations, which should occur in the early stages of an investigation if a company wishes to satisfy the DOJ's timeliness requirement, and fulsome reporting of the details of the alleged violations, which

typically would happen during the course and/or at the conclusion of a company's internal investigation. Whether intentional or not, this creates a substantial risk that the DOJ could deny all credit to a company that voluntarily disclosed potential FCPA violations, but did not, in the DOJ's view, disclose all relevant facts during the investigation.

Full Cooperation

Although the criteria set forth for full cooperation credit are not new, the emphasis on several factors merits attention. First, the Yates Memo standard is rearticulated, requiring timely disclosure of "all facts related to involvement in the criminal activity by the corporation's officers, employees or agents."[15] Companies that fail to meet this standard, even if they have identified in earnest what they believe are all of the relevant facts regarding individuals, will not qualify for any cooperation. Indeed, the Fraud Section will not even assess "the scope, quantity, quality, and timing of cooperation" unless this threshold requirement is met.[16]

The DOJ also expects that a company will proactively identify "relevant evidence not in the company's possession," and, "*unless legally prohibited*," facilitate "the third-party production of documents and witnesses from foreign jurisdictions."[17] In the past, a company's willingness to cooperate in the investigation of others, including third-parties, has been a factor considered by prosecutors in exercising leniency. It now appears, however, that the DOJ requires that a company proactively cooperate in the investigation of third-parties, to the extent possible, or else it will not qualify for full cooperation credit.

Throughout the plan, the DOJ notes that the burden is on a company to satisfy the DOJ that certain requirements have been met. The same is the case when a company claims that "conflicting foreign law" prohibits it from producing evidence or making employees available for interviews.[18] As in the past, the DOJ will assess a company's willingness to attempt to facilitate cooperation in the face of foreign legal obstacles, such as blocking statutes, but the plan now makes it clear that the DOJ can deny cooperation credit if it concludes that those claims are suspect.[19]

The plan also raises questions about the extent to which a company's attorney-client privilege and its attorney's work product in connection with an internal investigation will be respected.[20] Although the Principles of Federal Prosecution of Business Organizations only require that a company disclose relevant facts, the DOJ plan goes further. It requires that a company and its counsel, when reporting on facts gathered during an internal investigation, must identify "specific sources [of facts] where such attribution does not violate the attorney-client privilege, rather than a general narrative of facts."[21] As a general rule, the identity of the source of facts gathered by counsel during an internal investigation is privileged and/or work product and, in some jurisdictions, disclosure of this information may constitute a waiver of the privilege as to that witness. How and when the DOJ will seek attribution remains to be seen, but this is certain to be an area of concern for companies that must also be mindful of their exposure to civil liability and associated discovery demands from private plaintiffs.

Remediation

The pilot program makes clear that the DOJ will not give any credit for remediation unless a company has first demonstrated it "is eligible for cooperation credit," foreclosing what had in the past been at least a possibility for independent consideration of some leniency.[22] To receive credit for remediation, a company must implement an "effective compliance and ethics program," the elements of which have been listed in past DOJ settlements and the FCPA guidance issued by the DOJ and SEC in November 2012,[23] and some of which are restated in this latest memorandum. One new item of note is that in addition to assessing whether there are sufficient resources devoted to compliance, the DOJ will look at "[h]ow compliance personnel are compensated and promoted compared to other employees."[24] No further details are provided as to whether compensation and promotion are assessed against other employees who serve in legal, finance and audit functions, as opposed to sales and marketing staff and senior management.

Disgorgement

A last noteworthy aspect of the pilot program is that a company will be not be eligible for any cooperation credit if it does not "disgorge all profits resulting from the FCPA violations," regardless of whether it

has satisfied all of the other criteria set forth in the guidance.[25] Traditionally, disgorgement has been a civil remedy pursued by the SEC in its FCPA enforcement actions. Criminal penalties, on the other hand, are set forth in the federal criminal code and the Sentencing Guidelines, and both the relevant statute and the Guidelines take into account the gross profits made from corrupt conduct in assessing the penalty. *See* Alternative Fines Act, 18 U.S.C. §3571(d) (allowing for fines of up to twice the benefit that the defendant sought by making the corrupt payment). Although prosecutors may consider the adequacy of civil remediation in making determinations as to the necessity of corporate prosecution, the pilot program's conditioning of leniency on payment of disgorgement is a departure from the DOJ's long standing principle that the threat of criminal prosecution should not be used to accomplish civil remediation.

Recommended Practices

We believe that in the short term, the DOJ will look for opportunities to demonstrate its commitment to granting leniency under the new pilot program. Because of the program's stringent requirements, and the time required to investigate and resolve major matters, eligible matters are likely to be small in relation to most of the cases the DOJ has settled.

Pending further evidence of how the program will be implemented, we encourage companies to take the following steps to ensure their ability to cooperate to the fullest extent required by the new guidance:

- Ensure that all employment agreements going forward require cooperation with both company investigators (including outside counsel) and government investigators, and ensure that any severance agreement with an executive or employee implicated in an FCPA scheme includes a requirement that the severed employee cooperate with government investigators to be eligible for his or her full severance benefits.
- As soon as practicable, revisit all collective labor and employee agreements in jurisdictions with significant privacy and labor rights, such as the European Union, to ensure that the company has clearly preserved, to the extent possible under the law, its ability to conduct a thorough investigation of employees located in its international subsidiaries. This includes the right to review employee work emails without having to be subject to limitations imposed by employee labor associations, such as works council.
- When making an initial voluntary disclosure before all relevant facts are known, take steps to ensure that company counsel shares all that is known at the time of the disclosure, advises the DOJ of areas that the company is still investigating, and informs the DOJ, to the extent possible, of all information related to other sources of evidence that the government may wish to pursue, such as relevant bank accounts or implicated third parties.
- Before commencing the internal investigation, review the investigative plan with the DOJ to ensure the prosecutors are satisfied with the nature and scope of the plan. Company counsel should also seek guidance as to whether the DOJ does not want counsel to approach certain witnesses, so that the company cannot be accused of interfering with the government's investigation.
- As the company's internal investigation progresses, provide the DOJ with regular updates of all relevant facts regarding the involvement of officers and employees in the activity under investigation, as well as information about other potential sources of evidence.
- If requested by the DOJ and possible, bring former employees to the U.S. for interviews and provide documents obtained from third parties, or even encourage and facilitate the government's interview of third-parties.
- Ensure that all steps taken in the course of the internal investigation are done at the direction of counsel and memorialized accordingly to preserve the corporate attorney-client privilege to the greatest extent possible.
- Prepare to demonstrate the amount of revenues, expenses, profits and losses associated with the alleged corrupt conduct in order to avoid an arbitrary and unjust disgorgement and penalty.

We will continue to monitor developments under the FCPA pilot program and provide updates as warranted.

1. "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" is available at https://www.justice.gov/opa/file/838386/download.
2. These principles are set forth in the United States Attorney's Manual at Section 9-28.000, *et. seq.*, available at https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.
3. DOJ Non-Prosecution Agreement with Parametric Technology (Shanghai) Software Co. Ltd. and Parametric Technology (Hong Kong) Ltd., entered February 16, 2016, at 1, available at https://www.justice.gov/opa/file/824911/download.
4. Siemens AG Plea Agreement, 08-CR-367 (D. D.C. Dec. 15, 2008), at 5, available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-15-08siemensakt-plea.pdf.
5. DOJ Plan at 8.
6. The pilot program does not specify the manner of disgorgement or to whom disgorgement would be made, although the DOJ presumably contemplates that the profits will be paid into the U.S. Treasury, either as part of a criminal resolution with the DOJ or a civil resolution with the SEC.
7. DOJ Plan at 9.
8. Id. at 4.
9. Id. at 5.
10. Id. at 7-9 and note 6.
11. Id. at 4 (quoting U.S.S.G. §8C2.5(g)(1)).
12. Id.
13. Memorandum of Deputy Attorney General Sally Yates on Individual Accountability for Corporate Wrongdoing, issued September 9, 2015, at 3 ("In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct."). The Yates Memorandum is available at https://www.justice.gov/dag/file/769036/download.
14. DOJ Plan at 4.
15. Id. at 5.
16. Id. at 6.
17. Id.
18. Id. at 5, note 3.
19. Id.
20. For more information on how best to preserve the attorney-client privilege over internal investigations, please refer to our previous Corporate Internal Investigations Alert of July 8, 2014, available at http://www.weil.com/~/media/files/pdfs/white_collar_defense_july_08_14.pdf.
21. DOJ Plan at 5-6.
22. Id. at 7.
23. See *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 2012), at 56-62. The Resource Guide is available at https://www.justice.gov/criminal-fraud/fcpa-guidance.
24. DOJ Plan at 7.
25. Id. at 2 and 9, note 6.

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