

Memorandum

Department of Justice Announces New Foreign Corrupt Practices Act Self-Reporting Pilot Program and Accompanying Guidance

April 6, 2016

On April 5, 2016, the U.S. Department of Justice (“DOJ”) issued a memorandum (“Fraud Section Memo”) announcing a new one-year pilot program designed to encourage companies to self-report violations of the Foreign Corrupt Practices Act (“FCPA”) and to cooperate with the DOJ’s Fraud Section. This new pilot program builds upon the DOJ’s previously released Yates Memo, issued in September 2015, which articulated the Justice Department’s priority to hold individuals accountable for an organization’s misconduct.

The Fraud Section Memo clearly represents an attempt by the Justice Department to encourage and incentivize companies to self-report FCPA violations, and to overcome skepticism that self-reporting will actually result in any benefits. Under the new guidance, the DOJ appears to be signaling the following:

- Companies that self-report, cooperate, and remediate, in accordance with the guidance set forth in the Fraud Section Memo, are likely to receive a declination of prosecution, unless certain factors are also present. These factors include:
 - where the nature of the misconduct is particularly serious;
 - where senior company management was involved in the misconduct;
 - where the company obtained significant profit from the misconduct, taking into account the company’s overall revenues and profitability; or
 - where the company has a history of non-compliance.
- Where one or more of the above-stated factors are present, companies that self-report, cooperate, and remediate are unlikely to receive an outright declination, but may still obtain a significant reduction in potential fines.

- Companies that fail to self-report, cooperate, and remediate are less likely than before to receive any leniency.

The new pilot program and guidance apply only to the FCPA Unit of the Justice Department's Fraud Section, and do not apply to any other DOJ offices or sections, the U.S. Securities and Exchange Commission, or any other agency.

The Pilot Program

Requirements

The pilot program sets forth three requirements for a company to qualify for mitigation credit: (1) voluntary self-disclosure, (2) full cooperation, and (3) timely and appropriate remediation. Each of these elements of the pilot program carries its own requirements. In addition, to qualify for any credit under the pilot program, a company must disgorge all profits from the misconduct at issue.

1. *Voluntary Self-Disclosure*

The Fraud Section Memo explains that the Fraud Section will carefully assess the circumstances of disclosure under the pilot program. In order for a company to receive credit for voluntary self-disclosure of misconduct:

- The disclosure must not be one that a company is otherwise required to make by law, agreement or contract;
- The voluntary disclosure must qualify under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation"; and
- The company must disclose the misconduct promptly after discovering it, with the burden on the company to show timeliness.

2. *Full Cooperation*

There are also specific requirements regarding full cooperation with DOJ. Among the most notable are:

- Timely disclosure of relevant facts related to the wrongdoing, including all facts related to involvement in potential criminal activity by the company's officers, employees, or agents;
- "Proactive cooperation"; in other words, the company must disclose relevant facts, even when not specifically asked to do so, and must identify opportunities for the DOJ to obtain relevant evidence not in the company's possession;
- Timely updates of any internal investigation, including rolling disclosures of information;

- Disclosure of all facts relevant to potential criminal conduct by third-party companies (including officers or employees) and third-party individuals; and
- At the DOJ's request, making company officers and employees with relevant information available for interviews (including those located overseas, as well as former officers and employees).

The Fraud Section Memo notes that while companies should be eligible for some cooperation credit under the pilot program if they simply meet the threshold criteria of the Yates Memo, this will generally be significantly less credit than they could receive for full cooperation.

3. Timely and Appropriate Remediation

Assuming a company fully cooperates, the Fraud Section Memo indicates that the following are generally required for a company to receive full credit for remediation under the pilot program:

- Implementation of an effective compliance and ethics program — taking into account (i) whether the company has a culture of compliance; (ii) whether the company dedicates sufficient resources to compliance; (iii) whether the company has experienced compliance personnel; (iv) the independence of the company's compliance function; (v) whether the company performs effective risk assessments and tailors the compliance program based on such assessments; (vi) compensation and promotion of compliance personnel; (vii) the auditing of the compliance function; and (viii) the reporting structure of compliance personnel;
- Appropriate discipline of employees involved in misconduct; and
- Any other facts demonstrating that the company takes its misconduct seriously, accepts responsibility for it, and implements measures to reduce the risk of such misconduct occurring again.

Mitigation Credit

The Fraud Section Memo provides that, if a company meets all of these requirements (outlined above), DOJ will consider issuing a declination of prosecution. However, before granting a declination, DOJ will also consider countervailing interests, such as the seriousness of the offense, the involvement of executive management, the size of the company's profit from the conduct and whether the company has a history of non-compliance. If the requirements are met but DOJ determines not to issue a declination, the Company will still qualify for the full range of potential mitigation credit. In this case, DOJ may accord up to a 50% reduction off the bottom end of the Sentencing Guidelines' fine range. Moreover, if DOJ determines that the company has implemented an effective compliance program at the time of resolution, DOJ will not require an FCPA monitor — which, in recent years, have sometimes been imposed in DOJ FCPA settlements.

Finally, if a company does not voluntarily disclose misconduct, but later fully cooperates with the DOJ and timely and appropriately remediates, it will receive some mitigation credit, though less than if the company had voluntarily disclosed misconduct. Under this scenario, the company will be eligible for, at most, a 25% reduction off the bottom end of the Sentencing Guidelines' fine range.

Summary

The Justice Department's new pilot program appears to be designed to provide greater incentive for companies to self-report all relevant facts and fully cooperate in connection with FCPA violations. The extent to which this program actually will impact the decision to self-report suspected FCPA violations remains to be seen. On the one hand, the pilot program provides more of a roadmap for obtaining leniency in FCPA investigations. At the same time, however, the pilot program and guidance appear to signal that leniency will be difficult – and perhaps more difficult than before – to secure for companies that do not self-report, cooperate, and remediate. In addition, the program's cooperation requirements stand to provide the DOJ with additional information regarding possible misconduct by employees, which could result in an increase in FCPA prosecutions against individuals.

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