

Client Alert

April 2016

DOJ Publishes FCPA Enforcement Plan and Guidance

The Department of Justice (the “DOJ”) has clarified its approach to self-reporting of violations of the Foreign Corrupt Practices Act (“FCPA”) in the latest memo in a series of memos which articulate new policies regarding corporate criminality. On April 5th, 2016, DOJ published the FCPA Enforcement Plan and Guidance¹ (the “Guidance”), announcing a new pilot project increasing cooperation credit for companies seeking mitigation credit after an FCPA violation.

The DOJ’s FCPA Unit has historically provided mitigation credit and lowered fines below the Sentencing Guidelines range for companies that voluntarily disclose FCPA violations, fully cooperate in the investigation and remediate. Favorable consideration for cooperation and mitigation has traditionally been governed by the Principles of Federal Prosecution of Business Organizations (the “USAM principles”). The new FCPA Guidance goes beyond those principles and provides specific guidance for matters involving alleged violations of the foreign bribery statute. The Guidance does not supplant the USAM principles, but it does shed light on how companies can set themselves up for the maximum amount of mitigation credit possible.

Requirements Outlined in the Guidance

To receive the full amount of mitigation credit, a company must (1) voluntarily disclose misconduct, (2) fully cooperate with the investigation, and (3) remediate. The recently published Guidance illuminates each of these requirements in detail, as follows.

1. Voluntary self-disclosure

As a preliminary step, the FCPA Unit will consider whether the self-disclosure was in fact made voluntarily. Disclosures mandated by law, agreement, or contract are not “voluntary” for purposes of the pilot program. Once a disclosure is deemed voluntary, the following requirements will guide the FCPA Unit in determining whether mitigation credit is appropriate:

- The disclosure must be made *prior to an imminent threat of disclosure* or government investigation.
- The disclosure must be made within a *reasonably prompt time* after the company becomes aware of the offense.
- The company must disclose *all relevant known facts*, including individuals involved in any FCPA violation.

2. Full cooperation

The FCPA’s decision about whether a company has fully cooperated involves considering the USAM principles as well as the guidance in the DAG Memo on Individual Accountability, which instructs that

¹ UNITED STATES DEPARTMENT OF JUSTICE, THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download>.

individuals are accountable for corporate wrongdoing. In addition, the pilot program mandates the following requirements, subject to restrictions imposed by national or foreign law:

- The company must *timely disclose all relevant facts*, including which officers, employees, or agents were involved in the violation.
- Cooperation must be *proactive*, not reactive.
- The company must *preserve, collect, and disclose* relevant documents and information.
- The company must *timely update* the FCPA Unit on its own internal investigation and *disclose relevant facts and sources* gathered during its internal investigation.
- The company must *make officers and employees available* for interviews upon request.
- The company must *disclose overseas documents*, the locations where they were found, and who found the documents.
- The company must *facilitate third-party production* of documents and witnesses from foreign jurisdictions.
- The company must *provide translations* of relevant documents in foreign languages upon request.

3. Remediation

As a prerequisite to receiving credit for mitigation, the company must be eligible for cooperation credit. The FCPA Unit will take into account any actions demonstrating that the company recognizes the seriousness of the misconduct. In particular, it will look to whether:

- The company implements an *effective compliance and ethics program*. The criteria for such a program include: establishing a culture of compliance, dedicating sufficient resources to compliance, retaining experienced compliance personnel, keeping the compliance function independent, performing effective risk assessment and tailoring compliance based on that assessment, reasonably compensating and promoting compliance personnel compared to other employees, auditing the compliance program, and maintaining a reasonable reporting structure of compliance personnel.
- The company provides for *appropriate discipline* of employees.

Amount of Mitigation Credit Available

Under the pilot program, where a company fully cooperates and timely remediates but does not voluntarily self-disclose, it will be eligible for at most a 25 percent reduction off the bottom of the Sentencing Guidelines fine range. Where a company voluntarily self-discloses, fully cooperates, and timely remediates, it will be eligible for up to a 50 percent reduction off the bottom of the Sentencing Guidelines fine range. If the company has an effective compliance program, the Fraud Section's FCPA unit generally will not require that a monitor be put in place.

Finally and perhaps most significantly, the FCPA Unit will consider declining prosecution when a company self-discloses violations. In evaluating declination in these self-reported matters, the Department will consider countervailing interests, such as: involvement by executives in the violations, significant profit, a history of non-compliance, or a prior resolution by the company within the past five years.

The pilot program is effective April 5, 2016, and the FCPA Unit will apply the Guidance to companies that meet its requirements during the pilot period, even if the pilot then expires. Notably, the pilot program applies only to investigations carried out by the FCPA Unit and does not extend to other parts of the DOJ.

The Bottom Line

While this new policy stops short of a default rule of declination for self-reported FCPA violations, the Department is clearly dangling the non-prosecution outcome as incentive for companies to practice active internal monitoring, robust compliance and affirmative disclosure. Coupled with the Yates Memo

regarding individual accountability, the new policy provides clear guidance as to the nature and extent of cooperation the Department expects. These policy statements demonstrate the Department's desire to incentivize compliance and objective internal investigations.

The new policy applies to the FCPA investigations, but it demonstrates the Department's general approach to self-disclosure. Objective and thorough investigations, timely disclosure, and effective mediation will earn credit with the Department regardless of subject matter. While only time will tell if company cooperation of the sort outlined in these new policies results in an increased number of declinations, companies are well-advised to heed these new policies and ensure they are doing all they can to identify and remediate FCPA and other issues as they arise.

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