

DOJ Issues New FCPA Guidance and Launches Self-Reporting Pilot Program

Article By:

Kelly A. Moore

Eric W. Sitarchuk

Alison Tanchyk

The *US Department of Justice* has announced the creation of a one-year pilot program intended to encourage companies to self-report bribery violations and provide extensive cooperation in exchange for reduced penalties, ranging from reductions in fines to declinations.

On April 5, the ***Fraud Section*** of the ***US Department of Justice (DOJ)*** issued its “[Foreign Corrupt Practices Act Enforcement Plan and Guidance](#)” (Guidance) outlining the following “three steps in [its] enhanced FCPA enforcement strategy”:

1. The intensification of its investigative and prosecutorial efforts by substantially increasing its FCPA law enforcement resources.
2. The strengthening of its coordination with foreign law enforcement.
3. Its implementation of an “FCPA enforcement pilot program” to encourage voluntary disclosure, cooperation, and remediation.^[1]

While the first two steps have been championed in prior DOJ press releases and speeches, the third step—the creation of the FCPA enforcement pilot program—is an important development that has the potential to change the voluntarily disclosure calculus in connection with FCPA matters.

The Guidance applies “to organizations that voluntarily self-disclose or cooperate in FCPA matters during the pilot period, even if the pilot thereafter expires.”^[2]

Intensification of DOJ’s Investigative and Prosecutorial Efforts

The Fraud Section plans to more than double the size of its FCPA Unit by “adding 10 more

prosecutors to its ranks”^[3]—a staffing goal that was previously announced by Assistant Attorney General for the Criminal Division Leslie Caldwell at an FCPA conference in November 2015.^[4] The Guidance also cites the FBI’s establishment of “three new squads of special agents devoted to FCPA investigations and prosecutions,” a hiring initiative that was announced approximately a year ago.

Strengthening of DOJ’s Coordination with Foreign Law Enforcement

The second part of the Guidance builds on previous statements by senior DOJ leaders that they “are greatly aided by our foreign partners”^[5] and “it is safe to say [in 2013] that we are cooperating with foreign law enforcement on foreign bribery cases more closely today than at any time in history.”^[6]

FCPA Enforcement Pilot Program—Eligibility and Potential Benefits

The most important part of the Guidance is the Fraud Section’s announcement of a one-year “FCPA enforcement pilot program,” which provides for “mitigation credit” that takes into consideration three essential factors: (1) voluntary disclosure, (2) full cooperation, and (3) remediation. In cases in which the above three factors are met but a criminal resolution is nonetheless warranted, “mitigation credit” can include “up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought” and the avoidance of a third-party compliance monitor.”^[7] Moreover, the Guidance states that, in appropriate cases, where the above factors are fully satisfied, DOJ “will consider a declination of prosecution.”^[8]

Voluntary Self-Disclosure

A company must voluntarily disclose an FCPA violation to the Fraud Section in order to be eligible for the full mitigation credit. As a preliminary matter, the disclosure must be truly voluntary—a disclosure that the “company is required to make, by law, agreement, or contract” would not constitute voluntary self-disclosure for purposes of this pilot.^[9] Second, the disclosure must occur “prior to an imminent threat of disclosure or government investigation” and be “within a reasonably prompt time after becoming aware of the offense,” with the burden on the discloser to demonstrate timeliness.^[10] Finally, the disclosure must include “all relevant facts known to [the company], including all relevant facts about the individuals involved in any FCPA violation.”^[11]

DOJ’s voluntary disclosure requirement follows a recent announcement by the US Securities and Exchange Commission (SEC) that companies subject to FCPA enforcement actions are required to self-report their potential misconduct to be eligible for deferred prosecution agreements and non-prosecution agreements. Full Cooperation

The Guidance sets forth nearly a dozen requirements for companies seeking cooperation credit under the pilot program.^[12] Those requirements can be distilled into the following four categories:

- **Disclosure of Relevant Facts:** Companies are expected to disclose “all facts relevant to the wrongdoing at issue” on a timely basis, including “all facts related to involvement in the criminal activity by the corporation’s officers, employees, or agents” and “all facts relevant to potential criminal conduct by all third-part[ies].” Disclosure is expected to be “proactive” rather than “reactive,” and facts relevant to the investigation should be voluntarily provided “even when [companies are] not specifically asked to do so.” In addition, disclosures are expected to include “all relevant facts gathered during a company’s independent

investigation.”

- **Preservation and Disclosure of Documents:** All relevant documents—as well as “information related to their provenance”—are expected to be collected, preserved, and disclosed. This expectation extends to “overseas documents” and important details about those records such as their location and the individuals who discovered them. In some cases, prosecutors may insist that companies provide translations of foreign-language documents. Finally, it is expected that companies will assist with the “third-party production of documents . . . from foreign jurisdictions.”
- **Making Individuals Available for Interviews:** Upon request, companies are expected to “mak[e] available for [DOJ] interviews those company officers and employees who possess relevant information,” including—where appropriate and possible—individuals located overseas, as well as those who no longer work for the company.
- **Conducting Transparent and Coordinated Internal Investigations:** Companies are expected to provide timely updates about their internal investigations and, where requested, ensure that such investigations do not conflict with those being conducted by the government.

The Guidance notes that “cooperation comes in many forms,” and 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.”^[13]

Remediation

The final requirement is that of “timely and appropriate remediation,” and the following items generally will be required in order for companies to receive remediation credit:

- **Implementation of an Effective Compliance Program:** While the criteria depend on the size and resources of the organization, the following factors are normally considered:
 - Whether the company has established a “culture of compliance”
 - Whether the company has sufficient compliance resources
 - The quality and experience of the compliance personnel
 - The independence of the compliance function
 - Whether the company’s compliance program has performed an effective risk assessment and tailored the compliance program based on that assessment
 - How a company’s compliance personnel are compensated and promoted
 - Auditing of the program to assure its effectiveness
 - The reporting structure of compliance personnel within the company
- **Discipline of Culpable Employees:** It is expected not only that companies discipline culpable

employees, but that they have systems that provide for the possibility of disciplining others with oversight of the responsible individuals.

- Acceptance of Responsibility and Implementation of Reforms: Companies are expected to recognize the seriousness of the misconduct, accept responsibility for it, and implement reforms to identify and reduce the risk of similar violations.^[14]

Credit

Where the above conditions are met but a criminal resolution is warranted, the Fraud Section's FCPA Unit (1) may accord up to a 50% reduction off the "bottom end" of the Sentencing Guidelines fine range, if a fine is sought; and (2) generally should not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

Furthermore, where the same conditions are met, the Fraud Section's FCPA Unit will consider a declination of prosecution. In doing so, prosecutors must balance the importance of encouraging disclosure against the seriousness of the offense. In assessing the seriousness of the offense, prosecutors are to consider the involvement by executive management in the FCPA misconduct, the size of the ill-gotten gains in relation to the overall revenue of the company, a history of noncompliance by the company, and any prior resolutions by the company with DOJ within the past five years.

Finally, if the company cooperates and remediates, but has not voluntarily disclosed, the Fraud Section's FCPA Unit may provide partial mitigation credit, but will agree to no more than a 25% reduction off the bottom of the Sentencing Guidelines fine range.^[15]

Implications

This Guidance comes after what has been a growing perception that voluntary disclosures have slowed significantly due to a lack of transparency, consistency, and clarity as to what the benefits are, if any, to self-disclosing. Whether the pilot program succeeds in encouraging self-disclosures will likely depend on the perception of companies and defense counsel of the fairness and openness of the application of the criteria in the Guidance.

[1] US Dep't of Justice, Memorandum from Andrew Weissmann titled "[The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance](#)" (Apr. 5, 2016) (Guidance)

[2] Guidance at 3.

[3] Id. at 1.

[4] Stephen Dockery, "[US Justice Dept. Boosting Foreign Corruption Staff](#)," Wall Street Journal (Nov. 17, 2015)

[5] US Dep't of Justice, "[Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act](#)" (Nov. 19, 2014)

[6] See id.; see also US Dep't of Justice, "[Acting Assistant Attorney General Mythili Raman Delivers Keynote Address at the Global Anti-Corruption Congress](#)" (June 17, 2013)

[7] Guidance at 8.

[8] Id. at 9.

[9] Id. at 4.

[10] Id.

[11] Id.

[12] Id. at 5-6.

[13] Id. at 6.

[14] Id. at 7-8.

[15] Id. at 8-9.

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