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FCPA

DOJ Announces Increased Foreign Corrupt Practices Act Enforcement Measures

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On April 5, 2016, the U.S. Department of Justice (DOJ) announced a significant increase in its efforts to enforce the Foreign Corrupt Practices Act (FCPA). The DOJ's three-step plan increases personnel dedicated to investigating FCPA violations, fosters international cooperation and coordination in ongoing investigations, and further incentivizes companies to self-disclose FCPA issues.

The FCPA broadly prohibits U.S. businesses and persons from making payments to foreign officials in order to receive or retain business. After being sparingly used since it was signed into law in 1977, the past decade has shown that the DOJ and the Securities and Exchange Commission, which share enforcement responsibility for the law, have made FCPA enforcement a top priority. The government's efforts have led to large civil and criminal penalties for FCPA violations that should put all companies and their employees on notice that they need to carefully monitor their foreign operations for compliance. In an April 5 memorandum from Andrew Weissmann (the ''April 5 DOJ Guidance''), Chief of the DOJ Criminal Division's Fraud Section, the DOJ specifically outlined its increased enforcement plan that will likely result in even more FCPA investigations and prosecutions—of both companies and individuals—in the future (66 CARE, 4/6/16).

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Overview of the DOJ's New FCPA Enforcement Plan

The DOJ's three-step enhanced enforcement plan is squarely aimed at ensuring a more robust targeting of potential misconduct covered by the law. The April 5 DOJ Guidance also strongly encourages a company's voluntary self-disclosure of FCPA violations, and clearly delineates what a company will have to do in order to obtain cooperation credit from the DOJ.

The DOJ is significantly increasing the amount of personnel dedicated to investigating and enforcing the FCPA.

First, in a move the DOJ characterized as the ''most important step in combatting FCPA violations,'' the DOJ is significantly increasing the amount of personnel dedicated to investigating and enforcing the FCPA. The DOJ's Fraud Section is adding 10 more prosecutors to its FCPA unit, increasing its law enforcement resources there by 50 percent. The Federal Bureau of Investiga-

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tion is also increasing its dedicated FCPA resources with the addition of three new dedicated squads of special agents. According to the DOJ, the new personnel should ''send a message to wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light.''

Second, the DOJ is stepping up its coordination with foreign law enforcement agencies in order to more effectively fight corruption on a global basis. The DOJ and its foreign counterparts are more effectively sharing leads and information and making it easier to share access to documents and witnesses across its borders.

Third, the DOJ announced a one-year pilot program designed to incentivize companies to self-report FCPA violations and fully cooperate with the department in order to become eligible for increased cooperation credit. This mitigation credit will only be available for companies that voluntarily self-disclose, fully cooperate in the specific manner the DOJ identifies in the April 5 DOJ Guidance, take appropriate remediation steps, and disgorge all profits resulting from the violations. At the end of the one-year period, the DOJ will evaluate whether to extend the life of the program, and whether to modify its terms in light of the lessons learned during the year.

Understanding the DOJ's Guidance in Light of Prior DOJ Memorandum Focusing on Increased Individual Accountability

In order to understand what the DOJ is now going to accept when it comes to cooperation with an FCPA investigation, it is important to understand the renewed focus the DOJ has placed on holding individuals accountable for corporate wrongdoing as reflected in a Sept. 9, 2015, memo from Deputy Attorney General Sally Quillian Yates (the ''Yates Memo'') (13 CARE 1952, 9/11/15). The Yates Memo is referenced numerous times throughout the DOJ's April 5 Guidance and therefore plays an integral part in the implementation of the pilot program.

Recognizing that a corporation does not act on its own but only through individuals, the Yates Memo makes clear that holding individuals involved in corporate wrongdoing accountable for their conduct is and should always be a main focus of DOJ attorneys in any criminal or civil investigation. The Yates Memo announces six steps the DOJ enacted in order to increase its efforts to hold individuals accountable:

1. If a corporation wants cooperation credit from the DOJ, it must give the DOJ all relevant facts related to individuals involved in the identified misconduct.
2. DOJ attorneys and investigators should focus on individuals from the start of any investigation.
3. Civil and criminal attorneys at the DOJ handling an investigation should be in frequent contact with one another.
4. In the usual case, the DOJ will not release individuals from liability when resolving a matter with a corporation.
5. DOJ attorneys should not resolve a matter with a corporation if there is not a clear plan in place to resolve cases against individuals involved in the wrongdoing.
6. Civil investigations should focus on individuals and consider bringing a lawsuit against an individual based on considerations other than whether or not that individual can pay any fine to be imposed.

The Yates Memo is a clear direction that the DOJ will be focused on bringing more cases against individuals, and companies facing the prospect of an FCPA investigation will have to act accordingly.

What Counts as a Voluntary Self-Disclosure In an FCPA Matter?

The April 5 DOJ Guidance sets forth how the DOJ will define what counts as a voluntary self-disclosure for purposes of a company's participation in the pilot program, with a particular focus on the circumstances surrounding a disclosure. First, a disclosure a company is required to make—whether by operation of law or contract, for example—does not count. Second, the DOJ requires that the disclosure be made: (1) prior to an imminent threat of disclosure or government investigation; (2) ''within a reasonably prompt time after becoming aware of the offense''; and (3) in a way that ensures the company discloses all of the relevant facts it knows, including all facts related to individuals involved in the violation.

Defining Full Cooperation

The April 5 DOJ Guidance explains that the Principles of Federal Prosecution of Business Organizations set forth in the U.S. Attorneys' Manual and the U.S. Sentencing Guidelines already provide that companies can get credit for self-disclosure, cooperation, and the installation of timely and effective remediation measures in the wake of discovering an FCPA violation. The pilot program, however, gives even more credit to companies that meet its established criteria.

In order to get full cooperation credit under the pilot program, the April 5 DOJ Guidance sets forth a series of additional cooperation steps a company must take:

1. As outlined in the Yates Memo, timely disclosure of all facts related to the individuals involved in the wrongdoing.
2. ''Proactive cooperation''—a company must disclose relevant facts even if not specifically asked to do so by the DOJ and identify ways for the government to obtain evidence not in the company's possession and not known by the government.
3. Preserving and collecting relevant documents, and producing those documents to the government.
4. Providing timely updates on the company's own internal investigation with rolling disclosures of facts.
5. If requested, ensuring that an internal investigation does not conflict with the government's investigation.

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6. Disclosing facts to the DOJ about possible misconduct by third-party companies and individuals.
7. Making a company's current and former employees and officers (both in the U.S. and abroad) available for DOJ interviews (subject to the invocation of their Fifth Amendment rights against self-incrimination).
8. Disclosing all relevant facts learned during a company's internal investigation and attribution of those facts to specific sources if consistent with maintaining the attorney-client privilege.
9. Disclosing all documents located abroad, including providing where and by whom the documents were found, unless disclosure is not possible due to foreign law restrictions (although the company has the burden to prove that the foreign law prevents disclosure).
10. Assisting in the production of third-party documents and witnesses unless prohibited by law.
11. Translating relevant documents upon request.

The April 5 DOJ Guidance underscores that cooperation is case-specific and not all investigations are created equal—a small company is not expected to conduct as expansive of an investigation as a Fortune 100 company. An ''appropriately tailored'' investigation is what will typically receive full cooperation credit. Moreover, the DOJ reiterated that nothing in the April 5 DOJ Guidance or the Yates Memo requires waiver of the attorney-client privilege.

Implementing Timely Remediation Measures

While acknowledging that ''remediation can be difficult to ascertain and highly case specific,'' the April 5 DOJ Guidance sets forth the benchmarks it will require a company to meet in order to get full credit under the pilot program:

1. Implementing an effective compliance program which includes fostering a culture of compliance within the company, committing sufficient resources to the compliance function, hiring high quality and experienced compliance personnel, maintaining the independence of the compliance program, conducting risk assessments and updating the compliance program based on the results, appropriate compensation and promotion of compliance personnel, auditing the compliance program to make sure it is effective, and establishing an appropriate reporting structure in the company for compliance personnel.
2. Disciplining employees (including culpable supervisors) as appropriate, including those individuals identified as being involved in the misconduct.
3. Taking additional steps that show the company understands the serious nature of the misconduct, accepts responsibility, and has taken steps to lessen the risk of similar instances occurring in the future.

Credit Available Under the DOJ's FCPA Pilot Program

If a company voluntarily self-discloses, fully cooperates, and takes timely and appropriate remediation steps, then it is eligible for full credit under the pilot program and can obtain additional reductions beyond any fine reduction set forth in the Sentencing Guidelines. In cases where criminal prosecution is being considered, the DOJ may give up to a 50 percent reduction off the bottom of the fine range established in the Sentencing Guidelines, and the company should be able to avoid having a monitor appointed as long as there is an effective compliance program in place. Critically, the DOJ will also consider declining to prosecute the company if it satisfies the above criteria.

The April 5 DOJ Guidance emphasizes the great weight the DOJ puts on voluntary disclosure by noting that a company that does not voluntarily disclose FCPA misconduct but later fully cooperates and timely remediates is available for substantially lower cooperation credit—the DOJ may only give the company at most a 25 percent reduction from the bottom of the Sentencing Guidelines range.

Practical Advice for Handling FCPA Risks In Light of New DOJ Guidance

The release of the April 5 DOJ Guidance provides companies with valuable insight into DOJ charging decisions and what it expects companies to do when they uncover potential FCPA misconduct. Here are some key takeaways business leaders and in-house counsel should consider in managing FCPA risks:

1. Proactively establish a robust FCPA compliance program that appropriately trains employees on the contours of the FCPA, identifies potential FCPA risks, and contains mechanisms to properly escalate potential FCPA problems. This is the time to get your compliance house in order because the DOJ is significantly boosting its own resources to identify FCPA violations. Conduct that once went undiscovered by the government may now see the light of day, and companies are best served by staying ahead of the compliance curve.
2. If your company is acquiring another company that has foreign operations, make sure to perform targeted FCPA due diligence to identify potential FCPA risks prior to closing the transaction.
3. When you become aware of a potential FCPA risk, act quickly and decisively to launch an internal investigation to determine if there is a real problem and identify the scope of the issue, obtaining outside counsel as appropriate to run the investigation and protect the independence of that investigation.
4. Immediately preserve all relevant records.
5. In light of the DOJ's mandate to focus on individual misconduct in the corporate context, consider early on whether it is appropriate to engage separate attorneys for potentially affected individuals.
6. If documents and/or witnesses are located abroad, investigate whether any local privacy laws or blocking statutes are in place that could limit or prohibit certain types of disclosures or the production of documents. Formulate a plan early on in the investigation to ensure full disclosure of the

information the DOJ needs to show that the company is fully cooperating, but do it in a way that minimizes the risk to the company of running afoul of foreign law.

7. Consider an early disclosure to the DOJ even while the internal investigation is ongoing. Now more than ever, early disclosure of a problem can save a company millions of dollars, and potentially pave the way to avoiding criminal prosecution. If someone else beats the company to the DOJ and discloses the wrongdoing before the company does, the company will not likely be eligible for full cooperation credit under the pilot program.

8. The DOJ is giving companies a chance for an unprecedented amount of cooperation credit, but it comes at a price. If a company self-reports and intends to cooperate, it needs to recognize what that means under the new framework established by the DOJ, and fully commit to providing the information the DOJ needs in order to satisfy itself that the company is serious about solving the problem.

9. An ounce of prevention is worth more than a pound of cure. Establish a reputation that your company takes FCPA compliance seriously and will not tolerate payments to foreign officials in order to gain business. Train employees to recognize red flags before they develop into a systemic problem. Create a culture of compliance where employees feel free to share their FCPA concerns up the management chain.

FCPA enforcement efforts are here to stay, and in fact, the DOJ, now more than ever, is actively monitoring the marketplace to root out corruption. Putting in place systems to stop an FCPA problem before it starts is key to ensuring that while increased DOJ enforcement may trap other companies, your company will avoid the type of investigation and civil or criminal penalty that could cripple a business.

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