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CLIENT MEMORANDUM

White Collar Update: DOJ Announces One-Year FCPA Self-Reporting Pilot Program

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On April 5, 2016, the U.S. Department of Justice ("DOJ") launched a new one-year pilot program encouraging voluntary self-disclosure of misconduct related to the Foreign Corrupt Practices Act ("FCPA"). Companies meeting certain cooperation, remediation, and disgorgement requirements will now be eligible for a fine reduction of up to 50% below the bottom of the Sentencing Guidelines range, resolution without a monitor, and consideration of a declination. The pilot program complements the Yates Memo and recent amendments to the U.S. Attorneys' Manual ("USAM"), reflecting further efforts by DOJ to incentivize cooperation and to clarify requirements for obtaining maximum credit.

Assistant Attorney General Leslie R. Caldwell issued a **press release** announcing the pilot program and **Enforcement Plan and Guidance Memorandum** ("Guidance") issued by Andrew Weissmann, Chief of DOJ's Fraud Section. The program applies only to FCPA matters handled by the Fraud Section's FCPA Unit and will last one year, at which point the Fraud Section will determine whether extension or modification of the program is warranted. In her announcement, Ms. Caldwell stressed the importance of self-reporting and the consequences of failing to do so, noting that "[i]f a company opts not to self-disclose, it should do so understanding that in any eventual investigation that decision will result in a significantly different outcome than if the company had voluntarily disclosed the conduct to us and cooperated in our investigation." Nevertheless, the Guidance rightly notes that the government cannot compel self-disclosure.

Pilot Program Requirements

The Guidance makes clear that the pilot program does not supplant the USAM's Principles of Federal Prosecution of Business Organization ("Filip Factors") or the U.S. Sentencing Guidelines, which separately incentivize self-disclosure and cooperation; rather, the Guidance "sets forth the circumstances in which an organization can receive additional credit in FCPA matters" beyond any fine reduction provided by the Sentencing Guidelines. Companies seeking credit under the pilot program must meet four main conditions:

- *Voluntary Self-Disclosure and Disclosure of Individual Wrongdoing*. Voluntary disclosure must be timely, occur "prior to an imminent threat of disclosure or government investigation,"[1] and include "all relevant facts known to [the company], including all relevant facts about the individuals involved in any FCPA violation." Disclosures that companies are already "required to make, by law, agreement, or contract" will not suffice.
- *Full Cooperation*. Beyond the "threshold" cooperation required by the Yates Memo and the USAM, companies must meet eleven supplemental requirements to receive full cooperation credit. Among other requirements, a company must:

[1] U.S.S.G. § 8C2.5(g)(1).

  - provide proactive cooperation;
  - preserve and disclose relevant documents, including those located overseas;
  - “de-conflict” its internal investigation with the government’s investigation, where requested;
  - facilitate employee interviews;
  - provide all facts relevant to criminal conduct of third-party companies and individuals;
  - disclose all relevant facts, including attribution to specific sources where it does not violate attorney-client privilege; and
  - facilitate production of foreign third-party documents and witnesses.

  The Guidance acknowledges that cooperation is not one-size-fits-all; companies must conduct an “appropriately tailored investigation.” A company may claim it cannot satisfy a requirement, but it bears the burden of establishing that inability. Companies that satisfy some, but not all, of these criteria are still eligible for cooperation credit under the program, but it will be “markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.”

- *Remediation*. DOJ’s new Compliance Counsel, Hui Chen, will aid the Fraud Section in evaluating remediation efforts, which DOJ acknowledges are “difficult to ascertain and highly case specific.” Companies must implement an “effective compliance and ethics program,” appropriately discipline employees, and take any other measures that “demonstrate recognition of the seriousness of the corporation’s misconduct [and] acceptance of responsibility for it.” A company must otherwise qualify for cooperation credit to receive credit for remediation.
- *Profit Disgorgement*. Companies must disgorge all profits stemming from FCPA violations.

Potential Credit and Rewards

Companies that voluntarily self-disclose, fully cooperate, timely and appropriately remediate, and disgorge profits are eligible for the following benefits:

- *Fine Reduction*. A company may receive up to a 50% fine reduction off the bottom end of the Sentencing Guidelines range. Companies that fail to self-disclose misconduct initially but later fully cooperate and remediate will only be entitled to “at most” a 25% fine reduction off the bottom end of the Sentencing Guidelines fine range.
- *No Monitor Appointment*. The FCPA Unit generally will not appoint a monitor if a company has implemented a sufficiently effective compliance program at the time of resolution.
- *Declination*. When a company has satisfied all of the program’s requirements, the Fraud Section may, in its discretion, decline to prosecute. “Countervailing interests” that weigh against a declination include the involvement of executive management in the misconduct, significant profit to the company, a history of non-compliance, or a prior resolution with DOJ in the past five years.

Enhanced FCPA Enforcement Strategies

The Fraud Section’s pilot program complements broader, intensified efforts to combat bribery committed by both individuals and companies.

- *Increased Resources.* DOJ’s Fraud Section is adding ten additional prosecutors to its FCPA Unit (a 50% increase) and three new squads of special agents devoted to FCPA investigations and prosecutions.

- *International Coordination*. DOJ is strengthening its cross-border coordination and collaboration with foreign anti-bribery regulators to increase sharing of leads, documents, and witnesses. DOJ cited a number of cases illustrating the results of this effort, such as **Alcoa**; **Alstom**; **Hewlett-Packard**; **PetroTiger**; **Total**; and **VimpelCom**. International assistance in these cases came from authorities in numerous countries, including Australia, Colombia, France, Indonesia, Sweden, Switzerland, and the United Kingdom.
- *Individual Accountability*. The program is intended to build on DOJ's focus on individual accountability in corporate investigations, consistent with the **Yates Memo** and the **USAM amendments**, by increasing its ability to prosecute individuals whose conduct might otherwise have been undiscovered or impossible to prove. The Department's ongoing prosecution and recent convictions of individuals related to **Petroleos de Venezuela S.A.** reflect this effort.

Practical Impact

The Fraud Section's Guidance parallels other DOJ efforts to provide greater consistency and transparency in resolving FCPA investigations. Indeed, DOJ has long sought to promote the benefits of self-disclosure and cooperation in FCPA investigations and more broadly. The Guidance's emphasis on self-disclosure mirrors the USAM amendments establishing prompt disclosure as a separate Filip Factor for all corporate investigations. DOJ likewise stressed the importance of self-disclosure in its few publicly-announced declinations.

The Guidance also coincides with the Securities and Exchange Commission's ("SEC's") recent announcement that self-reporting will be a prerequisite to receiving a Deferred or Non-Prosecution Agreement for FCPA-related misconduct. Though both DOJ and the SEC now incentivize self-reporting, these agencies may have separate investigation timelines, assess mitigation credit differently, or reach different outcomes.

The Guidance leaves a number of questions unanswered, as well.

- *Timing of Resolutions*. It is too soon to say whether the pilot program will result in shortened FCPA investigations, which often stretch for years. DOJ's Andrew Weissmann remarked in a February 2016 address that DOJ will aim to resolve cases for companies that self-report within one year, and the Guidance incentivizes companies to move quickly by focusing on timely cooperation and tailored investigations. However, some of the pilot program's requirements, such as provision of documents and witnesses from other countries and third parties, may have the unintended consequence of prolonging FCPA investigations.
- *Liability in Other Jurisdictions*. Companies that self-disclose to DOJ and receive resulting benefits must weigh the risks of follow-on enforcement actions in other jurisdictions, which may not provide the same mitigation credit.
- *Declinations and Disgorgement*. It is not clear how DOJ will impose the disgorgement requirement in cases where DOJ grants a declination, unless a company separately commits to disgorge profits to the SEC.
- *Effect on Monitors*. Reversing a recent trend of a reduced use of monitors, DOJ required both **VimpelCom** and **Olympus Latin America** to retain three-year monitors as part of FCPA resolutions earlier in 2016. DOJ's willingness to dispose of monitors in cases meeting the pilot program's requirements further suggests they are not a necessary part of FCPA resolutions.

All companies, regardless of their eligibility for the pilot program, should use the Guidance as a helpful window into DOJ's views about cooperation, remediation, and enforcement strategies in FCPA investigations.

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