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DOJ Announces Pilot Program to Encourage FCPA Self-Disclosures

For a number of years, we have suggested that companies would benefit, and the Department of Justice's enforcement programs would be more effective, if DOJ were to provide greater clarity on the actions companies must take to secure full cooperation credit, particularly in Foreign Corrupt Practices Act cases. Yesterday, DOJ announced a new pilot program aimed at providing exactly that sort of guidance and clarity.

At a press conference led by Assistant Attorney General Leslie Caldwell, the DOJ's Fraud Section unveiled a one-year pilot program that, for the first time, spells out specific incentives for corporations to self-disclose FCPA misconduct. Under the program, corporations that voluntarily self-disclose FCPA misconduct, and otherwise meet the "stringent" requirements of the program, will be eligible for a "full range" of mitigation credit, including a fine reduction of up to 50% below the low end of the applicable U.S. Sentencing Guidelines range, a general presumption that no monitor will be required, and consideration of an outright declination of any prosecution. To qualify for these benefits, a company must provide full cooperation, as well as timely and appropriate remediation and disgorgement of any ill-gotten profits. By contrast, according to the terms of this new program, corporations that fail to voluntarily self-disclose FCPA misconduct, but otherwise cooperate fully, will only qualify for "limited credit," identified as at most a 25% reduction below the bottom of the Sentencing Guidelines range. DOJ's pilot program, which is effective as of April 5, 2016, follows on the heels of a November 2015 Securities and Exchange Commission ("SEC") policy requiring self-reporting of FCPA misconduct for corporations to be eligible for deferred or non-prosecution agreements with the SEC.

In guidance that accompanied the announcement, DOJ detailed the requirements for voluntary self-disclosure under the pilot program. To qualify for favorable treatment, a corporation must disclose all relevant facts known to it, including all facts about the involvement of individuals, and must do so before "an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense," terms borrowed from U.S. Sentencing Guideline Section 8C2.5(g)(1). Disclosures that corporations are required to make by law, agreement, or contract will not constitute qualifying self-disclosures under the pilot program.

The Fraud Section further announced exacting expectations regarding corporate cooperation. In addition to timely disclosure of relevant facts, documents, and information, "full cooperation" under the pilot program will require proactive efforts that include identification of known, relevant evidence outside the corporation's possession; provision of facts relating to criminal conduct of third party companies and individuals; making witnesses available, including, where possible, witnesses overseas; and disclosure of relevant foreign documents, including where appropriate facilitating such production from third-parties, except where prohibited by foreign law.

Expectations for timely and appropriate remediation were also detailed in the Fraud Section's guidance. A sufficient remediation effort under the pilot program will require implementation of a well-resourced and audited compliance program that establishes a culture of compliance; dedicates sufficient resources; invests in qualified, experienced and appropriately compensated personnel; ensures sufficient independence of the compliance function; tailors compliance efforts to effective risk assessments; enjoys an appropriate reporting structure; and includes a robust disciplinary process. DOJ's new Compliance Counsel will be deeply engaged in evaluating any cooperating corporation's remediation efforts.

For years, DOJ has urged corporations to self-disclose misconduct and promised favorable treatment for those that do, but lack of transparency regarding DOJ's charging and resolution decisions has made it all but impossible to identify with precision the actual rewards that would result from such self-disclosure. The stated ambition of this pilot program is to introduce greater transparency and thus better inform corporate decision-making and encourage self-disclosure. Whether the one-year pilot program will be continued, or even expanded beyond the FCPA realm, will likely depend upon whether the program produces the uptick in self-disclosures that DOJ is clearly seeking.

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