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MORE ON CORPORATE GOVERNANCE

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DOJ's FCPA enforcement plan and guidance: Is it anything new?

On April 5, the U.S. Department of Justice announced a new Foreign Corrupt Practices Act Enforcement Plan and Guidance ("Guidance"). The Guidance purports to create a new framework under which prosecutors may offer reduced fines, deferred prosecution agreements, nonprosecution agreements, or even declinations.

1. Intensifying investigative resources and strengthening coordination with foreign counterparts

The Guidance announces its focus on "intensifying its investigative and prosecutorial efforts" by adding 10 prosecutors and three squads of FBI special agents dedicated to FCPA enforcement. Moreover, DOJ promises increased coordination with foreign counterparts. Rather than reveal new efforts, these pronouncements simply reflect DOJ's existing priorities. For example, earlier this year, DOJ demonstrated the success of cooperation with foreign counterparts when it announced a settlement with VimpelCom Limited, the world's sixth-largest telecommunications company. The settlement required VimpelCom to pay criminal penalties in excess of $230 million to the DOJ and over $230 million to Dutch prosecutors, as well as to disgorge over $375 million to be divided between the SEC and the Public Prosecution Service of the Netherlands.

2. FCPA pilot program

The Guidance announces implementation of a FCPA pilot program, whereby companies can become eligible for mitigation credit by: (1) voluntarily self-disclosing the criminal conduct; (2) fully cooperating, including disclosing the involvement in the criminal activity by the corporation's officers, employees, or agents; (3) taking appropriate remedial action, including disciplinary measures against those employees identified as responsible for the misconduct, as well as against those "with oversight of the responsible individuals;" and (4) disgorging profits.

A company is eligible for *partial* credit (up to 25% reduction in fine) where the company fully cooperates and engages in appropriate remediation, but does not voluntarily disclose. Where a company satisfies all pilot program requirements, the company may receive *further* credit (up to a 50% reduction in fine).

"Full cooperation" as defined by the Guidance is onerous, requiring:

- Proactive (not reactive) and timely disclosure of all relevant facts, including those related to third-party, employee, officer, or agent involvement in the criminal activity;
- Identifying opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government;
- Providing timely and ongoing updates on the company's internal investigation;
- Making present and former officers and employees available for interviews;
- Attribution of facts to specific sources(where attribution does

not violate attorney-client privilege);
- Disclosure of overseas documents;
- Facilitation of third-party production of documents and witnesses from foreign jurisdictions (unless legally prohibited); and
- Providing translations of relevant documents upon request.

Most unnerving is DOJ's failure to commit to declining prosecution for companies that comply with all of the above factors. The Guidance provides: "Where those . . . conditions are met, the Fraud Section's FCPA Unit *will consider* a declination of prosecution." This lack of commitment by DOJ is puzzling given that prior to the announcement of the new pilot program, companies that had complied with the Guidance's milestones were already eligible for similar or even greater rewards. For example, in 2012 Morgan Stanley received a declination after voluntarily disclosing FCPA violations by a former managing director, cooperating in DOJ's investigation, and implementing a compliance program. Moreover, even though VimpelCom had not made a voluntary disclosure, DOJ awarded a 45% reduction off of the bottom of the Sentencing Guidelines fine range (rather than the 25% reduction available thru the pilot program) and declined prosecution.

What does the Guidance mean for companies?

While the Guidance doesn't change DOJ's prior approach to FCPA violations, it does provide greater transparency about its analysis: prompt remedial action is essential to minimize a company's liability, as are self-reporting and full cooperation.

The Guidance also echoes the Yates Memo's message that a critical component of a company's cooperation is identification of all culpable individuals and all facts relevant to proving their culpability. A company that self-reports must be prepared to provide this information to DOJ, but must balance the possible reward of mitigation credit against potential risk. Last year, in *Shell Oil Co. v. Writt*, the Texas Supreme Court held that statements made to the DOJ about the criminal liability of an employee in a company's FCPA investigation report were absolutely privileged and therefore could not subject the company to defamation liability. 464 S.W.3d 650 (Tx. 2015). In so holding, the court reasoned that the "evidence [was] conclusive that when Shell provided its internal investigation report to the DOJ, Shell was a target of the DOJ's investigation and the information in the report related to the DOJ's inquiry." Under the Guidance, however, statements made by companies in their investigation reports to DOJ may not be protected by the absolute privilege, because the Guidance requires companies to make their disclosures "prior to an imminent threat of disclosure or government investigation."

Conclusion

The Guidance is explicit in its intent and purpose, providing:

[T]his pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement. Such voluntary self-disclosures thus promote aggressive enforcement of the FCPA and the investigation and prosecution of culpable individuals.

Despite the risks, it appears that companies are electing to implement the procedures mandated by DOJ, lest they risk attracting unwanted attention. Deputy Attorney General Sally Yates, in her May 10th speech before the New York City Bar Association, noted that companies are making "real and tangible efforts to adhere to our requirement that they identify facts about individual conduct, right down to providing what I'm told are called 'Yates Binders' . . . that contain relevant emails of individuals being interviewed by the government." According to DAG Yates, this new approach is helping to "steer officers and employees in their organizations toward best practices and higher standards." While such change is admirable, so too would be more certainty for companies that opt to self-report. DAG Yates only promised that "equilibrium will return" and "a new normal will exist." For companies trying to make tough decisions, that time can't come soon enough.

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