COVINGTON

The New FCPA Pilot Program: What Will It Mean In Practice?

April 21, 2016

Anti-Corruption

On April 5, 2016, the United States Department of Justice ("DOJ"), through the Criminal Division's Fraud Section, announced a one-year Foreign Corrupt Practices Act ("FCPA") enforcement pilot program (the "Pilot Program") intended to motivate companies to voluntarily disclose FCPA-related misconduct and increase transparency around the Fraud Section's approach to mitigation credit in corporate FCPA resolutions.[1]

The incentive for voluntary disclosure comes in the form of a commitment by the Fraud Section's FCPA Unit to consider a declination of prosecution or, if a criminal resolution is deemed warranted, substantially discounted fines (up to 50% off the bottom end of the Sentencing Guidelines fine range) and no appointment of an outside compliance monitor.[2] These potential benefits would be available only when a company has voluntarily self-disclosed misconduct in an FCPA matter in accordance with the Pilot Program; fully cooperated in a manner consistent with the Deputy Attorney General's September 2015 memo on individual accountability (the "Yates Memo") and related principles in the U.S. Attorney's Manual[3]; met the additional "stringent requirements" of the Pilot Program, which include disgorgement of all profits resulting from the FCPA violation; and timely and appropriately remediated. In other words, if – and only if – various requirements are met and disgorgement is paid, companies may then receive the discretionary benefits articulated in the Pilot Memo.

The Pilot Program is intended to address a concern expressed by many companies about the unpredictability of what may happen once they voluntarily disclose. That having been said, it remains to be seen whether the Pilot Program will, in fact, motivate companies to more readily self-disclose FCPA violations. On the one hand, the Pilot Program holds out the possibility, in a voluntary disclosure case, of a declination or a substantially discounted fine and avoidance of

---

[1] Memorandum from Andrew Weismann, Chief (Fraud Section), U.S. Dep't of Justice (Apr. 5, 2016), *available at* https://www.justice.gov/opa/file/838386/download (the "Pilot Memo"). The Pilot Program is effective from April 5, 2016, and applies to all organizations that self-disclose or cooperate during the one-year pilot period, even if the Pilot Program is thereafter discontinued.

[2] In the absence of voluntary disclosure, companies that otherwise meet the Pilot Program's requirements for full cooperation, remediation, and disgorgement may be eligible for up to a 25% discount off the low end of the Sentencing Guidelines range.

[3] Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice (Sept. 9, 2015), *available at* http://www.justice.gov/dag/file/769036/download; *see also* our prior Yates Memo guidance; U.S. Dep't of Justice, United States Attorneys' Manual 9-28.000 *et seq.*, *Principles of Federal Prosecution of Business Organizations* (1997) (the "*USAM Principles*"), *available at* https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

an outside monitor. But, as was the case before the Pilot Program, these potential benefits are discretionary, and companies cannot predict with certainty whether and to what extent these benefits will be conferred. Moreover, even in cases of a declination, it would appear that disgorgement of all profits resulting from the FCPA violation will be required under the Pilot Program. With no guaranty of a declination or other forms of leniency – and considering the significant expense associated with DOJ investigations, as well as the potential to earn substantial discounts based on cooperation and remediation alone – many companies may be reluctant to voluntarily report potential FCPA violations to DOJ, at least until data points emerge under the Pilot Program and the picture becomes clearer as to whether other countries will act consistently with DOJ's charging decisions in follow-on enforcement proceedings abroad.

In our view, the more immediate impact of the Pilot Program can be found in the guideposts that it provides regarding the Fraud Section's expectations for voluntary disclosure, cooperation, and remediation. As noted above, the Pilot Program includes "additional stringent requirements" in these areas that have not been as clearly articulated in prior DOJ guidance. In that sense, the Pilot Memo provides useful transparency regarding DOJ's expectations.

With respect to self-reporting, the Pilot Memo emphasizes that the Fraud Section "will make a careful assessment of the circumstances of the disclosure." In other words, "the Fraud Section will determine whether the disclosure was already required to be made." As one example, the Fraud Section apparently will not consider a disclosure that is required by "law, agreement, or contract" to be "voluntary." The Pilot Memo also makes clear that companies must satisfy the Sentencing Guidelines requirements that disclosure occur "prior to the imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense," and adds that "the burden [is] on the company to demonstrate timeliness." Further, building on the Yates Memo, the Pilot Memo requires that a company "disclose[] all relevant facts known to it, including all relevant facts about [] individuals involved in any FCPA violation." Thus, in the Pilot Memo, the Fraud Section starts with the requirements of the Sentencing Guidelines, and draws from the *USAM Principles*, Yates Memo, and other sources to offer a composite and more transparent view of what the Section will deem to be "voluntary" for purposes of mitigation credit in the Pilot Program.

The Pilot Memo takes a similar approach to cooperation – *i.e.*, as a condition to receiving "credit for full cooperation" under the Pilot Program, companies must adhere to the principles on cooperation articulated in the Sentencing Guidelines, *USAM Principles*, Yates Memo, and the additional requirements set forth in the Pilot Memo. In this regard, the Pilot Memo gathers in one document the following list of benchmarks that will be used by the Fraud Section to evaluate cooperation under the Pilot Program:

- As set forth in the Yates Memo, disclosure of all relevant facts, including facts related to criminal activity by officers, employees, or agents;
- "Proactive cooperation," including identification of opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government;
- Preservation, collection, and disclosure of relevant documents and information relating to their provenance;
- Provision of updates on a company's internal investigation, including rolling disclosures of information;

- Where requested, "de-confliction" of an internal investigation with the government investigation;[4]
- Provision of all facts relating to potential criminal conduct by all third parties (including their officers and employees) and third-party individuals;
- Upon request, making company officers and employees available for DOJ interviews, including overseas officers and employees (subject to individuals' Fifth Amendment rights);
- In disclosing relevant facts gathered during a company's independent investigation, attribution of facts to specific sources (subject to the attorney-client privilege), rather than a general factual narrative;
- Disclosure of overseas documents, the location from which they came, and who found them (or, where foreign law prohibits such disclosure, the company must establish the prohibition and work to identify legal bases to provide such documents);
- Unless legally prohibited, facilitation of the production of documents and witnesses by third parties; and
- Where requested, the provision of translations of relevant documents in foreign languages.

Perhaps not surprisingly, the Fraud Section preserves for itself considerable discretion in determining how much cooperation credit to offer under the new program. According to the Pilot Memo, "[c]ooperation comes in many forms," and once the requirements of the Yates Memo have been met, the "Fraud Section should assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company's cooperation under this pilot." We infer from this language that cooperation credit will continue to be viewed on a sliding scale once the threshold requirements of the Yates Memo have been met, with the possibility of "full cooperation credit" reserved for those companies that meet the additional requirements set forth in the Pilot Memo.[5]

The Pilot Memo also provides important transparency regarding the Fraud Section's expectations in the area of compliance and remediation. Most notably, building upon the DOJ/SEC *FCPA Resource Guide*'s "Hallmarks of an Effective Compliance Program," the Pilot Memo explains that DOJ will evaluate "[h]ow a company's compliance personnel are

---

[4] DOJ has explained, through a spokesperson, that the "de-confliction" requirement "means a company should ensure it does not interview certain people before the DOJ does in particular circumstances." Adam Dobrik, *Global Investigations Review*, "DOJ clears ambiguity in FCPA pilot programme" (Apr. 14, 2016), *available at* http://globalinvestigationsreview.com/article/1025618/doj-clears-ambiguity-in-fcpa-pilot-programme.

[5] For companies seeking guidance on scoping internal investigations beyond the oft-repeated mantra "don't boil the ocean," the Pilot Memo explains that DOJ does not "expect a company to investigate matters unrelated in time or subject to the matter under investigation," and that generally "evidence of criminality in one country, without more, would not lead to an expectation that an investigation would need to extend to other countries." Thus, there appears to be a sense of proportionality in the Fraud Section's approach. But of course, that can cut the other way, depending on the size and resources of the company. The Pilot Memo notes, for example, 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."

compensated and promoted compared to other employees." In addition, while the *Resource Guide* addresses the critical role that employee discipline plays in an effective compliance program, the Pilot Memo breaks new ground in signaling DOJ's view that companies must consider the "possibility of disciplining [employees] with oversight of" individuals engaged in misconduct.

As is the case with any new guidance from DOJ, a number of questions can be asked, and the answers will only emerge over time. For example:

- *How will DOJ apply the policy that companies will not receive credit for self-reports required by "law, agreement, or contract?"* While this policy would seem to be targeted at reports required as part of previous government enforcement resolutions, such as corporate integrity agreements or deferred prosecution agreements, it has the potential to sweep more broadly. For example, will government contractors who are required to self-report under the Federal Acquisition Regulations or contractual provisions be barred from receiving voluntary disclosure credit? And what about financial institutions required to file Suspicious Activity Reports?
- *How will DOJ evaluate the timeliness of a self-report in circumstances where the company was first contacted by a would-be whistleblower?* The Pilot Memo notes that to qualify for voluntary disclosure credit, a self-report must meet the Sentencing Guidelines requirements that it come before an "imminent threat of disclosure or government investigation" and "within a reasonably prompt time" of becoming aware of the offense. Chief of the Fraud Section Andrew Weissmann has already stated that a disclosure prompted by a belief that a "whistleblower has already reported [] information or is about to" will not be considered voluntary.[6] Mr. Weissmann's comment, however, leaves open how, in practice, the Fraud Section will evaluate a company's belief as to what a would-be whistleblower might do and when, and how that belief influenced (if at all) the company's decision to self-disclose. We are hopeful that the Fraud Section will clarify its expectations in this regard so that companies can properly evaluate whether and when the presence of a would-be whistleblower will lead the Fraud Section to deem a company's disclosure "not voluntary."
- *Does the Pilot Program portend harsher resolutions for companies that do not self-report?* While the Pilot Memo makes clear that DOJ will consider declinations for companies that voluntarily disclose, cooperate, and remediate, it is less clear whether declinations or other forms of leniency will be offered to the same extent as in the past for companies that do not self-report. We do not read the Pilot Memo to rule out the possibility of declinations or various forms of leniency for such companies (indeed, the Pilot Memo incorporates the *USAM Principles*, which clearly articulate the importance of balancing the nature and seriousness of the offense, pervasiveness of wrongdoing, collateral consequences, and other factors in making the Department's charging decisions), but we do wonder whether the Fraud Section's approach to declinations and leniency in general will become stricter in cases that do not involve a voluntary

[6] Remarks for Andrew Weissmann, ACI FCPA Keynote, at 2 (May 20, 2015), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/06/08/06-02-2015-aci-keynote.pdf.

disclosure.[7] This dynamic will be somewhat difficult to assess in the coming year. We would expect that – rather than calling attention to more draconian outcomes for companies that did not self-report – the Fraud Section will be more focused on providing examples of companies that would have faced criminal enforcement action under any set of facts but have been given significant leniency under the Pilot Program.

- *What will "full cooperation" look like in practice?* The Pilot Memo's full cooperation requirements are open-ended, and it is too early to predict how they will affect internal investigations and be evaluated by DOJ. For example, to meet the proactive cooperation requirement, will companies be expected to advise DOJ when individual subjects are traveling to the U.S., so as to facilitate law enforcement contact with such individuals? How often and under what circumstances and parameters will DOJ request that companies de-conflict their investigations? Asking counsel to refrain from interviewing company employees can raise a host of compliance and other challenges for companies, particularly given the duration of most FCPA investigations. We presume that de-confliction requests will be infrequent and narrowly tailored, but this issue will be another to watch in the coming year.
- *What credit is available for voluntary disclosure when cooperation or compliance and remediation fail to meet the Fraud Section's expectations?* When cooperation is deemed less than "full" or compliance and remediation are somehow lacking, what benefit will be conferred for voluntary disclosure? The answer to this question would seem critical to the ultimate success or failure of the new Pilot Program. Given the stringency of DOJ's requirements for "full" credit for cooperation, one has to assume that some companies will miss the mark on one dimension or another, even after a voluntary disclosure. If these companies fare no better than companies that did not voluntarily disclose – or if the incremental benefit of disclosure is not readily apparent – the Fraud Section will likely face the very same questions surrounding the predictability of outcomes that the Pilot Program is intended to address.

[7] At a minimum, it would appear that a company like VimpelCom – which in February received a 45% discount off the bottom end of the Sentencing Guidelines range even without a self-disclosure – would not be eligible for such a result under the Pilot Program. Pilot Memo at 8 ("[I]n circumstances where no voluntary self-disclosure has been made, the . . . FCPA Unit will accord at most a 25% reduction off the bottom of the Sentencing Guidelines fine range.").

If you have any questions concerning the material discussed in this client alert, please contact the following senior members of our Global Anti-Corruption group:

Tammy Albarrán	+1 415 591 7066	talbarran@cov.com
Robert Amaee	+44 20 7067 2139	ramaee@cov.com
Stephen Anthony	+1 202 662 5105	santhony@cov.com
Bruce Baird	+1 202 662 5122	bbaird@cov.com
Lanny Breuer	+1 202 662 5674	lbreuer@cov.com
Eric Carlson	+86 21 6036 2503	ecarlson@cov.com
Jason Criss	+1 212 841 1076	jcriss@cov.com
Christopher Denig	+1 202 662 5325	cdenig@cov.com
Shanya Dingle	+1 202 662 5615	sdingle@cov.com
Steven Fagell (Co-Chair)	+1 202 662 5293	sfagell@cov.com
James Garland	+1 202 662 5337	jgarland@cov.com
Ben Haley	+1 202 662 5194	bhaley@cov.com
Barbara Hoffman	+1 212 841 1143	bhoffman@cov.com
Eric Holder	+1 202 662 6000	eholder@cov.com
Mitch Kamin	+1 424 332 4759	mkamin@cov.com
Robert Kelner	+1 202 662 5503	rkelner@cov.com
Nancy Kestenbaum	+1 212 841 1125	nkestenbaum@cov.com
David Lorello	+44 20 7067 2012	dlorello@cov.com
Mona Patel	+1 202 662 5797	mpatel@cov.com
Mythili Raman	+1 202 662 5929	mraman@cov.com
Margaret Richardson	+1 202 662 5075	mrichardson@cov.com
Don Ridings (Co-Chair)	+1 202 662 5357	dridings@cov.com
Dan Shallman	+1 424 332 4752	dshallman@cov.com
Doug Sprague	+1 415 591 7097	dsprague@cov.com
Anita Stork	+1 415 591 7050	astork@cov.com
Daniel Suleiman	+1 202 662 5811	dsuleiman@cov.com
Alan Vinegrad	+1 212 841 1022	avinegrad@cov.com
Hui Xu	+86 21 6036 2508	hxu@cov.com