

DOJ Adds Resources for FCPA Cases, Offers Incentives for Voluntary Disclosures

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Four Times Square
New York, NY 10036
212.735.3000

skadden.com

On April 5, 2016, the Department of Justice's (DOJ) Fraud Section made two related announcements in its Foreign Corrupt Practices Act (FCPA) Enforcement Plan and Guidance.¹ First, the Fraud Section announced a substantial addition of investigative and prosecutorial resources — 10 more prosecutors in its FCPA unit, a 50 percent increase, and three new FBI squads devoted to FCPA cases. Second, the Fraud Section announced that any company making a voluntary disclosure regarding possible FCPA violations to the Fraud Section between April 5, 2016, and April 5, 2017 — assuming all other requirements are met — could receive “up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range” and avoid the appointment of a monitor. This pilot program is designed to encourage companies to make voluntary disclosures to the Fraud Section by delineating specific benefits they could receive through such disclosures.

Companies should expect that the allocation of additional resources, coupled with the incentives being offered for voluntary disclosures, will result in an increase in FCPA investigations and prosecutions, including against individuals. However, given the multiple predicate conditions to obtain the voluntary disclosure benefits and the time required to resolve complex FCPA matters, it may take some time before we know whether the pilot program, in practice, provides the tangible benefits identified by DOJ. In addition, it is not clear whether the initial voluntary disclosure must take place on or after April 5, 2016, to qualify for the incentives, or whether DOJ intended to include companies that currently are engaged in making voluntary disclosures and cooperating with the Fraud Section. As explained below, we believe the language in the announcement supports the latter interpretation. In any event, including current cooperators within the purview of the pilot program may provide the best pathway for DOJ to establish the bona fides of the program in the near term.

Guidance and Pilot Program

Additional Resources. The Fraud Section, which provides “centralized supervision, guidance, and resolution” for FCPA matters, plans to increase its ranks by more than 50 percent by adding 10 prosecutors. Given the typical time requirements for DOJ to make new hires, including the background clearance process, the planned increase in resources may take some time unless the positions are filled from within the department. The addition of three new FBI teams also will take time to implement and may potentially move more slowly than the Fraud Section hiring process. Notwithstanding the long lead time to increase the resources as announced, companies should expect that the dedication of additional resources will, over the long run, increase the number of FCPA investigations and prosecutions, whether through voluntary self-disclosures or traditional law enforcement efforts (such as through the use of confidential informants, wiretaps, execution of search warrants and data mining).

The Pilot Program. The pilot program applies only to FCPA matters handled by the Fraud Section. Acceptance into the pilot program requires a voluntary self-disclosure, full cooperation and remediation, all as defined by DOJ. The Fraud Section defines each of these concepts as follows:

Voluntary Self-Disclosure. First, for a self-disclosure to qualify as voluntary, it must occur “prior to an imminent threat of disclosure or government investigation.” Second,

¹ Although the Fraud Section announced that the United States was “not going at this alone” and that it was “sharing leads with our international law enforcement counterparts,” this is not a new development. Past press announcements by DOJ on FCPA prosecutions repeatedly have touted joint enforcement efforts with numerous international law enforcement agencies.

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the company must make the disclosure “within a reasonable time after becoming aware of the conduct.” The company has the burden of demonstrating “timeliness.” Third, the company must disclose “all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.”

Full Cooperation. The Fraud Section guidance includes an extensive set of requirements for a company to receive credit for full cooperation:

- The company must disclose “on a timely basis” “all facts relevant” to the potential FCPA violation, “including all facts related to involvement in the criminal activity by the corporation’s officers, employees or agents.”
- The cooperation must be “proactive,” not “reactive.” This concept includes “identify[ing] opportunities for the government to obtain relevant evidence not in the company’s possession and not otherwise known to the government.”
- The company must impose a document retention directive that is consistent with a comprehensive litigation hold.
- The company must provide timely and potentially rolling updates on its internal investigation.
- The company must “de-conflict” its internal investigation from the government investigation, if requested to do so by Fraud Section.
- The company must provide “all facts relevant to potential criminal conduct by all third-party companies and individuals.”
- The company must make “available for Department interviews” company officers and employees, including any who live abroad.
- In providing complete disclosure of facts learned in the internal investigation, the company must “attribute[e] facts to specific sources” (without waiving the attorney-client privilege).
- Disclosure of “overseas documents,” including sources and locations, unless such disclosure is prohibited by foreign law.
- Where lawful, the company must facilitate “third party production of documents and witnesses from foreign jurisdictions.”
- When requested by the Fraud Section, the company must provide translations of “relevant documents in foreign languages.”

The Fraud Section also will evaluate a company’s cooperation in accordance with the “threshold requirements” of the Yates Memorandum regarding individual accountability. As noted in the guidance: “[N]ot all companies will satisfy all the components of full cooperation, either because they decide to cooperate only later in an investigation, or they timely decide to cooperate but fail to meet all of the criteria listed above.”

Timely and Appropriate Remediation. Remediation requirements including the following:

- The company must have a culture of compliance.
- The company must dedicate sufficient resources to compliance.
- The compliance program must be independent, with experienced personnel capable of identifying risky transactions, and it must be audited for efficacy.
- The Fraud Section will evaluate “[h]ow a company’s compliance personnel are compensated and promoted compared to other employees” and the “reporting structure of compliance personnel.”

Achievable Credit Through the Pilot Program. The guidance establishes two avenues for credit, measured by a percentage reduction in fine as established by the United States Sentencing Guidelines:

- *Up to 25 percent off if the company does not voluntarily disclose:* Company must “later fully cooperate[] and timely and appropriately remediate[].”
- *Up to 50 percent off and no requirement of a monitor if it voluntarily self discloses:* Company must fully cooperate in a manner consistent with the Yates memo, meet the “additional stringent requirements” of the pilot program” and “timely and appropriately remediate.”

Commentary

There is little question that the dedication of additional DOJ and FBI resources will result in an increase in FCPA investigations and prosecutions. This increase in activity will be slow and measured, and the new resources are likely to bear fruit within a year of being assigned to the FCPA team.

It remains to be seen whether the pilot program triggers an increase in voluntary self-disclosures. Although there is potential for a 50 percent reduction in the criminal fine for fully qualifying self-disclosures, the hurdles imposed to achieve “full cooperation,” the uncertainty associated with the calculation of the Sentencing Guidelines fine and the complete discretion granted to the Fraud Section in determining both may dissuade some companies from coming forward until there is a proven track record establishing what qualifies as full cooperation and how DOJ applies the guidelines in voluntary disclosure cases. In this regard, it will be important for DOJ to be transparent regarding application of these criteria and the benefits derived from participating in the pilot program.

There is some ambiguity regarding whether companies currently engaged in making a voluntary disclosure and cooperating with the Fraud Section will be grandfathered into the pilot program.

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The Fraud Section's announcement states that the pilot program will apply to "organizations that voluntarily self-disclose *or* cooperate" during the pilot period (emphasis added). It thus appears that a voluntary disclosure made before the announcement of the pilot program with cooperation during the year-long test period is sufficient to qualify for the program benefits. It

certainly would behoove DOJ to apply the qualification criteria in this manner in order to provide positive examples of the benefits of the program in the shorter term. Because of the complexity of FCPA matters, it is highly unlikely that any matter disclosed after April 5, 2016, will be resolved with a public settlement by April 5, 2017.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Gary DiBianco

Washington, D.C.
202.371.7858
gary.dibianco@skadden.com

Warren Feldman

New York
212.735.2420
warren.feldman@skadden.com

Keith D. Krakaur

London
44.20.7519.7100
kkrakaur@skadden.com

Michael K. Loucks

Boston
617.573.4840
michael.loucks@skadden.com

Mitchell S. Ettinger

Washington, D.C.
202.371.7444
mitchell.ettinger@skadden.com

Ryan D. Junck

London
44.20.7519.7006
ryan.junck@skadden.com

Andrew M. Lawrence

Washington, D.C.
202.371.7097
andrew.lawrence@skadden.com

Colleen P. Mahoney

Washington, D.C.
202.371.7900
colleen.mahoney@skadden.com