

DOJ's Fraud Section Issues Foreign Corrupt Practices Act Enforcement Plan and Guidance

April 11, 2016

On April 5, 2016, the Department of Justice's Fraud Section ("DOJ") issued its Foreign Corrupt Practices Act ("FCPA") Enforcement Plan and Guidance ("Guidance"), which announced (1) a more than doubling of DOJ resources allocated to FCPA enforcement, (2) increased coordination with its foreign counterparts and (3) the launching of a FCPA enforcement pilot program, effective immediately.

The Guidance indicates that the DOJ is adding 10 more prosecutors to its FCPA Unit, which represents a more than 50% increase in its attorney staff. Also, the FBI has established three new squads of special agents devoted to FCPA investigations and prosecutions. Thus, the DOJ is likely to significantly increase the number of FCPA investigations and prosecutions in the coming months and years.

The Guidance also announces the DOJ's increased cooperation with foreign law enforcement agencies. International cooperation in this area has increased in recent years. The third element, the FCPA pilot program, is the most significant aspect of the Guidance. By setting forth the Guidance, the DOJ "intend[s] to provide a clear and consistent understanding of the circumstances in which [the DOJ] may accord additional credit in FCPA matters to organizations that voluntarily disclose misconduct, fully cooperate, and timely and appropriately remediate."

The Guidance indicates the DOJ's desire to achieve this goal by "providing greater transparency about what we require from companies seeking mitigation credit" and "what sort of credit those companies can receive[.]"

The Guidance then sets forth how the pilot program will work and how DOJ might accord credit over and above what is currently provided for by the U.S. Sentencing Guidelines and the *Principles of Federal Prosecution of Business Organizations* found in the United States Attorneys' Manual.

To qualify for this enhanced credit, a company must take the following steps:

1. Voluntarily disclose all known facts concerning the potential FCPA violation, within a reasonably prompt time of becoming aware of the offense. A disclosure that is required to be made by law, contract, or is otherwise imminent, does not qualify as a voluntary disclosure under the Guidance. A company which does not voluntarily disclose, but which cooperates with the investigation and takes appropriate remedial steps, may still receive some credit under the program. However, such credit will be "at most" a 25 percent reduction of the bottom of the Sentencing Guidelines fine range.
2. Fully cooperate with the DOJ's investigation of the potential violation. The Guidance incorporates the principles of the recent DOJ "Memo on Individual Accountability," which focuses on the involvement in criminal activity by a company's officers, employees and agents. It provides that such cooperation should be pro-active and comprehensive. It indicates that less-than-prompt and complete cooperation might result in some degree of credit under the program but that such credit will be "markedly less than for full cooperation[.]"

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3. Timely and appropriate remediation of the potential violation. The Guidance makes clear that remediation includes:

(1) “[i]mplementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary dependent on the size and resources of the organization;” and (2) appropriate disciplinary action of affected employees, officers or agents.

If a company fully meets the standards set forth by the Guidance: (1) the DOJ may reduce by 50 percent the bottom end of the otherwise-applicable sentencing guideline fine range; (2) a corporate monitor will generally not be appointed if the company has implemented an effective compliance program; and (3) the DOJ will consider declining prosecution of the company. The Guidance is not intended to offer any benefits to individual violators of the FCPA.

The Guidance follows a recent announcement by the US Securities and Exchange Commission that companies subject to FCPA enforcement actions are required to self-report their potential misconduct to be eligible for deferred prosecution agreements and non-prosecution agreements.

The Guidance is a step forward in providing clarity and more incentive for companies to voluntarily disclose FCPA violations before they are uncovered by the government through other means. It is also consistent with the DOJ’s recent emphasis on uncovering violations by individuals.

If you have questions about the Guidance or need assistance in proceeding with the mitigation credit, please contact Tom Appleman or any other Miller Canfield attorneys.

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