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PERSPECTIVE

FCPA program continues focus on individuals

By Debra Wong Yang, Michael Li-Ming Wong and Wesley Sze

Whether or not to self-report violations of the Foreign Corrupt Practices Act has constituted a problematic and vexing question for companies — and their counsel — when confronted with internal allegations of potential foreign bribes. While the U.S. Department of Justice has long made vague promises of rewarding self-disclosure with "credit" for cooperation, the lack of any specific guidance stymied companies' abilities to quantify that potential credit in any meaningful way.

With the DOJ's announcement earlier this month of their new "pilot program" for FCPA enforcement, the DOJ has finally provided transparency for companies seeking to qualify for mitigation credit.

Notably, the pilot program comes on the heels of the Yates Memorandum, which emphasized the DOJ's renewed focus on prosecutions of individuals involved in corporate misconduct. The pilot program builds on DOJ's focus by offering leniency to companies in exchange for relevant information about the misconduct, including the identities of the offending individuals. While the focus on individuals is not something new, establishing a process where all prosecutors will engage in an assessment regarding individuals culpability is a change. Moreover, in conjunction with the rollout of this new pilot program, the DOJ is devoting additional resources and personnel to its FCPA-related investigative and prosecutorial efforts, as well as further strengthening coordination with its law enforcement counterparts around the globe.

The Nuts and Bolts of the New Pilot Program

An accompanying guidance memorandum signed by Andrew Weissmann, chief of the Fraud Section, outlines the details of the pilot program. A company must satisfy three requirements in order to be eligible for mitigation credit under the pilot program: voluntary self-disclosure, full cooperation, and timely and appropriate remediation.

• Voluntary self-disclosure. First, the company must voluntarily report all relevant facts regarding the FCPA-related misconduct "within a reasonably prompt time after becoming aware of the offense," and "prior to any imminent threat of disclosure or government investigation." The disclosure must include all facts known to the company, including identities of the individuals involved in the potential FCPA violation. This last point, which may be a direct outgrowth of the Yates memo, makes it amply clear to companies seeking self-disclosure credit that they will not be able to withhold from the government investigators the identities of the specific officers or employees engaged in the misconduct.

• Full cooperation. Second, the company must also "proactively" cooperate with the government investigation, including affirmatively disclosing all relevant facts about the misconduct and individuals involved, preserving, collecting, and producing relevant evidence, making company officers and employees available for interviews (including so-called "de-confliction," which requires a company to refrain from interviewing certain individuals until the government has had a chance to do so), and providing timely updates on the company's internal investigation. The guidance notes, however, that what constitutes "full cooperation" will depend largely on the particular circumstances of the case, taking into account "the scope, quantity, quality, and timing of cooperation" and size and sophistication of the company.

• Timely and appropriate remediation. Finally, a company seeking credit under the pilot program will also be required to implement timely and appropriate remediation measures. Although remediation can be "difficult to ascertain and highly case specific," the guidance suggests that appropriate remediation may include implementation of a compliance and ethics program, discipline of employees responsible for the misconduct, and any other measures demonstrating recognition of the seriousness of the company's misconduct. The guidance states that the Fraud Section will continue to refine the benchmarks for reviewing company remediation efforts under the pilot program.

In addition to these three requirements, a company must also disgorge all profits resulting from the FCPA violation to receive any mitigation credit.

The potential mitigation credit is substantial. A company deemed to satisfy all the requirements will be eligible to receive up to a 50 percent reduction off minimum fines under the Sentencing Guidelines. In addition, a monitor will "generally" not be required for companies that implement effective compliance programs as part of their remediation efforts. And finally, declination of prosecution will also be considered for companies satisfying the pilot program's requirements. The pilot program also provides for a limited credit of up to a 25 percent reduction off the Sentencing Guidelines minimum fine for companies that fully cooperate and appropriately remediate, even if no voluntary self-disclosure was made.

The Murky Waters of FCPA Enforcement

The pilot program is a welcome step in bringing clarity to an area that has traditionally been shrouded in uncertainty, as it has been notoriously difficult for companies to navigate the potential costs and benefits of a voluntary self-disclosure strategy. With this new pilot program, the DOJ has set forth in greater detail exactly what it expects companies to do in order to qualify for mitigation credit. Moreover, the potentional reduction in fines — which have constituted hundreds of millions of dollars in past FCPA settlements — is significant enough to warrant the attention of many chief compliance officers.

Another upshot of the program is that it provides a roadmap that companies can follow when crafting their own voluntary self-disclosure strategies. Indeed, the pilot program is an improvement over the highly subjective system of fine reductions and leniency the DOJ has "historically provided" to cooperating companies in the past — which has all but happened behind closed doors. At the very least, by knowing the key requirements and their potential range of benefits, companies now have a framework they can use to make better informed decisions. The guidance also gives companies a concrete hook for making arguments as to why mitigation credit is deserved.

Despite these benefits, the pilot program does not address everything and misses in at least two key respects.

First, the guidance fails to set forth many objective criteria upon which companies can rely to ensure compliance with the pilot program's requirements. For example, it fails to define what constitutes a "reasonably prompt time" for voluntary self-disclosure, or exactly how much "proactive" effort a company must put into its government cooperation. Nor does the guidance shed light on exactly what it means for a company to "demonstrate recognition of the seriousness of [its] misconduct." In the absence of any more specific and concrete criteria for evaluating each of the three requirements, the guidance falls somewhat short of providing the clarity that companies truly need.

Second, even if a company is found to have satisfied the requirements, the pilot program nonetheless vests complete discretion in the DOJ to determine exactly what mitigation credit — if any — will be offered. In this sense, the pilot program still fails to give any real reassurances to complying companies. The guidance only provides the maximum benefits that are available under the program, promising that a company will receive "up to" a 50 percent reduction in fines, that a monitor will "generally" not be required, and that a declination of prosecution will be "considered." Even companies seeking to fully comply with the pilot program will face an element of uncertainty regarding what credit they will receive — which may ultimately make the business case for a strategy of voluntary self-disclosure a much harder sell.

Looking Forward to the Year Ahead

The pilot program articulates the DOJ's balance between providing greater transparency to the public and greater certainty to companies — all the while ensuring that the DOJ can retain the flexibility needed to effectively respond to the wide variety of circumstances that new cases may present. Despite its shortcomings, companies and their counsel should be well advised to carefully examine and consider the guidance memorandum.

Whether the pilot program's incentives for voluntary self-disclosure will in fact induce more companies to self-disclose FCPA-related wrongdoing — and thus result in more prosecutions — remains to be seen. Already, the pilot program has garnered significant attention and scrutiny, and the reaction has been decidedly mixed. But hopefully the pilot program will accomplish its goals of accountability and transparency by establishing clear, reliable, and predicable standards that will guide companies into establishing effective compliance strategies that are equally rewarding to both the DOJ and companies alike.

And so perhaps it is fitting to return to the two key themes of accountability and transparency. At the end of the pilot program's year, we will see if the DOJ has lived up to these values itself — perhaps by providing the data to show that mitigation credit is indeed a real and substantial possibility for companies considering voluntary self-disclosure. In addition, the DOJ should consider giving additional clarification and guidance as to the specific steps companies should take to comply with the program's requirements. And perhaps then, by demonstrating accountability and transparency itself in the implementation of the pilot program, the DOJ will also succeed in establishing an equitable and effective means of securing company cooperation as part of its FCPA enforcement regime.

Debra Wong Yang *and* **Michael Li-Ming Wong** *are partners, and* **Wesley Sze** *is an associate, at Gibson, Dunn & Crutcher LLP.*

DEBRA WONG YANG
Gibson, Dunn & Crutcher

MICHAEL LI-MING WONG
Gibson, Dunn & Crutcher