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ALERT MEMORANDUM

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DOJ Launches Foreign Corrupt Practices Act Pilot Program

Last week, the U.S. Department of Justice ("DOJ" or "Department") announced a new program to promote Foreign Corrupt Practices Act ("FCPA")[1] enforcement and encourage more companies to self-report FCPA misconduct. As part of an enhanced strategy, the DOJ is increasing the number of prosecutors and investigators dedicated to FCPA enforcement and strengthening its cooperation with non-U.S. law enforcement officials. But the heart of the new program is the introduction of a pilot project that attempts to detail more precisely than the DOJ has in the past what companies need to do to obtain credit for self-reporting possible FCPA violations and what kind of credit they will receive if they do.

Companies that have discovered their employees engaging in conduct that does or might violate the FCPA have long faced considerable uncertainty when attempting to assess whether to voluntarily disclose these matters to U.S. authorities. Despite encouragement from the DOJ and SEC to disclose these internal bribery investigations, companies are frequently unsure if the benefits (i.e., perhaps no enforcement action or relatively light sanctions) are worth the cost (i.e., possible criminal prosecution, fines, and additional legal and remediation costs). The pilot program tries to address that uncertainty by, according to the DOJ, "providing greater transparency" about (i) what the DOJ will require from companies seeking mitigation credit for disclosing wrongdoing, (ii) what form of cooperation and remediation will be required, and (iii) what sort of credit they can receive.

Whether this program prompts more companies to self-report remains to be seen. At a minimum, it is likely to tip the balance towards self-reporting for some companies uncertain about what to do. Nevertheless, the resolution of FCPA investigations are highly dependent on the specific facts and circumstances of each case. Even with greater transparency from the DOJ, in many (if not most) instances, there will continue to be uncertainty about exactly where self-reporting will lead.

[1] Broadly speaking, the FCPA (i) bars U.S. companies, companies with securities registered in the U.S., and companies acting within U.S. territory from bribing officials of non-U.S. governments or government controlled entities and (ii) requires companies with securities registered in the U.S. to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. Individuals may also face liability under the statute. The FCPA is enforced by both the DOJ, which generally handles criminal enforcement of the law, and the U.S. Securities and Exchange Commission ("SEC"), which brings civil enforcement actions. Virtually all corporate FCPA cases are resolved through settlements with the DOJ, the SEC, or both.

The DOJ FCPA Enforcement Plan

On April 5, 2016, the DOJ announced a three-step "enhanced FCPA enforcement strategy." In what it described as the "most important step," the DOJ is increasing the number of staff for its FCPA unit by 50%, adding 10 new prosecutors, and creating three new squads of FBI special agents dedicated to FCPA investigation and enforcement. While this boost in resources underscores the DOJ's commitment to FCPA enforcement, this is not new information, but rather a restatement of the information announced by Assistant Attorney General Leslie Caldwell over four months ago.[2]

For the second step of the new program, the DOJ is strengthening its coordination with foreign law enforcement officials in corruption cases. The DOJ asserts that the Department and its foreign colleagues are sharing leads and striving to more effectively share documents and witnesses. While these comments may refer to greater cooperation generally, the reference to sharing documents is likely a nod to the DOJ's efforts to work around data privacy laws, especially some of the more stringent data privacy laws in Europe. Those laws create significant challenges for international companies that want to share documents located outside the U.S. with U.S. officials. This proposed second step is consistent with a well-established trend, acknowledged long ago by the DOJ. For example, in 2014, a senior DOJ official stated that the DOJ's "cooperative relationships with our law enforcement partners in [foreign] countries [enable us] to share vital information and evidence among countries and access individuals located overseas."[3] Indeed, the recent news release itself refers to FCPA cases that benefitted from international cooperation that date from as far back as 2013.

The Pilot Program

The pilot program, the third step of the strategy, is aimed at inducing more companies to self-report FCPA problems.[4] The hope is that if more companies know

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[2] Leslie R. Caldwell, Assistant Attorney General, DOJ, American Conference Institute's 32nd Annual International Conference on Foreign Corrupt Practices Act, National Harbor, MD (Nov. 17, 2015).

[3] Leslie R. Caldwell Speaks, Assistant Attorney General, DOJ, American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act, National Harbor, MD (Nov. 19, 2014).

[4] The DOJ is careful to note that this pilot project does not replace the DOJ's own Principles of Federal Prosecution of Business Organizations, which set out principles for resolving all corporate criminal matters. Instead, solely for FCPA cases, the new project can provide "additional credit" beyond what is offered in the United States Sentencing Guidelines and more specific information on the nature and benefits of cooperation. In the pilot program, however, what is required for these added benefits is "more exacting" than what is required under the Sentencing Guidelines.

what they need to do to get credit and what credit they will get, more companies will self-report. The guidance for the pilot program is laid out in four parts: (i) voluntary self-disclosure, (ii) "full cooperation," (iii) "timely and appropriate remediation," and (iv) credit for the company.

First, to satisfy the program's criteria for voluntary self-disclosure, the company must disclose the matter before "an imminent threat" that the government will learn of the matter from other sources; make the disclosure "reasonably prompt[ly]" after the company discovers the matter; and disclose all relevant facts known to the company, including facts regarding individual malfeasance. Disclosure mandated by law or contract does not count for the purposes of the pilot program. (This leaves open the question of whether public companies could *ever* participate in the new program if they discover material FCPA matters that may require disclosure under the securities laws.)

Second, the key elements of what the DOJ calls "full cooperation" include (i) timely disclosure (essentially, the voluntary disclosure described above), including compliance with the DOJ's Yates Memorandum of September 2015 (the "Yates Memorandum") (which focuses on disclosure of individual wrongdoing),[5] and disclosure of information on and from third parties; (ii) updating that disclosure in a timely manner; (iii) proactively offering information (i.e., offering bad news without prompting from DOJ questions); (iv) preserving and providing relevant documents and information wherever they may be located, including cooperating to overcome the hurdles imposed by data privacy laws; (v) translating relevant documents; (vi) to the extent feasible, making employees and ex-employees available for interviews; (vii) to the extent consistent with privilege, detailing the sources of information; and (viii) "de-confliction" of an internal investigation with the government investigation.

Third, to satisfy the "timely and appropriate" remediation requirement, companies must, as a preliminary matter, satisfy the cooperation requirements described above. Remediation, on its own, is not enough to qualify under the pilot program. As for the remediation itself, companies must implement a compliance program that is periodically modified and includes the following components: (i) the establishment of a culture of compliance; (ii) sufficient resources for the compliance function; (iii) qualified and

[5] U.S. Department of Justice: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download. The Yates Memorandum announced (i) that in order to gain any cooperation credit, a corporation must provide all relevant facts about any individuals involved in the misconduct and (ii) other measures to enhance the DOJ's policy against individual wrongdoers, including: a consistent focus on individuals from the inception of an investigation; the coordination of criminal and civil investigations; and the preservation of individual liability when resolving a corporate investigation.

experienced compliance personnel; (iv) an independent compliance function; (v) risk assessment and tailoring the compliance program based on the assessment; (vi) auditing of the compliance program; and (vii) an appropriate reporting structure for compliance personnel within the company. In addition, the remediation component mandates several human resources rules. Of course, those who engage in wrongdoing must receive appropriate discipline for misconduct, but there should also be an evaluation of compliance personnel compensation and promotion compared to other employees; consideration of possible discipline for those who supervised responsible individuals; and consideration of how compensation may impact misconduct and the failure to adequately supervise. Finally, there is a catch-all requirement that companies add "any additional steps" designed to demonstrate a company's acknowledgement of the serious nature of its misconduct and avoid similar problems in the future.

Fourth, if a company meets the voluntary disclosure, full cooperation, and timely and appropriate remediation standards, *and* disgorges any profits earned from a bribery scheme, the DOJ "may," (i) if a fine is sought, grant a 50% reduction off the bottom end of the Sentencing Guidelines fine range; (ii) "generally" not require a monitor if the company has implemented an effective compliance program; and (iii) "consider" a declination of prosecution. In assessing whether a declination is warranted, the DOJ will consider "countervailing interests," namely, whether the company has a history of misconduct or the incident involved large sums or senior management.

Companies that fully cooperate and conduct timely and appropriate remediation but fail to voluntarily disclose misconduct will receive "markedly less" credit than those that do self-report. At best, these companies can receive no more than a 25% reduction off the bottom of the Sentencing Guidelines fine range.

Outstanding Questions

The new pilot program provides an effective roadmap for those determined to gain the benefits of self-disclosure. The guidelines for voluntary self-disclosure, full cooperation, and timely and appropriate remediation, while still subject to interpretation, are fairly detailed and reasonably straightforward. (Even in the absence of FCPA misconduct, the listed remediation factors will inform FCPA compliance programs.)

Nonetheless, for those companies on the fence regarding self-reporting, considerable uncertainty remains. First, companies will still likely consider the risk of detection by U.S. authorities absent self-reporting, and, especially in this age of whistle-blowers, that risk remains difficult to gauge. Second, the DOJ offers no

guarantees. If companies comply with the requirements of the program, the DOJ *"may"* offer a fine reduction, *"generally should"* not impose a monitor, and *"will consider"* a declination (and declination decisions may be subject to "countervailing interests"). Third, even if a company complies with the requirements of the DOJ program and receives credit from the DOJ, for those subject to SEC jurisdiction, there is no assurance that the SEC will not impose its own stiff penalties. Fourth, FCPA settlements (except, sometimes, declinations) are public, and public settlements with the DOJ, no matter how favorable, may trigger law enforcement actions outside the United States. The likelihood (and the outcome) of any such non-U.S. prosecution presents another layer of uncertainty. [6]

Even given these continuing uncertainties, the pilot program likely will push at least some companies towards self-disclosure because the DOJ maintains that, henceforth, companies will *only* be given credit if they meet the mandates of the program. (Despite that claim, presumably the DOJ will still exercise leniency for the truly trivial FCPA violation, even if the offending company does not meet the standards of the pilot program.)

Finally, while the DOJ claims it will assess the merits of the pilot program after one year, it will likely take considerably longer to truly evaluate the effect of this program.

If you have any questions, please feel free to contact Breon Peace (bpeace@cgsh.com), Jonathan Kolodner (jkolodner@cgsh.com), or any of your regular contacts at the firm. You may also contact our partners and counsel listed under White-Collar Defense and Investigations or Litigation and Arbitration located in the "Our Practices" section of our website at http://www.clearygottlieb.com.

[6] It is also unclear how the DOJ will deal with misconduct that occurred prior to the start of the program. For example, if a company violated the FCPA six months ago, but failed to self-report at that time (i.e., it did not disclose the matter within a reasonably prompt time after learning of the matter, as required by the pilot program), it is unclear whether the company has lost the opportunity to gain the credit for voluntary disclosure, cooperation, and remediation outlined in the program.

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