

The DOJ's 3-step plan to increase FCPA enforcement



Jennifer Dowdell Armstrong | Wednesday, April 13, 2016

The Department of Justice's (DOJ) Fraud Section of the Criminal Division recently unveiled its Foreign Corrupt Practices Act (FCPA) Enforcement Plan and Guidance Memorandum (Guidance) outlining the three actions it will take to step up its efforts to detect and prosecute both individuals and companies for FCPA violations, including an enforcement pilot program.

Step 1: More robust resources

The Guidance states the DOJ is enhancing its investigative and prosecutorial resources by more than 50 percent by adding 10 more prosecutors to its ranks. The FBI also established three new squads of special agents devoted exclusively to FCPA investigations and prosecutions. The Guidance Memorandum warns that these new hires "should send a message to wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light."

Step 2: Increased cooperation with law enforcement

The Guidance recounts that the DOJ is coordinating increased efforts with its internal law enforcement counterparts to share leads, documents, and witnesses. The DOJ credits this cooperation with assisting in recent high-profile prosecutions of both individuals and corporations involving U.S. and foreign companies.

Step 3: FCPA enforcement pilot program

Most significantly, the Guidance announced an FCPA enforcement pilot program to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to (1) voluntarily self-disclose FCPA-related misconduct, (2) fully cooperate with the Fraud Section, and, where appropriate, (3) remediate flaws in their controls and compliance programs. Companies that satisfy these three conditions may receive credit up to a 50 percent reduction off the bottom end of the U.S. Sentencing Guidelines fine range and eliminate the need for a corporate monitor if a company has implemented an effective compliance program by the time of resolution.

Significantly, the government will consider declining to prosecute companies that timely disclose, cooperate, and remediate. Andrew Weissman, the Guidance's author, said the new one-year pilot program "draws a clear distinction between credit that you can be eligible for voluntary self-disclosure as opposed to companies that may decide to wait to see if they get caught, and then cooperate."

The Guidance identifies concrete steps a company must take to be deemed to voluntarily self-disclose, cooperate, and remediate, which include:

- Promptly disclose all facts relevant to the wrongdoing at issue, including all facts regarding involvement

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by the corporation's officers, employees, or agents

- Disclose all relevant facts gathered during a company's independent investigation, including attribution of facts to specific sources (where such attribution does not violate the attorney-client privilege), rather than a general narrative
- Preserve, collect, disclose, and translate relevant documents and information, and identify opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government
- Upon request, allow DOJ to interview company officers and employees with relevant information -- including those located overseas -- subject to the individuals' Fifth Amendment rights
- Provide all facts relevant to potential criminal conduct by all third-party companies (including their officers or employees) and third-party individuals
- Implement an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but will include:
 - whether the company has established a culture of compliance
 - whether the company dedicates sufficient resources to the compliance program and staffs it with independent, experienced compliance personnel
 - whether the compliance program has performed an effective risk assessment, tailored the compliance program based on that assessment, and audits the program to ensure effectiveness
- Appropriate discipline of employees
- Any additional steps that demonstrate recognition of the seriousness of the corporation's misconduct and acceptance of responsibility for it

For questions regarding the Guidance, other FCPA issues, and the role our attorneys can play in developing effective compliance strategies individually tailored for your company's needs, please contact one of the attorneys listed below.



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