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US FCPA ENFORCEMENT TRENDS: A NEW PARADIGM

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Foreign Corrupt Practices Act (FCPA) enforcement continues to be a focus of US regulators. Over the past year, the U.S. Department of Justice (DOJ) and the Securities Exchange Commission (SEC) – the U.S. agencies charged with enforcing the FCPA – announced a number of policies and made a number of statements that, collectively, suggest an intention to send several messages to companies subject to the FCPA.

Enforcement Agencies Pushing Self-Disclosure

FCPA regulators from both DOJ and the SEC have been emphasizing the importance of voluntary self-disclosure for some time. In an attempt to demonstrate more tangible benefits to companies from self-reporting, DOJ recently announced a one-year pilot program, which could give a company up to a 50% discount on the low-end of the fine range for an FCPA violation if it self-reports the violation and cooperates with the government.[1] This program has received mixed reviews from the FCPA bar, with many expressing skepticism about its effectiveness due to its highly discretionary nature.

In addition, the SEC has announced that self-reporting will be a pre-condition to a company receiving a deferred prosecution agreement or a non-prosecution agreement. The SEC's FCPA enforcement head, Andrew Ceresney, expressed "hope that this condition on the decision to recommend a [deferred or non-prosecution agreement] will further incentivize firms to promptly report FCPA misconduct to the SEC and further emphasize the benefits that come with self-reporting and cooperation."

The decision whether to self-disclose has historically been one of the most difficult decisions for companies dealing with FCPA violations. This decision was complicated in large part because of the uncertainty surrounding the amount of cooperation credit (if any) a company would receive for effectively turning itself in to the authorities. Through the new DOJ pilot program and these public statements (and as evidenced by significant credit given in resolving recent FCPA enforcement actions), it appears that the DOJ and SEC are signaling real and tangible benefits to those companies that self-disclose violations.

DOJ Focus on Individuals

On September 9, 2015, Deputy Attorney General ("DAG") Sally Yates issued a formal memorandum to DOJ prosecutors. While the so-called Yates Memo deals generally

1 For a more detailed discussion of the DOJ pilot program, see https://www.foley.com/doj-fraud-section-offers-super-credit-in-fcpa-pilot-program-04-07-2016/

with DOJ's policies regarding the prosecution of white collar crime, it has several significant implications for DOJ's FCPA enforcement program.

One of the most notable aspects of the Yates Memo is its direction that line prosecutors focus on individuals when investigating allegations of corporate misconduct. As Deputy Attorney General Yates summarizes:

> "One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."

Accordingly, the Yates Memo emphasizes that both – criminal and civil – DOJ attorneys should focus on individuals "from the very beginning of any investigation of corporate misconduct." It goes on to state that, "absent extraordinary circumstances or approved departmental policy [...] [DOJ] lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees" in either criminal or civil matters.

In February 2016, the DOJ announced that it will now require companies to certify that they have fully disclosed all information relating to individual wrongdoing before finalizing a corporate settlement agreement.

DOJ Mandating Internal Investigations

Another key aspect of the Yates Memo involves the DOJ's awarding of "cooperation credit" based on how companies respond to allegations of bribery in violation of the FCPA. Obtaining such cooperation credit can be extremely valuable for companies, as it can impact whether the company is charged criminally or, if the company is charged, result in a meaningful reduction of the fine range. The Yates Memo provides some insight to companies seeking to obtain cooperation credit from DOJ in instances where they are alleged to have engaged in misconduct:

> "In order for a company to receive any consideration for cooperation [...] the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct."

We view this statement as a clear mandate to companies: If you want to get cooperation credit from DOJ, you must provide a detailed report of the facts and circumstances surrounding the allegations, including identifying the persons responsible. Deputy Attorney General Yates further emphasized this point in a recent speech: "Companies seeking cooperation credit are expected to do investigations that are timely, appropriately thorough and independent, and report to the government all relevant facts about all individuals involved, no matter where they fall in the corporate hierarchy."

In sum, the decision for companies whether to conduct an internal investigation into a potential FCPA issue is now made easy. If they hope to get any cooperation credit, an internal investigation is a requirement.

But while the decision to investigate might be easy, the DOJ's renewed focus on individual accountability (and disclosure requirements for cooperation credit) may significantly complicate the investigative process. (The U.S. Chamber of Commerce recently published a white paper criticizing the Yates Memo and outlining potential unintended consequences.[2]) Companies will now need to be more mindful of potential conflicts in dealing with individual employees, audit committees, and Boards of Directors. Particularly when allegations of wrongdoing reach multiple or high-level employees companies should consider involving experienced outside investigative counsel.

2 See http://www.instituteforlegalreform.com/uploads/sites/1/YatesMemo-Paper_Web.pdf

SEC Broken Windows Enforcement

The SEC has continued to bring a majority of its enforcement actions against companies. It has done so under what SEC Chairwoman Mary Jo White has referred to as the "broken windows" theory of securities enforcement. That is, the SEC announced that it will "pursue even the smallest infractions" in order to foster a culture of legal compliance.

Recent enforcement actions bear this out: In June 2016, the SEC announced non-prosecution agreements with Nortek and Akamai, each involving a small (by FCPA standards) six-figure financial consequence. In 2015, Hyperdynamics Corporation, an oil and gas company with operations in the Republic of Guinea, consented to the entry of an administrative cease-and-desist order and agreed to pay a $75,000 penalty to the SEC.

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