

April 6, 2016

## DOJ Announces Bigger Stick, Carrot, in FCPA Enforcement

Yesterday, the Fraud Section of the Department of Justice (“DOJ”) issued its Foreign Corrupt Practices Act (“FCPA”) Enforcement Plan and Guidance (the “Guidance”). The Guidance announces the DOJ’s commitment to intensify even further its campaign to detect and prosecute FCPA violations, along with newly articulated incentives for business organizations that self-report violations.

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### Key Takeaways

In short, the DOJ is “substantially increasing” its FCPA law enforcement resources domestically and strengthening its coordination with foreign anti-bribery law enforcement. The DOJ’s message is that it is now better positioned to detect wrongdoing “that might have gone uncovered in the past.”

Critically, along with its enhanced enforcement measures, the DOJ is launching a yearlong pilot program that offers “significant credit” to business organizations that promptly disclose violations, cooperate in any investigation, and remediate their compliance issues. The pilot program offers a substantial reduction in fines, the potential for no corporate monitor, and even a declination of prosecution—credits that reach beyond what is available under the United States Attorneys’ Manual (“USAM”) and the United States Sentencing Guidelines (“USSG”). Further, the DOJ clarified its policy for how a business organization’s voluntary self-reporting will yield significantly reduced sanctions. The Guidance provides the clearest prescription yet of exactly what kind of disclosure, cooperation, and remediation will earn leniency, and exactly what form a resolution – or declination – will take.

Of course, it remains to be seen how the pilot program, and its guidelines, will be applied in practice. However, today’s announcement clearly will change the risk analysis for many business organizations weighing the likelihood that an internal FCPA compliance issue will be detected and the relative costs and benefits of self-reporting.

### The Stick – Details on the DOJ’s Enhanced FCPA Enforcement

The Guidance announces three key initiatives that will enhance the DOJ’s ability to detect and prosecute individuals and companies that violate the FCPA. *First*, the DOJ is substantially increasing its enforcement resources, appointing ten new dedicated FCPA prosecutors—a 50% increase—and adding three new squads of Federal Bureau of Investigation (“FBI”) special agents devoted to FCPA investigations. *Second*, due to the international nature of FCPA violations, the DOJ is enhancing communication and coordination with foreign counterparts. In its self-described “international approach,” the DOJ is increasing efforts to share leads, witnesses, and other evidence with foreign anti-bribery enforcement agencies. *Third*, the Guidance establishes an FCPA enforcement pilot program to “promote greater accountability for individuals and companies that engage in corporate crime.” As discussed below, the pilot program seeks to incentivize business organizations to self-police and self-report FCPA violations by offering more clearly articulated benefits for such cooperation and providing greater clarity about what kind of cooperation is required.

### The Carrot – Details on the DOJ’s FCPA Enforcement Pilot Program

Effective April 5, 2016, the pilot program is a yearlong initiative applicable only to matters investigated by the Fraud Section’s FCPA Unit. The program’s objective is to promote self-disclosure and cooperation by offering business

organizations the opportunity to earn bonus mitigation credit if they can meet the pilot program's heightened standards for (1) voluntary self-disclosure; (2) full cooperation; and (3) timely and appropriate remediation.<sup>1</sup>

Although the Government historically has provided guidance regarding credit for self-reporting and cooperation in the USAM and the USSG, the pilot program offers even greater benefits for FCPA-specific matters.<sup>2</sup> When a company voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, it can expect “up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range.”<sup>3</sup> Further, the Guidance states that a Monitor will not likely be necessary if an effective compliance program has been implemented and is functioning. And critically, if all of the pilot program's preconditions are met, the DOJ “will consider a declination of prosecution.”

The Guidance also provides the most specific instruction yet on what is required to merit such mitigation credits. The Guidance acknowledges the past lack of clarity on what constituted adequate disclosure, cooperation, and remediation, noting that its aim is to provide “greater transparency” on what is expected. For the self-reporting prong to be met, for example, a company must make its voluntary self-disclosure “within a reasonably prompt time,” and the burden is on the company to prove timeliness. Further, a “disclosure that a company is required to make, by law, agreement, or contract” will not qualify. The Guidance also lists several factors required for a business organization to meet the cooperation requirement, including proactive (rather than reactive) cooperation, rolling disclosure of information and documents, employee and former employee interviews, and provision of third-party documents and witnesses. Finally, while the Guidance notes that the sufficiency of remediation “can be difficult to ascertain and highly case specific,” it details a number of baseline requirements, including a sufficiently resourced and independent compliance program, effective risk assessment and audit functions, and an overall culture of compliance. The Guidance notes that further details on what DOJ considers an adequate compliance program are being developed and benchmarked.

As noted above, measuring the full implications of the Guidance is impossible until the DOJ rolls out its plan in practice. However, the Guidance's stated purpose of changing the calculus for business organizations as to the relative costs and benefits of self-reporting (or not) is worth careful consideration.

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<sup>1</sup> As stated in the Guidance, a company also must disgorge all profits resulting from the FCPA violation to be eligible for any such credit.

<sup>2</sup> The DOJ states that the Guidance was not intended to supplant the USAM or the USSG—rather, those standards must likewise be met as a prerequisite to earning the enhanced mitigation credits available under the pilot program.

<sup>3</sup> If a company has fully cooperated and timely and appropriately remediated, but did not voluntarily self-disclose, then it can expect “at most a 25% reduction off the bottom of the Sentencing Guidelines fine range.”