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FCPA Compliance---Recent Department of Justice Initiatives

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The Department of Justice (DOJ) recently initiated a one-year pilot program to encourage companies to self-report violations of the Foreign Corrupt Practices Act (FCPA). Any company contemplating self-reporting such a violation needs to carefully consider participating in the pilot program. As part of that analysis, a company must consider the pros and cons of voluntary self-disclosure, as well as the expectation of full corporate cooperation, including complying with USAM principles and the high-profile Yates Memorandum, the latter of which addresses individual accountability for corporate wrongdoing.

The Pilot Program

Effective April 5, 2016 and administered by the DOJ's Fraud Section, the pilot program encourages companies to self-report FCPA violations, fully cooperate with the Fraud Section in the investigation, and later remediate FCPA-related lapses to qualify for mitigation credit. Such self-disclosure must occur *before* the government's investigation and promptly after the company becomes aware of the FCPA offense. Of particular importance is the obligation that the company provide all relevant facts, including relevant facts about the people -- whether top executives or rank-and-file employees -- engaged in the wrongdoing. Under the pilot program, the participating company will be required to disgorge all ill-gotten gains.

The Yates Memorandum

A. Background

In September 2015, the DOJ released a memorandum to prosecutors entitled "Individual Accountability for Corporate Wrongdoing." Commonly known as the "Yates Memorandum," because it was authored by Deputy Attorney General Sally Yates, the Memorandum has increased the government's prosecutorial focus on individual accountability for corporate wrongdoing. It was designed to counter the increased perception that the DOJ was less interested in prosecuting individuals than the companies they work for. In November 2015, a revised United States Attorney's Manual incorporated the Yates Memo's directives and added a new section "Focus on Individual Wrongdoers" to reflect the Memo's new approach. Although the full effect of the Yates Memo policy remains to be seen, what is clear is that corporations cannot simply end an investigation with a conclusion of corporate liability while not disclosing all relevant facts as to those who committed the underlying conduct.

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B. Yates and the Pilot Program

To receive mitigation credit under the pilot program -- which mitigation can be substantial -- a corporation must comply with the USAM and the Yates Memo, including disclosing all relevant facts about how the company's officers and other employees are involved in the wrongdoing. The program also requires the company be proactive in providing facts and evidence, as well as relevant documents, on a rolling basis as the investigation proceeds -- and also to make the company's current and former employees available for interviews. One obvious drawback of complying with the Yates directive is that it may put employees and employers at odds because it requires the company to take a more aggressive approach to identifying culpable individuals early on in the investigation. In doing so it may leave employees to feel that they are under attack from the very company that employs them, as well as the government. This may have consequences with respect to the level of cooperation an employee is willing to provide, causing many to argue that it has resulted in employees seeking independent counsel more frequently, driving up the costs of defense. This may well create a wedge that will have consequences going forward, including the inability of a company to fully comply with the pilot program in order to receive maximum mitigation credit. Under the pilot program the mitigation credit for voluntary self-disclosure and cooperation is significant: a company may receive up to 50% off the criminal fine it might otherwise be required to pay and a reduced likelihood that the government will impose a corporate monitor as part of its resolution with the offending company.

Although the pilot program has many attractive features, its benefits are ultimately conferred by prosecutors on a discretionary basis, meaning, it does not obligate the government to provide guaranteed minimum reductions for self-disclosure; rather, the Fraud Section continues to retain enormous prosecutorial discretion in how it executes the program. Further, the pilot program does not create leniency for individuals.

Another concern is that the obligations imposed by the Yates Memo may hamper a company's ability to undertake timely and appropriate remediation efforts. That necessary remediation includes an effective and independent corporate compliance program as well as appropriate discipline for responsible employees. Lack of employee cooperation in identifying and disciplining these individuals necessarily makes fulfilling these objectives far more difficult.

Importantly, and of significance going forward, the rollout of the pilot program comes at a time when the DOJ has increased the size of its FCPA prosecution staff by 50%, and dedicated additional resources for such investigations and prosecutions. This, in turn, is likely to increase the number of cases the DOJ may pursue under the FCPA. It also strongly signals that the FCPA is high on the DOJ radar screen. Indeed, with the roll out of the pilot program, coupled with the new obligations under the Yates Memo, companies will have tough choices to make about whether and when to self-report and begin its march to cooperation.

If you have any questions, please contact your Seyfarth attorney, Karen Y. Bitar at *kbitar@seyfarth.com*.

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