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## White Collar Defense and Investigations

### DOJ Announces FCPA Pilot Program in an Effort to Incentivize Companies to Self-Report Misconduct

**Action Item:** On April 5, 2016, the U.S. Department of Justice (“DOJ”) issued a memorandum laying out a one-year pilot program designed to offer mitigation credit to companies that voluntarily disclose Foreign Corrupt Practices Act (“FCPA”) violations. The memorandum also announced an increase by 50 percent of the number of prosecutors assigned to DOJ’s FCPA unit as well as an increase in the number of Federal Bureau of Investigation (“FBI”) agents working these cases. It further describes DOJ’s efforts to work more closely with foreign law enforcement to investigate corruption matters. The pilot program provides substantial potential rewards for companies that comply with all of its components, including the possibility of a declination of charges. Nevertheless, navigating the program’s requirements in an effort to obtain a declination or to mitigate the imposition of a criminal fine may prove difficult for many companies.

On April 5, 2016, the Chief of the Fraud Section for the U.S. DOJ’s Criminal Division issued a memorandum related to the Department’s prosecution of violations of the FCPA. The memorandum highlighted the DOJ’s efforts to intensify its prosecution of FCPA violations by (1) increasing the Fraud Unit’s stable of prosecutors devoted to FCPA issues by 50 percent and creating teams of special FBI agents focused solely on FCPA matters, and (2) strengthening the Department of Justice’s collaboration with its foreign counterparts in order to combat bribery schemes worldwide. The memorandum also announced the start of a

one-year pilot program designed to incentivize companies to voluntarily self-disclose FCPA-related misconduct.

#### The FCPA Pilot Program

The pilot program was designed to increase the Fraud Section’s ability to prosecute individual wrongdoers and to provide greater transparency as to what the DOJ requires from companies seeking mitigation credit for any potential penalties they may face for FCPA misconduct. As set forth in the FCPA memorandum, in order to qualify for full cooperation credit, a company must meet three specific requirements: (1) voluntary self-disclosure; (2) cooperation; and (3) timely and appropriate remediation.

**Voluntary Self-Disclosure:** To meet this requirement, companies, “within a reasonably prompt time,” must disclose potentially unlawful conduct prior to an imminent threat of disclosure or a government investigation. The disclosure must also consist of all “known relevant facts,” including the names of the individuals involved.

**Cooperation:** While the September 9, 2015, memorandum issued by Deputy Attorney General Sally Yates concerning individual accountability in corporate prosecutions (the “Yates Memorandum”) sets forth specific criteria for a company to receive **any** mitigation credit (beyond that normally available under the Sentencing Guidelines) for cooperation in connection with a federal criminal prosecution, the recently issued FCPA memorandum details

additional criteria for companies seeking to achieve **full** mitigation credit for FCPA misconduct. To receive full cooperation credit companies must, among other things, be proactive in disclosing facts relevant to the government’s investigation; preserve, collect, and disclose documents and their provenance; provide timely updates on their internal investigations; and disclose overseas documents. Notably, the scope, quantity, quality, and timing of cooperation is fact-specific, and can take into account a company’s size and resources.

**Remediation:** Credit for remediation will only be available to those companies that have met the minimum cooperation criteria set forth in the Yates Memorandum. Moreover, for a company to receive credit for its remediation efforts, it must demonstrate the implementation of an effective compliance program and that it has appropriately disciplined the employee(s) engaged in the alleged misconduct.

### Potential Impact of the Pilot Program

According to the FCPA memorandum, the biggest potential benefit for meeting all of the pilot program criteria is that the DOJ **“will consider a declination of prosecution.”** If the Department nonetheless determines that a criminal resolution is warranted, a company that satisfies the components of the pilot program may be accorded **up to a 50 percent reduction** off the bottom end of the Sentencing Guidelines fine range. In circumstances where no voluntary self-disclosure is made but where a company later fully cooperates and timely and appropriately remediates flaws in its controls and compliance program, the memorandum provides that the company will be eligible to receive **at most a 25 percent reduction** off the bottom of the Sentencing Guidelines fine range.

### Conclusion

The potential reward for companies that comply with all of the components of the pilot program could be substantial, including the possibility that the DOJ will decline outright to prosecute the misconduct. Nevertheless, navigating the pilot program’s very specific requirements in an effort to obtain a declination or to mitigate the imposition of a criminal fine may prove difficult for many companies and will require the input of legal counsel. Indeed, the full implications of how the pilot program will affect companies that find themselves in a position to self-report potential FCPA misconduct have yet to be made known. At a minimum however, the program could change the way companies handle internal investigations as well as their compliance and reporting structure in order to maximize their opportunity to receive full mitigation credit. Companies must decide how to manage the trade-off between seeking the potential benefits of the pilot program and devoting the resources and time necessary to comply with the pilot program’s criteria.

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