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FCPA

The New Rules of the Game for Cooperation Credit in Foreign Corrupt Practices Act Cases

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The U.S. Department of Justice and the U.S. Securities & Exchange Commission recently identified new metrics (and clarified familiar ones) they use to assign corporate cooperation credit in government investigations, especially in Foreign Corrupt Practices Act (FCPA) cases. Receiving cooperation credit from the DOJ and SEC, especially full credit, can significantly mitigate the negative financial and reputational impacts of an FCPA investigation.

In this article, I explain how the DOJ and SEC have raised the bar for cooperating companies by requiring prompt and thorough self-disclosures that are both truly voluntary and also identify all culpable persons. I also discuss some of the primary benefits of cooperating in FCPA cases and how companies can position themselves to get the most credit possible in the early stages of an FCPA investigation.

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The Evolving Nature of Corporate Cooperation Credit in FCPA Cases

Over the last year, DOJ and SEC officials have explained what is required for companies to receive full cooperation credit in FCPA cases. In sum, the DOJ and SEC expect an unprecedented level of cooperation from companies. What might have passed as exemplary cooperation a few years ago may not be enough to earn full credit today. What follows are three of the government's most significant expectations and how they might affect FCPA investigations.

First, to receive full cooperation credit, companies must promptly self-disclose FCPA violations. Both the DOJ and SEC have historically rewarded companies that self-disclose potential FCPA violations, but both regulators now consider self-disclosure a prerequisite for full cooperation credit. Perhaps equally important, the DOJ and SEC will also consider how long it takes the company to self-disclose. Unnecessary or unjustifiable delays in disclosure will diminish a company's cooperation credit.

In a speech last May, Andrew Weissmann, Chief of the DOJ's Fraud Section, which oversees FCPA prosecutions, explained that a voluntary self-disclosure to the DOJ ''must include the company disclosing all non-privileged information known to it at that time concerning the misconduct.''[1] While that has long been the government's expectation, Mr. Weissmann added that ''belated disclosure . . . won't get you voluntary self-disclosure credit with the Fraud Section.''[2] Nor can companies hope to ''make up'' for a failure to self-disclose by later cooperating fully with the DOJ. Such an approach, Weissmann said, ''is no longer going to cut it.''[3]

[1] Remarks for Andrew Weissmann, ACI FCPA Keynote, May 20, 2015, http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/06/08/06-02-2015-aci-keynote.pdf.
[2] *Id.*
[3] *Id.*

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For the SEC, self-disclosure is also a prerequisite for companies seeking the most lenient sanctions, and like the DOJ, full cooperation credit requires prompt self-disclosure. Last November, Andrew Ceresney, Director of the SEC's Division of Enforcement, announced at an FCPA conference that ''a company must self-report misconduct in order to be eligible for the Division to recommend'' a deferred prosecution or non-prosecution agreement in an FCPA case.[4] While the policy announced by Ceresney was new, it appears to merely formalize what has been the SEC's standing practice. In every prior FCPA case where the SEC agreed to a deferred prosecution or non-prosecution agreement, the company voluntarily disclosed the violation and then provided ''significant cooperation throughout the investigation.''[5]

For the DOJ and SEC, Ralph Lauren is likely the gold standard of prompt, voluntary disclosure.

Both regulators acknowledge that every internal investigation is unique and that the promptness of each disclosure will be judged on a case-by-case basis. However, recent FCPA resolutions with Ralph Lauren Corp. (Ralph Lauren),[6] Parametric Technology Software Co. (Parametric),[7] and VimpelCom Ltd.[8] offer some guidance. For the DOJ and SEC, Ralph Lauren is likely the gold standard of prompt, voluntary disclosure. In 2013, Ralph Lauren self-reported preliminary findings of its internal investigation to the SEC within two weeks of uncovering unlawful payments and gifts to the company's customs broker in Argentina. While two weeks may not be enough time to report even preliminary findings in some FCPA investigations, the Ralph Lauren case, which DOJ and SEC officials regularly cite, demonstrates the importance of investigating quickly and beginning the disclosure process even before all of the facts are known.

In contrast, Parametric and VimpelCom did not receive voluntary disclosure credit when they resolved their investigations with the DOJ in 2016 with a deferred prosecution agreement and non-prosecution agreement, respectively, because both companies failed to disclose certain misconduct when the companies learned of it. In Parametric's case, the company's initial disclosure to DOJ in 2011 did not include certain information about misconduct known to the company at the time of the disclosure.[9] The DOJ subsequently learned that Parametric had not disclosed everything it knew at the time of the initial disclosure.[10] Parametric's failure to disclose all known relevant facts made them ineligible for a voluntary disclosure discount. Parametric's ultimate fine of $14,540,000[11] could have been lower had they disclosed in a timely manner.

The new emphasis on prompt disclosure places added pressure on companies to make disclosure decisions quickly, often on the basis of imperfect information. On this issue, there is no way to ''make up'' for a late disclosure with exemplary post-disclosure cooperation, according to the DOJ. Furthermore, for reasons explained later, companies must be the first to alert the government of the misconduct to receive full cooperation credit, further incentivizing prompt disclosures.

Prompt self-disclosure alone, however, is not enough for the DOJ and SEC to bestow the benefits of full cooperation upon a company. Both regulators also require the company to conduct a full investigation; provide updates and documents in a timely manner; make employees available to the government for interviews; and implement appropriate remediation, among other things.

Second, corporate self-disclosures must be truly voluntary. Neither regulator will extend full cooperation credit if a company's disclosure is prompted by anything other than good corporate citizenship. For example, a company that discloses misconduct because the company believes that a whistle-blower will imminently alert regulators to the misconduct will not receive full cooperation credit. Nor will the regulators extend full cooperation credit if they learn of the violation before the self-disclosure. In either case, Director Ceresney has said that ''the consequences to the company will likely be worse and the opportunity to earn additional cooperation credit may well be lost.'' The DOJ takes a similar view.

The ''voluntariness'' and ''promptness'' requirements imposed by regulators reinforce each other and serve to encourage self-disclosure before all of the facts are known. Take the case of a whistle-blower who alerts management to a foreign bribe scheme within the company. There are several risks to the company while it investigates the allegations. One risk is that the company may not investigate quickly enough, or the whistle-blower may not perceive that the company is taking the allegations seriously, which causes the whistle-blower to contact the government. If that happens before a self-disclosure, the company will be out of the running for full cooperation credit having lost out on being first in the door (voluntariness) and taking too long to disclose (promptness).

Third, companies must help the government pursue cases against culpable individuals. The DOJ and SEC have emphasized their commitment to bringing enforcement actions against culpable individuals, not just companies. Director Ceresney recently reaffirmed the SEC's commitment to ''[h]olding individuals account-

[4] Andrew Ceresney, Director, Division of Enforcement, U.S. Securities & Exchange Commission, ACI's 32nd FCPA Conference Keynote Address, Nov. 17, 2015, http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html#_ftn11 (70 CARE, 11/18/15).

[5] *Id.*

[6] *U.S. Securities & Exchange Commission v. Ralph Lauren Corp.*, Non-prosecution Agreement, https://www.sec.gov/news/press/2013/2013-65-npa.pdf .

[7] Non-prosecution Agreement, Parametric Technology (Shanghai) Software Co. Ltd. And Parametric Technology (Hong Kong) Ltd., Feb. 16, 2016, *available at* http://www.justice.gov/opa/file/824911/download.

[8] *United States v. VimpelCom Ltd.* Deferred Prosecution Agreement, Feb. 10, 2016, *available at* http://assets.law360news.com/0760000/760920/vimpelcom%20dpa.pdf (33 CARE, 2/19/16).

[9] *See* supra note 7.

[10] *Id.*

[11] *Id.*

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able for their wrongdoing'' because of its importance to ''effective deterrence.''[12]

It was the DOJ, however, that made prosecuting individuals the focus of a major policy announcement last year. Corporations must now ''provide to the [DOJ] all relevant facts about the individuals involved in corporate misconduct'' ''to be eligible for *any* cooperation credit'' in any federal prosecution or civil corporate action.[13] DOJ investigations will therefore be focusing on individuals from the start. Prosecutors are also required to develop a ''clear plan'' for resolving cases against individuals before resolving the case against the corporate entity.

The DOJ in particular will therefore expect companies to help the government pursue criminal cases against individuals. That entails, at a minimum, identifying any and all culpable individuals regardless of their corporate rank, marshaling any incriminating evidence against them for the DOJ, and making employees available for interviews by the DOJ.

Like the other two cooperation factors discussed in this article, the emphasis on holding individuals accountable creates certain dilemmas for companies. Companies may now feel compelled to retain legal counsel earlier in the process than they otherwise might have for certain employees. Employees covered by the company's directors and officers liability insurance may demand legal counsel when they otherwise might not have. When employees ''lawyer up'' it tends to slow down the company's investigation, which for the reasons given previously, can be to the company's detriment when it asks the government for full cooperation credit since the government expects prompt disclosures.

The Benefits of Cooperation and How Companies Should Adapt To the New Corporate Cooperation Rules

Receiving full cooperation credit in an FCPA investigation can bestow significant benefits on a company. Full credit, for example, can influence the regulators' choice of disposition, such as a non-prosecution or deferred prosecution agreement, either of which is preferable to entering a corporate guilty plea. But even when a guilty plea is required, the extent of a company's cooperation can affect which company within the company's corporate structure enters the guilty plea. The government is more likely to allow a subsidiary to plead guilty, rather than the parent company, if the company cooperated fully or even partially. There are also significant monetary benefits to full cooperation. Full cooperation credit will result in lower financial penalties and may also avoid the imposition of a costly compliance monitor. It can also persuade regulators to forgo other sanctions, such as debarment.

Companies hoping for full cooperation credit should heed the regulators' heightened expectations. More than ever, the decisions a company makes in the nascent stages of an FCPA investigation will impact how much cooperation credit the regulators will grant the company, thus affecting the corporate bottom line. Consider the recent DOJ settlement with VimpelCom. Although VimpelCom received a 45 percent reduction in its fine for its cooperation, remediation, and quickly acknowledging the misconduct, it received no credit for voluntarily self-disclosing. Even after the 45 percent discount, VimpelCom's total monetary penalty was $460,326,398.[14] If VimpelCom had self-disclosed in a timely manner and if the DOJ had awarded the company a mere 5 percent further reduction in the fine as credit, it would have saved VimpelCom $41,847,854. While the fine in most cases is sure to be less than several hundred million dollars, the underlying principle applies to all cases—full cooperation credit likely saves the company money.

To adapt to the new rules of cooperation, companies should consider taking at least three important steps. First, companies should consider getting outside counsel involved as early as possible, even if just in a support role to in-house counsel at the outset. Many companies choose to use internal resources—in-house lawyers, accountants, human resource professionals—to conduct preliminary investigations of possible FCPA violations. While there is much to recommend that approach, in-house teams may not have the requisite experience, skill, and time to conduct the prompt, yet thorough investigation that is necessary to quickly learn the relevant facts and potentially disclose them to the regulators. Outside counsel, for example, can help the company devise a targeted investigation plan, an important aspect of conducting an efficient investigation. Early involvement by outside counsel will also cut down the amount of time the company spends investigating generally since outside counsel will be engaged in the investigation from the outset. The company can also self-disclose more promptly, if appropriate, for the same reasons.

Second, regardless who conducts the investigation, the company's lawyers should create an investigation plan with clear priorities. Quickly identifying the relevant facts, key witnesses, and where the most relevant documents are likely located is vital. According to the DOJ, investigations should not seek to ''boil the ocean,'' but should be ''appropriately tailored'' with the results reported in a ''timely manner.''[15] Long, rudderless investigations are not only wasteful to corporate resources, but they also threaten to undermine the value of a company's cooperation.

And third, when the company's high-level executives are potentially implicated in an investigation, retaining outside counsel is advisable to protect the integrity and independence of the investigation. The DOJ and SEC will not give a company full cooperation credit if the

[12] *See* supra note 4.

[13] Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, *Individual Accountability for Corporate Wrongdoing*, Sept. 9, 2015, http://www.justice.gov/dag/file/769036/download (13 CARE 1952, 9/11/15).

[14] *See* supra note 8. The total monetary penalty consists of three parts: (1) $190,163,199.20 to the U.S. Treasury as a fine; (2) a potential offset of up to $230,163,199.20 for any criminal penalties paid to the Organization of the Public Prosecution Service of the Netherlands; and (3) $40,000,000 in forfeiture to the U.S. *Id*.

[15] Leslie R. Caldwell, Assistant Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act, National Harbor, Md., Nov. 19, 2014, available at http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st (12 CARE 1566, 11/21/14).

government perceives that the company's investigation is protecting its senior executives. To combat that perception, companies should retain reputable, independent outside counsel to conduct the investigation.

Conclusion

The DOJ and SEC expect more than ever from cooperating companies in FCPA cases. The regulators have reserved the most lenient penalties for companies that meet a high standard of cooperation. Meeting those standards will require changing the way companies approach FCPA investigations, especially in the early stages.

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