New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO. 79
TUESDAY, APRIL 26, 2016

International Criminal Law and Enforcement

Expert Analysis

Limits in New FCPA Leniency Program May Hinder Effectiveness

By **Nicholas M. De Feis**

And **Philip C. Patterson**

On April 5, 2016, the Fraud Section of the Department of Justice (DOJ) announced a pilot program offering potential leniency to corporations that self-report Foreign Corrupt Practices Act (FCPA) violations. The program aims to facilitate the prosecution of individuals by giving corporations an incentive to self-report employee involvement in bribing of foreign officials. The program thus furthers the goal of the Yates Memo, released by the DOJ in September 2015, which announced the department's intention to hold more individuals accountable for corporate misconduct.

Although intended to incentivize self-reporting, the program has limits and collateral requirements for credit that should cause corporate counsel serious concerns. The leniency offered under the program only applies to prosecutions by the Fraud Section's FCPA Unit and does not prevent prosecutions by other DOJ sections, other federal or state agencies or foreign authorities. Given that FCPA violations are international in scope, and almost always involve conduct that could be prosecuted under multiple legal theories, corporations must consider potential consequences before attempting to take advantage of the program.

The Pilot Program offers potential leniency to corporations—but not individual employees—for self-reporting misconduct where certain stringent conditions are met.

The Pilot Program lacks another feature that may also hinder effectiveness: any nod to the possibility of leniency for cooperating employees. Under the program, only corporations can receive leniency for self-reporting misconduct. This limitation may undermine the goal of self-reporting. Additionally, the program sets forth detailed and arguably expensive requirements for remediation, covering such areas as the resources devoted to the compliance function and even compensation of compliance personnel.

The FCPA and DOJ Policies

The FCPA, passed in 1977, makes it a crime for U.S. individuals and entities to secure business by bribing foreign officials.[1] It also applies to foreign persons or entities that cause an act in the United States that furthers a foreign bribe. The FCPA also requires U.S. issuers to comply with accounting provisions regarding record-keeping and internal controls.

In the wake of the 2008 financial crisis, numerous corporations were investigated for conduct that some believed contributed to the financial crisis. Many firms paid large penalties to resolve investigations. But a perception then emerged that the employees responsible for the corporate misconduct escaped prosecution because the corporations "took the fall" for them.

On Sept. 9, 2015, the DOJ released a memo by Deputy Attorney General Sally Yates entitled, "Individual Accountability and Corporate Wrongdoing."[2] The so-called "Yates Memo" emphasized that the Justice Department intends to target individual employees for prosecution to deter corporate misconduct. The memo makes clear that for a corporation to receive any consideration from the government for cooperation, it must disclose "all relevant facts about the individuals involved in corporate misconduct."

NICHOLAS M. DE FEIS, *a former federal prosecutor, is a partner at De Feis O'Connell & Rose.* PHILIP C. PATTERSON *is counsel to the firm.*

On April 5, 2016, the DOJ Fraud Section released a memo by Chief Andrew Weissman describing its plans to enhance FCPA enforcement by, among other things, increasing resources and cooperation with foreign authorities.[3] Notably, the memo also gives teeth to the Yates Memo by announcing a Pilot Program to incentivize corporations to self-report misconduct "to permit prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement."[4]

The Pilot Program offers potential leniency to corporations—but not individual employees—for self-reporting misconduct where certain stringent conditions are met. For example, the self-reporting must be voluntary and not the result of disclosure required "by law, agreement, or contract."[5] Presumably, a corporation thus cannot receive leniency if it makes a disclosure that it was required to make pursuant to securities laws, a consent decree, deferred prosecution agreement or other legal obligation. Moreover, a corporation must self-report "prior to an imminent threat of disclosure or government investigation."

The program also requires total disclosure, including "all relevant facts about the individuals involved in any FCPA violation."[6] Cooperation must be complete and "proactive," and includes updating the government on internal investigations. Employees must be made available for government interviews, and relevant facts must be disclosed including the specific sources for each fact. This includes all relevant documents whether located in the United States or overseas, except where prohibited by foreign law.[7]

The program notes that a corporation need not waive attorney-client privilege to comply with the policy, although this provision seems almost at odds with the level of disclosure required. For example, the program requires corporations to disclose all relevant facts about employee misconduct, which necessarily implicates legal opinions about culpability. Indeed, the whole process of selecting employee targets and supporting documents implicates opinions of counsel.

Rewards under the program can exceed those under the sentencing guidelines. If a corporation complies with every disclosure, cooperation and remediation requirement, and disgorges all illicit profits, it can receive up to 50 percent off the bottom of the fine range—if a fine is even sought. Moreover, corporations that remediate can avoid having a monitor appointed. Most appealing of all, if all conditions are met, the Fraud Section "will consider a declination of prosecution."[8] Lesser benefits are also available for firms that do not meet all requirements.

The program became effective on the day the memo was released and it will last for one year, when the results will be evaluated for possible continuation.

Remediation Obligations

The benefits offered by the program are limited. The memo specifically states, "[T]his Guidance applies only to the Fraud Section's FCPA Unit….It does not apply to any other part of the Fraud Section, the Criminal Division, the United States Attorneys' Offices, any other part of the Department of Justice, or any other agency."[9] In short, a corporation that fully discloses wrongdoing and otherwise complies with the program still faces risks from other domestic and foreign agencies. Indeed, the Fraud Section's enhancements to FCPA enforcement include increased cooperation with foreign authorities. Presumably foreign authorities will thus get more access to materials produced to the Fraud Section, which could facilitate parallel foreign prosecutions.

The limitations on the leniency offered under the Pilot Program present a serious concern for any corporation that uncovers misconduct. Given that an FCPA violation is essentially a bribe paid overseas to secure business, such conduct can run afoul of multiple statutes such as mail and wire fraud, tax, and money laundering offenses. Moreover, if a corporation is public, it presumably both reported the revenue it corruptly generated and deducted the costs of the bribes. The corporation thus could be prosecuted under the securities laws, or subject to a parallel SEC enforcement action. Indeed, the SEC has its own authority to pursue FCPA actions regardless of what the Fraud Section does. As such, the decision to self-report may require more than a few leaps of faith: that the corporation will qualify under the program, that the improved "coordination with foreign counterparts" will help mitigate the international consequences of self-reporting, and that full cooperation will have some positive impact on sister law enforcement agencies. None of this is discussed in the memo.

The program also requires "implementation of an effective compliance and ethics program" and lists various criteria to be met before a corporation can receive leniency.[10] Among other things, the criteria address the "quality and experience" of compliance personnel and their compensation. The criteria also include auditing and internal disciplinary procedures. Full compliance under the program thus may entail substantial financial costs.

Antitrust Leniency

The Pilot Program is not the DOJ's first leniency policy. The DOJ Antitrust Division's Corporate Leniency

Program (Antitrust Program) has been in force since 1993. It offers leniency to the first corporation to voluntarily self-report misconduct, and corporations that subsequently self-report can receive diminishing amounts of leniency. Like the Pilot Program, the Antitrust Program does not provide protection against prosecutions by other parts of the DOJ or other domestic or foreign agencies. This limitation, however, does not appear to have significantly hindered the Antitrust Program's effectiveness. The Antitrust Division has called the program its "most important investigative tool" that has advanced investigations in multiple industries and helped recover billions in fines.[11] Significantly, the Antitrust Program specifically provides that individual employees who admit their misconduct and cooperate can also receive leniency.

The success of the Antitrust Program indicates that the Pilot Program will not necessarily be hindered by the lack of protection against prosecutions by other agencies. Yet, under the antitrust regime the interests of a corporation and its employees are aligned—if they all cooperate then they can all receive leniency. To the extent there is competition, it is between corporate cartel members who may race to the courthouse for win, place and show benefits available under the Antitrust Program. By contrast, under the Pilot Program an individual employee who had second thoughts or regret about involvement in FCPA misconduct may hesitate to self-report because her only reward may be a pat on the back on the way out the door and the hope for mercy under traditional prosecutorial principles.

Of course, not everyone can get immunity, but the purpose of the new program might have been better served with some clear inducements for employee cooperation. One year after the Antitrust Division introduced its Corporate Leniency Program, it promulgated a policy for individuals that offered leniency to anyone who "did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity."[12]

Under the new Pilot Program, the only way FCPA misconduct may get self-reported is if employees who are not involved in the misconduct discover it and turn in their fellow employees—or if the corporation is lucky enough to receive third-party assistance. The corporation can then win leniency and the employees who reported the misconduct are presumably commended by the corporation.

A corporation that fully discloses wrongdoing and otherwise complies with the program still faces risks from other domestic and foreign agencies. Indeed, the Fraud Section's enhancements to FCPA enforcement include increased cooperation with foreign authorities.

Such a scenario will likely occur, but the lack of any clear path to leniency for individuals may make self-reporting less likely.

Moreover, pitting corporations against their employees, and employees against each other, may create awkward corporate cultures. Corporate counsel conducting internal investigations may want to consider retooling so-called corporate Miranda warnings so that employees are advised about the limited reach of the Pilot Program and the benefits and risks of cooperation. The government's involvement in corporate affairs and incentives under the program may also generate an interesting suppression motion or two.[13]

Conclusion

The new Pilot Program is designed to facilitate the prosecution of individuals by giving their employer an incentive to turn on them. Any leniency to the corporation is limited to the FCPA Unit of the DOJ's Fraud Section. Any corporation considering the program must weigh its risks and costs. Corporate counsel must make every effort to try to get any domestic or foreign agencies involved in the subsequent investigation to commit to a global resolution; and counsel for individuals would be wise to attempt to obtain some commitments from the DOJ, if possible.

As for the effectiveness of the Pilot Program, the Antitrust Program shows that limits on the scope of any leniency are not a great impediment to self-reporting. To its credit, the DOJ has reinforced the message of the Yates memo. Yet, the lack of any individual leniency in the Pilot Program may hinder its effectiveness and have other unintended consequences.

1. 15 U.S.C. §§78dd-1, et seq.
2. See DOJ, Yates, Sally, "Individual Accountability for Corporate Wrongdoing," https://www.justice.gov/dag/file/769036/download.
3. See DOJ Fraud Section, Weissman, Andrew, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," https://www.justice.gov/opa/file/838386/download.
4. Id. at 9.
5. Id. at 4.
6. Id.
7. Id. at 5-6.
8. Id. at 8-9.
9. Id. at 9.
10. Id. at 7.
11. See Antitrust Division, "Cracking Cartels with Leniency Programs," https://www.justice.gov/atr/speech/cracking-cartels-leniency-programs.
12. See Antitrust Division, "Leniency Policy for Individuals," https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf.
13. See, e.g., *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (affirming dismissal of indictment of KPMG executives because government pressured firm not to advance their defense costs).