New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 20
FRIDAY, JULY 29, 2016

International Criminal Law and Enforcement

Expert Analysis

Does the New FCPA Leniency Program Threaten Due Process?

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In our last column, we described the Department of Justice (DOJ) Fraud Section's new pilot program offering leniency to corporations that self-report Foreign Corrupt Practices Act violations (FCPA Pilot Program).[1] The Program is designed to further the goals of the DOJ's Yates Memorandum, released in September 2015, which announced the DOJ's intention to deter corporate misconduct by holding more individual employees accountable. The Yates Memo was the latest in a series of memoranda issued by the DOJ describing its policies on prosecuting corporations and their employees, including how corporations can avoid or mitigate prosecution through cooperation with the government.

Commentators have noted, however, that some of the conduct these memos require of corporations can essentially turn them into agents of the government. In fact, courts have held that corporate actions against employees pursuant to these memoranda violated employees' constitutional rights because the government had coerced corporations into becoming state actors.

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Like these policy memos, the FCPA Pilot Program requires certain conduct by corporations to prove their commitment to cooperation with the government. But the cooperation contemplated by the program moves corporations closer to—and perhaps over—the line at which they become state actors. Such a result should be of concern not only to corporate counsel and the defense bar, but also to prosecutors, who may see prosecutions derailed by unintended constitutional violations.

Evolution of DOJ Policies

For many years, the DOJ has been attempting to refine and clarify the principles by which prosecutors will decide whether to indict corporations and their employees, and under what circumstances corporations can receive leniency from prosecution for cooperation. These efforts have included guidance in the form of memoranda such as the Holder Memorandum in 1999, the Thompson Memorandum in 2003, the McNulty Memorandum in 2006, the Filip Memorandum in 2008 and the Yates Memorandum in April 2015. A goal of these memoranda has been to deter corporate wrongdoing by increasingly prosecuting individuals for corporate misconduct.

Although these memoranda are intended to provide clarity, multiple memoranda have proven necessary partly because of criticisms and

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successful legal challenges to some of the policies. The most notable example is Judge Lewis Kaplan's 2006 opinion in *U.S. v. Stein*.[2] In *Stein*, the U.S. Attorney's Office investigated certain KPMG executives for alleged involvement in illegal tax shelters. To avoid charges, KPMG sought to cooperate in the investigation.

Under the DOJ policies at the time, some of the factors prosecutors were required to consider in determining whether a corporation deserved leniency included the extent of its cooperation with the government and whether it was advancing its employees' legal fees. Like many corporations, KPMG had a long history of paying the legal fees of employees, even after they were indicted. This time, however, KPMG capped employee legal fees and made them contingent on cooperation with the government—including submitting to interviews. KPMG entered into a deferred prosecution agreement with the government and cut off legal fees for employees who were indicted.[3]

The KPMG defendants moved to dismiss the indictment claiming that the government had violated their constitutional rights. In a series of opinions, Judge Kaplan held that KPMG's actions were the result of overwhelming government pressure, which violated the defendants' Fifth Amendment due process right to a fair trial and Sixth Amendment right to effective assistance of counsel. The judge also held that the DOJ policy requiring consideration of advancement of fees—while couched in language about impeding a government investigation—violated fundamental principles of fairness required by due process.

Kaplan also cautioned that the infamous prosecution of Arthur Anderson & Co., which effectively went out of business after a conviction that was later overturned by the Supreme Court, has forced corporations to seek to avoid indictment at all costs. Kaplan wrote that the DOJ had "capitalized on this," and caused "the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights."[4] Ultimately, Judge Kaplan dismissed the indictment.[5]

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Judge Kaplan's dismissal was affirmed by the U.S. Court of Appeals for the Second Circuit.[6] The court based its decision on a Sixth Amendment violation and did not reach the issue of a Fifth Amendment violation. The court noted that although there is no bright-line test to determine whether a private entity's conduct amounts to state action, the line can be crossed when the government compels private action through "significant encouragement." The court held that on the issue of legal fees, the government exerted "overwhelming influence" over KPMG and became "entwined" in controlling KPMG's actions.

The DOJ responded with revised policy memos, but commentators observed that the steps corporations need to take to be considered for leniency has increasingly turned corporations into state actors.[7]

FCPA Pilot Program

In 2015, the DOJ issued the Yates Memorandum, which emphasizes deterring corporate misconduct by prosecuting the individual employees involved. It states, "[T]o be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue…and provide to the [DOJ] all facts relating to that misconduct."[8] Commentators quickly noted that this language changed the targeting of responsible individuals from one of many factors for consideration into a "threshold requirement," and that the Yates Memo as a whole further risked turning corporations into state actors violating their employees' Fifth and Sixth Amendment rights.[9]

The Pilot Program is an attempt to further the goal of the Yates Memo by offering leniency to corporations that self-report FCPA violations and cooperate thoroughly with the government.[10] The FCPA, passed in 1977, generally makes it a crime for U.S. individuals and entities to secure business by bribing foreign officials.[11] It also applies to foreign persons or entities that cause an act in the U.S. that furthers a foreign bribe. Pursuant to the program, corporations that discover and self-report FCPA

violations by their employees may receive leniency from the FCPA Unit. Corporations that fully report, cooperate, remediate and pay fines can even completely escape prosecution.

The cooperation requirements, however, are the closest any of the DOJ policies have come to turning corporations into state actors. For example, 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." Cooperation must be complete and "proactive," which includes timely updates to the government. 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 U.S. or overseas, except where prohibited by foreign law.

Corporations, "[u]nless legally prohibited," must also "facilitat[e]… third-party production of documents and witnesses from foreign jurisdictions." The remediation requirements are similarly stringent, even going so far as to take into account the compensation of compliance personnel.[12]

Perhaps tellingly, the program also contains something of a Freudian slip. It states that cooperation includes, "[w]here requested, de-confliction of an internal investigation with the government investigation." Apart from being ambiguous, this use of the term "de-confliction" has loaded connotations. Although "de-confliction" is an increasingly popular term, in military, engineering and law enforcement circles, the term traditionally means preventing two systems on the same side from interfering with each other. Indeed, in the law enforcement context, a de-confliction database is a computer database that separate law enforcement agencies can consult to avoid having their active investigations interfere with each other. Thus, the Pilot Program's reference to "de-confliction" between corporate and government investigations hints that both entities are on the same side.

Conclusion

Taken as a whole, qualifying for FCPA Pilot Program leniency may make corporations state actors. As Judge Kaplan observed, the death of Arthur Anderson has caused corporations to conclude that their survival depends on avoiding indictment at all cost. The requirements of the Program, combined with the categorical language of the Yates Memo—"to be eligible for any credit…the company must"—involve the government in internal corporate affairs to a surprising extent. Together, these requirements court potential mischief at the very least in the name of saving the company, and may be a strong incentive for corporations to do things that the government cannot do easily or even legally.

The program's requirements may also unwittingly create problems for prosecutors, who can expect that any employee who gets served up on a platter by his or her employer will try to raise constitutional and other arguments at trial. Indeed, the mere fact that a corporation has expressed a desire to seek leniency under the program could be the basis of an argument by an employee-defendant that everything uncovered by the corporation constituted state action.

The DOJ memoranda are commendable not just for attempting to deter corporate misconduct, but also for attempting to provide corporations and their counsel with clarity. But corporations, counsel and prosecutors should tread carefully, and continually attempt to assess when their actions may risk infringing individual rights.

1. Nicholas M. De Feis and Philip C. Patterson, "Limits in New FCPA Leniency Program may Hinder Effectiveness," NYLJ, Apr. 26, 2016, available at http://www.newyorklawjournal.com/id=1202755915736/Limits-in-New-FCPA-Leniency-Program-May-Hinder-Effectiveness.

2. 435 F.Supp.2d 330 (S.D.N.Y. 2006).

3. Id. at 341-50.

4. *U.S. v. Stein*, 440 F.Supp.2d 315 (S.D.N.Y. 2006).

5. *U.S. v. Stein*, 495 F.Supp.2d 390 (S.D.N.Y. 2007).

6. *U.S. v. Stein*, 541 F.3d 130 (2d Cir. 2008).

7. See, e.g., Lowell & Mann, "Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights," 40 GEO. L.J. REV. CRIM. PROC. iii (2011).

8. See DOJ, Yates, Sally, "Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015.

9. See Hoey, Norsieck & Reppucci, Ropes & Gray Alert, "The Yates Memo: Have the Rules Really Changed?" (discussing U.S. Attorneys' Manual §9-28.700 (2015) and narrow exception where corporation cannot produce required evidence); see also Monnin & Stolze, "Everything Old is New Again: Why the Yates Memo is Constitutionally Suspect," Corporate Counsel 2016.

10. See DOJ, Weissman, Andrew, "Fraud Section's FCPA Enforcement Plan and Guidance," April 5, 2016.

11. 15 U.S.C. §§78dd-1, et seq.

12. See Pilot Program at 5-7.