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Evaluating the FCPA Pilot Program: A Shift in Company Thinking?

Law360, New York (April 11, 2017, 2:17 PM EDT) -- On April 5, 2016, the U.S. Department of Justice released a nine-page memorandum launching a one-year pilot program to reward companies that voluntarily self-report violations of the Foreign Corrupt Practices Act.

Now that a year has passed and the DOJ is reviewing the results (the program continues during this process), Law360 is publishing a series of guest articles examining the impact and potential future of the FCPA pilot program. This Expert Analysis series includes commentary from attorneys who worked on cases in which declinations were issued under the program.

Has the U.S. Department of Justice's Foreign Corrupt Practices Act pilot program led companies to behave any differently than they did before when it comes to voluntarily self-disclosing potential FCPA violations? According to Kenneth Blanco, acting assistant attorney general for the DOJ's Criminal Division, the one-year pilot program, which was set to expire on April 5, 2017, will "continue in full force" while the DOJ evaluates its "utility and efficacy," including whether to extend it, and if it is extended, whether and how it should be revised. While we await the outcome of this review, it is a good time to consider how things have played out under the pilot program and whether these developments have impacted the way companies think about voluntary self-disclosure.


Mona Patel

Carrots: Declinations and Disgorgement

The pilot program sought to motivate companies to voluntarily self-disclose "by providing greater transparency" about what the DOJ would require from companies in order to earn mitigation credit. It created a new kind of DOJ declination — one in which "even a company that voluntarily self-discloses, fully cooperates, and remediates will be required to disgorge all profits resulting from the FCPA violation." Short of a declination, a company that voluntarily discloses, fully cooperates, fully remediates and meets all of the requirements of the pilot program (1) "may" receive up to a 50 percent reduction off the bottom end of the sentencing guidelines fine range, and (2) "generally should" avoid the appointment of a monitor, assuming an effective compliance program already has been implemented. Whether or not a voluntary self-disclosure will result in a declination, a 50 percent reduction in penalties, something less than a 50 percent reduction in penalties, or any mitigation credit at all, is left to the discretion of prosecutors.

Over the course of the last year, the DOJ issued five public declinations under the FCPA pilot program. Issuers that received declinations were required to disgorge profits resulting from their FCPA violations in parallel U.S. Securities and Exchange Commission actions; nonissuer domestic concerns signed detailed DOJ declination letters which required disgorgement and recited facts about the misconduct:

- Nortek Inc. (June 7, 2016). Nortek self-reported to the DOJ and the SEC after confirming improper payments, but before completing its internal investigation. It entered into a nonprosecution agreement with the SEC, under which it agreed to pay $291,491 in disgorgement plus prejudgment interest, but is not required to agree to the SEC recitation of facts unless it breaches the NPA.

- Akamai Technologies Inc. (June 7, 2016). Akamai self-reported to the DOJ and the SEC "within weeks" of discovering FCPA violations in December 2014. It entered into a nonprosecution agreement with the SEC, under which it agreed to pay $652,452 in disgorgement plus prejudgment interest, but is not required to agree to the SEC recitation of facts unless it breaches the NPA.

- Johnson Controls Inc. (June 21, 2016). JCI self-reported FCPA violations to the DOJ and the SEC in June 2013, after retaining outside counsel to conduct an internal investigation and approximately one month after receiving a second anonymous complaint. JCI resolved a parallel SEC matter by agreeing, under an administrative order, to pay $11.8 million in disgorgement plus prejudgment interest, and a $1,180,000 civil money penalty.

- HMT LLC (Sept. 29, 2016). HMT made a "timely, voluntary" self-disclosure and agreed to sign a declination letter which included a statement of facts and required HMT to disgorge $2,719,412 in profits gained through $500,000 in illegal payments over the course of a nine-year period.

- NCH Corporation (Sept. 29, 2016). NCH agreed to sign a declination letter which included a statement of facts and required NCH to disgorge $335,342 in illegally gained profits.

The DOJ and the SEC credited these companies for their remedial efforts (including terminations of employees), steps taken to enhance their compliance programs, and their extensive cooperation, including providing translations, work product such as factual chronologies, selected hot documents and interview summaries, and detailed findings from their internal investigations, including in "real time" (Nortek, Akamai, JCI).

However, the DOJ opted not to decline in two other cases involving voluntary self-disclosure.

On June 21, 2016, BK Medical ApS entered into a nonprosecution agreement and agreed to pay a $3,402,000 penalty, which reflected a 30 percent discount off the bottom of the applicable sentencing guidelines fine range. Although BK Medical voluntarily and timely disclosed, the DOJ determined that it should not receive full cooperation credit because it did not divulge certain relevant facts that it learned during the course of its internal investigation.

On Dec. 29, 2016, General Cable Corporation entered into a nonprosecution agreement and agreed to pay a $20,469,694.80 penalty, which reflected an aggregate discount of 50 percent off the bottom of the applicable fine range, to resolve its FCPA matter. As with companies who received declinations, General Cable "voluntarily and timely disclosed the conduct at issue" and "fully cooperated and fully remediated," including by, among other things, providing updates and making regular factual

presentations, providing translations of documents, analyzing and organizing voluminous evidence for the prosecutors, and providing, "by the conclusion of the investigation," all relevant facts known to it.

For a company considering whether or not to take the affirmative step of voluntary self-disclosure, it is difficult to ascertain precisely what could account for the difference between obtaining a declination, a 50 percent reduction in potential penalties, or a 30 percent reduction in potential penalties. Is it because some provided "real time" as opposed to "routine" updates? Or that some provided more detail in their affirmative presentations than others? Or were there other considerations at play? Additionally, a domestic concern considering self-disclosure must now weigh whether it will be required to certify a statement of facts in order to obtain a favorable result, a requirement did not appear in the pilot program guidance and may not apply to issuers.

While voluntary self-disclosure under the pilot program would appear to qualify a company for a declination or a reduction of at least 25 percent off the bottom end of the sentencing guidelines fine range, the substantial degree of discretion that prosecutors retain as to the terms of cooperation credit almost necessarily leads to less transparency and more uncertainty. A company weighing whether or not to voluntarily self-disclose a potential FCPA violation and expose its activities to scrutiny faces the challenge of assessing whether its case will end in a declination and disgorgement of profits, or in a percentage reduction off the sentencing guidelines fine range that is only slightly better than what the company might receive without disclosing. To the extent that the pilot program can, going forward, include more certainty — such as the presumption of a declination if certain, defined conditions are met, or guidance as to the circumstances in which a disgorgement or an agreed-upon statement of facts, might not be required — the prospect of voluntary self-disclosure may become more appealing.

Sticks: Limits to Mitigation Credit Based on Cooperation and Remediation Alone

What about companies that did not voluntarily self-disclose? Were they penalized? As the pilot program guidance promised, they fell on the other side of the line and were treated much differently. Companies that did not voluntarily disclose FCPA misconduct were eligible only for "limited credit" under the program and could obtain, at most, a 25 percent reduction off the bottom of the sentencing guidelines fine range, even if they fully cooperated with the DOJ and fully remediated the violations.

For example, Las Vegas Sands, which did not self-disclose but cooperated by providing translated documents and "voluntarily collecting, analyzing and organizing voluminous evidence and information" in response to requests from the DOJ, entered into a nonprosecution agreement with DOJ on Jan. 19, 2017, and received a 25 percent reduction off the bottom of the applicable range, while settling a related SEC enforcement action for approximately $9 million. Likewise, Odebrecht SA, which fully cooperated with the government's investigation, entered into a plea agreement with the DOJ and received a 25 percent reduction. While companies like Las Vegas Sands and Odebrecht did not qualify for an additional potential 25 percent reduction off the bottom end of the fine range available for those who voluntarily disclose, they appear to have earned the full 25 percent reduction available for those who fully cooperate and fully remediate.

By contrast, companies that were deemed to have partial cooperation or remediation, and that did not voluntarily self-disclose, received less than the potential maximum 25 percent reduction. Teva Pharmaceuticals and its Russian subsidiary agreed on Dec. 22, 2016, to resolve FCPA charges by paying a total of nearly $520 million in connection with enforcement actions brought by both the DOJ and the SEC. Teva received a 20 percent discount off the bottom end of the fine range because, while its cooperation was "substantial," the company made "vastly overbroad assertions of attorney-client

privilege" and failed to produce requested documents "on a timely basis," causing delays in the early stages of the DOJ investigation.

Other companies received even less credit than Teva, or no credit at all. Braskem SA, which was caught up in the same bribery scheme as Odebrecht, agreed to pay a total criminal penalty of $632 million, receiving a 15 percent reduction off the bottom end of the fine range. The DOJ limited the cooperation credit because Braskem did not begin to fully cooperate until after prosecutors developed significant independent evidence of the misconduct, and failed to produce any documents, information about witness statements, or information about the facts gathered from its internal investigation until seven months after its initial contact. In another example, LATAM Airlines, which entered into a DPA on June 25, 2016, received no discount off the sentencing guidelines fine range and agreed to pay a $12.75 million criminal penalty and retain an independent monitor. While LATAM fully cooperated with the DOJ's investigation, it did not remediate adequately in that it failed to discipline the employees responsible for the criminal conduct, including one high-level company executive.

These decisions line up with the guidance issued at the inception of the pilot program, and do provide some useful guideposts on what meaningful cooperation and remediation look like. There are certainly some questions as to how broad an assertion of privilege might have to be in order for the DOJ to consider it "overbroad," how late a production must be in order to become "untimely," or how soon during an internal investigation a company should present facts to the DOJ. Overall, however, the treatment of companies who did not voluntarily self-disclose, and of BK Medical, suggest there is little margin for error when it comes to a company's level of cooperation with the government and its efforts to remediate potential FCPA violations. Taken together with the DOJ's recently released criteria for the evaluation of corporate compliance programs, companies can expect an increasingly exacting review of their implementation of anti-corruption policies, procedures and controls and other efforts taken to prevent violations of the statute. Should the DOJ extend and revise the pilot program, any additional certainty it can provide around its expectations will better enable companies to make informed judgments about whether or not to voluntarily self-disclose.

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