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THE EVOLVING CALCULUS OF CORPORATE VOLUNTARY DISCLOSURE IN FOREIGN CORRUPT PRACTICES ACT CASES

In some watershed cases, companies have received significant benefits from self-reporting FCPA violations to the U.S. Government, including substantial reduction of fines and even declinations. But these benefits are not guaranteed. Some of the factors affecting the important decision whether to self-report, the author finds, are (i) the existence of a robust compliance program at the company, (ii) the potential whistleblower involvement, (iii) increased government focus on third parties and management of such parties by the company, (iv) greater cooperation among anti-corruption authorities and related risk of follow-on prosecutions, and (v) renewed government emphasis on prosecution of individuals.

By Joan E. Meyer *

Prosecutors and regulatory agencies in the United States, the United Kingdom, and elsewhere around the world have set expectations that, in order to maximize the prospect of receiving cooperation credit (including any associated reduction in monetary penalties), the voluntary disclosure of corporate wrongdoing must be made timely, genuinely, and in good faith. The U.S. government, in particular, frequently emphasizes the potential benefits of self-reporting improper conduct in Foreign Corrupt Practices Act ("FCPA") cases. Indeed, in many instances, it can be in a company's best interests to do so. However, while certain recent high-profile corporate resolutions have demonstrated that the rewards of disclosure can be genuine and meaningful, for many reasons, companies must carefully consider all relevant factors before making any decision to self-report FCPA-related misconduct.

A decision relating to whether or not to make a voluntary disclosure to the U.S. government in an FCPA matter — typically the U.S. Department of Justice ("DOJ") and/or the Securities and Exchange Commission ("SEC") — will involve a multitude of factors, and present one of the most challenging issues a company and its lawyers will ever contemplate. For example, once a company decides to self-report potentially improper or illegal activity, it may be exposed to intense investigative scrutiny by U.S. prosecutors, often for an extended period, even if it later turns out that no such activity occurred. Conversely, if a

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company does not disclose when perhaps it should have, it should expect more severe penalties under the U.S. Sentencing Guidelines ("USSG"), which provide for discounts in self-reporting scenarios that are unavailable to companies that have not made a timely disclosure.

The difficulty of this decision is compounded further by the complicated and dynamic factors that go into the equation. For instance, in recent years, the FCPA enforcement environment has evolved in several ways, including the mechanisms by which companies are credited for disclosure by the DOJ and SEC, the government's areas of focus in prosecuting FCPA cases, the whistleblower incentives under current U.S. law, the importance of robust anti-corruption compliance, and the increased cooperation among international law enforcement agencies in corruption-related cases. This article describes some of the most important changes in this area and discusses how they may affect the company's decision about whether to make a voluntary disclosure to the U.S. government in an FCPA matter.

DISCLOSURE FRAMEWORK

The general rule in the United States is that there is no legal obligation for a person or corporation to self-disclose criminal conduct to the government. There are some circumstances, however, where a company may be legally obligated to report certain conduct to government authorities. For example, certain sections of the Sarbanes-Oxley Act of 2002 ("SOX"), a discussion of which is beyond the scope of this article, require disclosure of violations that involve fraud or preclude management from certifying the effectiveness of internal controls. Except for certain limited circumstances, entities are generally not required to self-report, and any disclosure made by the company is, therefore, typically perceived as "voluntary." Notwithstanding this, U.S. authorities in FCPA matters have been eager in recent years to emphasize the benefits to companies of voluntarily disclosing violations, with pledges of more lenient treatment, measurable reductions in penalties, and even declinations (*i.e.*, a formal decision not to prosecute). To this effect, on April 5, 2016, the DOJ issued a Pilot Program[1] that sheds some light on the value of corporate self-disclosure with respect to a company obtaining a settlement. In the Pilot Program, the Department made another effort to encourage corporate disclosures by elaborating on the size of penalty reductions cooperating corporations could expect to receive.

The U.S. approach to voluntary disclosure in FCPA matters is grounded primarily in the Principles of Federal Prosecution of Business Organizations section ("Principles") of the U.S. Attorney's Manual. Through these Principles, the government has sought to incentivize voluntary disclosures as a way to encourage entities to come forward early and cooperate with the government's investigation. According to the Principles, prosecutors may consider, among several core factors, a company's timely and voluntary disclosure in evaluating whether the company will even be charged.[2] Moreover, a company may receive credit in an FCPA case that is otherwise appropriate for indictment or prosecution by cooperating with the government's investigation.[3] Further, the USSG state that a company that provides timely and reasonable disclosure of an offense is eligible for a significant decrease in its level of culpability.[4]

Notably, the United States is not the only jurisdiction to have in place a system for voluntary disclosure, although it is widely considered the most active. The U.K. Serious Fraud Office ("SFO"), for example, has published guidance on voluntary disclosure, which emphasizes that credit will be given where a disclosure is made transparently and in good faith.[5] Despite having

[1] Andrew Weissman, Fraud Sec. Chief, U.S. Dep't of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" ("Pilot Program") (April 5, 2016), https://www.justice.gov/opa/file/838386/download.

[2] DOJ, *United State's Attorney's Manual* § 9-28.300 (2015).

[3] *Id.* § 9-28.700.

[4] USSG *Manual* § 8C2.5(g) (2012).

[5] SFO, *Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010* § 1 (Oct. 2012), *available at* http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_

a system for voluntary disclosure, there has, thus far, been limited enforcement activity under the U.K. Bribery Act 2010, so it remains unclear how the U.K. prosecutorial and judicial systems will respond to self-reporting scenarios in terms of cooperation credit and financial penalty-related benefits. With respect to international organizations, the World Bank ("Bank") launched its voluntary disclosure program ("VDP") in 2006, alongside significant enhancements to its sanctions procedures.[6] While the Bank has been increasingly active in enforcing its anti-corruption regime, as with the Bribery Act, it is difficult at this point to objectively assess the achievements of the VDP. For instance, the Bank has released little information to date about the impact that the VDP has had on incentivizing entities to come forward in a self-reporting capacity, uncover evidence of misconduct, or improve the integrity of Bank-funded projects.

KEY DISCLOSURE CONSIDERATIONS

Examples of Self-Reporting Credit in Practice

Recent corporate FCPA resolutions showcase the tangible benefits of making a voluntary disclosure under the appropriate circumstances. In 2014, for example, the SEC announced the settlement of FCPA charges against Layne Christensen, a global water management, construction, and drilling company headquartered in Texas. In its public statements announcing the settlement, the SEC effusively praised the company's decision to voluntarily disclose their misconduct and the company's extensive cooperation with the resulting investigation: "Layne self-reported its violations, cooperated fully with our investigation, and revamped its FCPA compliance program. Those measures were credited in determining the appropriate remedy."[7] Moreover, the DOJ declined to prosecute Layne Christensen altogether, due (at least in part) to the company's decision to self-report, and its exemplary cooperation and anti-corruption compliance program remediation.

The non-prosecution agreements Ralph Lauren secured from the DOJ and SEC in April 2013[8], and the decision by both authorities to decline enforcement altogether against Morgan Stanley in April 2012[9], are also often cited as seminal cases highlighting the advantages of corporate voluntary disclosure and cooperation in FCPA matters. Importantly, the *Resource Guide to the U.S. Foreign Corrupt Practices Act*, issued jointly by the DOJ and SEC in November 2012, reinforces the self-reporting approach that contributed to the significant benefits received by Layne Christensen, Morgan Stanley, and Ralph Lauren, explaining that "both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters."[10]

Challenges of Quantifying Disclosure

Notwithstanding the above examples, some commentators have posited that there may be little benefit to voluntary disclosures, even in the face of the subsequent discovery of FCPA-related wrongdoing by prosecutors and eventual government enforcement. In 2012, for example, a controversial paper from the New York University School of Law concluded that there was no quantifiable evidence that voluntary disclosure led to reduced penalties under FCPA enforcement actions.[11]

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[6] World Bank Group, *VDP Guidelines for Participants* (2011), *available at* http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.

[7] Press Release, U.S. Securities & Exchange Commission, SEC Charges Texas-Based Layne Christensen Company with FCPA Violations (Oct. 27, 2014), *available at* https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543291857.

[8] Press Release, U.S. Securities & Exchange Commission, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), *available at* https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780. *See also* Press Release, U.S. Dep't of Justice, Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Penalty (Apr. 22, 2013), *available at* https://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay.

[9] Press Release, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required.

[10] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 54, *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[11] Steven J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* 21-23 N.Y.U., Law & Economics Research Paper Series, Working

The study contradicts frequent claims by DOJ and SEC officials that voluntary disclosures lead to more lenient treatment in charging and penalty decisions.

Predictably, some have challenged certain conclusions from this study. For example, the study did not consider whether voluntary disclosure had greater positive effects on business growth and stock prices as compared with matters that were discovered and pursued independently by the government. Second, the study did not evaluate whether mitigating activities (such as voluntary disclosure and cooperation) resulted in less intrusion by the government into the company's internal investigation. Third, the study assessed FCPA cases between 2004 and 2011. Since 2012, there has been a substantial increase in the number of known declinations by the DOJ and SEC. The companies that have announced declinations since 2011 often cite the government's consideration of voluntary disclosure, cooperation, and/or compliance program remediation as reasons for the favorable treatment received. Accordingly, while it raises interesting questions about the actual benefits received by companies that voluntarily disclose FCPA-related misconduct, the study does not consider some essential business and financial indicators, and it predates recent watershed FCPA cases involving voluntary disclosure.

The Whistleblower Effect

The bounty system and increased whistleblower protections introduced by the Dodd-Frank Act have increased the likelihood that a whistleblower will provide a tip to government authorities relating to real or perceived FCPA violations. Dodd-Frank, which came into effect in August 2011, includes provisions for increased incentives for whistleblowers who report violations to the SEC. The provisions direct the SEC to provide monetary awards to eligible individuals who voluntarily provide original information that leads to SEC enforcement actions resulting in monetary sanctions over $1,000,000 (and successful related actions).[12] The prospective whistleblower bounty ranges from 10% and 30% of the monetary sanctions imposed on the offending company. Importantly, the bounty applies to all persons, including foreign nationals living outside of the United States. The increased incentives also include enhanced anti-retaliation provisions to protect whistleblowers.

Indeed, during fiscal year 2015, the SEC received over 4,000 whistleblower tips, a 30% increase over the number of tips received in fiscal year 2012. And the bounty system has not just increased the quantity of tips. The SEC has reported that the *quality* of the reports has increased significantly since the new incentive system was introduced in 2011. The prospect of a significant financial reward is proving to be enough to turn potential whistleblowers into actual whistleblowers — for instance, the SEC paid more than $37 million to eight whistleblowers in FY 2015.

Despite the whistleblower bounty and related incentives resulting from Dodd-Frank, companies should give careful consideration as to whether a whistleblower report is likely prior to making the decision to self-report. For example, where the relevant FCPA-related conduct is an isolated, "one off" event, and the company has taken appropriate corrective action to discipline the employees involved and remediate any anti-corruption compliance gaps, there may be little risk of further exposure. This confluence of circumstances may counsel against disclosure, although the company will also need to consider whether disclosure is preferable where the offense is relatively minor.

Where the company chooses not to disclose, all steps related to the internal investigation, both its process and findings, as well as any remediation and discipline, should be thoroughly documented in case a whistleblower does report to the government or the government otherwise learns of the incident and decides to pursue the case. This way, the company will be in the best position to defend its actions, including its decision not to disclose, if a government investigation ensues and the failure to disclose is raised.

Increased Focus on Third Parties

An analysis of FCPA cases in recent years demonstrates that a majority of FCPA enforcement actions against companies (in some studies, up to 90%) involve the actions of one or more third parties, acting for or on behalf of the company, with respect to the alleged improper conduct. As the FCPA makes abundantly clear in its statutory language, and as the narratives of many DOJ and SEC FCPA resolutions note in significant detail, the illegal acts of third parties are often attributed to the companies that engage those parties.

Therefore, the government's expectation in this regard is that companies will be proactively aware of the

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Paper No. 12-15 (July 2012), *available at* http://ssrn.com/abstract=2116487.

[12] 15 U.S.C. § 78u-6.

actions and operations of their business partners (through due diligence, training, and ongoing engagement monitoring), and that, as necessary and appropriate, companies will disclose any potential or actual criminal conduct by such business partners, most importantly intermediaries acting for or on behalf of each company before foreign (non-U.S.) government officials.

Existence of a Compliance Program

Additionally, the SEC and DOJ are increasingly interested in the state of a company's anti-corruption compliance program, as well as remediation made in the wake of FCPA investigation findings. For example, in the declination provided to Morgan Stanley in 2012 and the non-prosecution agreement with Ralph Lauren in 2013, a pre-existing anti-corruption compliance program and/or actions taken to significantly enhance the program, were key considerations by the government in reaching its resolution. Recent activity by the DOJ — specifically, the November 2015 appointment of a new DOJ compliance counsel to evaluate the existence and effectiveness of compliance programs for companies under an FCPA investigation — suggests that the DOJ will be further intensifying its focus on the existence of robust compliance programs in the upcoming years.

The robustness of a company's FCPA compliance program is, therefore, an important factor for corporate leadership to consider in deciding whether or not to make a voluntary disclosure. Companies should regularly conduct comprehensive risk assessments of their programs to adequately profile global FCPA risk. They should then develop meaningful plans to remediate program gaps, and consider memorializing this information prior to approaching the government (when such actions are feasible in light of the impending investigation).

Greater Cooperation among Anti-Corruption Authorities

The increase in global enforcement has created a more complex risk environment for determining whether or not to disclose FCPA misconduct. A greater number of countries are sharing information and engaging in joint or follow-on investigations and prosecutions. Further, more countries, including many with historically low enforcement activity, are now active in investigating and prosecuting corporate crime. Countries such as Canada, Germany, France, Australia, Russia, Spain, and Brazil are ramping up their enforcement capabilities and enhancing their respective anti-corruption laws and regulations. By way of example, global investigations have led to coordinated dawn raids in the U.S., Canada, the European Union, Australia, Japan, China, and elsewhere.

The increase in global investigations and improved cooperation among anti-corruption authorities around the world will, in certain scenarios, counsel in favor of voluntary disclosure. More countries are putting corporate activities under the microscope, leading to the increased likelihood of corporate crime being exposed independently by prosecutors and/or regulators around the world. This also has the effect of reducing society's tolerance for corporate misconduct, further elevating the risk of whistleblower reports and investigations. A secondary consequence of increased cooperation among global authorities is an escalation in the likelihood of follow-on prosecutions. Foreign governments, for example, are now more likely to pursue prosecutions in their own jurisdiction when an FCPA disclosure is made to U.S. authorities. This is partially the result of the high likelihood of information-sharing once investigative findings have begun to crystallize.

U.S. authorities reserve the right in FCPA matters to inform other countries about the evidence supporting its findings. This has also been evident with respect to international organizations such as the Bank. Despite the fact that the VDP is confidential, the Bank reserves the right to share information it has uncovered with member countries.[13] The Bank can inform national enforcement agencies about the alleged improper actions that a company has disclosed. As a result, companies may be concerned that disclosing improper conduct to the Bank could result in an endless parade of prosecutions in separate countries.

Such concerns, however, can be managed through careful planning and deliberation. It should be noted that follow-on prosecutions have always been a risk for companies involved in high-profile FCPA cases in the past decade (*e.g.*, Siemens, Alstom). In some cases, effective counsel can manage joint and follow-on prosecutions, and mitigate their impact. For example, in some instances, corruption matters have been prosecuted by multiple jurisdictions where enforcement agencies have imposed lesser penalties to compensate for sanctions that the company endured elsewhere. Counsel, therefore, should consider the pros and cons of disclosures in certain jurisdictions, such as the ability to settle all investigations at the same time, the possibility of offsetting fines, and the chances of obtaining credit for self-disclosure in all jurisdictions where such credit

[13] The World Bank Group, *supra* note 5, § 5.7.3.

is available against the likelihood of a substantial expansion of the investigation and associated negative consequences. The increase in global enforcement, information-sharing, and country-to-country cooperation must also be considered by counsel and corporate leadership in weighing the benefits of self-reporting FCPA matters in one or more jurisdictions.

Renewed Emphasis on Prosecuting Individuals

Finally, while it is not entirely clear what the ultimate impact will be of the new DOJ policy regarding individual prosecutions, the government's renewed focus on pursuing individuals for corporate crimes (including FCPA violations) may serve as a deterrent to voluntary disclosure. In September 2015, U.S. Deputy Attorney General Sally Quillian Yates issued a memorandum directing DOJ criminal and civil attorneys to prioritize the prosecution of individuals responsible for corporate wrongdoing.[14] The memorandum, commonly referred to as the "Yates Memo," detailed several guiding principles, which have since been added to the U.S. Attorney's Manual. Three of the key principles with implications for voluntary disclosure are as follows:

- a requirement that "in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;"[15]
- a direction that prosecutors should not resolve matters without a clear plan to resolve related individual cases; and
- an edict that criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Moreover, and perhaps most importantly, the Yates Memo mandates that no cooperation credit shall be provided to corporations absent complete factual disclosure about all individual wrongdoers involved in any alleged impropriety.

The ramifications of such policy changes are significant. Senior corporate executives, for example, may feel increasingly targeted by the DOJ, and could therefore be less likely to authorize internal company investigations (or to cooperate with them). As a result, companies and their outside counsel may want to reconsider the advisability of self-reporting when it may be difficult to develop or disclose evidence of individual liability.

The Yates Memo does not reduce the potential credit available to companies seeking to voluntarily disclose an FCPA violation. These updated principles in the Yates Memo do, however, impose added obligations that may require companies in FCPA and other matters to work expeditiously to meet mounting expectations of what meaningful "cooperation" represents to the DOJ. And, as noted above, while the Yates Memo principles are too new at this point to gauge the longer-term impact on voluntary disclosures, companies will be wary of the new hurdles and need to integrate a careful consideration of them into the decision of whether or not to self-report FCPA matters to the government.

CONCLUSION

Over the past five years, the government has taken steps to amplify the benefits of voluntary disclosure in FCPA cases, while, at the same time, further developing whistleblower incentives, expanding its focus on the actions of third parties, scrutinizing anti-corruption compliance programs, and imposing additional requirements with respect to individual accountability. This has occurred in the context of an overall upward trend in global enforcement of corruption-related matters, which has likewise increased information-sharing among enforcement agencies around the world.

With the FCPA enforcement landscape evolving so rapidly (and with such important ramifications for entities), companies must tread carefully in contemplating the benefits and risks of self-reporting. Disclosure of an FCPA matter in the United States, for example, may trigger investigations from multiple agencies in various jurisdictions around the world. And greater attention to the prosecution of individuals pursuant to the Yates Memo, as well as the increased pressure on companies to identify and turn over culpable executives, will make companies uneasy and defensive in dealing with the government. A careful and measured examination of the facts, the risk of detection, the gravity of the potential impropriety, and related considerations will help properly inform the company's decision about whether or not to self-report. That careful assessment will ultimately put the company in the best possible position for dealing with the government, should the need arise. ■

[14] DOJ Mem. Regarding Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015), *available at* http://www.justice.gov/dag/file/769036/download ("Yates Memo").

[15] DOJ, *supra* note 10 at 2.