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Should General Counsel Disclose Potential FCPA Violations?

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In April 2016, the Fraud Section within the Criminal Division of the U.S. Department of Justice issued a memorandum entitled "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance." The DOJ's new guidance should draw the attention of all general counsel whose companies have offices, or sell products, overseas.

In simple terms, the Foreign Corrupt Practices Act generally prohibits certain companies and individuals from giving "anything of value" to a foreign official in order to obtain or retain business. The Act also mandates that public companies in the United States maintain accurate financial records and a system of internal accounting controls that, among other things, will reasonably detect and prevent improper payments to foreign officials. Violations of the FCPA are to be prosecuted by DOJ, but it appears that many such violations have escaped detection due to a lack of resources at DOJ and at the FBI. The April 2016 memorandum is intended to address that issue.

The 2016 memorandum may best be characterized as a "stick and carrot" approach in treating corporations that violate the FCPA. On the "stick" side, the DOJ advised that it is "substantially increasing its FCPA law enforcement resources" by adding 10 more prosecutors to its FCPA unit and by creating three new FBI squads to investigate and prosecute FCPA violations.

The DOJ also announced that it is "strengthening" its coordination with foreign law enforcement authorities "to hold corrupt individuals and companies accountable." This increase in enforcement activity, coupled with the 2015 "Yates Memo" announcing the DOJ's commitment to prosecute corporate executives who countenance FCPA violations, is intended to serve as a warning to executives, including general counsel, that FCPA violations will be uncovered and, when they are, the executives in charge will be prosecuted.

The "carrot" offered by the DOJ is a new "pilot program." This program seeks to motivate companies "to voluntarily self-disclose FCPA-related misconduct," to fully cooperate with the DOJ, and to remediate flaws in each company's compliance program. If followed, the "guidance" states that a corporate client may receive favorable consideration.

This consideration may include the type of disposition (e.g., a non-prosecution or deferred prosecution agreement, or a reduced criminal charge), the fine amount, or foregoing the appointment of a monitor. "Organizations that voluntarily self-disclose, fully cooperate, and remediate will be eligible for significant credit in all three (3) categories." In contrast, the memorandum makes clear that those that cooperate and remediate, but do not self-disclose, may be eligible for some lesser credit.

Lying beneath the surface, the DOJ's message is threefold: (1) they believe that U.S. companies and their agents are still bribing foreign officials; (2) they are increasing the number of FBI agents and prosecutors devoted to FCPA enforcement to increase the likelihood that such bribes will be exposed and that the participants will go to jail; and (3) if a company does self-report, they may give the company favorable consideration. Conversely, the DOJ will be far less generous with a company if they uncover the bribery themselves.

Ultimately, when company officials discover that one of their employees or outside agents has bribed a foreign official, the general counsel and upper management will have two unpleasant alternatives. First, they may decide not to self-disclose the violation because the crime was already completed and self-reporting the offense could be financially devastating to the company.

Second, they may choose to self-report the wrongdoing and hope that the government will decide: (1) not to prosecute the company; (2) not to seek a devastating fine; and (3) not to require the appointment of a monitor to oversee the administration and operations of the company. The choice will depend on the circumstances, but in any case the general counsel should insist from that point forward that:

1. The bribery be ended immediately;
2. All persons associated with the bribes be terminated from the company;
3. The company (including any parent company) does not falsely report any information in its corporate financial statements that relate directly or indirectly to the payment of any bribe; and
4. The company retain counsel to conduct an immediate investigation to identify all bribes that have been paid as well as all business that was obtained or retained as a result of the bribery, and implement a comprehensive compliance program, including stringent internal accounting controls, that will prevent such bribery in the future.

Rather than eliminate the general counsel's dilemma, the DOJ's guidance appears to complicate the situation. After all, the illegal act has already occurred and in many cases there is still relatively little chance that the wrongdoing will be discovered by the DOJ (unless an internal whistleblower discloses the information). Moreover, if the company self-discloses the bribery, it likely will be subject to some significant sanction, which necessarily will include forfeiture of all profits generated by reason of such bribes. There also is the very real possibility that the DOJ would attempt to prosecute one or more of the company's executives.

Nevertheless, if the company did have a stringent compliance program in place when the alleged bribe took place, or if the bribe payments must be reported on the company's books to avoid a separate FCPA violation, self-reporting the violation will make more sense. First, it might cause DOJ to forego sanctioning the company (other than to disgorge the funds). Second, it eliminates the possibility of a whistleblower later reporting the misconduct to DOJ.

Most importantly, it frees the company from potential blackmail and it eliminates the possibility that someone at the company, whether intentional or not, will falsify the company's books in such a way that it misstates the company's finances, thus potentially giving rise to a wholly separate criminal violation.

In the end, whether a general counsel recommends that the company self-disclose or not, the company and its officials have significant downside risk. The risk of non-disclosure is that company officials could face more substantial criminal and civil liability if DOJ later uncovers FCPA violations and perceives the officials as compliant in the wrongdoing or in the later cover-up.

Conversely, the risk of voluntary disclosure is that it will invite careful scrutiny of the company's business activities overseas, may result in significant fines, and could result in company officials being prosecuted. Balancing all of the relevant facts and legal considerations is not a simple task and general counsel should consider seeking the assistance and advice of outside counsel.

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