by Paul B. Cogswell, JD, CFE, CCEP

The Fraud Section's FCPA Enforcement Plan: A carrot or a stick?

- Understand the three steps to the enhanced FCPA strategy.
- Understand the risks and benefits to the self-disclosure aspect of the guidance provided.
- Understand the disclosure requirements of the guidance as it relates to when and how disclosure may be appropriate.
- Understand and articulate the seven factors necessary to accept full responsibility and cooperation with a government investigation.
- Appreciate the value of using risk assessment principles when revising and architecting anti-corruption programs.

In 2016, the Securities and Exchange Commission (SEC) reported at least 23 enforcement actions for violations of the Foreign Corrupt Practices Act (FCPA).[1] They collectively levied $915,730,000 in fines, settlements, and disgorgement orders. No matters went to trial. In fact, our research has yet to discover an FCPA violation allegation that has gone to trial and resulted in a conviction in recent history.

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The new guidance authored by the United States Department of Justice Fraud Section was published in a memo in April 2016 and started with a commitment to "enhancing the Department of Justice's efforts to detect and prosecute both individuals and companies for violations of the Foreign Corrupt Practices Act."[2] The Fraud Section added ten more prosecutors to the FCPA unit, a 50% increase. In addition, the FBI has established three new squads devoted to FCPA investigations and prosecutions.[3]

The Fraud Section's memo continues to enforce the theme that current efforts are expanding globally through cooperation with foreign counterparts. Indeed the first part of the memorandum reinforces the Deputy Attorney General's memo on individual accountability, authored by Sally Yates (aka, the Yates Memo),[4] and provides the reader with the impression that FCPA violations are high on the priority list of the Justice Department. It constitutes an accurate portrayal of the metaphoric "stick and carrot" analogy. The Yates Memo provides what is considered by some to be a significant carrot in the form of an enforcement pilot program.

The principal goal as stated is to promote greater accountability for companies and individuals by motivating them to "voluntarily self-disclose" FCPA-related misconduct, cooperate with Justice Department, and remediate flaws in their internal controls and compliance programs. For this, the Justice Department proposes an explanation of what credit will be accorded

to a business organization that discloses, cooperates, and remediates. The credit may affect the type of disposition a company could face, including but not limited to a reduction in fines and the determination for the need of an outside monitor.

It is interesting to note that the Fraud Section's memo cites the Principles of Federal Prosecution of Business Organizations as outlined in the United States Attorney's Manual (USAM),[5] which details the factors to consider for prosecuting organizations. The guidance does not alter or supplant the USAM, but it does provide a foundation in which corporations can receive "additional credit" in FCPA matters[6] above and beyond any reduction in fines. The memo sets forth a clear statement of the necessary prerequisites in which credit may be applied.

Voluntary self-disclosure

The guidance distinguishes disclosures that are required versus those that are truly voluntary. It quotes the United States Sentencing Guidelines that require the disclosure to be made "prior to an imminent threat of disclosure or government investigation" and "within a reasonably prompt time after becoming aware of the offense." It is yet to be seen whether it can be established from a bright-line perspective as to what constitutes either of the terms "imminent" or "reasonably prompt," but one can infer that as soon as a potential violation has been uncovered and reasonably corroborated through professional investigation, disclosure would be appropriate.

Complete disclosure

The guidance also attempts to answer the question of "what" should be disclosed. Here it again implies the importance of individual accountability by advising that all relevant facts known should be disclosed. When a voluntary disclosure has been made in accordance with the Yates Memo, the government suggests that they may accord a 50% reduction off the bottom end of the Sentencing Guidelines fine range if a fine is being sought.[7]

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In addition to the timely disclosure requirement, the Fraud Section's memo also sets forth additional criteria that may be considered beyond the USAM principles earlier cited. In short, these requirements determine whether full cooperation from the target is being achieved:

- Full disclosure of all facts known that are relevant to the wrongdoing at issue;
- Proactive cooperation—disclose relevant facts *sua sponte* (i.e., "of one's own accord") and identify opportunities for the government to obtain relevant evidence if not otherwise known;
- Provide updates of the target's internal investigation in a timely manner;
- Preserve, collect, and disclose all relevant documents;
- Align internal investigation goals with the objectives of the government's investigation;

- Make available all witnesses who may have relevant information; and
- Disclose facts of any independent investigation.

The guidance also emphasizes that the government's efforts should in no way conflict with either the attorney-client or work product privilege doctrines as set forth in the USAM.[8]

Remediation

The government acknowledges that remediation can be "difficult to ascertain," but it encourages timely and thorough remediation. The Fraud Section's memo states some critical prerequisites to receiving credit for acts of remediation under this section. They are:

- Implementation of an effective compliance and ethics program
- Culture of compliance
- Sufficient resources
- Quality and independence of the Compliance function
- Tailored risk assessments
- Appropriate discipline of individuals responsible for the misconduct
- Additional steps that demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility, and implementation of measures to reduce recurrent risk

Credit for cooperation can occur for companies that have voluntarily disclosed as well as for those that have not done so. In cases where no voluntary disclosure has been made but the Justice Department finds full good faith cooperation, the government can recommend a 25% reduction from the bottom of the USSG fine range, as opposed to a 50% reduction when a voluntary disclosure has been determined to have occurred. In addition, where the company self-discloses, fully cooperates, and engages in a timely and appropriate remediation, the government generally will not require the appointment of an outside monitor and may even consider a declination to prosecute. It should be noted however that for any credit under the pilot program, the company should be required to disgorge any profits associated with the misconduct under investigation.

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The pilot program will remain in effect through April 5, 2017; however, sources indicate that it would be most likely extended based on the experience gained during the initial period.

Although the guidance has been in effect for seven months, FCPA enforcement overall has become vastly more active as measured by fines and settlements. At 2015 year end, there were a total of $143,100,000 in fines levied. This represented the lowest total since 2006.[9] As noted in the SEC report, in 2016 fines were at least $915,730,000, clearly setting aside the notion that Justice Department has de-emphasized its focus on FCPA matters.

Whether or not this increase in 2016 will be attributed in part or in whole to the new guidance and allocation of personnel remains to be seen. The larger question that needs to be answered is whether enforcement activity in relation to fines represents a true picture of prevention or just more efficient means of remediation.

From a compliance perspective, the real takeaway for most organizations is that there is pragmatic value not only in investing in a compliance program, but also for regularly reassessing the efficiencies in the program through the deployment of efficient risk assessment techniques. It is inevitable that gaps may occur in organizations that engage in multinational and cross-border business environments, and some could rise to potential violations of the FCPA.

This pilot program is further evidence that, after 41 years since the enactment of the Foreign Corrupt Practice Act, prevention and strong compliance remains an important tactic in the prevention of FCPA violations, but if a violation occurs, the best course of action may in fact be to find common ground with the government, thoroughly investigate, and seek to prove that the violation was an aberration that exemplifies an exception rather than the rule. Although the notion of immediate and thorough self-disclosure is somewhat counterintuitive to the defense bar, time will tell if these actions help to foster prevention and lessen occurrences of FCPA violations.

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Prevention

Effective prevention of FCPA violations may be a matter of practicing good risk management principles. The basics of risk management are to manage risks you are generally faced with or may face as a result of continual risk assessment. Ultimately, risk is managed by balancing frequency and severity with allocation of resources, because there are only three things one can do when facing a risk. As any good risk manager will tell you, one has three options to manage risk: elimination, subrogation, or mitigation. As it relates to managing FCPA risk, the list gets even shorter.

Elimination of any process-related risk is nearly impossible unless it is totally avoided. For example, a retailer that wishes to completely and resolutely eliminate the risk of inventory shortage can do so, but only when they close their doors and cease operations. No shortage, but no sales either. A professional solution would not encompass one that impedes the reason for the entity to exist. That would be akin to a surgeon having a successful operation, but for the fact that the patient expired. Levity aside, we can't obviously eliminate with surety any risk to an organization of becoming the victim of an FCPA violation.

The second classical theory of risk management centers on the concept of "sharing" the risk through subrogation. In the case of FCPA violations, this concept is most impractical, because insurers wouldn't generally share in a risk where the law has been violated. It is also less than likely that you can share the risk with the particular bad actor, because most violations inure to the benefit of the company.

This leaves mitigation. Mitigation guidance is seen throughout the guidance provided by the Justice Department, but also centers on measuring the effectiveness of your company's ability to recognize symptoms early, deal with them efficiently,

and provide for remedial solutions that provide long-term benefits. An effective compliance program as it relates to FCPA balances the preventive efforts against the effectiveness of early recognition and remediation of potential issues. I liken this effort to a well-choreographed elephant ballet. Just as others have posited that there is a triangular effect to the commission of white-collar crimes (i.e., means, opportunity, motive), so too is there a combination of efforts that I refer to as the compliance triangle (i.e., assessment, education, mitigation).

Assessment begins with the understanding that FCPA violations evolve dynamically as company operations and strategies change. As business strategies evolve from the conceptual to the practical, successful compliance risk assessment can weigh the necessary actions to apply proportionate to that risk. For example, a healthcare firm decides to expand operations in Latin America and hires a business development consultant to determine how to approach the market. If the business development team did not have a good idea of the compliance and geopolitical risks involved in undertaking that venture in that region, the potential for an FCPA violation becomes both palpable and probable. However, with the proper assessment strategy, the business initiative can be supported and the risks can be mitigated. Compliance should be an integral part of the strategy team, especially when considering cross-border or international ventures.

Education is another important leg of the triangle in mitigating FCPA risk. The adage that "one size fits all" is especially not applicable to compliance education. A pillar of prevention relies on educating individuals to those most common risks. Naturally, everyone should take the "FCPA 101" training and post-training assessment; however, developing education programs based on risks as they evolve may mean that employees should be given specific and more advanced training based on their potential exposure to FCPA risks.

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The third leg is mitigation or eliminating the opportunity to violate the law. Being the product of a strong (albeit dated) parochial education system, one learns that "the fear of God is the beginning of all wisdom." Eliminating opportunity or mitigation is part preventive and part reactive. Mitigation through thorough investigation and remediation shows your constituents (both external and internal) that you are willing to thoroughly respond to a suspected FCPA violation with accuracy and alacrity, and that the response is measured, reasonable, and appropriate. Most organizations will be judged more on their reaction to a crisis rather than their ability to prevent it altogether. When an FCPA violation occurs, an objective, thorough, and independent response will go far in mitigating the damages and prove to the stakeholders that you are a company with character.

Conclusion

As the guidance continues to find its way into practice, most of the credits that can be obtained through voluntary disclosure, complete cooperation, and sensible remediation are the same components of any truly effective compliance program (beyond FCPA compliance). Ultimately, the objective metrics will be discovered through a frequency, decreasing the number of FCPA violations over time. This article attempts to align the guidance given to the outputs it seeks to obtain and points out some general similarities between that guidance and the overall practice of compliance in the everyday world. ✳

1. Securities and Exchange Commission: SEC Enforcement Actions (listed by year). Available at http://bit.ly/fcpa-cases
2. DOJ Criminal Division: The Fraud Section's FCPA Enforcement Plan and Guidance. April 5, 2016. Available at http://bit.ly/enforce-plan
3. Idem.
4. DOJ Office of the Deputy Attorney General: The Yates Memo. September 9, 2015. Available at http://bit.ly/doj-dag-file
5. DOJ: U.S. Attorneys Manual: Title 9: 9-28.000 Principles of Federal Prosecution of Business Organizations. Available at http://bit.ly/usam-principles
6. Ibid, Ref #1, p. 3
7. United States Sentencing Commission: 2015 Chapter 8, Sentencing of Organizations. Available at http://bit.ly/chapter-8-sent
8. Ibid, Ref #5. 9-28.710 Attorney-Client and Work Product Protections. Available at http://bit.ly/ac-work-product
9. Shearman and Sterling LLP: FCPA Digest: Recent Trends and Patterns in FCPA Enforcement. July 2016, p. 5. Available at http://bit.ly/recent-trends-fcpa

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