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Department Of Justice Rolls Out FCPA Enforcement Pilot Program

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On April 5, the Department of Justice (DOJ) issued a press release and accompanying memorandum detailing what it is terming a one-year FCPA "pilot program" as part of an effort to provide more transparency and guidance to companies on the benefits of self-disclosing FCPA violations and cooperating with government investigations. The memorandum sets out three components of the DOJ's "enhanced FCPA enforcement strategy," which are:

1. Increasing law enforcement resources for FCPA prosecutions by hiring 10 new prosecutors for the Fraud section's FCPA unit;
2. Strengthening coordination with foreign counterparts in order to share leads, documents and witnesses; and
3. Establishing the pilot program to motivate companies to voluntarily self-disclose FCPA-related misconduct, cooperate and remediate.

The central theme of the enhanced strategy appears to be the application of a "carrot and stick" approach – the "stick" being an increased likelihood that wrongdoing will come to light without self-disclosure, and the "carrot" being the rewards the company can obtain through appropriate cooperation and self-disclosure. Much of the memorandum rehashes prior DOJ policy statements and directives. For example, the DOJ and FBI have previously publicized their efforts to bolster law enforcement resources for FCPA prosecutions. The DOJ has also emphasized previously that a company's cooperation can lead to that company's receipt of a percentage-based reduction off of the low-end of the sentencing guidelines range, depending upon the level of disclosure, cooperation and remediation. Increased focus on individual culpability and working with foreign jurisdictions are also principles that have previously been publicized. What is new? The pilot program's directives and specific requirements, even if not individually new or surprising, are presented for the first time as specific "boxes to check" in evaluating whether it makes sense for a company to self-disclose and cooperate. The memorandum first provides that if a company is to receive credit for a voluntary self-disclosure, the disclosure must (1) be made in a timely fashion (prior to an imminent threat of a government investigation); (2)

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be made within a reasonable amount of time after discovery, and (3) include all relevant and known facts, including all relevant facts about individuals involved in an FCPA violation. These are prerequisites for the receipt of credit for a self-disclosure. Additionally, eligibility for the cooperation benefits of the pilot program means a company must disclose relevant facts proactively (rather than reactively); preserve, collect and disclose relevant documents (including those located overseas) and provide translations; provide timely updates; "de-conflict" the internal investigation with the government investigation "where requested;" provide facts relevant to third-party misconduct, make company officers available for interviews as practicable (including those overseas); and disclose non-privileged findings made during any internal investigation. The memorandum also indicates that context is important; a small company will not be expected to perform the same investigation as a Fortune 100 company and the DOJ will take into account the company's ability to cooperate, from a financial perspective. Again, these requirements are not necessarily surprising or new, but their presentation as prerequisites is helpful for shaping a company's expectations of what cooperation entails. The remediation "checklist" includes implementation of an effective compliance program (one that, *inter alia*, is effective, independent, tailored to risk and includes auditing functions), appropriate discipline of employees, including compensation considerations and "any additional steps" that the company takes to demonstrate its commitment to compliance and identify future risks. If a company meets all of these requirements, it will be eligible for a 50 percent reduction off of the bottom end of the applicable guidelines range and will generally not be subject to the appointment of a monitor. If it meets the cooperation and remediation requirements but did not appropriately self-disclose, it will be eligible for, at most, a 25 percent reduction. So what does the memorandum fail to address? For many companies, the main goal of disclosure, cooperation, and remediation is ultimately to receive a declination (and the attendant minimal publicity). Of course, it is apparent from past settlements that self-disclosure and cooperation alone do not always lead to a declination, and the memorandum does note that even companies that voluntarily self-disclose, fully cooperate and remediate will be required to disgorge all profits, which would likely require a public settlement. However, the memorandum does little to explain what factors take a company from a full 50 percent credit to a non-public declination. Since declinations are non-public, it will remain difficult for companies to determine the likelihood of receiving a declination, even if all of the requirements articulated in the memorandum are met. The memorandum signals that the DOJ continues to prioritize and take seriously its efforts to prosecute companies and individuals under the FCPA. While the "carrot and the stick" it provides may give companies (and prosecutors) a more concrete set of guidelines and thus clarify expectations on both ends, it still leaves room for the DOJ to make case-by-case determinations on settlements and declinations. As such, it does not provide much additional comfort that declinations are really, seriously on the table.