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CLIENT MEMORANDUM

DOJ's Fraud Section Issues Guidance on Pilot Program for Self-Reporting, Cooperation, Remediation and Fine Reduction

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On April 5, 2016, Assistant Attorney General Leslie Caldwell and Andrew Weissmann, Chief of the Department of Justice's ("DOJ's") Fraud Section, released a memorandum detailing enhancements to the Fraud Section's FCPA enforcement strategy (the "Guidance"). Most significantly, the Guidance revealed that the Fraud Section will be conducting a one-year FCPA enforcement pilot program to provide cooperating companies the opportunity to receive substantial reductions in fines imposed by the Fraud Section's FCPA Unit.

The pilot program and the Guidance are designed to offer greater transparency concerning the Fraud Section's requirements for companies seeking mitigation or cooperation credit and the benefits to companies meeting those requirements. The pilot program is also intended to enhance the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered, consistent with the mandate of the September 9, 2015 Memorandum from the Deputy Attorney General (the "Yates Memo") and related remarks from Assistant Attorney General Caldwell on May 14, 2015. In this regard, the Guidance is the next step in the broader DOJ policy initiative to deter corporate misconduct by putting individuals at risk of criminal prosecution or civil claims by incentivizing companies to disclose facts about individuals' misconduct.

To qualify for mitigation credit under the pilot program, a company must meet three general requirements: (1) voluntarily self-disclose its FCPA-related misconduct, (2) fully cooperate with the Fraud Section's investigation, and (3) where appropriate, remediate flaws in its internal controls and compliance program.

Under the pilot program, if a company meets each of the three general requirements designated by the Guidance, then the Fraud Section may accord up to a 50% reduction off the lower end of the otherwise applicable fine range prescribed under the U.S. Sentencing Guidelines. In addition, full cooperation would generally mean that the Fraud Section would not require appointment of a monitor. The Guidance also provides that if all three requirements are met, the Fraud Section will also consider declining prosecution altogether.

Under the Guidance, if a company does not voluntarily self-disclose its FCPA misconduct but otherwise meets the second and third general requirements, it will receive "markedly less" credit than that afforded to companies that do self-disclose wrongdoing. Under these circumstances, the Fraud Section will accord, at most, a 25% reduction off the lower end of the U.S. Sentencing Guidelines fine range.

The Guidance details specific criteria for satisfying each of the pilot program's three general requirements. First, a company must voluntarily self-disclose misconduct to the Fraud Section. The Guidance states that this disclosure must be truly voluntary and not otherwise required by law, contract or agreement. The disclosure must also occur "prior to an imminent threat of disclosure or government investigation." Moreover, the company must disclose the conduct "within a reasonably prompt time after becoming aware of the offense," and it must disclose all relevant facts known to it, including all relevant facts about the individuals involved.

Second, the company must fully cooperate with the Fraud Section's investigation. The Guidance provides that full cooperation entails:

- Timely disclosure of all facts relevant to the wrongdoing at issue, including all facts related to involvement in criminal activity by the corporation's officers, employees or agents and all third parties;
- Proactive disclosure of relevant facts and opportunities for the DOJ to obtain relevant evidence;
- Preservation, collection and disclosure of relevant documents and information;
- "De-confliction" of internal investigations with DOJ investigations, as requested;
- Making company officers and employees available for DOJ interviews, including, where possible, former employees and employees located overseas, subject to individuals' Fifth Amendment rights;
- Disclosure of all relevant facts gathered during a company's independent internal investigation, including attribution of facts to specific sources, where not protected by attorney-client privilege;

- Disclosure of overseas documents, except where the company can show that disclosure is "impossible" due to foreign laws, including foreign data privacy laws;
- Facilitating third-party production of documents and witnesses from foreign jurisdictions; and
- Provision of translation of relevant documents, when requested.

According to the Guidance, consistent with existing DOJ policy, the cooperating company will not be required to waive the attorney-client privilege or work-product protection to be eligible for full cooperation credit.

The Guidance offers additional advice on the relative scope of investigations required for full cooperation credit, explaining that the Fraud Section does not expect small companies to conduct investigations that are as expensive or as quick as, by way of illustration, Fortune 100 companies. Moreover, the Guidance provides that it does not expect companies to investigate subjects unrelated to matters under investigation. In a footnote, the Guidance specifically states that evidence of criminality in one country, absent facts suggesting a more widespread problem, would not lead the Fraud Section to expect an extension of investigation to other countries.

Third, the company must complete timely and appropriate remediation of FCPA issues. The Guidance describes that remediation must include (i) implementation of an effective compliance and ethics program, (ii) appropriate discipline for employees responsible for misconduct and a system for potentially disciplining those with oversight responsibilities for those employees and that considers how their compensation is affected, and (iii) any additional steps demonstrating recognition of the seriousness of the misconduct, including measures to identify future risks.

The Guidance provides that the criteria for evaluating an effective compliance program will include whether the company has a culture of compliance that will not tolerate criminal conduct, whether the company dedicates sufficient resources to compliance, the quality and experience of compliance personnel, the independence and reporting structure of the compliance function, whether the company has performed an effective risk assessment and tailored its compliance program based on that assessment, how compliance personnel are compensated and promoted relative to other employees, and whether the compliance program is audited for effectiveness. Cooperating companies should expect that their compliance programs will be rigorously tested by the Fraud Section's recently hired Compliance Counsel, who will also be refining benchmarks for assessing compliance programs.

In addition to the three general requirements discussed above, to be eligible for full mitigation credit, a company will also be required to disgorge all profits resulting from FCPA violations.

The pilot program is effective April 5, 2016 as part of a one-year trial, and is applicable to organizations that self-disclose or cooperate during the pilot period, even if the pilot program thereafter expires. At the end of the one-year pilot period, the Fraud Section will determine whether to extend or modify the program. The Guidance is applicable only to matters handled by the FCPA Unit of the DOJ's Fraud Section. This Guidance is not applicable to matters handled by other

components of the DOJ, and does not restrict the Securities and Exchange Commission in its handling of FCPA investigations and settlements, including SEC penalties, disgorgement and imposition of a monitor. Nevertheless, the Guidance provides useful benchmarks in dealing with federal prosecutors outside the Fraud Section during corporate investigations.

The Guidance is the latest sign that the DOJ is intent on incentivizing companies to self-disclose potential FCPA violations and pursuing charges against culpable individuals. The Guidance adds a measure of clarity to the degree of credit a self-disclosing, cooperating company may receive and the nature of the cooperation it must provide to receive that credit. Although any additional clarity is a welcome development for management and boards who may face difficult decisions regarding self-disclosure, the Guidance by no means eliminates the uncertainties that surround self-disclosure decisions. Particularly with the DOJ's emphasis on early disclosure, companies will continue to be presented with disclosure decisions in the context of imperfect information, uncertain outcomes and potentially profound consequences.

The full Guidance is available here: https://www.justice.gov/opa/file/838386/download.

If you have any questions or need assistance on FCPA compliance, please contact Martin Weinstein (202-303-1122, mweinstein@willkie.com), Robert Meyer (202-303-1123, rmeyer@willkie.com), Jeffrey Clark (202-303-1139, jdclark@willkie.com), William Stellmach (202-303-1130, wstellmach@willkie.com) or the Willkie attorney with whom you regularly work.

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