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Evaluating FCPA Pilot Program: A Look At SEC Involvement

Law360, New York (April 12, 2017, 3:23 PM EDT) -- On April 5, 2016, the U.S. Department of Justice released a nine-page memorandum launching a one-year pilot program to reward companies that voluntarily self-report violations of the Foreign Corrupt Practices Act.

Now that a year has passed and the DOJ is reviewing the results (the program continues during this process), Law360 is publishing a series of guest articles examining the impact and potential future of the FCPA pilot program. This Expert Analysis series includes commentary from attorneys who worked on cases in which declinations were issued under the program.


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Ever since the U.S. Department of Justice announced its Foreign Corrupt Practices Act pilot program on April 5, 2016, there has been considerable attention paid to this program and the guidance the DOJ has published regarding the factors it considers in giving credit to companies who self-report and otherwise cooperate.[1] However, any company that seeks to take advantage of the pilot program will often have to deal with not only the DOJ, but also the U.S. Securities and Exchange Commission.

Of course, the SEC has played more and more of a prominent role in the U.S. government's FCPA program. Indeed, in 2016, the SEC brought a record 26 FCPA enforcement actions, far surpassing its prior record of 18 in 2007.[2] In 14 of these cases, the SEC acted more or less independently, taking action where the DOJ opted not to.[3]

Consistent with the SEC's role in the overall FCPA program, the SEC has played an equally prominent role in the first year of the DOJ's pilot program. Indeed, in those cases under the program in which the DOJ publicly declined to take action and the SEC could take action, the SEC did take action.[4] Yet, while there has been a detailed analysis of the factors that the DOJ considers in resolving cases under the pilot program, there has been far less discussion of the factors the SEC considers. The general factors identified by the DOJ are, broadly speaking, substantially the same as those identified by the SEC; however, it is important to know the differing sources of those factors and the detailed questions on which the SEC is likely to focus, particularly given how often the SEC takes action without the DOJ.

Factors Guiding the SEC's Enforcement Action

Upon the announcement of the DOJ's pilot program, the SEC, unlike the DOJ, did not make a separate announcement detailing the factors it would consider in determining what credit to give companies that self-report FCPA violations and otherwise cooperate in investigations. However, since 2001, the SEC staff, in deciding whether to grant credit for cooperation to companies, has been guided by a discrete set of factors set forth in a report issued by the SEC, which has come to be known as the "Seaboard Report."[5] These factors include generally:

- Self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;

- Self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;

- Remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and

- Cooperation with law enforcement authorities, including providing the SEC staff with all information relevant to the underlying violations and the company's remedial efforts.[6]

In addition to these general considerations, the Seaboard Report sets forth 49 separate questions that reflect some of the criteria the SEC considers in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation. These include such questions as:

- Were the company's auditors misled?

- Is [the misconduct] the result of pressure placed on employees to achieve specific results, or a tone of lawlessness set by those in control of the company?

- What compliance procedures were in place to prevent the misconduct now uncovered?

- Why did those procedures fail to stop or inhibit the wrongful conduct?

- How high up in the chain of command was knowledge of, or participation in, the misconduct?

- Is [the conduct] symptomatic of the way the entity does business, or was it isolated?

- How long did the misconduct last?

- What steps did the company take upon learning of the misconduct?

- Are persons responsible for any misconduct still with the company?
- Did the company identify what additional related misconduct is likely to have occurred?
- Were the audit committee and the board of directors fully informed? If so, when?
- Did the company ask its employees to cooperate with [SEC] staff and make all reasonable efforts to secure such cooperation?
- What assurances are there that the conduct is unlikely to recur?
- Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct?[7]

In January 2010, the SEC also announced a formal initiative to encourage individuals and companies to cooperate and assist in investigations. In connection with this announcement, it issued a policy statement reaffirming the importance of the Seaboard factors.[8] The policy statement also announced a similar framework for evaluating cooperation by individuals in the SEC's investigations and actions.[9] The statement identified four general considerations, including:

- The value and nature of the assistance provided by the individual;
- The importance of the underlying matter, including the character of the investigation and the dangers to investors or others presented by the underlying violations involved in the investigation;
- The societal interest in holding the individual accountable; and
- Whether, how much, and in what manner it is in the public interest to award credit for cooperation, in part, based upon the cooperating individual's personal and professional profile.[10]

In addition, with changes in its composition, the SEC is likely to be more influenced than it has been in recent years on the considerations set forth in its 2006 guidance on corporate penalties.[11] This guidance focuses on two principal considerations:

- The presence or absence of a direct benefit to the corporation as a result of the violation; and
- The degree to which the penalty will recompense or further harm injured shareholders.[12]

The guidance also considers several other factors, some of which overlap with those considered by the SEC in giving credit for cooperation, such as the "[p]resence or lack of remedial steps by the corporation" and the "[e]xtent of cooperation with the SEC and other law enforcement."[13]

Perhaps not surprisingly, when the DOJ announced the pilot program, the general factors it stated it would evaluate were substantially similar to those that have guided the SEC's decisions to grant cooperation credit for many years. These factors included:

- voluntary self-disclosure of FCPA-related misconduct;

- full and demonstrated cooperation; and

- timely and appropriate remediation of flaws in corporate controls and compliance programs.[14]

SEC Enforcement in Cases Where DOJ Declined Action Under the Pilot Program

In the first year of the pilot program, the SEC took action in three of the five cases where DOJ issued public declination notices.[15] With respect to the other two cases, the SEC did not have jurisdiction and could not take action.[16]

The SEC's actions reflected a clear application of the Seaboard factors. In the Nortek and Akamai cases, for example, the SEC agreed to enter into nonprosecution agreements, something the SEC had done only once before in the FCPA context.[17] As part of these agreements, Nortek paid disgorgement of $291,403 plus $30,655 in interest; Akamai paid $652,452 in disgorgement plus $19,433 in interest.[18] Neither was required to pay a penalty.

In the press release announcing the agreements and in the respective statements of fact attached to the agreements, the SEC highlighted some of the considerations that led to its decision to enter into the NPAs, including the companies' prompt self-reporting of the misconduct and extensive cooperation with the SEC's ensuing investigations.[19] Also Kara Brockmeyer, chief of the SEC Enforcement Division's FCPA Unit, stated "Akamai and Nortek each promptly tightened their internal controls after discovering the bribes and took swift remedial measures to eliminate the problems. They handled it the right way and got expeditious resolutions as a result."[20]

In short, the SEC stressed its continued focus on self-reporting, extensive cooperation and prompt remediation. Furthermore, Andrew Ceresney, then director of the SEC Enforcement Division, made clear that the SEC would like to make greater use of NPAs, noting that "[w]hen companies self-report and lay all their cards on the table, non-prosecution agreements are an effective way to get the money back and save the government substantial time and resources while crediting extensive cooperation."[21]

In connection with the third DOJ declination, the SEC issued a settled order finding that a Chinese subsidiary made improper payments of approximately $4.9 million.[22] The ultimate $14 million settlement included an agreement by to disgorge to the SEC $11,800,000 plus prejudgment interest of $1,382,562 and a civil penalty of $1,180,000, and to report to the SEC for one year on the status of its FCPA and anti-corruption related remediation and implementation of compliance measures.[23] The SEC specifically noted in its order that the company "self-reported the potential FCPA violations to the SEC staff and DOJ," that it "provided thorough, complete, and timely cooperation throughout the investigation," and "under[took] remedial efforts," including the termination or separation of 16 employees and placement of suspect vendors on a "do-not-use/do-not-pay list," among other actions.[24]

Conclusion

If a company is looking to take advantage of the benefits touted by the DOJ's pilot program, it would be advisable to appreciate the role the SEC is likely to play in any eventual investigation and resolution. Further, while both the DOJ and SEC are likely to focus on the same general factors in giving credit (i.e., voluntary self-disclosure, full cooperation and remediation), one should appreciate the different guidance setting forth these factors for each agency, how each agency is likely to assess these factors,

and the detailed questions each agency is likely to ask. Indeed, this is a particularly important consideration given the possibility — if not likelihood — that, depending on the circumstances, the SEC may act in a given case without the DOJ.

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DISCLOSURE: Luke Cadigan, along with Brian Saulnier of K&L Gates LLP, represented Nortek in the matter discussed above.

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[1] Press Release, Leslie R. Caldwell, Assistant Att'y Gen., Crim. Div., U.S. Dep't of Justice, Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), available at https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program; see also Memorandum from Andrew Weissmann, Chief (Fraud Section), Crim. Div., U.S. Dep't of Justice, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), available at https://www.justice.gov/criminal-fraud/file/838416/download.

[2] SEC Enforcement Actions: FCPA Cases (last updated Feb. 9, 2017), available at https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

[3] Compare id. with U.S. Dep't of Justice, Criminal Division – Related Enforcement Actions (last updated Jan. 12, 2017), available at https://www.justice.gov/criminal-fraud/related-enforcement-actions.

[4] U.S. Dep't of Justice, Criminal Division – Declinations (last updated Sept. 29, 2016), available at https://www.justice.gov/criminal-fraud/pilot-program/declinations; Press Release, SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016), available at https://www.sec.gov/news/pressrelease/2016-109.html (along with Brian Saulnier of K&L Gates LLP, Luke Cadigan represented Nortek in this matter); see also Rel. No. 78287 (July 11, 2016), available at https://www.sec.gov/litigation/admin/2016/34-78287.pdf.

[5] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Securities Exchange Act Release No. 44969 and AAER-1470 (Oct. 23, 2001), available at http://www.sec.gov/litigation/investreport/34-44969.htm ("Seaboard Report").

[6] SEC Division of Enforcement, Enforcement Manual at 98-99 (citing the Seaboard Report), available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[7] See Seaboard Report.

[8] Press Release, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), available at https://www.sec.gov/news/press/2010/2010-6.htm;

Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, Securities Exchange Act Release No. 61340 (Jan. 13, 2010) ("Policy Statement on Individuals"); 17 CFR § 202.12; see also SEC Spotlight: Enforcement Cooperation Program (Sept. 20, 2016), available at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml (providing an overview of the SEC Enforcement Division's Cooperation Program); Andrew Ceresney, Director, Division of Enforcement, The SEC's Cooperation Program: Reflections on Five Years of Experience (May 13, 2015), available at https://www.sec.gov/news/speech/sec-cooperation-program.html.

[9] SEC Enforcement Manual, supra note 6 at 95 (citing Policy Statement on Individuals).

[10] SEC Enforcement Manual, supra note 6 at 95-98.

[11] Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at https://www.sec.gov/news/press/2006-4.htm.

[12] Id.

[13] Id. Furthermore, in his remarks at the 2017 SEC Speaks Conference, Acting Chairman Michael S. Piwowar noted that in assessing corporate penalties, he looks to this guidance, and that under this guidance, he is "generally comfortable with assessing civil monetary penalties in Foreign Corrupt Practices Act cases." See Acting Chairman Michael S. Piwowar, Remarks at the "SEC Speaks" Conference 2017: Remembering the Forgotten Investor, Washington, D.C. (Feb. 24, 2017), available at https://www.sec.gov/news/speech/piwowar-remembering-the-forgotten-investor.html.

[14] Weissmann, supra note 1 at 2, 4-8.

[15] Supra note 4.

[16] Letter from Lorinda Laryea, Trial Attorney, Fraud Section, and Daniel Kahn, Deputy Chief, Fraud Section, U.S. Dep't of Justice, to Steven A. Tyrrell, Esq., Weil, Gotshal & Manges LLP (Sept. 29, 2016), available at https://www.justice.gov/criminal-fraud/file/899116/download; Letter from Laura N. Perkins, Assistant Chief, Fraud Section, Rohan Virginkar, Trial Attorney, Fraud Section, and Daniel S. Kahn, Deputy Chief, Fraud Section, U.S. Dep't of Justice, to Paul E. Coggins, Esq. and Kiprian Mendrygal, Esq., Locke Lord LLP (Sept. 29, 2016), available at https://www.justice.gov/criminal-fraud/file/899121/download.

[17] SEC June 7, 2016 Press Release, supra note 4; see also Press Release, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (April 22, 2013), available at https://www.sec.gov/news/press-release/2013-2013-65htm.

[18] SEC June 7, 2016 Press Release, supra note 4.

[19] Id.

[20] Id.

[21] Id.

[22] Rel. No. 78287 (July 11, 2016), available at https://www.sec.gov/litigation/admin/2016/34-78287.pdf.

[23] Id.

[24] Id.
