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The First Ninety Days of the FCPA Unit's Pilot Program

By Brian F. Saulnier, Luke T. Cadigan, Meghan E. Flinn, Krista Consiglio, Amy J. Eldridge and R. James Mitchell

On April 5, 2016, the Department of Justice ("DOJ") introduced a yearlong "Pilot Program" to guide the conduct of investigations and prosecutions pursuant to the Foreign Corrupt Practices Act ("FCPA"). Announced by Assistant Attorney General Leslie Caldwell, the Pilot Program seeks to bring "transparency" to FCPA investigations and "accountability" to the subjects of those investigations.[1] In the weeks following the announcement, commentators questioned whether the Pilot Program could satisfy its dual objectives. The DOJ then issued two declination letters pursuant to the Pilot Program, demonstrating, for the first time, the tangible benefits available through compliance with its provisions.[2]

Looking back at the first 90 days of this initiative, we revisit the concerns initially raised in response to the Pilot Program and weigh the significance of the declination letters, which appear to represent the DOJ's attempts to address those concerns. Although uncertainties remain that may prevent the Pilot Program from meaningfully influencing corporate decision-making in the short term, initial observations demonstrate a real commitment to decreasing the length and burden of FCPA investigations and equipping corporate boards with a road map for efficient FCPA compliance programs.

Summary of the Pilot Program

Fraud Section Chief Andrew Weissmann outlined the details of the Pilot Program in a guidance document titled *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*.[3] The guidance identifies the Pilot Program's three primary requirements—self-disclosure, cooperation, and remediation—and describes the standards for meeting these requirements, pulling from components of the Principles of Federal Prosecution of Business Organizations ("USAM Principles"),[4] the U.S. Sentencing Guidelines, and the DOJ's recently issued guidance on individual accountability for corporate wrongdoing (the "Yates Memo").[5] Additionally, the guidance specifies the mitigation credit a

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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/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

[2] Letter from Daniel Kahn, Deputy Chief (Fraud Section), Crim. Div., U.S. Dep't of Justice, to Luke Cadigan, K&L Gates LLP ("Nortek Letter") (June 3, 2016), *available at* https://www.justice.gov/criminal-fraud/file/865406/download; Letter from Daniel Kahn, Deputy Chief (Fraud Section), Crim. Div., U.S. Dep't of Justice, to Josh Levy, Esq., Ropes & Gray LLP ("Akamai Letter") (June 6, 2016), *available at* https://www.justice.gov/criminal-fraud/file/865411/download.

[3] 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/opa/file/838386/download.

[4] U.S. Dep't of Justice, U.S. Attorneys' Manual, tit. 9, *Principles of Federal Prosecution* (last updated Dec. 2014), *available at* https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution.

[5] *See* Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Justice, *Individual Accountability for Corporate Wrongdoing* (the "Yates Memorandum") (Sept. 9, 2015), *available at* https://www.justice.gov/dag/file/769036/download.

company can receive if it acts in accordance with these standards when managing an FCPA investigation.

Voluntary Self-Disclosure

In order to receive credit for self-disclosure under the Pilot Program, a company must disclose criminal conduct prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time of becoming aware of it, and in a manner that discloses all relevant facts known by the company.[6] The disclosure does not count for purposes of mitigation if it is made pursuant to a law, agreement, or contract that independently requires disclosure of the conduct.[7] That is, the disclosure must be truly voluntary.

Full and Demonstrated Cooperation

The guidance defines 11 measures that a company must take in order to receive the cooperation credit afforded by the Pilot Program.[8]

- Timely disclosure of all facts relevant to the wrongdoing at issue, including facts related to the involvement of the corporation's officers, employees, or agents;
- Proactive cooperation;
- Preservation, collection, and disclosure of relevant documents and information;
- Provision of timely updates on any ongoing internal investigation;
- "De-confliction" of an internal investigation with the government's investigation, when requested;
- Provision of facts relevant to potential criminal conduct by all third parties, including individuals;
- Availability of company officers and employees for interview by the government;
- Disclosure of all relevant facts gathered in the company's internal investigation and the specific sources of those facts to the extent that the disclosure can be made without violating the attorney-client privilege;
- Disclosure of overseas documents, except where foreign law prohibits such disclosure;
- Facilitation of the third-party production of documents and witnesses from foreign jurisdictions, except where legally prohibited; and
- Translation of relevant documents.

The "scope, quantity, quality, and timing of cooperation," as set forth by these requirements, may vary based on the circumstances of each case.[9] For example, compliance with the

[6] Weissmann, *supra* note 3, at 4.

[7] *Id.*

[8] The DOJ will consider a company's claim that compliance with one or more of these requirements is "impossible" because of impediments such as conflicting foreign law. *Id.* at 5 n.3. The company, however, bears the burden of establishing such circumstances. *Id.*

[9] *Id.* at 6.

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Yates Memo alone should qualify a company for some cooperation credit, though "the credit generally will be markedly less than for full cooperation."[10] Overall, the DOJ will look for "an appropriately tailored investigation" when considering cooperation credit.[11]

Timely and Appropriate Remediation

This last requirement of the Pilot Program centers on the company's efforts to minimize the recurrence of criminal conduct. In evaluating remediation efforts, the DOJ will first evaluate a company's compliance and ethics program.[12] The DOJ will consider:

- Whether the company has established a culture of compliance, i.e., the employees are aware that criminal conduct "will not be tolerated";
- Whether the company supports compliance with sufficient resources;
- Whether compliance personnel "can understand and identify the transactions identified as posing a potential risk";
- Whether the compliance function is independent;
- Whether the compliance program has performed an effective risk assessment and adjusted its program accordingly;
- How compliance personnel are compensated and promoted;
- How the compliance program is audited; and
- How reporting is structured with respect to compliance personnel.

To receive credit for remediation, the company must also demonstrate appropriate discipline of any employees responsible for misconduct and those overseeing such employees. Further, the company must have taken steps that "demonstrate recognition of the seriousness of the corporation's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct."[13] Importantly, to receive credit for compliance efforts, a company must be eligible for cooperation credit.[14]

Allocation of Credit

The credit provided by the Pilot Program goes beyond that available under the Sentencing Guidelines, and the primary factor is self-disclosure. If a company fails to self-disclose FCPA misconduct, but later cooperates and remediates appropriately, it may receive "at most a 25% reduction off the bottom of the applicable Sentencing Guidelines fine range."[15] Alternatively, if a company has voluntarily self-disclosed FCPA misconduct in accordance with the standards set forth by the Pilot Program, while also fully satisfying the cooperation and remediation requirements, it may receive up to a 50% reduction. Satisfaction of all three requirements—voluntary disclosure, cooperation, and remediation—will also generally

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[10] *Id.* at 7.

[11] Id.

[12] *Id.* at 7–8.

[13] *Id.* at 8.

[14] *See id.* at 7 ("[I]n other words, a company cannot fail to cooperate and then expect to receive credit for remediation despite that lack of cooperation.").

[15] *Id.* at 8.

relieve the company from appointment of a monitor as part of the resolution. In some cases, the DOJ may consider declining prosecution depending on "countervailing interests, including the seriousness of the offense."[16] Regardless of the credit received by the company, it will be required to disgorge all profits gained from the FCPA misconduct at issue.[17]

The Pilot Program in Action

The Nortek and Akamai Declination Letters

Ninety days after the announcement of the Pilot Program, the first settlements have come in the form of two declination letters issued by the DOJ to Nortek, Inc. ("Nortek") and Akamai Technologies, Inc. ("Akamai"). On June 7, 2016, following the SEC's announcement that it had reached non-prosecution agreements with Nortek and Akamai,[18] the DOJ published copies of the declination letters it had sent to each company, which stated that they were issued "[c]onsistent with the FCPA Pilot Program."[19]

The two unrelated cases involved foreign subsidiaries' payments to Chinese government officials. An internal audit at Nortek discovered that foreign employees had made payments and given gifts in violation of company policy.[20] Similarly, Akamai discovered that its foreign subsidiary had made payments to induce government-owned entities to purchase more services than needed.[21]

In declining prosecution, the DOJ pointed to each company's "prompt voluntary self-disclosure," "fulsome cooperation," and "full remediation." Demonstrating the connection between the Yates Memo and the Pilot Program, the DOJ underscored the companies' identification of responsible individuals and agreement to cooperate in any ongoing investigations of those individuals. In addition, the DOJ noted the remedial efforts of both companies, which involved enhancing their compliance programs and internal controls and properly disciplining and/or terminating the employment of those employees involved in the misconduct. The companies' agreement to pay disgorgement in their respective settlements with the SEC also influenced the DOJ's decision to close the investigations.[22]

The Analogic Non-Prosecution Agreement

On June 21, 2016, the DOJ announced its non-prosecution agreement with Analogic Corp. ("Analogic") and its wholly owned Danish subsidiary, BK Medical.[23] In the summer of 2011, BK Medical, through its parent company, self-disclosed to the Danish government, the DOJ,

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[16] *Id.* at 9.

[17] *Id.* at 9 n.6.

[18] 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.

[19] *Supra* note 2.

[20] SEC Non-Prosecution Agreement with Nortek, Inc. ("Nortek NPA"), Ex. A (June 7, 2016), *available at* https://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf.

[21] SEC Non-Prosecution Agreement with Akamai Technologies, Inc. ("Akamai NPA"), Ex. A (June 7, 2016), *available at* https://www.sec.gov/news/press/2016/2016-109-npa-akamai.pdf.

[22] *See* Nortek NPA, *supra* note 20, at 2 (agreeing to disgorgement in the amount of $291,403 plus $30,655 in interest); Akamai NPA, *supra* note 21, at 2 (agreement to disgorgement in the amount of $652,452 plus $19,433 in interest).

[23] DOJ Non-Prosecution Agreement with BK Medical ApS ("BK Medical NPA") (June 21, 2016), *available at* https://www.justice.gov/opa/file/868771/download.

and the SEC that it uncovered improper payments from distributors, which were then funneled to third parties.[24] BK Medical received "full credit" for its voluntary disclosure, and the DOJ acknowledged the "extensive remedial measures" adopted by the company.[25] But, BK Medical did not receive full cooperation credit because it failed to fully disclose known information about the identities of a number of the state-owned entity end-users of the company's products.[26] As such, the agreement provides for "an aggregate discount of 30% of the bottom of the U.S. Sentencing Guidelines fine range," creating a $3,402,000 penalty. Additionally, BK Medical paid $7,672,651 in disgorged profits through its resolution of the parallel matter with the SEC.[27] Referencing the company's commitment to compliance, as well as its agreement to report annually to the DOJ on its compliance efforts, the DOJ concluded that a monitor was unnecessary.[28]

Although the non-prosecution agreement did not specifically mention the Pilot Program, the factors considered mirror those outlined in the Pilot Program: (1) "voluntar[y] and timely disclos[ure]," (2) "engage[ment] in extensive remedial measures," (3) "commit[ment] to continue to enhance its compliance program," (4) "no prior criminal history," and (5) "agree[ment] to continue to cooperate with the Offices."[29]

Takeaways from the First Quarter of the Pilot Program

The Pilot Program—and the resolution of the Akamai and Nortek cases—seemingly represents an acknowledgement by the DOJ of the importance of setting defined expectations in resolving FCPA cases.[30] As was the case at the time of its announcement, uncertainties remain with respect to the meaning and application of the Pilot Program. But, the recent case examples, combined with the conversation and debate about the Pilot Program since its inception, highlight additional data for evaluating both the problems and solutions created by the initiative.

1. *The variables and incentives that corporate boards must consider under the Pilot Program do not appear to differ meaningfully from pre-Pilot Program analyses.*

The FCPA Unit has historically rewarded self-reporting and cooperation in its enforcement decisions. The Pilot Program appears to formalize this practice, relying on concepts established by the Yates Memo and the long-standing USAM Principles and Sentencing Guidelines. But the DOJ decidedly offers no guarantees. The 25% and 50% discount figures have no articulated relation to the circumstances of a case or the type of violation at issue. And the guidance is replete with words like "may," "up to," and "generally," thus giving the government opportunity to deviate from the credit system.

Indeed, given that the credit system turns almost entirely on self-disclosure, the extent to which a middle ground exists between the 25% and 50% discounts is uncertain. With

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[24] Analogic Corp., Annual Report (Form 10-K) (Oct. 4, 2011).

[25] BK Medical NPA, *supra* note 23, at 1.

[26] *Id.*

[27] *Id.* at 4.

[28] *Id.* at 2.

[29] *Id.*

[30] *See, e.g.*, Caldwell, *supra* note 1 ("Transparency in our corporate FCPA charging decisions is important for several reason. . . . [T]ransparency informs companies what conduct will result in what penalties and what sort of credit they can receive for self-disclosure and cooperation with an investigation.").

respect to the voluntary disclosure requirement, the differential in credit between entities that self-report, and those that do not, appears to be without exception. However, there are legitimate reasons a company may investigate, and need to investigate, before self-reporting. For example, despite its best compliance efforts, a company may not be able to gain a preliminary understanding of a potential FCPA violation in advance of a whistleblower's report to the government. In such cases, does it serve the goals of incentivizing effective compliance programs and responsive leadership at companies for the entity to be limited to a 25% discount for its failure to disclose?

Going by the FCPA Unit's pre-Pilot Program practices, the answer would be "no." In its early-2016 resolution with VimpelCom for FCPA misconduct, the DOJ afforded the company a 45% discount—25% for full cooperation and an additional 20% for "prompt acknowledgement of wrongdoing [and] willingness to resolve promptly its criminal liability on an expedited basis"—and VimpelCom had not self-disclosed.[31] As written, the Pilot Program does not seem to allow for this result, possibly giving rise to harsh consequences for some well-intentioned companies.

The BK Medical NPA, however, confirms a middle ground between full cooperation and less-than-full cooperation. There, the company promptly disclosed—earning "full" disclosure credit—but fell short of the cooperation standards. Assuming that the company would have otherwise received a 50% discount under the Pilot Program, BK Medical's incomplete cooperation cost it an additional 20% in penalties.

This case is informative in that it proves the deductions under the Pilot Program have some flexibility. But the DOJ did not explain how it arrived at a 30% discount, as opposed to a 35% discount, for example, in response to BK Medical's lack of cooperation. The guidance recognizes that "[c]ooperation comes in many forms," which implies there is case-by-case evaluation, yet it does not provide a complete or definitive description of what might constitute "full cooperation." To the extent the DOJ seeks to "motivate companies" to voluntarily self-disclose and fully cooperate with the Fraud Section after discovery of FCPA misconduct,[32] it should provide as much information as it can in each Pilot Program resolution about how the companies satisfied the 11 factors regarding cooperation credit.

2. *The payment of disgorgement, though evidently a mitigating factor under the Pilot Program, may create confusion for companies in evaluating potential discounts.*

The calculation of disgorgement alone is problematic because of the difficulty with discerning profits causally connected to illicit activity.[33] Further, while the SEC generally seeks disgorgement as part of a parallel FCPA-enforcement action, the DOJ usually pursues a

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[31] *See* Deferred Prosecution Agreement, *United States v. VimpelCom Ltd.*, No. 16-cr-137 (ER), at 3–4 (Feb. 10, 2016), *available at* http://www.justice.gov/criminal-fraud/file/828301/download. Similarly, in settlements with Hewlett-Packard Russian and Alcoa World Alumnia LLC, the respective discounts were 33% and 53%, and neither case involved self-disclosure. *See* Plea Agreement, *United States v. ZAO Hewlett Packard A.O.*, No. 14-cr-201 (DLJ), at 16 (Apr. 9, 2014), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/04/09/hp-russia-plea-agreement.pdf; Plea Agreement, *United States v. Alcoa World Alumina LLC*, No. 14-cr-7, ¶¶ 34–35 (Jan. 8, 2014), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/15/01-09-2014plea-agreement.pdf.

[32] Caldwell, *supra* note 1.

[33] A recent case out of the Eleventh Circuit aptly demonstrates this point. *See, e.g.*, *SEC v. Graham*, No. 14-13562 (11th Cir. May 26, 2016), *available at* http://media.ca11.uscourts.gov/opinions/pub/files/201413562.pdf (ruling on the application of the statute of limitations for a disgorgement dispute).

penalty as part of its criminal resolution with the company.[34] Although double payment of disgorgement would be unprecedented,[35] there is uncertainty as to how the Pilot Program's disgorgement requirement could play out alongside an SEC enforcement action. In the declination letters issued to Nortek and Akamai, the payment of disgorgement to the SEC was viewed as a positive factor in the DOJ's decision not to prosecute.[36] But questions remain as to how disgorgement will be approached in scenarios where there is no DOJ declination or the statute of limitations may prevent the SEC from collecting full disgorgement amounts.

3. *The cost and duration of FCPA investigations continue to be a concern.*

Companies have consistently expressed concerns with the high cost and lengthy process of cooperating with FCPA investigations, problems that the Pilot Program does not directly address. Indeed, it is possible that, by affirmatively placing the onus on companies to collect overseas materials and witnesses (and, if necessary, to "bear the burden of establishing why it cannot" do so),[37] the Pilot Program could increase the costs. However, the increased cooperation burden may, in turn, decrease the length of investigations that companies so often seek by omitting the need to pursue typical bureaucratic routes to obtain evidence. For example, Nortek and Akamai saw merely 16 months between self-disclosure and receipt of the DOJ's declination letters.[38]

The DOJ is taking action to alleviate these concerns outside of the Pilot Program. Specifically, the DOJ has substantially increased the FCPA Unit's resources by adding 10 more prosecutors to its staff and establishing three new FBI squads to focus exclusively on FCPA investigations and prosecutions.[39] The DOJ has also concentrated on strengthening its collaboration with foreign governments in pursuing international bribery schemes: "We are sharing leads with our international law enforcement counterparts, and they are sharing them with us."[40] We expect that the effect of these additional resources will become more apparent in the coming months.

4. *Notwithstanding the remaining unknowns, the Pilot Program has achieved important transparency in that it establishes a written checklist of expectations for companies' compliance programs.*

At this point, the most helpful provisions of the Pilot Program come from its guidance on "timely and appropriate remediation." This section requires a company to "implement[] an effective compliance and ethics program" in order to receive remediation credit, and it

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[34] *See* Mary Jo White, Chair, SEC, Three Key Pressure Points in the Current Enforcement Environment (May 19, 2014), *available at* https://www.sec.gov/news/speech/2014-spch051914mjw.html.

[35] *See* Letter from Mary L. Schapiro, SEC Chairman, to the Honorable Mike Crapo, U.S. Senator (Sept. 23, 2011), *available at* https://www.scribd.com/doc/67832400/SEC-Chairman-Schapiro-FCPA-Letter-to-Senator-Crapo ("The Commission and Department of Justice do not obtain duplicative penalties in FCPA cases. Typically, the Commission will obtain monetary sanctions in the form of disgorgement (ill-gotten gains) while the Department of Justice obtains monetary sanctions in the form of penalties.").

[36] *See, e.g.*, Akamai Letter, *supra* note 2 (including as a factor in its analysis "the fact that Akamai will be disgorging to the SEC the full amount of disgorgement as determined by the SEC").

[37] Weissmann, *supra* note 3, at 5 n.3.

[38] Nortek, Inc., Annual Report (Form 10-K) (Mar. 2, 2015); Akamai Technologies, Inc., Quarterly Report (Form 10-K) (Mar. 2, 2015).

[39] Weissmann, *supra* note 3, at 1.

[40] *Id.* at 2.

outlines the eight "criteria" that must be included in the program.[41] Moreover, the BK Medical NPA includes as an attachment a detailed and useful summary of the comprehensive compliance program that the company agreed to adopt.[42] Though the Pilot Program speaks of compliance and remediation as a response to an FCPA violation, companies can take advantage of these resources *now.* The guidance and the BK Medical NPA give corporate compliance departments valuable written direction on the expectations for the creation,[43] maintenance,[44] and enforcement[45] of an effective compliance program, and companies do not have to wait for an FCPA violation to heed this direction.

Conclusion

The Pilot Program summarizes the approach the DOJ has emphasized in pre-Pilot Program cases: self-disclosure and cooperation will be rewarded. The Pilot Program and recent expansion of the FCPA Unit also signify the DOJ's recognition of the industry's need to control costs and shorten investigations. While the guidance is not definitive, and cannot encompass every potential scenario, the Pilot Program equips companies with a written outline of the potential rewards of self-disclosure, cooperation, and remediation. Additional data and case examples over time should help corporate boards become more comfortable with the Pilot Program. Until then, we should focus on what has been learned thus far: companies may benefit from bolstering their compliance functions and, if facing potential FCPA violations, should weigh their options in light of the outcomes in the Nortek, Akamai, and BK Medical cases.

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[41] The guidance also notes that the Fraud Section has sought the assistance of its new Compliance Counsel, Hui Chen, in "refining our benchmarks for assessing compliance programs." *Id.* at 7.

[42] BK Medical NPA, *supra* note 23, at B-1–B-8.

[43] *See* Weissmann, *supra* note 3, at 7 (emphasizing that a company should establish a "culture of compliance," hire "quali[fied] and experience[d] compliance personnel" to manage a compliance program, and maintain an "independen[t]" compliance function).

[44] *See id.* (requiring risk assessment, review of compliance personnel compensation and promotion, and auditing).

[45] *See id.* at 8 (stating, for example, that a compliance system should "provide[] for the possibility of disciplining others with oversight" of those responsible for misconduct).

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Authors:

Brian F. Saulnier
brian.saulnier@klgates.com
+1.412.355.6504

Luke T. Cadigan
luke.cadigan@klgates.com
+1 617.261.3118

Meghan E. Flinn
meghan.flinn@klgates.com
+1.202.778.9458

Krista Consiglio
krista.consiglio@klgates.com
+1 202.778.9022

Amy J. Eldridge
amy.eldridge@klgates.com
+1 202.778.9400

R. James Mitchell
jamie.mitchell@klgates.com
+1 202.778.9029