Westlaw Journal
WHITE-COLLAR CRIME
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 30, ISSUE 5 / FEBRUARY 2016

EXPERT ANALYSIS

FCPA: To Disclose or Not To Disclose, That is the Question

By Mark A. Berube, Esq.
Barton LLP

Corporations that uncover evidence of foreign bribery are left in a quandary. The legal landscape is such that the decision to voluntarily disclose Foreign Corrupt Practices Act violations must be carefully vetted.

What type of voluntary disclosure and cooperation is required to garner any leniency from the government? What benefits might be engendered by such disclosure and cooperation? What serious risks should be considered before deciding to approach the government?

THE REQUIRED SCOPE OF DISCLOSURE

At the outset, it is important to note that mere disclosure will likely confer no benefit. Through published deferred and non-prosecution agreements, official publications, internal memoranda and prepared remarks, the government has made clear that a corporation hoping to garner credit for voluntarily disclosing must do more than merely disclose the fact that evidence of bribery has been uncovered.

Indeed, what the government envisions is more aptly labeled voluntary cooperation. A corporation is expected to conduct a thorough internal investigation that fully develops the facts, disclose all of these facts to the government, identify all individuals involved in or responsible for the criminal behavior, and fully aid the government in any resulting investigation.

Many of the hallmarks of effective disclosure and cooperation are set forth in the Principles of Federal Prosecution of Business Organizations, otherwise known as the Filip memorandum. The fourth factor the Filip memorandum directs prosecutors to consider in deciding whether to criminally charge a corporation is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."[1]

The Filip memorandum goes on to provide further detail as to the contours of effective disclosure and cooperation, providing that a prosecutor may consider "whether the corporation made a voluntary and timely disclosure, the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives."

Relevant factual information includes how and when the alleged misconduct occurred, who promoted or approved it, and who was responsible for committing it. This emphasis on disclosing information to allow the government to hold individuals accountable is a theme of many of the authorities cited in this analysis.

After outlining the elements necessary for effective disclosure and cooperation, the Filip memorandum ends its discussion of cooperation on a cautionary note, warning that "even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a relevant potential mitigating factor, but it alone is not dispositive."

What the government envisions is more aptly labeled voluntary cooperation.

Many of the prominent themes of the Filip memorandum have been recently espoused and expanded upon by Assistant U.S. Attorney General Leslie R. Caldwell in public remarks. At New York University School of Law's April 17, 2015 Program on Corporate Compliance and Enforcement, Caldwell emphasized the need for corporations seeking cooperation credit to identify individual wrongdoers.

"Perhaps most critically," she said, "we expect cooperating companies to identify culpable individuals — including senior executives if they were involved — and provide the facts about their wrongdoing."[2]

She further reiterated that mere disclosure is not sufficient.

"The mere voluntary disclosure of corporate misconduct — by itself — is not enough. All too often, corporations expect cooperation credit for voluntarily disclosing and describing the corporate entities' misconduct, and issuing a corporate mea culpa," Caldwell said. "True cooperation, however, requires identifying the individuals actually responsible for the misconduct — be they executives or others — and the provision of all available facts relating to that misconduct."

Caldwell re-emphasized the need to disclose facts of individual wrongdoing at the New York City Bar Association's Fourth Annual White Collar Crime Institute on May 12, 2015. Corporations hoping for cooperation credit must disclose all relevant facts, "be they good or bad," she said, and "[i]mportantly that includes facts about individuals responsible for the misconduct, no matter how high their rank may be."[3]

Caldwell went on to address other elements of effective cooperation.

With regard to corporate internal investigations specifically, she emphasized that the government expects and appreciates an "orderly internal investigation," which usually means the government does not expect a call on "day one." In attempting to suggest parameters for the scope of an internal investigation, Caldwell made clear that if a company becomes aware of an FCPA violation in one country, it will be expected to thoroughly investigate the facts as to that violation/country. However, she added that it will not usually be expected to engage in an all-encompassing investigation designed to provide "a clean bill of health for the entire company worldwide."

Of note, she specifically addressed the provision of evidence to the government, and, in this regard, foreign privacy laws. Caldwell noted that rather than "a kneejerk invocation of foreign data privacy laws designed to shield critical information," a corporation's "first instinct when providing cooperation should be 'how can I get this information to the government?'"

An internal memorandum that was finalized Sept. 9, 2015, from Deputy U.S. Attorney General Sally Quillian Yates — the second most-senior official at the DOJ — to government attorneys and investigators even more sharply makes the point that cooperation credit hinges on the disclosure of individual misconduct. The Yates memorandum provides that "[i]n order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the department all relevant facts about individual misconduct."[4]

The memo further clarifies that "the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide the department all facts relating to that misconduct." If a corporation omits any wrongdoers or pertinent facts in its disclosure, it will forfeit any credit for cooperation and, as the Yates memorandum makes clear, any cooperation-related reduction at sentencing.

On the civil front, the earmarks of effective disclosure and cooperation before the SEC echo the factors enunciated by the DOJ. In 2001 the SEC issued what has become known as the Seaboard report. The report set forth factors for evaluating a corporation's cooperation in order to determine the appropriate charges to levy, including whether the company:

- Uncovered the improper conduct through its own self-policing.
- Voluntarily self-reported the conduct.

- Took steps to remediate the improper conduct.
- Cooperated with the SEC's investigation.[5]

Andrew Ceresney, director of the SEC's Division of Enforcement, commented on the Seaboard factors in remarks given May 13, 2015, at the University of Texas School of Law's Government Enforcement Institute. Again, central in his remarks on the issue of cooperation credit was the necessity to identify the individuals responsible for misconduct and all details related to it.

When a company commits to cooperation and expects credit for that assistance, the enforcement staff expects them to provide us with all relevant facts, including facts implicating senior officials and other individuals," Ceresney said. "In short, when something goes wrong, we want to know who is responsible so that we can hold them accountable. If a company helps us do that, they will benefit."[6]

Finally, while also not arising in the context of criminal prosecutions, the World Bank has developed its own detailed program to encourage and monitor voluntary disclosure of FCPA violations. Titled the Voluntary Disclosure Program, it outlines, in very specific terms, the steps an entity doing business with the World Bank must take if it uncovers instances of bribery and wishes to avoid debarment from World Bank projects.

The three primary required steps are to cease the corrupt practice, conduct an internal investigation and voluntary disclose the information gleamed about the misconduct, and adopt a "robust" compliance program that is monitored by a compliance monitor for three years.[7] Failure to cease the corrupt practice (or engaging in new ones), as well as failure to disclose "voluntarily, completely, and truthfully," will result in a mandatory 10-year public debarment from World Bank projects.

"We expect cooperating companies to identify culpable individuals," Assistant U.S. Attorney General Leslie R. Caldwell said.

THE BENEFITS OF DISCLOSURE/COOPERATION

In the FCPA context, there are undoubtedly concrete examples of situations where self-reporting and cooperation have produced tangible benefits, as well as those where the failure to report and cooperate have occasioned the opposite result. One example of the benefits flowing from a decision to aid the government involves PetroTiger Ltd., a British Virgin Islands oil and gas company that self-reported and fully cooperated with the DOJ's investigation into a scheme to secure a $39 million oil services contract through the bribery of a Colombian official. While the general counsel and two former chief executive officers of the company were charged with bribery and fraud, the DOJ declined to prosecute the company itself.[8]

On the flip side, the failure to self-report and cooperate has resulted in demonstrable harm. The French power and transportation conglomerate Alstom SA paid a record $772 million penalty as a result of FCPA violations involving tens of millions of dollars in bribes paid around the world. The extraordinary magnitude of this penalty in large part resulted from Alstom's failure to voluntarily report and refusal to cooperate with the government's investigation.[9]

Indeed, Patrick Stokes, deputy chief of the DOJ's FCPA unit, told attendees at a Georgetown University Law Center event that had the company cooperated, prosecutors would have sought a penalty of as little as $207 million in accordance with the sentencing guidelines — a 73 percent reduction.[10]

But the benefits of self-reporting and cooperation are not always so obvious. In the case of mining giant BHP Billiton, even with extensive cooperation in an investigation involving dubious alleged FCPA violations, the company was still required to pay a substantial civil penalty to resolve an SEC proceeding.

In sum, the alleged FCPA violations involved inviting government officials to attend the 2008 Beijing Summer Olympic Games without adequate internal controls to ensure that those invited were not involved in contract negotiations with BHP Billiton as a party.[11]

Even though the SEC acknowledged that "BHPB provided significant cooperation with the commission's investigation by voluntarily producing large volumes of business, financial, and accounting documents from around the world in response to the staff's requests, and by voluntarily producing translations of key documents," the company was still required to pay a $25 million civil penalty for failing to have the requisite internal controls in place to detect and prevent FCPA violations.

THE RISKS INHERENT TO DISCLOSURE/COOPERATION

While it would be hard to argue (both in terms of the threshold decision to indict for FCPA violations, as well as the magnitude of any monetary penalty) that self-reporting and cooperation do not often garner substantial benefits, there are serious risks that should be considered and, at minimum, prepared for prior to disclosure.

At the outset, the government may launch (or require the company internally to launch) an expensive and expansive investigation of a company's internal controls and compliance mechanisms, which may in turn lead to the discovery of additional FCPA (or other) violations. Indeed, notwithstanding Caldwell's general remarks about the scope of internal investigations, the DOJ has recently taken the extraordinary step of appointing a private sector compliance expert, Hui Chen, to aid the government in evaluating the efficacy of a company's existing procedures.[12] Depending on the results of any such evaluation, any consensual resolution with the government may entail entering into a post-resolution monitoring agreement requiring broad and costly compliance monitoring for years.[13]

On the flip side, the failure to self-report and cooperate has resulted in demonstrable harm.

There is also the very real risk that disclosure will lead to collateral investigations. As discussed above, the World Bank now has a detailed voluntary disclosure program in place. If a company doing business with the bank decides not to participate in this program, disclosure to the government would very likely put the bank on notice as well — and might lead to debarment from World Bank projects for 10 years.[14]

Debarment from World Bank projects is not the only potential collateral damage. Rather, disclosure to U.S. authorities may also lead to simultaneous investigation and prosecution by any number of foreign jurisdictions. Indeed, cooperation and joint prosecutions between U.S. and foreign authorities are becoming more commonplace, especially in light of conventions such as the United Nations Convention Against Corruption and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[15]

Apart from potential governmental or quasi-governmental investigations, civil shareholder derivative suits are often the real-world consequence of disclosing FCPA violations. Such suits often allege breach of fiduciary duty by officers and directors complicit in — or at fault for failing to uncover — the underlying bribery.

Finally, there is the very real risk of criminal prosecution faced by those who must decide whether to have the company voluntarily disclose in the first place. The government appears wholly committed to punishing individual offenders (especially high level management) to the full extent of the law. The Yates memorandum makes this point in detail.

Government attorneys are directed to focus on individual wrongdoing from the outset of an investigation to pursue from the beginning the "most efficient and effective way to determine the facts and extent of any corporate misconduct", encourage cooperation by lower level employees and, in turn, obtain information about those higher up in the corporate hierarchy, and ensure that any eventual resolution of an investigation holds individual wrongdoers accountable.[16]

Further, criminal and civil government attorneys are instructed to communicate continuously to ensure that the full measure of penalties for wrongdoing is being pursued at every juncture.

Moreover, the Yates memorandum provides, in perhaps its most troublesome edict, that "[b]ecause of the importance of holding responsible individuals to account, absent extraordinary circumstances of approved departmental policy..., department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees."

Indeed, emphasizing the gravity of this directive, all declinations or grants of immunity must now be approved in writing by the relevant assistant attorney general or U.S. attorney. And, in accord with this directive, prior to resolving any action against a corporation, government attorneys are directed to address, in writing, potentially liable individuals and the resolution of actions as to them, including the need for tolling agreements.

CONCLUSION

Two important points emerge from the above discussion. First, a corporation that has engaged in FCPA violations and hopes to receive cooperation credit must be willing to commit to an extensive internal investigation and disclose all pertinent facts, including facts related to individual wrongdoing, to the government. Second, the very nature of this detailed disclosure raises potential collateral risks that must be carefully evaluated.

NOTES

[1] Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys (Aug. 28, 2008), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

[2] Leslie R. Caldwell, Remarks at N.Y.U. Program on Corp. Compliance and Enforcement (Apr. 17, 2015) (transcript *available at* http://justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law).

[3] Leslie R. Caldwell, Remarks at N.Y.C. Bar Association's Fourth Annual White Collar Crime Institute (May 12, 2015) (transcript *available at* http://justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-city-bar-0).

[4] Memorandum from Sally Quillian Yates, Deputy Att'y Gen., to Gov't Attorneys and Investigators (Sept. 9, 2015) (*available at* http:// justice.gov/dag/file/769036/download).

[5] *See* 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, Exchange Act Release No. 44969, Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001).

[6] Andrew Ceresney, Remarks at University of Texas School of Law's Government Enforcement Institute (May 13, 2015) (transcript *available at* http://sec.gov/news/speech/sec-cooperation-program.html). Indeed, a company runs a very significant risk in the context of SEC actions if it fails to voluntarily disclose: an internal whistleblower may disclose anyway in the hopes of garnering 10 percent to 30 percent of any monetary sanctions recovered. *See* SEC.gov, Frequently Asked Questions, http://www.sec.gov/about/offices/owb/owb-faq.shtml (last visited Nov. 24, 2015).

[7] *See* World Bank Department of Institutional Integrity, VDP Guidelines for Participants, § 3 (July 20, 2006), http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDPGuidelinesforParticipants.pdf.

[8] *See* Press Release, Dep't of Justice, Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company (Jan. 6, 2014), http://justice.gov/opa/pr/foreign-bribery-charges-unsealed-against-former-chief-executive-officers-oil-services-company; Caldwell, Remarks at White Collar Crime Institute, *supra* note 3.

[9] *See* Press Release, Dep't of Justice, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

[10] *See* Jimmy Hoover, *Feds Say Sky-High Fines Show Perks of FCPA Self-Reporting,* Law360 (Mar. 12, 2015, 8:11 PM), http://www.law360.com/articles/631116/feds-say-sky-high-fines-show-perks-of-fcpa-self-reporting.

[11] *See* BHP Billiton Ltd. and BHP Billiton Plc, Exchange Act Release No. 74998 (May 20, 2015) (https://www.sec.gov/litigation/admin/2015/34-74998.pdf).[12] *See* Ed Beeson, *DOJ's New Compliance Counsel to Scope Company Efforts,* Law360 (Nov. 2, 2015, 6:47 PM), http://www.law360.com/articles/ 722115/doj-s-new-compliance-counsel-to-scope-company-efforts.

[13] Also, any subsequent infractions may result in the company being treated as a recidivist by the government. *See* Caldwell, Remarks at N.Y.U. Program, supra note 2 ("Just as with individuals, companies are expected to learn from their mistakes. A company that is already subject to a DPA or NPA for violating the law should not expect the same leniency when it crosses the line again.").

[14] While debarment for 10 years is often the most onerous penalty a World Bank partner can suffer, there are potential alternatives. For example, Siemens AG agreed to settle a World Bank investigation

by paying $100 million over 15 years to support anti-corruption work, agreeing to an up-to-four-year debarment for its Russian subsidiary, and consenting to a two-year no-bid period on World Bank projects. *See* Press Release, The World Bank, Siemens to Pay $100m to Fight Corruption as Part of World Bank Group Settlement (July 2, 2009), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,print:Y~isCURL:Y~contentMDK:22234573~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

[15] *See United Nations Convention against Corruption,* U.N. Office on Drugs and Crime, http://www.unodc.org; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

[16] Yates Memorandum, supra note 4. While the potential inability of an individual defendant to satisfy any eventual civil judgment remains a relevant factor in determining whether to proceed with litigation, government attorneys are cautioned that the twin goal of "accountability for and deterrence of individual misconduct" is just as important.

Mark A. Berube is a partner at **Barton LLP** in New York, where he practices in the areas of complex commercial litigation, including securities regulation, insurance, antitrust, bankruptcy, copyright and employment litigation. Berube also has an established practice in white collar criminal defense and regulatory investigations. He has defended clients in proceedings against the Department of Justice, the Securities and Exchange Commission, and state regulators. He can be reached at mberube@bartonesq.com.