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FCPA

What Recent DOJ Corporate Enforcement Actions Mean for Cooperating Companies

By Ann Sultan

The U.S. Department of Justice (DOJ) has recently taken two significant steps designed to help it better detect violations of the U.S. Foreign Corrupt Practices Act (FCPA) and prosecute both individuals and companies responsible for illegal conduct. The first was the Sept. 9, 2015, publication of the Deputy Attorney General Memorandum on Individual Accountability (also called the ''Yates Memorandum'') (13 CARE 1952, 9/11/15), and the second was the DOJ's release on April 5, 2016, of the Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (also known as the ''Pilot Program'') (66 CARE, 4/6/16). Almost a year since the Yates Memorandum and several months since the launch of the Pilot Program, what have been the practical implications for companies interacting with the DOJ in connection with potential FCPA violations? Specifically, what are the cooperation obligations for such companies vis-à-vis individuals, and what are the potential benefits for companies that meet DOJ expectations in cooperation?

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One of the key principles of the Yates Memorandum is that the DOJ seeks to make accountable those individuals that perpetrated wrongdoing. To do this, it ties corporate cooperation to disclosure of information relating to individual misconduct. In order to qualify for cooperation credit, according to the Yates Memorandum, companies must provide to the DOJ ''all relevant facts relating to the individuals responsible for the misconduct.'' Seven months later, the DOJ's Pilot Program declared that full cooperation by companies requires, ''as set forth in the [Yates Memorandum], disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the corporation's officers, employees, or agents.''

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''Cooperation,'' long an amorphous idea, has been subjectively measured and in practice often tied to closely-held government objectives and interests. The meaning of ''cooperation'' is starting to take shape in the DOJ's emphasis on individuals per the Yates Memorandum and the Pilot Program. In this article, we analyze the first declinations and corporate enforcement actions since the Pilot Program's unveiling in order to ascertain what corporate cooperation the DOJ has required from companies with respect to individuals. Additionally, we analyze present data to quantify the benefits obtained by companies that are getting credit for cooperating.

The Pilot Program is applicable to companies that voluntarily self-disclose or cooperate in FCPA matters during the one-year pilot period, even if the Pilot Pro-

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gram thereafter expires. Given the average length of investigations and resolution negotiations, this likely means that even companies who self-disclosed prior to the onset of the Pilot Program will be eligible for its benefits if they continue to cooperate during the effective period.

There have been three declinations since the Pilot Program's launch: Nortek, Inc. on June 3 (110 CARE, 6/8/16), Akamai Technologies, Inc. on June 6, and Johnson Controls, Inc. on June 21. Additionally, the DOJ entered into one Non-Prosecution Agreement (NPA), with BK Medical ApS, on June 21 (120 CARE, 6/22/16), and one Deferred Prosecution Agreement (DPA), with LATAM Airlines Group S.A., on July 25 (143 CARE, 7/26/16). Although the NPA and DPA do not explicitly mention the Pilot Program, given the Pilot Program's duration, it is likely that its guidelines were applied in those cases as well. We can learn about the requirements for cooperation with respect to individuals from the documents in all of these cases.

Scope of Cooperation

In the declination letters sent to Nortek and Akamai, the DOJ stated that each company had cooperated by ''identifying all individuals involved in or responsible for the misconduct'' and noted each company's ''agreement to continue to cooperate in any ongoing investigations of individuals.'' Here, the DOJ valued the identification of individuals connected with the misconduct and the companies' willingness to continue cooperating. The language in the DOJ's letter to Johnson Controls was slightly different. There, the DOJ acknowledged the company's cooperation in ''its provision of all known relevant facts about the individuals involved in or responsible for the misconduct . . . and its agreement to continue to cooperate in any ongoing investigations of individuals.'' Thus, with Johnson Controls, the DOJ did not specifically mention that the company had identified the relevant individuals, but instead that it had provided all relevant information about them. There could be several reasons for the difference. The explanation may be as simple as the DOJ tweaking its language as it develops its adherence to the Yates Memorandum and Pilot Program or perhaps reflective of something more complicated, like the possibility that the DOJ already knew who the culpable individuals were at the time of Johnson Controls' self-disclosure. Either way, it is clear that both the identification and provision of information regarding individuals are key for the DOJ, as is companies' continued cooperation.

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On the same day as Johnson Controls' declination, the DOJ entered into a NPA with Danish company BK Medical ApS. In the NPA, the DOJ specifically drew attention to an aspect of cooperation with which it felt BK Medical did not comply: the disclosure of information learned during the company's internal investigation. BK Medical did not disclose the ''identities of a number of the state-owned entity end-users of the company's products and information about certain statements given by employees in the course of the internal investigation.'' Despite DOJ's statement in the Pilot Program that it is not seeking privilege waivers, divulging information learned in the course of an internal investigation is challenging for companies. Companies which share such information must balance considerations of attorney-client privilege and the rapport among employees with their desire to cooperate with the government.

Importantly, aside from the non-disclosure issue, the DOJ wrote that BK Medical ''provided to the [DOJ] all relevant facts known to it, including information about individuals involved in the FCPA misconduct.'' This is similar to language in the Johnson Controls declination letter. Interestingly, while the Securities and Exchange Commission (SEC) entered into a settlement with BK Medical's chief financial officer in connection with this case, the DOJ has neither settled with nor charged anyone. It is possible that the DOJ lacked jurisdiction over the Danish CFO who resolved with the SEC. However, the DOJ took an interesting step: it leveraged the power of cooperation under a three-year NPA for the benefit of prosecutions abroad. In its NPA, BK Medical specifically agreed to ''cooperate with foreign authorities that are prosecuting individuals involved in this matter.''

The BK Medical NPA provides a helpful window into the practical cooperation expectations of the DOJ for cooperating companies. The DOJ has signaled that the disclosure of information obtained from individuals in internal investigations as well as a commitment to cooperate in the prosecution of individuals abroad is important.

LATAM's DPA, entered into about a month later, states that LATAM ''fully cooperated,'' including by providing ''information about individuals involved in the misconduct.'' This is similar to the language in the Johnson Controls declination and some of the language in the BK Medical NPA. Although LATAM neither self-disclosed nor fully remediated, and thus did not qualify for a declination under the Pilot Program, the DOJ noted the company's cooperation. The DPA noted that LATAM's cooperation was a factor in the calculation of the company's monetary penalty, though we may never know how much impact it had on the final figure.

With this in mind, the question remains: what is the value to companies of engaging in sometimes costly cooperation?

Potential Monetary Benefit of Cooperation

One of the main principles of the Pilot Program is that companies that self-disclose, fully cooperate, and remediate (and disgorge all profits from the FCPA misconduct at issue) can obtain declinations from the DOJ. Such companies are also less likely than other companies to receive a monitor. Nortek, Akamai and Johnson Controls appear to have fulfilled these requirements.

In cases short of a declination with no penalty payment, the value of cooperation is less clear. LATAM's DPA states that cooperation was a factor in the settlement terms. However, we may never know how valuable of a factor it was. BK Medical's NPA, however, sheds significant light on this issue. In the NPA, the

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DOJ outlined three specific factors it considered with respect to awarding credit to BK Medical: (1) voluntary self-disclosure; (2) cooperation; and (3) remediation. In the first and third of the factors, BK Medical performed well. In particular, BK Medical received ''full credit for its voluntary disclosure'' and further, the NPA commended BK Medical for engaging in ''extensive remedial measures, including enhanced financial controls related to payments and invoicing, enhanced FCPA training, and a new distributor due diligence program.''

By contrast, the DOJ noted that ''the Company did not receive full cooperation credit.'' Under the terms of the Pilot Program, a company can receive an up to 50 percent reduction below the Sentencing Guidelines for the fine amount. According to this NPA, BK Medical received a 30 percent reduction. Although the Pilot Program and BK Medical's NPA do not disclose how much credit the DOJ provides for a company's self-disclosure and remediation versus its cooperation, receiving only partial credit for cooperation may have cost BK Medical an additional 20 percent potential penalty reduction. Given the company's payment of a $3,402,000 penalty, a 20 percent reduction was worth just short of $1,000,000. Additionally, since BK Medical self-disclosed, remediated, otherwise cooperated with the DOJ and disgorged the profits of its FCPA misconduct (to the SEC), it might have qualified for a declination without penalty had it fully cooperated with the DOJ.

Recent enforcement actions by the DOJ—declinations, NPAs, and DPAs—have demonstrated the DOJ's commitment to requiring companies seeking mitigation credit or a declination to cooperate with respect to providing information on individuals. As we've seen, this cooperation may take the form of identifying individuals involved in the misconduct, providing all relevant information as to these individuals, agreeing to cooperate with ongoing investigations, and even cooperation with foreign governments in their pursuit of individuals. Providing the DOJ with this cooperation may benefit companies in terms of the resolutions offered by the DOJ and may also result in a substantial financial benefit in penalty calculations.