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U.S. Department of Justice

Criminal Division

Fraud Section

Washington, D.C. 20530

The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance[1]

Bribery of foreign officials to gain or retain a business advantage poses a serious systemic criminal problem across the globe. It harms those who play by the rules, siphons money away from communities, and undermines the rule of law.

Accordingly, the Department of Justice (Department) is committed to enhancing its efforts to detect and prosecute both individuals and companies for violations of the Foreign Corrupt Practices Act (FCPA), which criminalizes various acts of bribery and related accounting fraud. This memorandum sets forth three steps in our enhanced FCPA enforcement strategy.

As the first and most important step in combatting FCPA violations, the Department is intensifying its investigative and prosecutorial efforts by substantially increasing its FCPA law enforcement resources. These new resources will significantly augment the ability of the Criminal Division's Fraud Section and the Federal Bureau of Investigation (FBI) to detect and prosecute individuals and companies that violate the FCPA. Specifically, the Fraud Section is increasing its FCPA unit by more than 50% by adding 10 more prosecutors to its ranks. At the same time, the FBI has established three new squads of special agents devoted to FCPA investigations and prosecutions.[2] The Department's demonstrated commitment to devoting additional resources to FCPA investigations and prosecutions should send a message to

[1] This memorandum is for internal use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, organization, party or witness in any administrative, civil, or criminal matter.

[2] The Fraud Section of the Criminal Division has been given the authority to investigate and prosecute criminal violations of the FCPA, *see* USAM 9-47-110, exclusively administers the FCPA Opinion program and, together with the Securities and Exchange Commission, publishes comprehensive centralized guidance on the FCPA. As recognized by theDepartment, FCPA investigations involve unique challenges that present a compelling need for centralized supervision, guidance, and resolution, including complex issues involving transnational detection, collection of evidence, and enforcement. The Fraud Section, however, will frequently partner with the United States Attorneys' Offices on such matters.

wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light.

Second, the United States is not going at this alone. The Department is strengthening its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable. Law enforcement around the globe has increasingly been working collaboratively to combat bribery schemes that cross national borders. In short, an international approach is being taken to combat an international criminal problem. We are sharing leads with our international law enforcement counterparts, and they are sharing them with us. We are also coordinating to more effectively share documents and witnesses. The fruits of this increased international cooperation can be seen in the prosecutions of both individuals and corporations, in cases involving Archer Daniels Midland, Alcoa, Alstom, Dallas Airmotive, Hewlett-Packard, IAP, Marubeni, Vadim Mikerin, Parker Drilling, PetroTiger, Total, and VimpelCom, among many others.

Third, as set forth below, the Fraud Section is conducting an FCPA enforcement pilot program. The principal goal of this program is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs. If successful, the pilot program will serve to further deter individuals and companies from engaging in FCPA violations in the first place, encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations, and, consistent with the memorandum of the Deputy Attorney General dated September 9, 2015 ("DAG Memo on Individual Accountability"), increase the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.

We aim to accomplish this goal of greater accountability in part through the increased enforcement measures discussed above – adding additional agents and prosecutors to investigate criminal activity, and enhancing our cooperation with foreign law enforcement authorities where possible. And we also aim to accomplish the same goal by providing greater transparency about what we require from companies seeking mitigation credit for voluntarily self-disclosing misconduct, fully cooperating with an investigation, and remediating, and what sort of credit those companies can receive if they do so consistent with these requirements. Mitigation credit will be available only if a company meets the mandates set out below, including the disclosure of all relevant facts about the individuals involved in the wrongdoing. Moreover, to be eligible for such credit, even a company that voluntarily self-discloses, fully cooperates, and remediates will be required to disgorge all profits resulting from the FCPA violation.

The balance of this memorandum sets forth the Fraud Section's guidance ("Guidance") to our FCPA attorneys about how the Fraud Section will pursue the pilot program. The Guidance first sets forth the standards for what constitutes (1) voluntary self-disclosure of criminality, (2)

full cooperation, and (3) remediation by business organizations, for purposes of qualifying for mitigation credit from the Fraud Section in an FCPA matter. Next, the Guidance explains the credit that the Fraud Section will accord under this pilot to business organizations that voluntarily self-disclose, fully cooperate, and remediate. As set forth below, that credit may affect the type of disposition, the reduction in fine, or the determination of the need for a monitor.

By way of background, the Principles of Federal Prosecution of Business Organizations (the "USAM Principles") have long provided guidance on whether a criminal disposition against a company is appropriate and what form that disposition should take. *See* USAM 9-28.000. In addition, the United States Sentencing Guidelines ("Sentencing Guidelines") provide for reduced fines for business organizations that voluntarily disclose criminal conduct, fully cooperate, and accept responsibility for the criminal conduct. To provide incentives for organizations to self-disclose misconduct, fully cooperate with a criminal investigation, and timely and appropriately remediate, the Fraud Section has historically provided business organizations that do such things with a reduction below the low end of the Sentencing Guidelines fine range. These fine reductions and other incentives have not previously been articulated in a written framework. By setting forth this Guidance, we intend to provide a clear and consistent understanding of the circumstances in which the Fraud Section may accord additional credit in FCPA matters to organizations that voluntarily disclose misconduct, fully cooperate, and timely and appropriately remediate.

The Guidance does not supplant the USAM Principles. Prosecutors must consider the ten factors set forth in the USAM when determining how to resolve criminal investigations of organizations. Prosecutors must also calculate the appropriate fine range under Chapter 8 of the Sentencing Guidelines. This Guidance, by contrast, sets forth the circumstances in which an organization can receive additional credit in FCPA matters, above and beyond any fine reduction provided for under the Sentencing Guidelines, and the manner in which that additional credit should be determined, whether it be in the type of disposition, the extent of reduction in fine, or the determination of the need for a monitor. Organizations that voluntarily self-disclose, fully cooperate, and remediate will be eligible for significant credit in all three categories. But, as noted above, to receive this additional credit under the pilot program, organizations must meet the standards described below, which are more exacting than those required under the Sentencing Guidelines.

The pilot program will be effective April 5, 2016 as part of a one-year program applicable to all FCPA matters handled by the Fraud Section. The Guidance is being applied by the Fraud Section to organizations that voluntarily self-disclose or cooperate in FCPA matters during the pilot period, even if the pilot thereafter expires. By the end of this pilot period, the Fraud Section will determine whether the Guidance will be extended in duration and whether it should be modified in light of the pilot experience. The Guidance applies only to the Fraud Section's FCPA Unit and not to any other part of the Fraud Section, the Criminal Division, the

United States Attorneys' Offices, any other part of the Department of Justice, or any other agency.

Nothing in the Guidance is intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options and forego the credit available under the pilot program.

This Guidance first sets forth the requirements for a company to qualify for credit for voluntary self-disclosure, cooperation, and timely and appropriate remediation under this pilot program, including exceptions to the general rules. It then sets forth the credit that should be accorded if a company meets these criteria.

A. Requirements

1. Voluntary Self-Disclosure in FCPA Matters

Voluntary self-disclosure of an FCPA violation is encouraged. Indeed, in implementing the DAG Memo on Individual Accountability, the Department recently revised the USAM Principles to underscore the importance of voluntary self-reporting of corporate wrongdoing. Under the current USAM Principles, prosecutors are to consider a corporation's timely and voluntary self-disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the company's compliance program. USAM 9-28.900.

In evaluating self-disclosure during this pilot, the Fraud Section will make a careful assessment of the circumstances of the disclosure. A disclosure that a company is required to make, by law, agreement, or contract, does not constitute voluntary self-disclosure for purposes of this pilot. Thus, the Fraud Section will determine whether the disclosure was already required to be made. In addition, the Fraud Section will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing under this pilot:

- The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation";
- The company discloses the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and
- The company discloses all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.

2. Full Cooperation in FCPA Matters

In addition to the USAM Principles, the following items will be required for a company to receive credit for full cooperation under this pilot (beyond the credit available under the Sentencing Guidelines)[3]:

- As set forth in the DAG Memo on Individual Accountability, 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;

- Proactive cooperation, rather than reactive; that is, the company must disclose facts that are relevant to the investigation, even when not specifically asked to do so, and must identify opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government;

- Preservation, collection, and disclosure of relevant documents and information relating to their provenance;

- Provision of timely updates on a company's internal investigation, including but not limited to rolling disclosures of information;

- Where requested, de-confliction of an internal investigation with the government investigation;

- Provision of all facts relevant to potential criminal conduct by all third-party companies (including their officers or employees) and third-party individuals;

- Upon request, making available for Department interviews those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers and employees located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights);

- Disclosure of all relevant facts gathered during a company's independent investigation, including attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general

[3] If a company claims that it is impossible to meet one of these requirements, for example because of conflicting foreign law, the Fraud Section should closely evaluate the validity of that claim and should take the impediment into consideration in assessing whether the company has fully cooperated. The company will bear the burden of establishing why it cannot meet one of these requirements.

narrative of the facts;

- Disclosure of overseas documents, the location in which such documents were found, and who found the documents (except where such disclosure is impossible due to foreign law, including but not limited to foreign data privacy laws);
    - Note: Where a company claims that disclosure is prohibited, the burden is on the company to establish the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents.
- Unless legally prohibited, facilitation of the third-party production of documents and witnesses from foreign jurisdictions; and
- Where requested and appropriate, provision of translations of relevant documents in foreign languages.

Cooperation comes in many forms. Once the threshold requirements of the DAG Memo on Individual Accountability have been met, the Fraud Section should assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company's cooperation under this pilot. For example, the Fraud Section does not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company.[4] Nor do we generally expect a company to investigate matters unrelated in time or subject to the matter under investigation in order to qualify for full cooperation credit. An appropriately tailored investigation is what typically should be required to receive full cooperation credit; the company may, of course, for its own business reasons seek to conduct a broader investigation.[5]

As set forth in USAM 9-28.720, eligibility for full cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection and none of the requirements above require such waiver. Nothing in the Guidance or the DAG Memo on Individual Accountability alters that policy, which remains in full force and effect. Furthermore, not all companies will satisfy all the components of full cooperation, either because they decide

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[4] Where a company of any size asserts that its financial condition impairs its ability to cooperate more fully, the company will bear the burden to provide factual support for such an assertion.

[5] For instance, absent facts to suggest a more widespread problem, evidence of criminality in one country, without more, would not lead to an expectation that an investigation would need to extend to other countries. By contrast, evidence that the corporate team engaged in criminal misconduct in overseeing one country also oversaw other countries would normally trigger the need for a broader investigation. In order to provide clarity as to the scope of an appropriately tailored investigation, the business organization (whether through internal or outside counsel, or both) is encouraged to consult with Fraud Section attorneys.

to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies should be eligible for some cooperation credit under this pilot if they meet the DAG Memo on Individual Accountability criteria, but the credit generally will be markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.

3. Timely and Appropriate Remediation in FCPA Matters

Remediation can be difficult to ascertain and highly case specific. In spite of these difficulties, encouraging appropriate and timely remediation is important to reducing corporate recidivism and detecting and deterring individual wrongdoing. The Fraud Section's Compliance Counsel is assisting us in refining our benchmarks for assessing compliance programs and for thoroughly evaluating an organization's remediation efforts.

In evaluating remediation efforts under this pilot program, the Fraud Section will first determine whether a company is eligible for cooperation credit; in other words, a company cannot fail to cooperate and then expect to receive credit for remediation despite that lack of cooperation. The following items generally will be required for a company to receive credit for timely and appropriate remediation under this pilot (beyond the credit available under the Sentencing Guidelines):

- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but will include:
    - Whether the company has established a culture of compliance, including an awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
    - Whether the company dedicates sufficient resources to the compliance function;
    - The quality and experience of the compliance personnel such that they can understand and identify the transactions identified as posing a potential risk;
    - The independence of the compliance function;
    - Whether the company's compliance program has performed an effective risk assessment and tailored the compliance program based on that assessment;
    - How a company's compliance personnel are compensated and promoted compared to other employees;
    - The auditing of the compliance program to assure its effectiveness; and

- The reporting structure of compliance personnel within the company.

- Appropriate discipline of employees, including those identified by the corporation as responsible for the misconduct, and a system that provides for the possibility of disciplining others with oversight of the responsible individuals, and considers how compensation is affected by both disciplinary infractions and failure to supervise adequately; and

- Any additional 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, including measures to identify future risks.

B. Credit for Business Organizations under the Pilot Program

1. Limited Credit for Full Cooperation and Timely and Appropriate Remediation in FCPA Matters Without Voluntary Self-Disclosure

If a company has not voluntarily disclosed its FCPA misconduct in accordance with the standards set forth above, it may receive limited credit under this pilot program if it later fully cooperates and timely and appropriately remediates. Such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing, as described immediately below in category B.2. Specifically, in circumstances where no voluntary self-disclosure has been made, the Fraud Section's FCPA Unit will accord at most a 25% reduction off the bottom of the Sentencing Guidelines fine range.

2. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters

When a company has voluntarily self-disclosed misconduct in an FCPA matter in accordance with the standards set forth above; has fully cooperated in a manner consistent with the DAG Memo on Individual Accountability and the USAM Principles; has met the additional stringent requirements of the pilot program; and has timely and appropriately remediated, the company qualifies for the full range of potential mitigation credit.

In such cases, if a criminal resolution is warranted, the Fraud Section's FCPA Unit:

- may accord up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought; and

- generally should not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

Where those same conditions are met, the Fraud Section's FCPA Unit will consider a declination of prosecution.[6] As noted above, this pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement. Such voluntary self-disclosures thus promote aggressive enforcement of the FCPA and the investigation and prosecution of culpable individuals. Of course, in considering whether declination may be warranted, Fraud Section prosecutors must also take into account countervailing interests, including the seriousness of the offense: in cases where, for example, there has been involvement by executive management of the company in the FCPA misconduct, a significant profit to the company from the misconduct in relation to the company's size and wealth, a history of non-compliance by the company, or a prior resolution by the company with the Department within the past five years, a criminal resolution likely would be warranted.

As stated above, this Guidance applies only to the Fraud Section's FCPA Unit during the term of this pilot program. It does not apply to any other part of the Fraud Section, the Criminal Division, the United States Attorneys' Offices, any other part of the Department of Justice, or any other agency.

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[6] As noted above, to qualify for any mitigation credit under this pilot (whether in categories B.1 or B.2), the company should be required to disgorge all profits from the FCPA misconduct at issue.