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Wary Firms Won't Rush To Test FCPA Corruption Guidelines

By **Chuck Stanley**

Law360, Washington (January 11, 2018, 5:19 PM EST) -- U.S. Department of Justice guidelines advising leniency in exchange for cooperation in Foreign Corrupt Practices Act cases promise more certainty for companies and might over time embolden firms to try foreign ventures that once seemed too risky. But white collar attorneys don't expect companies to take new chances until they see how prosecutors use the guidance in practice.

Deputy Attorney General Rod Rosenstein in November announced new guidance for prosecutors aimed at encouraging companies to voluntarily notify the government of potential violations of the FCPA, which bars companies operating in the U.S. from making or offering improper payments to officials of foreign governments to secure business.

The guidelines say companies that self-disclose FCPA violations and fully cooperate with the DOJ, including remediation and disgorgement of any gains arising from the violation, would be approached under a presumption that their case will be resolved through a declination, meaning prosecutors would decline to bring an FCPA case and spare the company significant costs associated with litigation and punitive action.

In cases where "aggravated circumstances" such as repeat offenses or unusually large payments related to the corrupt activity make a declination inappropriate, the guidelines advise prosecutors to seek significant reductions on the minimum recommended penalties in exchange for cooperation.

Rosenstein said in announcing the guidelines that they are intended to give more certainty to companies debating whether to come forward with potential FCPA violations and produce more voluntary disclosures.

Attorneys advising corporations on FCPA issues will welcome the new guidelines because they promise more predictable outcomes, said Matthew Miner, a partner at Morgan Lewis & Bockius LLP's white collar practice. "Lawyers are always appreciative of clear criteria and expectations," he said.

Rosenstein's announcement touted the new regulations on the heels of an 18-month pilot program promising leniency to cooperative companies in which voluntary FCPA disclosures nearly doubled compared with an earlier equivalent period.

Miner says the incentives for cooperation under the new regulations are even more explicit than they

were under the pilot program. “Before, there was an understanding that you may get a declination. Now the incentive is concrete,” he said. “You’ll either get a declination or a 50 percent reduction off the low end of the sentencing guidelines.”

That certainty will help corporations and their attorneys assess the risks of coming forward, Miner said.

The explicit requirement for companies to disgorge any ill-gotten funds as part of the declination process is also an addition to the terms of the pilot program. But Miner said publicly listed companies would have previously faced disgorgement in such cases through the U.S. Securities and Exchange Commission.

Companies that maintain robust internal compliance efforts will likely cheer the new regulations, said John Buretta, a partner in Cravath Swaine & Moore LLP’s litigation group.

“The DOJ’s new FCPA corporate enforcement policy should be a welcome development for companies that are committed to corporate compliance and willing to take proactive steps to remediate misconduct when it is discovered,” Buretta said.

For companies that haven’t invested heavily in compliance, though, the substantial requirements of disclosure, remediation and disgorgement may make the new regulations less helpful.

In order to receive a declination or reduced punitive action, a company must identify the cause of the issue, put measures in place to prevent it from recurring and calculate the profits that must be forfeited before a resolution is reached. That’s difficult without robust compliance measures in place at the time the company comes forward, Miner said.

Even more than the prospect of escaping harsh punishment, white collar attorneys are enthusiastic about the certainty promised by the new guidance. A more predictable set of outcomes could allow companies with strong compliance structures to pursue riskier ventures abroad, said Joel Cohen, co-chair of Gibson Dunn & Crutcher LLP’s white collar defense and investigations group.

The new guidelines don’t mean companies will be rushing to hire compliance lawyers in 2018 and jump into new ventures, Cohen said. “Things don’t move that quickly, not in the hiring realm, and certainly not in the way in which risk is evaluated,” he said.

A new era of certainty over FCPA risk also won’t come from a set of guidelines alone, he said. Companies with potential exposure and their attorneys will be watching to see how the new guidance is carried out in practice.

“Predictability is as important as leniency,” Cohen said. “Companies need predictability in order to meaningfully assess higher risk activity. But predictability requires a track record. If a predictable record of declinations follows from the government’s recent statements, companies naturally will feel more comfortable participating in high-risk activity abroad.”

The guidance is not binding, and prosecutors will continue to exercise significant discretion when prosecuting FCPA cases, experts said.

As the guidance suggests declinations will not be available in cases with aggravating circumstances, the non-exhaustive list of such conditions will have to be sufficiently supplemented by real-life decisions

from the department before the guidelines result in the kind of certainty Rosenstein has touted, Buretta said.

Depending on how much management knew about an FCPA violation, the dollar amount involved and other factors, prosecutors may not always be inclined to show the sort of leniency outlined by the guidance.

Cohen agreed that a track record will take time to develop.

“The proof will be in the pudding,” he said. “It will take some time for companies and experienced counsel to develop a sufficient level of comfort that the government will act in accordance with the message they have delivered.”

Miner described the new guidelines as “concrete but not certain,” saying that discretion is necessary to account for the specifics of individual cases but that lawyers won’t know how far prosecutors are likely to stray from the guidance, given particular sets of variables, until some of these cases are resolved.

Still, Miner said the new guidelines align the interests of good corporate actors with those of the DOJ.

By rewarding voluntary disclosure, the DOJ has given companies an incentive to invest their own resources in policing corrupt activity in-house, which will hopefully allow the government to concentrate on the most egregious cases, Miner said.

With many of the DOJ’s most prominent FCPA cases having come against companies based outside the U.S., Cohen said it’s important to note that foreign-held businesses may be slower than their U.S. counterparts to accept the DOJ guidelines as indicative of a new normal in FCPA prosecution.

According to the International Compliance Association, nine of the 10 largest FCPA enforcement actions of all time have come against non-U.S. companies.

“Remember that many of the largest FCPA settlements have involved foreign companies, not U.S. companies, and it takes even longer for foreign companies to feel a level of comfort with shifts in policy arising from our Department of Justice,” Cohen said.

--Editing by Brian Baresch and Pamela Wilkinson.