Weighing the Options

By David Maria

We Found Potential FCPA Violations: Do We Self-report?

While there is substantial guidance from the U.S. Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") on how to interpret the Foreign Corrupt Practices Act ("FCPA"), there is little established case law. For a multitude of reasons, which could be the subject of a much longer article, FCPA cases rarely go to trial. Instead, these matters are typically resolved by settlement, which can range from a non-prosecution agreement ("NPA"), to a deferred prosecution agreement ("DPA"), to a felony plea by the company or one of its subsidiaries. Thus, in this unique area of criminal law, the key question does not center on how best to position the company to defend against potential charges in court but, instead, on whether or not to self-report to the government and disclose the potential wrongful conduct. This article addresses common issues that companies face with regard to the criminal side of FCPA matters, as opposed to issues that may arise on the civil side in dealing with the SEC) when making the decision of whether or not to self-report potentially criminal conduct.

Benefits of Self-Reporting and Cooperation

As a former prosecutor who worked on FCPA matters in DOJ's Criminal Division, a question that I am frequently asked by in-house lawyers is, "How do I know what credit the company will get if we self-report?" Companies rightfully want some certainty as to what the outcome will be if they disclose potential criminal conduct that may otherwise never be uncovered by the government. Unfortunately, there exists no certainty in this area. There are two primary sources of written guidance that set forth how prosecutors and courts are to factor in a company's disclosure of potential wrongdoing and cooperation with the government's investigation: (1) the Principles of Corporate Prosecution, set forth in the U.S. Attorney's Manual, and (2) Chapter 8 of the United States Sentencing Guidelines. These two sources are the starting point for any discussion regarding the benefits (or lack thereof) of self-disclosure.

Principles of Corporate Prosecution

In determining the disposition of a criminal investigation as it pertains to a cor-

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porate entity, including whether or not to charge the corporate entity, federal prosecutors are guided by the Principles of Federal Prosecution of Business Organizations (hereinafter, "the Principles"). The Principles are set forth in Chapter 9 of the United States Attorneys' Manual (the "USAM"), USAM Chapter 9-28.000 *et seq*., available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/, and provide nine factors that a prosecutor is to consider when determining whether to bring charges, one of which is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." *Id.* Chapter 9-28.300: Factors to Be Considered, no. 4.This factor is discussed in greater detail in 9-28.700, "The Value of Cooperation." *Id.* Chapter 9-28.700.This section explains that, in determining the extent of the corporation's cooperation, the prosecutor "may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives." *Id.* Thus, per the USAM, cooperation and voluntary disclosure are firmly tied together. Yet the language does contemplate the possibility of cooperation even if the company did not disclose the conduct.

From a practical standpoint, a corporate defendant starts with a significant strike against it if it seeks to cooperate *after* the government is informed of the conduct through independent means. Once the government learns of the conduct through a source other than the corporation (most likely a whistleblower), assuming that the corporation was aware of the conduct but opted not to disclose it (or had not yet disclosed it), even the most energetic cooperation may result in little credit given by the government.

Recent DOJ press releases make clear that DOJ views true cooperation as disclosure followed by cooperation and not just cooperation. Here are some examples:

- **Archer Daniels Midland:** "The agreements acknowledge ADM's timely, voluntary and thorough disclosure of the conduct; ADM's extensive cooperation with the department, including conducting a world-wide risk assessment and corresponding global internal investigation, making numerous presentations to the department on the status and findings of the internal investigation, voluntarily making current and former employees available for interviews, and compiling relevant documents by category for the department; and ADM's early and extensive remedial efforts." DOJ Press Release, http://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act. The criminal component of this matter was resolved through a guilty plea, not by ADM, but by one of its subsidiaries, Alfred C. Toepler International Ukraine Ltd., and $17 million in criminal fines.
- **Ralph Lauren:** "The agreement acknowledges RLC's extensive, thorough, and timely cooperation, including self-disclosure of the conduct, voluntarily making employees available for interviews, making voluntary document disclosures, conducting a worldwide risk assessment, and making multiple presentations to the Department on the status and findings of the internal investigation and risk assessment." DOJ Press Release, http://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay. The criminal component of this matter was resolved by the payment of an $882,000 penalty and a non-prosecution agreement (NPA).
- **Tyco International:** "This agreement acknowledges Tyco's timely, voluntary and complete disclosure, its cooperation—including a global internal investigation concerning bribery and related misconduct—and its extensive remediation." DOJ Press Release, http://www.justice.gov/opa/pr/subsidiary-tyco-international-ltd-pleads-guilty-sentenced-conspiracy-violate-foreign-corrupt. The criminal component of this matter was resolved through a guilty plea, again, not with Tyco, but with a subsidiary, Tyco Valves & Controls Middle East Inc., and $26 million in criminal fines.

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In each of these matters, the resolution was on the lenient side of the spectrum, as one of the matters was resolved via NPA, and the other two were resolved by a guilty plea by a foreign subsidiary and not by the parent company.

The importance to the government of the self-disclosure aspect is made especially clear in the joint DOJ/SEC publication, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, *A Resource Guide to the* U.S. Foreign Corrupt Practices Act, *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf, which was first published in November 2012. In this publication, the government provides multiple examples of "Past Declinations by DOJ and SEC," *i.e.*, matters where the DOJ, SEC, or both declined to take any prosecutorial or administrative action. In all six examples provided, the company had self-reported the misconduct. *Id.*at pp. 77–79.

In contrast, the resolution of the FCPA issues between the DOJ and Marubeni Corporation demonstrates what can happen if a company elects to neither self-report the conduct nor to cooperate with the government. In March of 2014, Marubeni—not one of its subsidiaries—entered a plea of guilty to an eight-count criminal information. The company was charged with one count of conspiracy to violate the anti-bribery provisions of the FCPA and seven counts of violating the FCPA. Marubeni agreed to pay a criminal fine of $88 million. In announcing the plea, the DOJ noted that "[t]he plea agreement cites Marubeni's decision not to cooperate with the department's investigation when given the opportunity to do so, its lack of an effective compliance and ethics

program at the time of the offense, its failure to properly remediate and the lack of its voluntary disclosure of the conduct as some of the factors considered by the department in reaching an appropriate resolution." DOJ Press Release, http://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine.

While self-reporting and cooperation by no means guarantee that the corporation will receive a declination, an NPA, or a plea by a subsidiary, it certainly increases the chances of one of these more lenient options. If the conduct is at all pervasive or egregious, DOJ will not decline to prosecute the matter and will require some sort of formal resolution and criminal fine. But the corporation may still be able to protect itself from a situation where the parent company itself (instead of a foreign subsidiary) is required to plead to a criminal charge.

United States Sentencing Guidelines

The other source of formal, written guidance regarding how self-reporting and cooperation are considered with respect to business organizations is in the United States Sentencing Commission's Federal Sentencing Guidelines Manual, which is commonly referred to as the United States Sentencing Guidelines (hereinafter, "the Guidelines"). The most current version, the 2013 USSC Guidelines Manual, is available at http://www.ussc.gov/guidelines-manual/2013-ussc-guidelines-manual, (hereinafter cited as "USSG") The Guidelines, which are advisory and not binding in nature, are intended to guide a court's analysis in determining an appropriate sentence for an individual or entity convicted of violating a federal criminal statute. That being said, federal prosecutors also utilize the guidelines in formulating plea agreements, including calculating fines pursuant to plea agreements.

Chapter 8 of the Guidelines, titled "Sentencing of Organizations," provides the method for determining the penalty to be imposed on a corporation, including the method for calculating the appropriate criminal fine. Prosecutors frequently utilize the provisions of Chapter 8 to calculate the fine in FCPA and other corporate matters, even when a resolution that does not require court approval is reached, such as an NPA.

So, how do self-reporting and cooperation affect the sentencing analysis in Chapter 8? Ultimately, it affects the multiplier that will be used to determine the overall fine to be levied against the company. The base fine will be established as the greatest of: (1) the amount set forth in the chart in Section 8C2.4 that corresponds to the calculated offense level; (2) the pecuniary gain to the organization from the offense; or (3) the pecuniary loss from the offense caused by the organization. USSG Section 8C2.4 (Base Fine) Again, while this section is intended to guide courts in the sentencing process, it is also typically the starting point for prosecutors when determining an appropriate criminal fine in matters that are resolved outside of court.

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The "Culpability Score" as determined in Section 8C2.5 of the Guidelines ultimately determines what multiplier will be used to determine the Guideline Fine Range, from which the criminal fine will be determined. *Id.* Sections 8C2.5 (Culpability Score), 8C2.6 (Minimum and Maximum Multipliers), and 8C2.7 (Guideline Fine Range – Organizations). The Culpability Score starts at 5 points, and points can be added or subtracted based on aggravating or mitigating factors. One such mitigating factor is "Self-Reporting, Cooperation, and Acceptance of Responsibility." *Id.* Section 8C2.5(g).

Here, if the organization self-reported the conduct (*i.e.*, disclosed in a timely manner, before the "imminent threat of disclosure or government investigation"), cooperated fully, and accepted responsibility, 5 points would be subtracted from the culpability score. *Id.* Section 8C2.5(g)(1). If the company merely cooperates but does not self-report, 2 points are subtracted. *Id.* Section 8C2.5(g)(2). And if the company only accepts responsibility, a single point is subtracted. *Id.* Section 8C2.5(g)(3). The subtraction of 5 points can affect the multiplier substantially, and it can result in the fine range being 5 percent (culpability score of 0 compared to 5) to 50 percent (culpability score of 5 compared to 10 or more) of what the range would be absent the subtraction of those points.

To illustrate, if the base fine calculated for an organization is $10 million and its Culpability Score is 8, the minimum and maximum multipliers are 1.60 and 3.20, *Id.* Section 8C2.6., resulting in a fine range of $16 million to $32 million. If five points are subtracted from the Culpability Score (resulting in a 3), the multipliers change to 0.60 and 1.20, resulting in a fine range of $6 million to $12 million.

Other Potential Unwritten Benefits of Self-Reporting

As set forth in the USAM and the Sentencing Guidelines, the primary benefits of self-reporting and cooperation are (1) limiting the criminal exposure to the company (with the main goal of preventing the parent company from being charged with a felony), and (2) limiting the amount of the fine. While every FCPA practitioner has opinions as to other benefits of self-reporting or considerations to weigh when making the decision to disclose, here are a few considerations that have proved important in my experience.

- Self-reporting immediately paints the company as a good corporate citizen. You are informing the government of misconduct that it might never have discovered. This is instrumental to building a good relationship with the prosecutor (and his or her superiors), who will be the ultimate decision makers in terms of the resolution that will be reached between the parties.
- Bringing the conduct to the government's attention permits the company and its counsel to tell its story on its

own terms—to control the process. The description of the conduct will certainly come across better when presented by the company than when presented by a whistleblower or a disgruntled vendor or competitor.

- The company can determine who the "bad actors" are and assist the government in its efforts to prosecute those individuals. This is yet another factor to be considered under the Principles of Federal Prosecution of Business Organizations. USAM 9-28.300, no. 4 ("the corporation's timely and voluntary disclosure of wrongdoing and *its willingness to cooperate in the investigation of its agents*" (emphasis added)). The Criminal Division—in the FCPA context and more broadly—is in fact eager to step up its prosecution of individuals in the corporate context. *See, e.g.,* Remarks by Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller at the Global Investigation Review Program (Sept. 17, 2014), *available at* http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html. The company's assistance in this regard will go a long way in garnering leniency for the company, and it may even get a free pass.
- In controlling the process, the company can seek an early resolution. There is no rule that the process of cooperating with the government has to be a two or three year process. Like many areas of government, the FCPA Unit, housed in the Fraud Section of the Criminal Division, is understaffed and cannot dedicate full time or attention to every matter that comes in the door. If, at an early stage, a company and its counsel build a good relationship and gain the trust of the prosecutors, the government may jump at its early offer to resolve the matter and garner some good press without having to conduct a full-scale investigation.
- If the discovery of the conduct by the company was in any way related to its compliance program or function, the company can gain substantial credit. Here, the company can tout its pre-existing compliance program (its effectiveness being demonstrated by the fact that it uncovered the prohibited conduct), which is a "factor to be considered" in the Principles of Federal Prosecution of Business Organizations. USAM 9-28.300, no. 5; *see also id.* 9-28.800, "Corporate Compliance Programs." Under the Sentencing Guidelines analysis, if it is determined that the company had an "Effective Compliance and Ethics Program," USSG Section 8B2.1, an additional three points can be subtracted from the organization's Culpability Score.
- Finally, from an SEC standpoint, self-reporting can preclude a whistleblower suit under the whistleblower provision of the Securities Exchange Act that was added by the Dodd-Frank Act in 2010. Of course, the company cannot take this action solely to preclude a complaint by a whistleblower that it knows, or believes, intends to file a complaint, solely for the purpose of precluding that complaint. As Section 21F of the Exchange Act as revised makes clear, it only rewards whistleblowers who provide "original information" to the SEC, which means "information that …is not known to the Commission from any other source." Securities Exchange Act Sections 21F(a)(3)(B) and 21F(b)(1). To ensure effectiveness of this strategy, the initial communication to the government should occur as early as possible, even if it is just as a "placeholder" phone call to, or meeting with, your favorite FCPA prosecutor and SEC Enforcement attorney to outline the parameters of the conduct and set the table for future disclosures of information and cooperation.

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Reasons Not to Self-Report (and What a Company Still Must Do if It Does Not Self-Report)

So far, in this article, I have discussed the benefits—*i.e.*, the "pros"—of self-reporting. But, there are also "cons" to self-reporting. Likewise, there are potential pros and cons to keeping quiet and not voluntarily reporting the conduct to the government.

The primary reason not to self-report potential criminal conduct, such as FCPA violations, is obvious: the government may never find out about the conduct. Conversely, if you report the conduct, there is a one hundred percent chance that the government will become aware of it. For public companies, self-reporting and being the subject of a government investigation also may trigger disclosure requirements under the federal securities laws, and such disclosures can harm a company's image in the press and negatively impact stock price. Thus, the cons of self-reporting are important considerations.

So, the real question is: What is the likelihood that the government will find out about the conduct? In the FCPA context, if asked this question five years ago, my answer would be very different than it is now. Then, there was very little likelihood that the government would find out about bribes being paid in foreign countries. Most foreign governments were not proactive in investigating bribery, and there was little, if any, incentive for employees of the company to blow the whistle on the conduct. From an odds perspective, there was a fair chance that the government would not find out about the conduct absent self-reporting, so gambling on the much greater penalties that could result if the government did find out was a gamble that many companies chose to take.

What is different now? With the passage of the Dodd-Frank Act in 2010, there is now a financial incentive for individuals to report potential FCPA violations. The whistleblower provision is not FCPA-specific and applies to any "violation of securities laws." 15 U.S.C. Section 78u-6(a)(6). Dodd-Frank added Section 21F to the Securities Exchange Act of 1934, 15 U.S.C.

Section 78u-6,a whistleblower provision that provides for potential monetary recovery to the whistleblower of 10–30 percent of the monetary sanctions imposed "in the action or related actions," as long as the enforcement action or actions result in monetary sanctions over $1 million. 15 U.S.C. Section 78u-6(b)(1). This provision has already resulted in thousands of whistleblower complaints being reported annually to the SEC. In 2012, 3,001 complaints were reported, and in 2013, 3,238 complaints were reported. 2013 SEC Annual Report to Congress on the Dodd-Frank Whistleblower Program, at p. 8, *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf. This included 115 complaints in 2012 and 149 complaints in 2013 that were related to alleged violations of the FCPA. *Id.* At Appendix B.

While at least one court has held that the whistleblower protection provisions in Dodd-Frank do not apply to foreign citizens working in foreign countries where all of the related events occurred abroad, *Liu v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014), the SEC has made clear that it will award (and, in fact, has awarded) money to foreign whistleblowers. *See In re Claim for Award in Connection with [Redacted]*, SEC Release No. 73174 (Sept. 22, 2014), 2014 WL 4678597. In a recent release determining a whistleblower award claim, the Commission distinguished the whistleblower award provisions from the whistleblower protection provisions, noting that "the whistleblower award provisions have a different Congressional focus than the anti-retaliation provisions, which are generally focused on preventing retaliatory employment actions and protecting the employment relationship." *Id.* at 2 n.2. While the SEC's release did not provide details about the conduct involved, it did find that, "[g]iven the monetary sanctions thus far collected, this should yield a total award [to the whistleblower] of between $30 and $35 million." *Id.* at 1. This award from September 2014 was the highest award since an award of $14 million, announced in October 2013. "SEC Awards More Than $14 Million to Whistleblower," *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.VD7NpPnF-G.

Conclusion

As these awards grow in size and become more highly publicized, the number of whistleblower complaints will increase. Because of the potential for fines in the tens, or even hundreds, of millions of dollars in FCPA matters, this is an area that is likely to see significant growth in the number of whistleblower complaints. The publicity attendant to the large awards that have been announced, and others that will undoubtedly be announced in the near future, will make its way around the globe. And, it's only a matter of time before plaintiffs' attorneys begin advertising their services and this whistleblower provision in foreign countries, especially in those countries that rank highest on the corruption index.

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The simple message here is that there is now a much greater likelihood that the government will find out about potential violations of the FCPA. What was once a remote chance of discovery is no longer remote.

If a company is willing to take that risk—*i.e.*, decide not to report potential violations of which it is aware—there are still steps that the company must take to best position itself in the event that the government does find out about the conduct. First, the company must launch a full investigation and determine the full extent of the conduct. Second, the company must remediate, and the steps that it takes must be objectively reasonable. The culpable employees should be terminated if it is determined that they knowingly committed the acts. If third-party vendors, agents, or distributors are involved, those relationships should be terminated permanently. Third, the company should make whatever changes necessary to its compliance program to ensure that, in the future, similar conduct is prevented, or, at the very least, detected.

If the company takes all of these steps, and the government somehow is alerted to the conduct, the company and its counsel can now go into its meetings with the government with a straight face, commit to cooperate going forward, and provide meaningful presentations on (1) how the conduct was discovered, (2) the thorough investigation that ensued, (3) the remedial steps that were taken, and (4) the changes that were made to ensure that the compliance program is top notch. While this will not secure the benefits discussed above that come with self-reporting, this approach can still lead to an amicable relationship with the government. Moreover, the company can still argue that it has met many of the considerations set forth in the Principles of Federal Prosecution of Business Organizations (*e.g.*, "willingness to cooperate in the investigation of its agents," USAM 9-28.300, no. 4, "existence and effectiveness of the corporation's pre-existing compliance program," *Id.* no. 5, and "the corporation's remedial actions, including any efforts to implement an effective compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies." *Id.* no. 6.). Per the Sentencing Guidelines, while the company will not receive the 5 point subtraction in its Culpability Score for self-reporting, it may still receive a 2 point subtraction for cooperation and acceptance of responsibility, USSG Section 8C2.5(g)(2), and it can state its case for a potential 3 point subtraction for an effective compliance and ethics program. *Id.* Section 8C2.5(f).

If the company does not investigate the conduct fully, ensure that it has ceased, and take steps to remediate, the company may encounter an argument that it is "obstructing justice," which is a situation in which the company, its officers and directors, and its outside counsel never want to be.