The importance of remediation in Foreign Corrupt Practices Act (FCPA) cases

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One of the recent trends in FCPA enforcement is the heightened focus and scrutiny by the US Government on corporate remediation. When a company identifies, investigates and reports misconduct to the government, the government expects a company will take appropriate measures to mitigate the risk of future misconduct, including taking specific steps to strengthen its compliance program. Remediation demonstrates corporate acceptance of responsibility for misconduct and is a critical factor in the Department of Justice's (DOJ) and the Securities and Exchange Commission's (SEC) decision-making in corporate FCPA resolutions. In the context of an FCPA settlement, remediation, along with prompt reporting and extensive cooperation, is a key factor in the government’s determination of whether it should bring charges, the amount of potential penalties to be imposed, and whether to require the appointment of a monitor.

At a recent conference on the FCPA in Washington, DC, Andrew Weissmann, Chief of the DOJ Fraud Section, stated, “One thing that is not getting enough attention is how much the focus is on remediation.” Weissmann further noted that remediation and whether a company has an effective corporate compliance program will have a direct effect on the DOJ’s view as to whether a monitor should be appointed. Companies need to start paying attention.
Remediation and DOJ’s FCPA Pilot Program

In announcing its “Pilot Program” on April 5, 2016, to encourage companies to voluntarily disclose FCPA matters, the DOJ enunciated three key principles for companies to successfully gain “credit” or mitigation of potential penalties in the settlement of a matter. These three principles are: 1) voluntary disclosure, 2) full cooperation, and 3) timely and appropriate remediation. A company could potentially receive a 50% discount off the bottom-end of the US Sentencing Guidelines’ fine range if it voluntarily discloses an FCPA matter, fully cooperates, and takes timely and appropriate remedial action. If a company does not voluntarily disclose but otherwise provides full cooperation and remediation, it can receive up to a 25% discount off the bottom of the Sentencing Guidelines’ fine range. In either case, full cooperation and remediation are prerequisites for obtaining a favorable disposition from the DOJ in an FCPA matter.

In its Pilot Program guidance, DOJ defines remediation as including:

- 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
- Appropriate discipline of employees, including disciplining individuals responsible for misconduct and maintaining a system that provides for the possibility of disciplining others with oversight of responsible individuals
- Any additional steps to demonstrate recognition of the seriousness of the corporation’s misconduct, its acceptance of responsibility and measures to reduce the risk of repetition of such misconduct

DOJ Fraud Section Pilot Program

On April 5, 2016, the DOJ’s Fraud Section, which is responsible for bringing FCPA cases in the US, started a one-year pilot program that encourages companies to self-report on FCPA violations and fully cooperate with the DOJ on investigations:

- Companies that self-disclose, cooperate and remediate may receive up to a 50% discount in fines under the Federal Sentencing Guidelines
- Companies that cooperate and remediate, but did not self-disclose, may receive up to a 25% discount in fines under the Federal Sentencing Guidelines
- Substantial fine discounts are conditioned on companies’ willingness to:
  - Self-disclose misconduct
  - Perform complete investigations that focus on individual employees and fully disclose all relevant information to the DOJ
  - Substantially remediate and take steps to demonstrate acceptance of responsibility, including appropriate disciplining of employees and developing a well-funded, well-staffed and independent compliance department that regularly undergoes quality audits.

See April 5, 2016, Memorandum from Andrew Weissmann, Chief, Fraud Section, DOJ Criminal Division: The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance at: www.justice.gov/criminal-fraud/file/838416/download

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1 See https://www.justice.gov/criminal-fraud/file/838416/download.
2 Id. at pages 7 and 8.
The impact of remediation on DOJ and SEC charging decisions

Remediation and being able to demonstrate an effective corporate compliance program are also significant factors in the government’s initial decision whether or not to bring corporate charges. The DOJ and SEC have both instituted processes for decision-making on whether it is appropriate to bring charges against a corporation for the acts of its employees. Both look at a number of common factors; the DOJ calls them “Filip Factors” and the SEC calls them “Seaboard Factors.” Both agencies include remediation and the effectiveness of the corporation’s compliance program as critical factors in their decision-making on whether to bring charges.

The DOJ’s and SEC’s heightened emphasis on remediation coincides with the agencies’ increased familiarity and understanding of corporate compliance programs. As a result of accumulated experience in the last 10 years of increased FCPA enforcement and the Filip and Seaboard processes, both the DOJ and SEC have become increasingly knowledgeable and sophisticated about how to evaluate the effectiveness of corporate compliance programs. Both agencies in November 2012 authored a Resource Guide to the U.S. Foreign Corrupt Practices Act, which provides guidance about what the agencies view as the “hallmarks” or elements of an effective corporate compliance program. The hallmarks are:

- Commitment from senior management and a clearly articulated policy against corruption
- Code of conduct and compliance policies and procedures
- Oversight, autonomy and resources
- Risk assessment
- Training and continuing advice
- Incentives and disciplinary measures
- Third-party due diligence and payments monitoring
- Confidential reporting and internal investigation
- Continuous improvement: periodic testing and review
- Mergers and acquisitions: pre-acquisition due diligence and post-acquisition integration

DOJ’s Filip Factors

The DOJ’s decision on whether to charge a company and the form of charges is governed by several factors:

- Nature and seriousness of the conduct, including risk posed to the public
- Pervasiveness of the wrongdoing within the company
- Company’s history of similar misconduct
- Company’s timely and voluntary disclosure
- Existence and effectiveness of the company’s pre-existing compliance program
- Company’s remedial actions, including any efforts to implement an effective corporate 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 governmental entities
- Collateral consequences, including potential for disproportionate harm to shareholders, pension holders, employees and others not proven personally culpable
- Adequacy of prosecution of individuals responsible for the company’s malfeasance
- Adequacy of civil remedies or regulatory enforcement actions

SEC Seaboard Factors

In the Seaboard Report, the SEC articulated an analytical framework for evaluating cooperation and determining whether, and to what extent, it will grant leniency to investigated companies. The Report identifies four broad measures of a company’s cooperation:

1. Self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top
2. Self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies and to self-regulatory organizations
3. Remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected
4. Cooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company’s remedial efforts.

See SEC Spotlight: Enforcement Cooperation Program at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml. The Seaboard Factors provide the analytical framework for the SEC’s Division of Enforcement for evaluating cooperation and making charging decisions against entities. The Seaboard Factors were first outlined in the Seaboard Report, an October 2001 Report of Investigation against a public company.

3 See the DOJ U.S. Attorney’s Manual Section 9-28.000, “Principles of Federal Prosecution of Business Organizations” (www.justice.gov/…/usam-9-28000-principles-federal-prosecution-business.org...). These principles are commonly known among white-collar criminal lawyers as “Filip Factors” as they were originally enunciated in a memo issued by then-Deputy Attorney General Mark Filip in 2008.

4 See SEC Spotlight: Enforcement Cooperation Program at https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml. The Seaboard Factors provide the analytical framework for the SEC’s Division of Enforcement for evaluating cooperation and making charging decisions against entities. The Seaboard Factors were first outlined in the Seaboard Report, an October 2001 Report of Investigation against a public company.

These hallmarks are described in further detail in the Resource Guide. The government has also published numerous deferred prosecution agreements (DPAs) and SEC settlement orders in FCPA cases which require settling companies to establish an effective corporate compliance program containing these specific elements.

The DOJ Fraud Section recently took a further step by hiring a compliance program counsel from the private sector, who actively assists prosecutors in making judgments on the effectiveness of a particular target company’s compliance program. DOJ Fraud Section Chief Weissmann stated that the hiring of compliance counsel “will make us more adept at evaluating corporate claims about compliance; to be sure we are holding companies to a high but realistic standard and not having the wool pulled over our eyes.”

Effective remediation was cited as a factor in two 2016 SEC non-prosecution agreements (NPAs) with Akamai Technologies, Inc. and Nortek Inc. In discussing reasons for the NPAs, the SEC highlighted the companies’ prompt reporting and extensive cooperation. The SEC’s FCPA Enforcement Unit Chief, Kara Brockmeyer, also discussed remediation, saying: “Akamai and Nortek each promptly tightened their internal controls after discovering bribes and took swift remedial measures to eliminate the problems. They handled it the right way and got expeditious resolutions as a result.” According to the NPAs, the companies terminated responsible employees for misconduct and “[s]trongened their anti-corruption policies and conducted extensive mandatory training with employees around the world with a focus on bolstering internal audit procedures and testing protocols.” DOJ declined prosecution in both cases.

In two other 2016 Pilot Program cases where the DOJ declined prosecutions, HMT LLC and NCH Corp., DOJ also cited full remediation and steps taken to enhance the respective company’s compliance program and internal accounting controls as reasons for the declinations.

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6 See Q&A with Hui Chen, DOJ Compliance Expert, and Andrew Weissmann, Chief of DOJ’s Criminal Division Fraud Section, by Laura Jacobus, posted February 1, 2016, at www.justice.gov/criminal-fraud/press-releases-speeches-testimony
Companies alerted to the possibility of FCPA violations need to conduct a thorough and independent investigation of the facts as quickly as possible. The investigation needs to include an examination of underlying facts of the misconduct, including who was involved and who was either aware of, or responsible for, oversight of the area where wrongdoing occurred. At some point early in the process, once the company believes that wrongdoing has occurred, it must make a determination whether to disclose wrongdoing to the government. If the company chooses to voluntarily disclose, the DOJ and/or SEC will likely make additional information requests for the company to conduct further investigation and/or conduct its own investigative procedures. This process, particularly in FCPA cases, often involves extensive additional investigation and can take months or years depending on the facts of the investigation.

It is at this point, in addition to conducting these additional investigative procedures, that the company should begin the process of taking remedial action, with the goal to conclude the remediation process before the commencement of settlement talks with the government. Companies often bring in separate advisors to assist in the remediation process. This is especially true for companies conducting lengthy internal investigations as they will want to keep the investigation and remediation work streams separate to ensure continued attorney-client privileged status and confidentiality of the investigation process.

What does remediation look like? That will depend on the facts of the investigation, but will likely include the following:

- Disciplinary action against employees involved in the misconduct and employees who, through lack of oversight or failure to act, allowed the misconduct to occur
- Payment of appropriate compensation to any victims of corporate wrongdoing
- Specific measures to reduce the risk of similar conduct reoccurring in the future. This typically begins with conducting risk assessment procedures to understand the potential risks of similar misconduct occurring in other business locations, other business units or areas of functional responsibility. In scoping and designing such procedures, a company should keep in mind that the government will make judgments about the company’s acceptance of responsibility and good faith by the extensiveness and depth of such procedures.
- Assessing the current state of the company’s corporate compliance program, what gaps in the program allowed the misconduct to occur and how the program should be strengthened going forward. The company will need to take a serious look at its compliance program, whether it is consistent with leading practices and whether it contains all the elements, or “hallmarks,” of an effective compliance program as stated in the SEC and DOJ Resource Guide. The DOJ Pilot Program guidance details the following additional areas the DOJ Fraud Section will likely probe as part of its analysis of the effectiveness of a company’s corporate compliance program:
  - 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 for its effectiveness

The reporting structure of compliance personnel within the company

Addressing the risks identified and gaps or weaknesses in the company’s compliance program by putting in place necessary structures, personnel, processes and policies, internal accounting controls, anti-corruption training, anti-corruption auditing and monitoring mechanisms, including data analytics and technology and any additional measures necessary to promote effective mitigation of the risk of future misconduct, continuous improvement and sustainability of the compliance function

The importance of remediation — internal investigations

Many companies, after conducting a thorough investigation and finding that an FCPA violation has likely occurred, may decide not to voluntarily disclose their findings to the government. In situations where the government is not made aware of allegations or actual misconduct, remediation still remains critically important. Undertaking a thorough investigation to understand what happened and taking appropriate remedial steps will greatly increase the company’s chances of preventing a recurrence of the misconduct. A recurrence could mean future interactions with the SEC or DOJ where the earlier issue may also come to light. If it later comes out that the company did not disclose the earlier issue and also did not remediate, the company will likely face increased scrutiny and harsher treatment from the government, with the increased possibility of civil or criminal liability for management, and possibly the board. Accordingly, remediation is still very important and should be conducted on the scale necessary to reasonably reduce the risk of a repetition of the problem conduct.

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How EY can help

Ernst & Young LLP’s Fraud Investigation and Dispute Services (EY-FIDS) practice is a global practice with more than 4,500 practitioners in over 70 countries who can mobilize quickly to meet the urgent needs of our global clients. EY-FIDS includes former federal prosecutors, former SEC Division of Enforcement investigators, former corporate compliance officers, forensic accountants and forensic technology specialists who have extensive experience in conducting FCPA/corruption investigations, performing corruption and compliance risk assessments, and assisting companies in designing and building anti-corruption compliance programs, including policies, controls, training, auditing and monitoring mechanisms. We bring all these disciplines along with industry experience to assist companies needing to assess and remediate corruption risk.
EY-FIDS has the business knowledge and insight to understand how to assist with implementation of effective compliance policies and internal controls, training and auditing/monitoring mechanisms that are consistent with your business goals.

We have conducted many successful engagements, helping clients:

- Appropriately scope and conduct anti-corruption risk assessments, including gap analyses and providing recommendations for improvement
- Appropriately scope and conduct an existing corporate compliance program assessment, corporate compliance risk assessment and program gap analysis. We advise companies on leading practices for corporate compliance program structures, program elements, governance, qualifications for personnel and reporting structures
- Provide compliance program governance advice, including advice on overall program charter or design, program independence and reporting structure, staffing and resource requirements, personnel qualifications, available technology tools and enhancements, etc.
- Design, build and help implement compliance programs and/or component parts, such as:
  - Compliance communication strategy evidencing the commitment of senior management and providing effective tone at the top
  - Codes of conduct, anti-corruption policies and procedures
  - Anti-corruption financial controls in areas such as gifts, meals and entertainment, petty cash, cash advances, facilitation payments, transactions with high-risk vendors such as agents and consultants, and conducting high-risk activities such as obtaining licenses and permits, customs, dealings with regulatory authorities
  - Third-party anti-corruption risk assessment, due diligence and contracting processes and controls
  - Effective and targeted compliance training
  - Anti-corruption internal auditing process, including audit tools and enablers for conducting anti-corruption audits and monitoring capability utilizing forensic data analytics
  - An effective whistle-blower and internal investigative process
  - An anti-corruption due diligence program for corporate mergers, acquisitions and entering into joint ventures
  - Processes and timetables for additional risk assessment and continuous improvement

We typically conduct remediation and compliance program advisory engagements working with internal and/or external counsel, and the findings from our work and our recommendations and communications are deemed confidential and attorney-client privileged. We have also, on numerous occasions and as a result of client requests, presented the results of our work to the DOJ and SEC.

Recent actions and statements by the DOJ and SEC have put remediation firmly in the government’s spotlight and companies facing government scrutiny need to act. Ernst & Young LLP has the knowledge and experience to help guide a company through this process. Please call us if we can be of assistance.

This paper was written by William T. Henderson, a partner in Ernst & Young LLP’s Fraud Investigation & Dispute Services practice.

Bill is a Certified Public Accountant and licensed (non-practicing) attorney. He was formerly a federal prosecutor with the DOJ Fraud Section and held a senior corporate compliance position at a Fortune 100 company.

Bill can be reached at william.henderson@ey.com or +1 212 773 4389.
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