

Disclosure and Negotiating with the Government – A FCPA Conundrum?-Part II

In yesterday's blog we explored the question of whether a company should self-report a potential FCPA violation to the pertinent US governmental authorities. Today, conclude our two-part series by exploring three issues: (1) What should you disclose; (2) How/When Should you Disclose; and (3) Negotiating the Final Settlement with the Government.

What should you disclose?

Once a company makes a decision to self-report, the next question is what to disclose. The clear weight of advice on this point is that a company should disclose all information about the problem because credibility of your company is on the line. If you underplay the facts it may do more damage in the long run. A company needs to be prepared to explain why the problem arose, what systems worked well or failed and what corrective actions were taken. In other words, what did your company do to prevent the violative conduct, and if such conduct occurred, how was it detected and what did your company do to deter a similar occurrence in the future?

In preparing your company's self-disclosure, there will be several detailed issues which the DOJ and/or SEC will want some answers to. These include:

- How was the conduct discovered?
- How long have you known?
- Who was or is involved? Are they still employed?
- What was the bribe amount and intended benefit?
- When did the conduct occur?
- How were the payments made?
- How has the relevant evidence been secured?
- Have you looked for all related conduct?
- Has the Board/Audit committee been notified?
- Was corrective action taken or is it planned?
- Are local prosecutors involved?

The DOJ and SEC will expect not only full cooperation during the investigation phase but also full communications. This will include briefings on interviews, updates on email findings/document review and presentation of forensic accounting findings. Also during this entire investigation phase, your company should be remediating the specific issue and implementing and updating their compliance program and internal controls. A company will also have to make a decision on how (and when) to deal with the employees involved in the conduct at issue. You should place any employees involved on paid-administrative leave and at some point, you will need to make the decision on whether to terminate the employees from

employment with your company. This final step needs to be considered carefully as it may end all cooperation by those employees.

How/When to Disclose?

After your company has made the decision to self-report, you will need to consider how and when to report. Initially a company should simultaneously self-disclose to both the DOJ and SEC or other applicable agency. There is no advantage to disclosing to only one as both the DOJ and SEC share such information quite quickly. Perhaps a more difficult question is how much investigation to do before disclosure. Once again, Lanny Breuer has suggested that “[a] corporation should seriously consider seeking the government’s input on the front end of its internal investigation.” This allows the DOJ to focus on issues it may see as more important than the company does. Such an example could be if the DOJ has an ongoing, unannounced investigation regarding a certain country and the self-disclosing company has agents in that country, the DOJ may want information on those agents. This could be even if the conduct at issue took place in different part of the world.

The final, and perhaps most difficult, question would appear to be the following: if and when to disclose to a foreign government. A foreign government may react quickly by arresting company officers in its country or take other actions which may seem inconsistent with US judicial proceedings. However, the DOJ has made it clear that it is increasingly cooperating with foreign governments in the fight against corruption so the DOJ itself may put the foreign government on notice.

Negotiating the Settlement

The initial starting point when negotiating a FCPA settlement is that you should retain a former federal prosecutor to lead your negotiating team. Do not have a civil litigation attorney lead this effort. This is because prosecutorial discretion governs the entire process and to understand the ins, outs and implications, your company needs someone who has been through the process from the government’s perspective. Some of this prosecutorial discretion includes whether to prosecute, who to prosecute and what conduct to prosecute.

After these decisions have been made an equally important set of decisions is up next for consideration. These involve the form of the Resolution; will it be a Deferred Prosecution Agreement (DPA); a Non-Prosecution Agreement (NPA), or best yet-a declination for the DOJ. In negotiating with the SEC there will be issues around whether the company will enter into Consent Decree or the SEC will seek and/or obtain a Permanent Injunction.

The next area for discussion will be that of penalties. The first decision will probably be whether or not individuals in the company are to receive any criminal sanctions and if this decision is in

the affirmative, it will certainly have implications for the company. Next will be the penalties, both from the DOJ and SEC, these can be fines, monetary penalties and profit disgorgement; all of which can add up to hundreds of millions of dollars.

Finally will be the decisions regarding post-resolution obligations and the time line for resolution of said obligations. Will an external monitor be involved and if so what will be the terms and conditions of the monitorship? Will your company have to create, enhance or implement a *best practices* compliance policy or a portion thereof, to remediate the conduct at issue? Will there be an increase in your company's compliance staff; will there be a Board mandate, with separate guaranteed funding for compliance issues and initiatives? Finally, how, and at what interval, will your company report its progress to the DOJ and SEC?

The FCPA investigation road can be a long and rocky one. Unfortunately there is no one path that a company can or should follow; each step must be considered, under the facts and circumstances of the company involved. There does appear to be one step that all agree upon and that is that your company must give the DOJ and SEC its full cooperation after an investigation commences, whether through self-disclosure, whistleblowing or other mechanisms.

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