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COMPLIANCE: A SPECIAL REPORT

In FCPA Investigations, Cooperation is Complex

Self-reporting has benefits, like control over the process, but it can be disruptive and revealing.

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An enforcement action by the U.S. Securities and Exchange Commission or Department of Justice can burden even a prepared organization and result in serious financial consequences. With the number of Foreign Corrupt Practices Act actions proliferating across industry types and organization sizes, and fines growing larger each year, it is increasingly important to be prepared to alleviate the impact to the business.

Recent decisions by the SEC and DOJ appear to indicate willingness to mitigate or reduce fines if companies investigate quickly and thoroughly, and transparently share information with the investigating body. This type of cooperative approach may significantly impact the financial fallout of such an investigation, but must be approached carefully.

During an investigation, a corporation can typically expect high legal costs due to the extensive work usually required, including the collection and review of documents located in international jurisdictions, interviewing of personnel in multiple locations and ongoing communication with government regulators. The participation from — or suspension of — key stakeholders within the organization, damage to the brand, lowering of share price and subsequent derivative lawsuits from shareholders are all factors that can cause major disruption.

COOPERATIVE INVESTIGATIONS

Dealing with these issues requires advisers to be experienced with SEC and DOJ investigations and knowledgeable about strategies that can minimize the incidence and impact of penalties.

Cooperation in the context of the Foreign Corrupt Practices Act (FCPA) can be both a very simple and very complex concept. One way to show a willingness to cooperate is to self-report an FCPA violation or assist with an existing government investigation in the hopes of reaching a favorable resolution — taking a helpful rather than adversarial stance.

However, there are varying views of the efficacy of self-reporting. Assistant Attorney General Leslie Caldwell, head of the Criminal Division of the DOJ, has provided some recent guidance on achieving cooperation; earlier this year, she announced a program designed to motivate companies to self-report FCPA-related violations.

As part of the program's present pilot period, companies that voluntarily disclose inappropriate conduct to regulators, fully cooperate and meet other "stringent requirements," may receive leniency and fine reductions.

To be considered cooperative, an investigation must be transparent. Timing is also critical. A corporation can self-report when misconduct is identified internally, which can go a long way toward establishing an open relationship between regulators and those under investigation.

Another benefit is predictability and added control over the process. Cooperation allows a corporation to become a participant in the investigation, offering input on the time line and terms. Remediation is easier as well; instead of waiting for a fine, an organization can spend some of that money to clean up problem areas.

DRAWBACKS AND DECISION-MAKING

There are, however, perceived downsides to FCPA self-reporting and many attorneys may advise their clients against the practice — or at least evaluate each case carefully before they recommend self-reporting. In short, self-reporting can be expensive, disruptive and revealing.

Deciding to self-report — or not — is difficult. Expert counsel should play a leading role in an internal investigation that determines the heart of the problem. Once there is understanding of the nature of the violation, which geographical regions it involved, and the cost of addressing it, it becomes possible to analyze self-reporting benefits and risks.

Data privacy is a key consideration. For international investigations, the movement of information and documents from their original locations to the U.S. for production to regulators can be challenging to say the least. However, the DOJ and SEC take an aggressive position toward obtaining data that resides in other countries if that data is relevant to a U.S.-based FCPA investigation, and are emphasizing that they consider a company's willingness to produce such data as criteria for cooperation.

Cooperation may not always be the right move if a corporation disagrees with the government that there is a problem, or if the issue is minor and can be dealt with discreetly internally. Similarly, organizations with a high tolerance for risk may choose not to cooperate, and gamble on the possibility that the government may not be able to collect enough evidence for a strong case. However, that approach is extremely risky.

One example of this is the 2014 Alstom case, in which the company did not cooperate and suffered harsh penalties — including individual charges against four executives, and a $772 million fine. In reporting this case, the DOJ cited lack of cooperation and brazenness of Alstom's conduct as factors for the size of the penalty. The agency also indicated that the Alstom case would stand as an example for future cases.

The decision to self-report or cooperate on the terms of the regulatory agency ultimately comes down to the corporation weighing all of the pros and cons with counsel and developing a strategy that demonstrates an effort toward doing the right thing. If regulators believe an organization is working in good faith to provide facts and be transparent, they are more likely to work toward a resolution collaboratively.

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