A New Era in FCPA Disclosure

By Lara Covington and Lisa Prager
Holland & Knight

In 2017, the FCPA turns 40. Since its passage, it has evolved from a contested statute with meager enforcement to a venerated law that is aggressively enforced by teams of lawyers and agents in the DOJ, SEC and the FBI. Enforcement trends have shifted over time, such as with the use of independent compliance monitors.

In the past few years, however, the government has heightened its rhetoric surrounding voluntary and complete self-disclosure. The DOJ and SEC have long pushed companies to voluntarily self-disclose, and in so doing touted its myriad benefits. But new policies and rules issued by the government strongly encourage and incentivize disclosure in unprecedented ways. At the same time, an alarming increase in data leaks and the ever-present danger of whistleblowers threaten to reveal or force the disclosure of company information and secrets at every turn.

The net effect of these internal and external pressures is that U.S. companies have never faced more inducements to disclose, nor more risks of inadvertently disclosing, potential FCPA violations.

DOJ and SEC Policies Encouraging, Incentivizing and Requiring Disclosure

In the last 18 months, the DOJ has issued policies and guidance attempting to encourage and incentivize disclosure of detailed information in criminal investigations.

The Yates Memo

On September 9, 2015, then U.S. Deputy Attorney General, Sally Yates, issued a memorandum on “Individual Accountability for Corporate Wrongdoing” to encourage prosecutors to gather from companies’ inculpatory information regarding its corporate executives. The so-called Yates Memo reinforces DOJ policy of focusing on accountability from individuals in corporate investigations and lays out specific steps intended to increase disclosure from companies regarding the actions of the individuals involved in a given investigation.

On November 16, 2015, the Yates Memo’s principles were codified in the U.S. Attorney’s Manual. In particular, USAM 9-28.700 was revised to make clear that “for any company to receive any consideration for cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue.” In other words, providing information about culpable individuals is the threshold that must be crossed to earn cooperation credit. In addition, the DOJ separated “voluntary disclosure” from “cooperation” in the factors to be considered in determining when to charge a corporation under 9-28.300, thus indicating the stand-alone importance of each.

Before the Yates Memo, companies could have earned cooperation credit by timely and voluntarily reporting the facts developed in an internal investigation, providing documents, and making witnesses available. But companies can no longer make the strategic decision to focus on the core group of responsible bad actors to earn cooperation credit. Rather, companies must investigate and identify all the individuals involved in the misconduct and disclose all relevant facts learned to qualify for cooperation credit.

The DOJ FCPA Pilot Program

On April 5, 2016, the DOJ’s Fraud Section unveiled its FCPA enforcement Pilot Program, which, like the Yates Memo, stressed the importance of reporting individual misconduct and voluntarily disclosing such conduct.
The Pilot Program’s primary goal is to incentivize companies to voluntarily disclose FCPA-related misconduct with the aim of promoting greater accountability for individuals and companies that engage in corporate crime.

With the Pilot Program, for the first time, the DOJ offered greater transparency into its calculation of cooperation credit as incentive for self-disclosure. Specifically, companies that voluntarily disclose, cooperate, and remediate are eligible for up to a 50 percent reduction off the bottom of the applicable Sentencing Guidelines range whereas companies that only cooperate and remediate (but do not voluntarily disclose) are eligible for at most a 25 percent reduction. As with the Yates Memo, only companies that disclose “all relevant facts about the individuals involved in the wrongdoing” are eligible for the full cooperation credit. Finally, when it comes to cooperation, timeliness also counts.

See “Going Deep on the Fraud Section’s FCPA Pilot Program” (Apr. 20, 2016); “How Will the Fraud Section’s Pilot Program Change Voluntary Self-Reporting?” (May 4, 2016); and “Earning Cooperation Credit Under the Fraud Section’s FCPA Pilot Program” (May 18, 2016).

SEC Disclosure Requirements

The SEC has followed the DOJ’s lead by issuing a new rule that requires information disclosures, including information that could lead to an FCPA prosecution, for certain companies. Specifically, Rule 13q-1 requires resource-extracting issuers (oil, natural gas, and mining companies) to disclose payments made to U.S. and foreign governments related to the commercial development of oil, natural gas, or minerals. The rule requires disclosure of payment information down to the project level, and includes an anti-evasion provision that requires disclosure of any payments that are part of a scheme to evade the disclosure requirements and thus could reasonably raise corruption concerns.

The SEC required disclosure of such payments to increase transparency in order to deter resource extraction issuers from entering into suspicious or corrupt transactions, combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources. Rule 13q-1 will not only require disclosure of legitimate payments to governments (such as taxes, fees), but will also likely trigger investigation and reporting of suspicious payments or benefits to individual government officials that potentially violate the FCPA.

As a Result, Companies Need to Dig Deeper During Investigations

In the FCPA context, under the Yates Memo and Pilot Program, companies that face allegations of corruption will feel increased pressure to not only act quickly but also to investigate to new depths. Companies have always been expected to conduct thorough investigations, but now they must dig deeper with respect to each individual involved to determine who is responsible for any misconduct and ensure all evidence related to that misconduct is collected, analyzed, and preserved.

Once misconduct is discovered, companies should weigh the risk of non-disclosure against the incentives offered by the Pilot Program. For companies that are resource-extraction issuers, Rule 13q-1 may tilt the scale towards disclosure if the misconduct involves corrupt payments associated with the commercial development of oil, natural gas or minerals that are required to be disclosed to the SEC. For all companies, the decision whether to voluntarily disclose misconduct will be impacted not only by the enticement of cooperation credit under the Pilot Program, but also the fear that such misconduct will be otherwise discovered, as discussed below.

Outsiders and Third-Party Disclosure

Governmental pressure is only one factor in a company’s decision to voluntarily disclose potential FCPA violations,
however. The potential for insiders and/or outsiders to disclose potential misconduct before they do is another. With sensitive information increasingly finding its way into the public domain, companies will likely feel the threat of third-party disclosure and its potential to eliminate a company’s ability to earn cooperation credit under the Pilot Program.

**Whistleblowers**

Corporate insiders turned whistleblowers have long posed a threat of third-party disclosure of potential FCPA violations. Now, they get paid for it.

In 2010, Congress established a whistleblower program to provide monetary incentives for individuals to come forward and report possible violations of the federal securities laws, including the FCPA, to the SEC. Whistleblowers with original information about a possible violation can earn an award of between 10 and 30 percent of the monetary sanctions collected in actions brought by the SEC and related actions.

In May 2016, the SEC paid its first FCPA-related whistleblower award of $3.75 million to a BHP Billiton insider who provided information about FCPA violations during the 2008 Beijing Olympics. As of November, Kara Brockmeyer of the SEC reported an upward trend in FCPA-related tips under the program with 238 received in 2016. With awards of this size and the likelihood of being identified to the government by their companies pursuant to the Yates Memo, corporate insiders are likely to increasingly report outside the company.


**WikiLeaks**

Corporate insiders aren’t the only ones with potentially damaging or sensitive information. Hackers and leakers have presented a new and credible threat to companies who desire to keep their potential misconduct hidden. In 2006, Julian Assange founded WikiLeaks to publish “censored or otherwise restricted official materials involving war, spying and corruption.” Though most of the leaks involve war, foreign affairs and politics, one of the earliest WikiLeaks leaks involved a secret report alleging the theft of more than $1 billion in government money by Kenya’s former president, Daniel Arap Moi and his associates. So far, WikiLeaks has not been connected to any published FCPA enforcement action, but with a searchable database of more than 10 million leaked documents, and more appearing every day, it’s just a matter of time.

**Other Anonymous Leaks**

In 2016, three companies were targeted by anonymous leakers who chose to publish otherwise private company information that could lead to FCPA liability.

**Unaoil**

In March 2016, the Huffington Post and Fairfax Media published the results of a months-long investigation into Unaoil, a Monaco-based firm that provided services to Western companies doing business in the Middle East, Central Asia and Africa. The media report was based on tens of thousands of leaked internal company documents dated from 2003 to 2012.

According to the Huffington Post, the leaked documents show that Unaoil helped U.S. companies like KBR and FMC Technologies win contracts by bribing foreign officials. The media report described specific instances of alleged bribery, including the names of those involved and details of the schemes.

As a result of the media report, Monaco police raided the Unaoil offices, the U.K. Serious Fraud Office opened a criminal investigation into Unaoil and reported multiple sources coming forward with additional information, and KBR and FMC Technologies disclosed they had been contacted by the DOJ and were cooperating.

**Panama Papers**

On the heels of the Unaoil report came the Panama Papers, a leak of 11.5 million files from the Panama-based global law firm Mossack...
Conclusion

As the FCPA looks toward its fifth decade, there are new risks of, and incentives for, third-party disclosure as well as increasing inducements from the governments for companies to thoroughly investigate and voluntarily disclose potential FCPA violations. With disclosure pressure from the inside, outside and the government, the FCPA may be entering a decade of unprecedented disclosure. In this environment, companies with FCPA risk should prepare for eventual disclosure by ensuring that they conduct a thorough investigation of any issues discovered, implement compliance policies and procedures where lacking, enhance existing policies and procedures, discipline or terminate wrongdoers, and document individual involvement. Even where disclosure is not voluntary, taking these steps will better position companies for cooperation credit under the Yates Memo and Pilot Program.

Lara A. Covington is a partner in the Washington, D.C., office of Holland & Knight. She is a white collar defense attorney with experience representing corporations and individuals in connection with government investigations and enforcement actions involving the FCPA, U.S. export controls and economic sanctions laws, and other federal regulatory issues.

Lisa A. Prager is a partner in the New York office of Holland & Knight. She is a white collar defense attorney who focuses on government investigations and enforcement actions relating to the FCPA, U.S. export controls and economic sanctions laws, anti-money laundering laws, the Dodd Frank Act’s whistleblower provisions, global cartels and government contract matters.

Fonseca that came from an anonymous source and were shared with the International Consortium of Investigative Journalists.

The files detailed how Mossack Fonseca helped clients set up shell companies. Though setting up a shell company is not per se illegal, they can be used to hide criminal proceeds or avoid taxes. The files also include documents received by Mossack Fonseca as registered agent for the companies it represented. Some of the leaked documents include contracts and other agreements between Unaoil and clients of Mossack Fonseca, thus providing investigators with further evidence of the companies involved. Indeed, soon after the Panama Papers were released, the SEC said it would review the files for possible violations of the FCPA.

Rio Tinto

Finally, this summer, an unknown person leaked emails involving Rio Tinto, a British-Australian multinational corporation and one of the world’s largest metals and mining corporations. The incriminating emails were posted online temporarily and revealed $10.5 million in payments to a consultant who was close to senior government officials in Guinea and who was involved with Rio Tinto’s acquisition of rights to iron-ore deposits in the Simandou reserves in that country. After the emails were published, Rio Tinto notified the DOJ, SEC, SFO and the Australian Securities and Investments Commission of the emails. Rio Tinto is cooperating with the various government investigations.

See “Effective FCPA Compliance Strategies in the Wake of the Panama Papers” (May 4, 2016).