

Ex-DOJ Criminal Chief Sees Red Flags In FCPA Pilot

By **Evan Weinberger**

Law360, New York (October 26, 2016, 2:44 PM EDT) -- The former head of the U.S. Department of Justice's Criminal Division said Wednesday that a requirement under a pilot Foreign Corrupt Practices Act disclosure program forcing companies to step back from conducting their own investigations raises serious concerns.

Lanny A. Breuer, now the vice chair of powerhouse firm Covington & Burling LLP, said the Justice Department's FCPA pilot program makes "an extraordinary request" by mandating that companies seeking to have the government decline to bring a corruption case must "deconflict" and halt their own internal investigations of potential violations.

By making that request, prosecutors are preventing companies that have self-disclosed a potential FCPA violation to avoid a prosecution, from being able to get their arms around a problem as they normally would. And that can pose a serious problem for management and boards who are trying to address corruption within corporate ranks on their own, Breuer said at the FCPA Blog Conference in New York.

"In general, particularly for publicly traded companies, [they] can't just stand down when such an allegation comes in," Breuer said.

The Justice Department in April had unveiled a pilot program that, for first time, outlined specific perks companies could be in store for if they come clean about foreign bribery they have detected in overseas operations, provided the companies follow certain steps to get the credit.

The pilot program looks to standardize for the first time the benefits of cooperation. Companies that fully meet the Justice Department's criteria could see fines cut in half off the lowest amount recommended by federal sentencing guidelines, or could avoid having to hire a compliance monitor, officials said.

In return, companies will be expected to disgorge profits and will have to let the Justice Department take the lead on any investigations rather than conducting their own internal investigations, among other specific cooperation requirements.

Breuer, who served as the assistant attorney general for the Criminal Division from 2009 through 2013 before returning to private practice, said Wednesday that the pilot program was an example of prosecutors' trying to provide more carrots and sticks meant to encourage companies to self-report violations.

“I would say that on paper ... these are very desirable benefits to the programs,” he said. “But they’re still discretionary.”

And that uncertainty means that the calculus for companies thinking about self-reporting any violations has not significantly changed, Breuer said.

The Justice Department does not have to decline to prosecute and does not have to lower the fines, especially in an environment where the government, particularly the U.S. Securities and Exchange Commission, has developed an aggressive interpretation of the FCPA, he said.

Breuer added that the Justice Department has taken an aggressive stance on what constitutes proper cooperation to reduce penalties, something else that has to be taken into consideration.

And there are also other significant uncertainties, particularly for banks and financial firms that face collateral consequences if they agree to a settlement with the Justice Department.

Banks and other financial firms that are convicted of a criminal penalty, or enter into a nonprosecution agreement, can be barred from advising retirement plans by the U.S. Department of Labor or from conducting banking activities by federal banking regulators.

But when a financial firm enters into an NPA, prosecutors, regulators and defendant financial firms can enter into negotiations to lessen the impact of some of those collateral consequences. That may not be a viable option under the FCPA pilot program, Breuer said.

Banks that have entered the program may not be able to communicate with their regulators about any issues should prosecutors take sole responsibility of an investigation, Breuer said.

The question for Breuer is whether a decision by the Justice Department to decline to prosecute a case accompanied by disgorgement is given the same treatment as an NPA by regulators, which automatically results in a debarment, or treated as a traditional declination to prosecute, where debarment is not automatic.

“This declination might be different, and if it is it might be another carrot,” Breuer said.

To date, there have been only five publicized declinations under the pilot program. None of the firms that have won a declination from the Justice Department are financial firms.

Breuer stressed that he was not criticizing the government, including his former colleagues at the Justice Department, for its interpretations of the FCPA or the questions surrounding the pilot program.

However, he said that attorneys need to bring those questions before clients as they determine whether to self-disclose a potential FCPA violation under the program.

“Candidly, I think if you’re advising a client, you’re doing your client a disservice if you’re not talking about these kinds of issues very openly and comprehensively,” Breuer said.

--Additional reporting by Ed Beeson. Editing by Edrienne Su.
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