

INSIGHTS

DOJ Launches FCPA Pilot Program to Promote Company Self-Reporting

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In a speech delivered last Wednesday by Assistant Attorney General Leslie Caldwell, the Justice Department's ("DOJ") Criminal Division announced the launch of a new Foreign Corrupt Practices Act ("FCPA") "pilot program" that encourages companies to voluntarily self-disclose FCPA-related misconduct in return for significant credit. The pilot program, effective April 5, 2016, and intended to span one year with the option to be extended, represents yet another push from the DOJ Fraud Section's FCPA Unit to intensify its investigative and prosecutorial efforts. In conjunction with the speech, DOJ released a nine-page "Foreign Corrupt Practices Act Enforcement Plan and Guidance" memorandum (the "Guidance"), available [here](#).

According to the Guidance, "The pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement." The Guidance further provides that it serves as a complement to the recently published Yates Memo on prosecuting individual defendants:

"The principal goal of this program is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs. If successful, the pilot program will serve to further deter individuals and companies from engaging in FCPA violations in the first place, encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations, and, consistent with the memorandum of the Deputy Attorney General dated September 9, 2015 ("DAG Memo on Individual Accountability") [the "Yates Memo"], increase the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove."

Corporate counsel may wonder how the pilot program departs from the longstanding corporate cooperation credit that DOJ encapsulated in its Principles of Federal Prosecution of Business Organizations (the "USAM Principles"). Though DOJ notes that the Guidance does not supplant the USAM Principles, the Guidance sets forth potential credit specific to FCPA matters that go "above and beyond" those previously provided for in the USAM Principles or the Sentencing Guidelines. Under this new pilot program, companies that opt to self-disclose, rather than wait to respond to a government investigation, will be eligible for significant benefits in the type of disposition, the extent of reduction in fine, and the determination of the need for a monitor. But in order to qualify for credit, a self-reporting company must meet more exacting standards than those defined in the USAM Principles. These include:

- Voluntary disclosure made by the company “prior to an imminent threat of disclosure or government investigation,” and “within a reasonably prompt time after becoming aware of the offense.” Company disclosure should include all relevant facts known, including the identity of potentially culpable individuals.
- Full cooperation. This entails “proactive” disclosure of all facts relevant to the investigation, preservation and disclosure of documents and information (including findings from internal investigations), providing employees and officers for interview, as well as disclosure of overseas documents and identifying foreign third-party witnesses. DOJ has recognized, however, that it does not expect a company “to investigate matters unrelated in time or subject to the matter under investigation in order to qualify for full cooperation credit.”
- Timely and appropriate remediation, which includes both bolstering and auditing the company’s compliance programs, performing risk assessments, and appropriate disciplining of employee misconduct.

In return for compliance with these three factors, the company will qualify for “the full range of potential mitigation credit,” including a prosecution declination. In cases where a criminal resolution is warranted, the company may be eligible for a “50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought,” and may be saved from the appointment of a monitor if it demonstrates implementation of an effective compliance program.

But take note, the FCPA pilot program is not akin to platforms such as the Antitrust Division's Leniency Program; though a company may indeed garner credit if it opts to self-report a FCPA violation under the pilot program, doing so does not automatically grant the company amnesty. If the self-reported violation is significant enough, or if other factors sway prosecutors away from granting credit, DOJ can still elect to charge a self-reporting company, and with that, impose significant financial consequences. If anything, the institution of the FCPA pilot program formalizes the longstanding benefits to self-reporting that have been well known to counsel for some time now.