

April 6, 2016

DOJ Announces a Pilot Program to Encourage Companies to Self-Report FCPA Violations

On April 5, 2016, the U.S. Department of Justice (“DOJ”) released an FCPA “Enforcement Plan and Guidance” memorandum announcing a one-year pilot program that is designed to “motivate[e] 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.”¹ The pilot program, which applies to business organizations only, provides new guidance concerning mitigation credit offered in relation to FCPA prosecutions that is separate from, and in addition to, any mitigation credit available under the Sentencing Guidelines.

The pilot program reflects an effort by DOJ “to increase transparency regarding charging decisions in corporate prosecutions,” which was described in recent statements by Assistant Attorney General Leslie Caldwell as one of DOJ’s top priorities.² The program also is designed to “increase the Fraud Section’s ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered” by making full disclosure of individual wrongdoing a condition of full cooperation by business organizations.³

In order to qualify for full mitigation credit under the pilot program, a company must (1) voluntarily self-disclose; (2) fully cooperate with a DOJ investigation; and (3) remediate, as appropriate, internal controls and compliance programs.

A. Self-Disclosure

A central aim of the pilot program is to encourage companies to self-disclose FCPA-related misconduct. The program guidelines establish voluntary self-reporting as an essential requirement for receiving

¹ U.S. Dep’t of Justice, The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance 2 (the “Memorandum”) (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download>. In addition to the pilot program, the memorandum also announces other enhancements to DOJ’s FCPA enforcement framework, including an increase in DOJ and FBI staff dedicated to FCPA prosecutions and enhanced collaboration efforts with foreign authorities.

² Leslie Caldwell, Assistant Attorney General, Dep’t of Justice, Remarks at American Conference Institute’s 32nd Annual International Conference on FCPA (Nov. 17, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference>.

³ Memorandum 2.

maximum mitigation credit. While companies may still receive partial credit for full cooperation, even if they do not voluntarily self-report, DOJ's announcement makes clear that voluntary disclosure will make a critical and meaningful difference in terms of the magnitude of the mitigation credit for which a company is eligible.

The memorandum also represents DOJ's first formal definition of what "voluntary" means in the context of FCPA self-reporting. For disclosure to be considered "voluntary," it must not be required by law, agreement, or contract and must occur "prior to an imminent threat of disclosure or government investigation."⁴ Additionally, the company must show disclosure was made reasonably promptly and incorporated all known relevant facts, including those specific to the individuals involved.

B. Cooperation

In order to qualify for full mitigation credit, companies must fully cooperate with DOJ's investigation. The memorandum notes that "[c]ooperation comes in many forms," and that a company is expected only to engage in an "appropriately tailored" investigation, which is "what typically should be required to receive full cooperation credit."⁵ In case of doubt, companies are encouraged to consult with Fraud Section attorneys concerning the scope of the investigation.

The pilot program's guidelines on cooperation are consistent with DOJ's recent emphasis on holding individuals as well as companies accountable for FCPA violations. The guidelines include the explicit requirement that companies provide all known facts concerning individual misconduct. The memorandum also makes clear that attribution of factual reporting to specific sources (within the bounds of the attorney-client privilege) is required for cooperation credit, suggesting at least the possibility that companies may need to be prepared to provide DOJ with summaries of individual witness interviews conducted during an investigation.

While assessment of cooperation is case-specific, in order to qualify for cooperation credit, a company must meet the following requirements:

- Timely disclosure of all relevant facts, including those relating to the individuals involved;
- Proactive, not reactive, cooperation, including identifying opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government;
- Preservation, collection, and disclosure of relevant documents;
- Timely updates on the company's internal investigation;

⁴ *Id.* at 4.

⁵ *Id.* at 6.

- If requested, de-confliction of the company's investigation with the government investigation;
- Disclosure of all facts relevant to potential criminal conduct by all third-parties;
- If requested, making relevant officers and employees available for interviews, including former employees and those located overseas (subject to those persons' Fifth Amendment rights);
- Disclosure of all relevant facts gathered during the company's investigation with attribution to specific sources (if not subject to the attorney-client privilege), not a general narrative of the facts;
- Disclosure of overseas documents, the location where those documents were found, and who found them (except where impossible due to foreign law);⁶
- Facilitation of third-party document and witness production from foreign jurisdictions, unless legally prohibited; and
- Where requested and appropriate, provision of translations of documents.

As noted above, companies can receive partial credit for cooperation even if they do not initially choose to cooperate or fail to meet all of the guidelines, so long as they report all relevant facts pertaining to individual misconduct.

C. Remediation

The program also offers mitigation credit for efforts to remediate flaws in a company's internal controls or anti-corruption compliance program. While the memorandum states that remediation "can be difficult to ascertain and highly case specific," it also provides guidelines regarding what remediation efforts will merit credit.⁷ These guidelines heavily focus on the compliance function and personnel, and include several specific prescriptions.

As an initial matter, under the pilot program, companies must be eligible for cooperation credit in order to be eligible for any remediation credit. If a company has earned cooperation credit, then the additional requirements for remediation credit are:

- Implementing an effective compliance and ethics program, the criteria for which will be periodically updated and may vary based on the size and resources of the organization. Current criteria include: (a) establishing a culture of compliance, including awareness among employees that criminal conduct will not be tolerated; (b) dedicating sufficient resources to the compliance function; (c) employing qualified and experienced compliance personnel; (d) ensuring the independence of the compliance function; (e) performing an effective compliance risk assessment and tailoring the compliance program to it; (f) appropriately compensating and promoting

⁶ If the company asserts that foreign law prohibits the disclosure of overseas documents, it has the burden of showing such a prohibition applies and no alternative basis for disclosure exists.

⁷ *Id* at 7.

compliance personnel relative to other employees; (g) effectively auditing the compliance program; and (h) establishing an effective reporting structure of compliance personnel within the country;

- Appropriate discipline of employees, and a system that provides for disciplining individuals with oversight of those responsible for misconduct and considers how compensation is affected both by disciplinary infractions and failure to supervise adequately; and
- Any additional steps that demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility, and the implementation of measures to reduce the risk of repetition (including measures to identify future risks).

D. Credit for Business Organizations under the Pilot Program

Finally, the memorandum also discusses the specific “amount” of credit a company can earn by participating in the program. Regardless of a company’s self-reporting, cooperation, or remediation efforts, the memorandum indicates that disgorgement of profits related to an FCPA violation is a baseline expectation for mitigation credit.

A company that meets all three requirements of the pilot program—voluntary self-disclosure, cooperation, and remediation—and also disgorges profits can receive up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range. Additionally, if the company has implemented an effective compliance program at the time of resolution, DOJ typically will not require the appointment of a monitor.

In some circumstances, full compliance with the pilot program can even result in declination to prosecute, and the memorandum suggests that declination is more likely if a company takes part in the program. The memorandum also makes clear, however, that a declination to prosecute will be unlikely if senior management takes part in misconduct, if the company makes a relatively significant profit from the misconduct, or if there has been a prior resolution between the company and DOJ within the past five years.

As noted above, companies that do not self-report can still be eligible for partial credit if they fully cooperate and remediate, but the memorandum makes explicit that any credit awarded will be “markedly less” than that offered to companies that self-disclose, thus granting voluntary self-disclosure⁸ a novel significance in FCPA enforcement. At most, companies that do not self-disclose can receive a 25% reduction from the bottom of the Sentencing Guidelines fine range.

At the conclusion of a year, the DOJ intends to assess the effectiveness of the pilot program and make a determination as to whether to continue it in its present or some other form.

⁸ *Id.*

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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