

## CLIENT ALERT

### And Now the Carrots: DOJ Announces FCPA Self-Reporting Pilot Program

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On April 5, 2016, the Fraud Section of the Department of Justice's Criminal Division launched a one-year pilot program under which companies can receive tangible credit for self-reporting violations of the Foreign Corrupt Practices Act. The rewards for self-reporting, cooperation, and remediation can include avoidance of a corporate monitor, a substantial fine reduction, or declination of prosecution entirely.

In a memorandum released yesterday, Fraud Section Chief Andrew Weissmann highlighted recent enhanced enforcement efforts, including the 50 percent increase in FCPA Unit prosecutors, the establishment of three FBI International Corruption Unit squads devoted to FCPA investigations, and the further strengthening of cooperation with international law enforcement bodies.

In connection with the release, Assistant Attorney General Leslie Caldwell said that incentivizing companies to self-report FCPA misconduct and cooperate by offering tangible benefits will also enhance the Fraud Section's ability to prosecute culpable individuals. In this respect, the pilot program is a logical next step following the September 9, 2015, Individual Accountability memorandum issued by the Deputy Attorney General (Yates Memorandum).

In addition, AAG Caldwell stressed that the pilot program was part of DOJ's ongoing effort to bring more transparency to the Department's process of resolving FCPA cases, stating:

[T]ransparency informs companies what conduct will result in what penalties and what sort of credit they can receive for self-disclosure and cooperation with an investigation. This, in turn, enables companies to make more rational decisions when they learn of foreign corrupt activity by their agents and employees.

#### The Requirements

The three factors the Fraud Section's FCPA Unit will evaluate under the pilot program are whether a company: (1) self-reports FCPA misconduct, (2) cooperates fully with the Fraud Section's investigation, and (3) remediates the misconduct.

##### 1. Voluntary Self-Disclosure

Disclosure must be fulsome and timely. Mirroring the language of the Yates Memorandum, a company must disclose "all relevant facts about the individuals involved in any FCPA violation" in order to meet this factor. *Self*-disclosure requires that a company discloses before any "imminent threat" of third-party disclosure or government investigation. A disclosure that a company is required to make by law or agreement is not considered voluntary.

##### 2. Cooperation

The cooperation criteria set forth in the Yates Memorandum provide the minimum standard for a company to receive any mitigation credit under the pilot program. The Yates Memorandum requires "disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the

corporation’s officers, employees, or agents.” Full cooperation credit under the pilot program, however, also requires “proactive” disclosure, the identification of relevant evidence not in the company’s possession or overseas, as well as facilitation of production of that evidence, document preservation, translation of documents where requested, availability of officers and employees for interviews, transparency of any internal investigation, “including attribution of facts to specific sources where such attribution does not violate the attorney-client privilege,” and provision of facts related to potential criminal conduct by third-party companies and individuals.

### 3. Remediation

Timely remediation and disgorgement of profits from FCPA misconduct are also prerequisites to receiving mitigation credit under the pilot program. Notably, remediation efforts will only be considered if the minimum cooperation standard from the Yates Memorandum has been met. With the help of recently hired Compliance Counsel [Hui Chen](#), the Fraud Section is refining the benchmarks by which it will assess companies’ compliance programs and other remediation efforts. Generally, a company must implement an effective compliance and ethics program, discipline employees responsible for misconduct—and possibly those who failed to supervise the responsible employees—and consider the discipline’s effect on compensation, and take any additional measures necessary to reduce the repetition of misconduct and to identify future risks.

### The Potential Rewards

Under the pilot program, DOJ may decline to prosecute companies that fully satisfy each factor. Alternatively, where a formal disposition is warranted, the FCPA Unit may discount the fine imposed by up to 50 percent off of the low end of the U.S. Sentencing Guidelines fine range. In addition, the Fraud Section will generally not impose a monitor where the company has implemented an effective compliance program by the time of resolution. Examples of circumstances that warrant criminal resolution rather than declination are the involvement of executive management in FCPA misconduct, relatively significant profits to the company from the misconduct, and a recidivist history.

Partial credit is also possible under the pilot program. For example, where a company fully cooperates and remediates FCPA violations, but did not voluntarily self-disclose, the company can receive up to a 25 percent reduction from the low end of the U.S. Sentencing Guidelines fine range.

### What Happens Next?

At the end of the one-year pilot period, the Fraud Section will determine whether to extend or modify the program. If the program expires, the pilot program framework will still apply where companies initiated self-disclosure and cooperated during its brief existence.

While DOJ has long sought to assure companies that it is in their best interest to voluntarily report FCPA violations, this more formalized program arguably makes that difficult decision less of a leap of faith. It is akin in some respects to the [corporate leniency program DOJ has applied to criminal antitrust violations](#) for more than 20 years, which has been successful in incentivizing corporate wrongdoers to step forward. Under the right circumstances, the pilot program may well shift the calculus for some companies debating whether to self-report FCPA violations to the government.

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