



## Government & Internal Investigations ADVISORY ■

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### DOJ's New FCPA Pilot Program Provides Roadmap for "Cooperation"

By Bill Jordan, Ted Kang, Matt Dowell and Kristen Kuan

The Department of Justice (DOJ) on April 5 announced a new, one-year pilot program for companies to self-report Foreign Corrupt Practices Act (FCPA) violations. The announcement comes amid other increased FCPA enforcement activities, including adding 10 prosecutors to the Criminal Division's FCPA unit and establishing three new FBI squads devoted to FCPA investigations. One of the explicit goals of the pilot program is to encourage companies to come forward with evidence of wrongdoing to help the DOJ prosecute individuals, a main Criminal Division priority summed up in last September's Yates Memo. (Prior coverage of the Yates Memo is available here: [The Yates Memo and the DOJ's Focus on Individuals](#).) Indeed, the ramifications of the new FCPA program will extend beyond anticorruption investigations since the program provides further guidance on what the DOJ means by "cooperation" – which is a controversial, and evolving, term.

The DOJ may consider several types of credit to companies that satisfy the pilot program's requirements, including declination of prosecution, up to a 50 percent reduction from the bottom of the applicable Sentencing Guidelines fine range and no appointment of a potentially costly corporate monitor. Even companies that don't self-report are still eligible to receive up to a 25 percent fine discount. Notably, credit awarded under the program is in addition to any cooperation credit a company may receive under the Sentencing Guidelines.

The pilot program ostensibly only applies to the DOJ's FCPA enforcement. But it is likely that federal prosecutors will look to the program's requirements when assessing cooperation and remediation in other contexts, including health care and financial fraud investigations. That could make it even harder for companies to qualify for cooperation credit under the more lenient U.S. Attorneys' Manual definition.

#### **Program Requirements**

To qualify for credit under this program, companies must self-disclose (or only be entitled to a reduced fine reduction), fully cooperate and institute appropriate remediation.

Self-disclosure must occur before a government investigation is imminent and must be made "within a reasonably prompt time" after the company becomes aware of the violation. Notably, the self-disclosure must identify all relevant facts known about the individuals involved.

Cooperation must be “proactive” and not “reactive” and must include timely disclosure of all relevant facts, including those about the company’s officers, employees and agents and any third parties. The company must also provide regular updates to the government about its internal investigation and facilitate (where possible) the disclosure of overseas documents and interviews with key witnesses. The company must also “de-conflict” its internal investigation with the government’s investigation when necessary. A full list of what cooperation entails is in the DOJ’s memorandum.

What constitutes appropriate remediation is “highly case specific.” But it likely requires implementation of an effective compliance program, discipline of bad actors (possibly including their supervisors) and other steps that show the company is taking its misconduct seriously.

## Implications

The pilot program builds on the Yates Memo and the November 2015 revisions to the U.S. Attorneys’ Manual focused on cooperation and individual accountability. The pilot program, however, is more restrictive than the U.S. Attorneys’ Manual in two main ways:

First, the pilot program makes self-disclosure a requirement for full credit (partial credit is available if there is no self-disclosure) and requires remediation for any credit. Although the U.S. Attorneys’ Manual encourages self-disclosure and remediation—and both are factors to consider when deciding whether to indict—it does not require them for cooperation credit. See USAM §§ 9-28.700, 9-28.900, 9-28.1000.

Second, the pilot program provides relatively specific examples of what full cooperation entails. This includes: (1) disclosure of relevant facts regarding third parties; (2) providing overseas corporate documents and facilitating the discovery of overseas documents from third parties; (3) regular updates to the government on the company’s internal investigation; and (4) translation of foreign documents.

In theory, the roadmap in the pilot program should translate into more predictable results when a company self-discloses. But there is still sufficient ambiguity in the program that could lead to unpredictability. For starters, the pilot program is not binding on the DOJ. The benefits of the program also extend only to companies, not individuals. Moreover, the program creates in many ways a multifactor, totality of the circumstances test that is open to interpretation. For example, what constitutes a “reasonably prompt” self-disclosure? What are “all relevant facts”? How will the DOJ deal with the attorney-client and work product privileges? The memo announcing the program even notes that what constitutes adequate remediation is “highly case specific.” Therefore, the DOJ still retains significant discretion in determining whether companies are eligible for credit under the program, and factors such as the severity of the underlying conduct, the completeness and promptness of the disclosure and the level of remediation undertaken will play a major role. Companies, in other words, should be cautious when predicting whether they will qualify for credit under the program.

One sure thing about the program is that it will be used to point companies to further guidance on what the DOJ means by “cooperation.” This evolving term, which may be applied differently by different prosecutors, is important for companies to keep in mind in any investigation, regardless of whether the company is in a self-disclosure mode or a more defensive mode.

The DOJ’s press release is available here: [Criminal Division Launches New FCPA Pilot Program](#). A copy of the memo outlining the program is available here: [The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance](#).

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