

DOJ Launches FCPA Pilot Program for Voluntary Self-Disclosure – What does it offer?

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On April 5th, 2016, the Department of Justice (“DOJ”) announced the Foreign Corrupt Practices Act Enforcement Plan and Guidance (“Guidance”) which aims to ensure greater accountability for Foreign Corrupt Practices Act (“FCPA”) violations and provide greater transparency for companies with regard to mitigation. The Guidance launches a pilot program that provides even further mitigation possibilities to companies which fulfill the conditions set out in the Guidance. The pilot program will be effective for a year, starting from April 5th, 2016.

Before delving into the pilot program, the Guidance points out the two other ways the DOJ targets to increase accountability. The first of these is an increase in FCPA enforcement resources. The second is an increase in international cooperation between law enforcement authorities around the world.

The third and the last method through which the DOJ aims to increase accountability is the pilot program. The pilot program opens the door for more mitigation opportunities by the DOJ, in case companies (i) voluntarily self-disclose, (ii) cooperate fully and (iii) remediate timely and appropriately with regard to FCPA matters. Accordingly, the pilot program aims to motivate companies to voluntarily self-disclose, deter FCPA violations and encourage companies to enact strong compliance programs.

What are the credits for companies under the program?

The Guidance sets out a twofold mitigation system depending on how much one complies with the pilot program. The first option is for companies who fully undertake the aforementioned three conditions of the pilot program. Such companies may (i) be awarded up to a 50% fine reduction from the bottom end of the U.S. Sentencing Guidelines fine scale and (ii) not be appointed a compliance monitor, given the existence of an already effective compliance program.

The second option is applicable to those companies which fail to disclose but fully cooperate with the DOJ and fully remediate. Such companies may be awarded utmost a 25% fine reduction from the bottom end of the U.S. Sentencing Guidelines fine scale. The Guidance further points out that when the conditions of the pilot program are met, the DOJ may consider a declination decision.

How can companies be eligible for the pilot program?

In order to be eligible under the pilot program, companies have to (i) voluntarily self-disclose, (ii) cooperate fully and (iii) remediate timely and appropriately with regard to FCPA matters.

- *Voluntary Self-Disclosure:*

Not every self-disclosure is deemed voluntary by the DOJ. In order for a self-disclosure to be deemed voluntary, it should not have been made due to any laws, agreements or contracts. In addition, the disclosure will have to be made (i) prior to an imminent threat of government action; (ii) in a reasonably prompt time following the company being aware of the conduct and (iii) by disclosing all facts known to the company, including about individuals involved. According to the Guidance, it is the company's burden to prove the timeliness of the disclosure.

- Full Cooperation:

The following are the demanding criteria to be considered as fully cooperative under the pilot program:

- Disclosure of all facts regarding the wrongdoing and individuals involved in criminal acts on a timely basis,
- Proactive and not reactive cooperation; this means that the company should provide all information that it has with regard to the violation, rather than just answering the questions asked by the government,
- Preservation, collection and disclosure of all relevant documents and information,
- Timely updates regarding the company's internal investigation,
- De-confliction of an internal investigation with DOJ, if requested,
- Provision of all facts relevant to the potential criminal conduct by third parties,
- Making the employees, including the ones abroad and former, available for interviews,
- Disclosure of all relevant facts gathered during the company's investigation,
- Disclosure of overseas documents, their location and who found them,
- Translation of relevant documents and
- Facilitation of third party production of documents and witnesses from foreign jurisdictions.

The Guidance emphasizes that full cooperation does not require a waiver of attorney-client privilege. Further, companies may decline to provide the abovementioned information where foreign laws prevent them from doing so. However, it will be the company's burden to establish the foreign law prohibition.

- Timely and Appropriate Remediation:

Eligibility under this criterion should be evaluated on a case by case basis. However, the following is said to be generally required:

- An effective compliance program is crucial, which includes but is not limited to the following:
 - (i) Whether the company has a culture of compliance,
 - (ii) Dedication of sufficient resources to compliance,
 - (iii) Whether the compliance function is independent,
 - (iv) Whether the compliance program is based on the appropriate risk assessment and tailored accordingly,
 - (v) The quality and experience of the compliance personnel,
 - (vi) How the compliance personnel compensated and promoted when compared with the other employees,
 - (vii) The auditing of the compliance program,
 - (viii) Reporting structure of the compliance personnel,
- An appropriate disciplining system for employees and
- Any further steps that recognizes the seriousness of the corporation's misconduct.

All in all, the Guidance is another effort by the DOJ to make sure that the FCPA violations are sanctioned and deterred. Companies are encouraged to self-disclose to get reductions on heavy fines imposed by way of the pilot program. The effectiveness of the pilot program for the following year will determine if the pilot program is to settle into general DOJ practices.

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