

DOJ Announces Extension of FCPA Pilot Program

Article By:

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The US Department of Justice plans to extend its FCPA Pilot Program, an initiative developed to encourage companies to self-report bribery violations and provide extensive cooperation in exchange for reduced penalties, ranging from reductions in fines to declinations.

On March 10, Acting Assistant Attorney General (AAAG) Kenneth A. Blanco [announced](#) that the US Department of Justice (DOJ) plans to temporarily extend its Foreign Corrupt Practices Act (FCPA) Pilot Program, which provides “mitigation credit” for companies that voluntarily disclose FCPA misconduct, provide full cooperation, and engage in appropriate remediation. In a speech delivered to the American Bar Association National Institute on White Collar Crime, AAAG Blanco championed the Pilot Program as a way of providing “prosecutors, companies and the public [with] clear metrics for what constitutes voluntary self-disclosure, full cooperation and full remediation,” and stated that the program “will continue in full force until we reach a final decision” about its utility and efficacy. The Pilot Program, which was launched on April 5, 2016 as a “one-year” initiative, had been set to conclude next month. This extension announcement follows the DOJ’s issuance of a new [guidance on compliance programs](#) last month.

To date, the DOJ has issued five [declinations](#) to companies under the Pilot Program despite encountering evidence of bribery. Two of the companies that received declinations were required by the DOJ to disgorge illegal profits. While the DOJ did not require the other three companies to disgorge profits or pay fines, they were each subject to separate FCPA enforcement actions brought by the US Securities and Exchange Commission (SEC) that resulted in disgorgement and/or other penalties.

Pilot Program—Eligibility and Potential Benefits

The DOJ [launched its Pilot Program](#) in April 2016 to try to encourage more companies to voluntarily disclose misconduct, provide full cooperation, and engage in remediation. In exchange, the DOJ offered mitigation credit—“up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought”—and the possibility of a declination.

Voluntary Self-Disclosure

A company must voluntarily disclose an FCPA violation to the DOJ in order to be eligible for the full

mitigation credit. As a preliminary matter, the disclosure must be truly voluntary—a disclosure that the “company is required to make, by law, agreement, or contract” would not constitute voluntary self-disclosure for purposes of this pilot. Second, the disclosure must occur “prior to an imminent threat of disclosure or government investigation” and be “within a reasonably prompt time after becoming aware of the offense,” with the burden on the discloser to demonstrate timeliness. Finally, the disclosure must include “all relevant facts known to [the company], including all relevant facts about the individuals involved in any FCPA violation.

Full Cooperation

The DOJ expects companies to comply with nearly a dozen requirements in order to be eligible for cooperation credit under the Pilot Program. Those requirements fall under the following four categories:

- **Disclosure of Relevant Facts:** Companies are expected to disclose “all facts relevant to the wrongdoing at issue” on a timely basis, including “all facts related to involvement in the criminal activity by the corporation’s officers, employees, or agents” and “all facts relevant to potential criminal conduct by all third [parties].” Disclosure is expected to be “proactive” rather than “reactive,” and facts relevant to the investigation should be voluntarily provided “even when [companies are] not specifically asked to do so.” In addition, disclosures are expected to include “all relevant facts gathered during a company’s independent investigation.”
- **Preservation and Disclosure of Documents:** All relevant documents—as well as “information related to their provenance”—are expected to be collected, preserved, and disclosed. This expectation extends to “overseas documents” and important details about those records such as their location and the individuals who discovered them. In some cases, prosecutors may insist that companies provide translations of foreign-language documents. Finally, it is expected that companies will assist with the “third-party production of documents . . . from foreign jurisdictions.”
- **Making Individuals Available for Interviews:** Upon request, companies are expected to “mak[e] available for [DOJ] interviews those company officers and employees who possess relevant information,” including—where appropriate and possible—individuals located overseas as well as those who no longer work for the company.
- **Conducting Transparent and Coordinated Internal Investigations:** Companies are expected to provide timely updates about their internal investigations and, where requested, ensure that such investigations do not conflict with those being conducted by the government.

The guidance notes that “cooperation comes in many forms,” and that the DOJ “does not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company.”

Remediation

The final requirement is “timely and appropriate remediation,” and the following items generally will be required in order for companies to receive remediation credit:

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- **Implementation of an Effective Compliance Program:** While the criteria depend on the size and resources of the organization, the following factors are normally considered:
 - Whether the company has established a “culture of compliance”
 - Whether the company has sufficient compliance resources
 - The quality and experience of the compliance personnel
 - The independence of the compliance function
 - Whether the company’s compliance program has performed an effective risk assessment and tailored the compliance program based on that assessment
 - How a company’s compliance personnel are compensated and promoted
 - Auditing of the program to ensure its effectiveness
 - The reporting structure of compliance personnel within the company
 - **Discipline of Culpable Employees:** It is expected that not only will companies discipline culpable employees, but that they have systems that provide for the possibility of disciplining others with oversight of the responsible individuals.
 - **Acceptance of Responsibility and Implementation of Reforms:** Companies are expected to recognize the seriousness of the misconduct, accept responsibility for it, and implement reforms to identify and reduce the risk of similar violations.

Credit

Where the above conditions are met but a criminal resolution is warranted, the DOJ (1) may accord up to a 50% reduction off the “bottom end” of the Sentencing Guidelines fine range if a fine is sought; and (2) generally should not require appointment of a monitor if the company has, at the time of resolution, implemented an effective compliance program.

Furthermore, where the same conditions are met, the DOJ will consider a declination of prosecution. In doing so, prosecutors must balance the importance of encouraging disclosure against the seriousness of the offense. In assessing the seriousness of the offense, prosecutors consider involvement by executive management in the FCPA misconduct, the size of the ill-gotten gains in relation to the overall revenue of the company, any history of noncompliance by the company, and any prior resolutions by the company with the DOJ in the last five years.

Finally, if the company cooperates and remediates but has not voluntarily disclosed, the DOJ may provide partial mitigation credit, but will not agree to more than a 25% reduction off the bottom of the Sentencing Guidelines fine range.

Implications

While it is unclear how long the DOJ will extend its Pilot Program beyond the April 5, 2017 deadline

and whether the existing program will ultimately form the basis for a more permanent enforcement protocol, the temporary renewal signals that the DOJ is dedicated to its goal of encouraging reporting, cooperation, and remediation. Today's announcement, coupled with the DOJ's recent compliance program guidance, also signals that the DOJ is interested in advancing programs and initiatives from the prior administration that promote investment in and attention to corporate compliance.

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National Law Review, Volumess VII, Number 69

Source URL: <https://www.natlawreview.com/article/doj-announces-extension-fcpa-pilot-program>