THE FIRST NINETY DAYS OF THE FCPA UNIT'S PILOT PROGRAM

Date: 5 July 2016

Foreign Corrupt Practices Act/Anti-Corruption Alert; Appearing also in *Law360* (11 July 2016)

By: Meghan E. Flinn

On April 5, 2016, the Department of Justice ("DOJ") introduced a yearlong "Pilot Program" to guide the conduct of investigations and prosecutions pursuant to the Foreign Corrupt Practices Act ("FCPA"). Announced by Assistant Attorney General Leslie Caldwell, the Pilot Program seeks to bring "transparency" to FCPA investigations and "accountability" to the subjects of those investigations.[1] In the weeks following the announcement, commentators questioned whether the Pilot Program could satisfy its dual objectives. The DOJ then issued two declination letters pursuant to the Pilot Program, demonstrating, for the first time, the tangible benefits available through compliance with its provisions.[2]

Looking back at the first 90 days of this initiative, we revisit the concerns initially raised in response to the Pilot Program and weigh the significance of the declination letters, which appear to represent the DOJ's attempts to address those concerns. Although uncertainties remain that may prevent the Pilot Program from meaningfully influencing corporate decision-making in the short term, initial observations demonstrate a real commitment to decreasing the length and burden of FCPA investigations and equipping corporate boards with a road map for efficient FCPA compliance programs.

SUMMARY OF THE PILOT PROGRAM

Fraud Section Chief Andrew Weissmann outlined the details of the Pilot Program in a guidance document titled *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*.[3] The guidance identifies the Pilot Program's three primary requirements—self-disclosure, cooperation, and remediation—and describes the standards for meeting these requirements, pulling from components of the Principles of Federal Prosecution of Business Organizations ("USAM Principles"),[4] the U.S. Sentencing Guidelines, and the DOJ's recently issued guidance on individual accountability for corporate wrongdoing (the "Yates Memo").[5] Additionally, the guidance specifies the mitigation credit a company can receive if it acts in accordance with these standards when managing an FCPA investigation.

VOLUNTARY SELF-DISCLOSURE

In order to receive credit for self-disclosure under the Pilot Program, a company must disclose criminal conduct prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time of becoming aware of it, and in a manner that discloses all relevant facts known by the company.[6] The disclosure

©2005-2026 K&L Gates LLP. All Rights Reserved.

does not count for purposes of mitigation if it is made pursuant to a law, agreement, or contract that independently requires disclosure of the conduct.[7] That is, the disclosure must be truly voluntary.

FULL AND DEMONSTRATED COOPERATION

The guidance defines 11 measures that a company must take in order to receive the cooperation credit afforded by the Pilot Program.[8]

- Timely disclosure of all facts relevant to the wrongdoing at issue, including facts related to the involvement of the corporation's officers, employees, or agents;
- Proactive cooperation;
- Preservation, collection, and disclosure of relevant documents and information;
- Provision of timely updates on any ongoing internal investigation;
- "De-confliction" of an internal investigation with the government's investigation, when requested;
- Provision of facts relevant to potential criminal conduct by all third parties, including individuals;
- Availability of company officers and employees for interview by the government;
- Disclosure of all relevant facts gathered in the company's internal investigation and the specific sources of those facts to the extent that the disclosure can be made without violating the attorney-client privilege;
- Disclosure of overseas documents, except where foreign law prohibits such disclosure;
- Facilitation of the third-party production of documents and witnesses from foreign jurisdictions, except where legally prohibited; and
- Translation of relevant documents.

The "scope, quantity, quality, and timing of cooperation," as set forth by these requirements, may vary based on the circumstances of each case.[9] For example, compliance with the Yates Memo alone should qualify a company for some cooperation credit, though "the credit generally will be markedly less than for full cooperation."[10] Overall, the DOJ will look for "an appropriately tailored investigation" when considering cooperation credit.[11]

TIMELY AND APPROPRIATE REMEDIATION

This last requirement of the Pilot Program centers on the company's efforts to minimize the recurrence of criminal conduct. In evaluating remediation efforts, the DOJ will first evaluate a company's compliance and ethics program.[12] The DOJ will consider:

- Whether the company has established a culture of compliance, i.e., the employees are aware that criminal conduct "will not be tolerated";
- Whether the company supports compliance with sufficient resources;

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Whether compliance personnel "can understand and identify the transactions identified as posing a potential risk";
- Whether the compliance function is independent;
- Whether the compliance program has performed an effective risk assessment and adjusted its program accordingly;
- How compliance personnel are compensated and promoted;
- How the compliance program is audited; and
- How reporting is structured with respect to compliance personnel.

To receive credit for remediation, the company must also demonstrate appropriate discipline of any employees responsible for misconduct and those overseeing such employees. Further, the company must have taken steps that "demonstrate recognition of the seriousness of the corporation's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct."[13] Importantly, to receive credit for compliance efforts, a company must be eligible for cooperation credit.[14]

ALLOCATION OF CREDIT

The credit provided by the Pilot Program goes beyond that available under the Sentencing Guidelines, and the primary factor is self-disclosure. If a company fails to self-disclose FCPA misconduct, but later cooperates and remediates appropriately, it may receive "at most a 25% reduction off the bottom of the applicable Sentencing Guidelines fine range."[15] Alternatively, if a company has voluntarily self-disclosed FCPA misconduct in accordance with the standards set forth by the Pilot Program, while also fully satisfying the cooperation and remediation requirements, it may receive up to a 50% reduction. Satisfaction of all three requirements—voluntary disclosure, cooperation, and remediation—will also generally relieve the company from appointment of a monitor as part of the resolution. In some cases, the DOJ may consider declining prosecution depending on "countervailing interests, including the seriousness of the offense."[16] Regardless of the credit received by the company, it will be required to disgorge all profits gained from the FCPA misconduct at issue.[17]

To read the full alert, click here.

Notes:

[1] Press Release, Leslie R. Caldwell, Assistant Att'y Gen., Crim. Div., U.S. Dep't of Justice, *Criminal Division Launches New FCPA Pilot Program* (Apr. 5, 2016), *available at* https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

[2] Letter from Daniel Kahn, Deputy Chief (Fraud Section), Crim. Div., U.S. Dep't of Justice, to Luke Cadigan, K&L Gates LLP ("Nortek Letter") (June 3, 2016), *available at* https://www.justice.gov/criminal-fraud/file/865406/download; Letter from Daniel Kahn, Deputy Chief (Fraud Section), Crim. Div., U.S. Dep't of Justice, to Josh Levy, Esq., Ropes & Gray LLP ("Akamai Letter") (June 6, 2016), *available at* https://www.justice.gov/criminal-fraud/file/865411/download.[3] Memorandum from Andrew Weissmann, Chief (Fraud Section), Crim. Div., U.S. Dep't of Justice, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), *available at* https://www.justice.gov/opa/file/838386/download.

©2005-2026 K&L Gates LLP. All Rights Reserved.

[4] U.S. Dep't of Justice, U.S. Attorneys' Manual, tit. 9, *Principles of Federal Prosecution* (last updated Dec. 2014), *available at* https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution.

[5] *See* Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Justice, *Individual Accountability for Corporate Wrongdoing* (the "Yates Memorandum") (Sept. 9, 2015), *available at* https://www.justice.gov/dag/file/769036/download.

[6] Weissmann, *supra* note 3, at 4.

[7] *Id.*

[8] The DOJ will consider a company's claim that compliance with one or more of these requirements is "impossible" because of impediments such as conflicting foreign law. *Id.* at 5 n.3. The company, however, bears the burden of establishing such circumstances. *Id.*

[9] *Id.* at 6.

[10] *Id.* at 7.

[11] Id.

[12] *Id.* at 7–8.

[13] *Id.* at 8.

[14] *See id.* at 7 ("[I]n other words, a company cannot fail to cooperate and then expect to receive credit for remediation despite that lack of cooperation.").

[15] *Id.* at 8.

[16] *Id.* at 9.

[17] *Id.* at 9 n.6.

KEY CONTACTS



MEGHAN E. FLINN
PARTNER

WASHINGTON, DC
+1.202.778.9458
MEGHAN.FLINN@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.

©2005-2026 K&L Gates LLP. All Rights Reserved.