



GLOBAL INVESTIGATIONS AND COMPLIANCE

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About Navigant

Navigant Consulting, Inc. (NYSE: NCI) is a specialized, global professional services firm that helps clients take control of their future. Navigant's professionals apply deep industry knowledge, substantive technical expertise, and an enterprising approach to help clients build, manage and/or protect their business interests. With a focus on markets and clients facing transformational change and significant regulatory or legal pressures, the Firm primarily serves clients in the healthcare, energy and financial services industries. Across a range of advisory, consulting, outsourcing, and technology/analytics services, Navigant's practitioners bring sharp insight that pinpoints opportunities and delivers powerful results. More information about Navigant can be found at navigant.com.

DOJ LAUNCHES FCPA SELF-REPORTING PILOT PROGRAM

I. BACKGROUND

On April 5, 2016, Assistant Attorney General Leslie R. Caldwell ("AAG") announced the launch of a one-year pilot program ("Pilot Program") intended to "...build on the September 9, 2015 Individual Accountability memorandum issued by the Deputy Attorney General" ("Yates Memo"), which provided guidance to Department of Justice ("DOJ") attorneys on holding individual employees accountable for corporate wrongdoing. The Pilot Program, which becomes effective immediately, is memorialized in a memorandum entitled "The Fraud Section's Foreign Corrupt Practices Act ("FCPA") Enforcement Plan and Guidance"² and is intended to

promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs. If successful, the pilot program will serve to further deter individuals and companies from engaging in FCPA violations in the first place, encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations.³

The Pilot Program provides guidance on the nature and scope of credit that companies can expect to receive under the U.S. Sentencing Guidelines depending on whether (1) they self-disclose FCPA violations; (2) cooperate with DOJ; and (3) timely and appropriately remediate. For example, timely self-disclosure, full and timely cooperation, and comprehensive remediation can result in a 50% reduction from the bottom end of the U.S. Sentencing Guidelines fine range and would not require the appointment of a monitor.

As part of the Pilot Program's goal to promote accountability, DOJ also announced that it has increased the amount of resources devoted to the investigation and prosecution of FCPA cases. The increased resources are intended to "...send a message to wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light."⁴

1. *DOJ Principles Regarding Corporate Cooperation and Individual Accountability for Corporate Wrongdoing*, Ellen Zimiles and Jay Perlman, Navigant November 2015 http://www.navigant.com/-/media/WWW/Site/Insights/GIC/GIC_YatesMemoClientAlert_TL_1115_FINAL.PDF.

2. U.S. Department of Justice - Fraud Section, Memorandum from the Chief of the DOJ Fraud Section Andrew Weissmann, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance, April 5, 2016, ("Pilot Program"), available at <https://www.justice.gov/opa/file/838386/download>.

3. See Pilot Program at pg. 2.

4. See Pilot Program at pg. 2.



II. INTENSIFIED INVESTIGATIVE AND PROSECUTORIAL EFFORTS

In announcing the Pilot Program, the AAG made clear that FCPA enforcement remains a top priority of DOJ due to the fact that, “Bribery of foreign officials harms those who play by the rules, siphons money away from communities, and undermines the rule of law” and that DOJ’s goal is to maintain a “robust and transparent enforcement program.”⁵ In furtherance of this goal, DOJ has taken the following steps:

- A. Added ten prosecutors to its FCPA unit. This represents a 50% increase;
- B. The FBI has added three new squads of special agents devoted to FCPA investigations and prosecutions; and
- C. Increased coordination with its foreign counterparts.

III. PILOT PROGRAM GUIDELINES

The Pilot Program provides increased guidance, clarity and transparency on the criteria required to receive credit for self-disclosure, cooperation and remediation, and details regarding the amount of credit that may be received based on fulfilling some or all of the criteria described in the Pilot Program. Simply stated, the three criteria on which credit is based are the following: First, a company must make a voluntary self-disclosure of the FCPA violation; second, the company then must provide full and complete cooperation to DOJ; and finally, the company must timely and comprehensively remediate. As detailed below, the amount of credit a company is eligible to receive changes drastically based on fulfillment of the above criteria. It is important to note that under the Pilot Program, companies are required to fully disgorge any profits resulting from the FCPA violations. In addition, nothing in the Pilot Program is intended to suggest that the government can require business organization’s to voluntarily self-disclose, cooperate or remediate.

5. Criminal Division Launches New FCPA Pilot Program, Courtesy of Assistant Attorney General Leslie R. Caldwell of the Justice Department’s Criminal Division (April 5, 2016), available at <https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program>.

The table below outlines the scope of credit companies could to receive under the U.S. Sentencing Guidelines depending on the criteria/action they take related to self-disclosure.

CRITERIA	SAMPLE KEY REQUIREMENTS TO QUALIFY	FULL MITIGATION CREDIT	PARTIAL MITIGATION CREDIT
Voluntary Self-Disclosure	<ul style="list-style-type: none"> Disclosure must occur “prior to an imminent threat of disclosure of government investigation.” Disclosure must occur “within a reasonably prompt time after becoming aware of the offense;” and the company discloses all relevant acts and individuals involved in the violations. 	If a company (1) voluntarily self discloses; (2) provides full cooperation; and (3) timely and comprehensively	Company does not voluntarily self-disclose.
Full Cooperation ⁶	<ul style="list-style-type: none"> The company must meet the requirements detailed in the Yates Memo regarding disclosure of violations committed by individuals; company officers and employees who possess relevant information must be made available for interviews (subject to the individuals’ Fifth Amendment rights); all relevant documents and information must be preserved and properly sourced; and all findings from an independent investigation that do not violate the attorney-client privilege must be provided. 	remediates, the company is eligible to receive up to a 50% fine reduction off the lower end of the Sentencing Guidelines. In addition, the company would most likely not require a monitor if the company has appropriately remediated.	If a company (1) provides full cooperation; and (2) timely and comprehensively remediates, the company is eligible to receive up to a 25% off the lower end the Sentencing Guidelines will be received.
Timely and Appropriate Remediation	<p>The company must first satisfy the criteria of Full Cooperation. Assuming the company has provided Full Cooperation, DOJ requires:</p> <ul style="list-style-type: none"> the implementation an effective compliance and ethics program;⁷ discipline of the employees involved in the violations. 	DOJ will also consider a declination of prosecution. ⁸	A monitor may still be required. DOJ will not consider a declination of prosecution.

6. See Pilot Program at pg. 5.

7. An effective compliance program varies based on the size and resources of the company, but will generally include: (1) an effective culture of compliance; (2) sufficient compliance resources; (3) the quality and experience of compliance resources; (4) the compliance function is independent of business; (5) an effective risk assessment and procedures tailored to the identified risks; and the (6) periodic audit of the compliance program to ensure its continued efficacy.

DOJ recently created the position of compliance counsel to review the compliance programs of companies under investigation for violations of the FCPA. The creation of this position demonstrates their commitment to carefully review and assess a company’s compliance program before making a decision to prosecute a company or impose certain penalties.

8. See Pilot Program at 9. In considering whether a declination is warranted, DOJ will also consider countervailing interests, including the seriousness of the offense. For example if executive management is involved in the misconduct, there is significant profits to the company as a result of the misconduct, there is a history of non-compliance or a prior resolution with DOJ in the previous five years, a declination would be unlikely.

IV. WHAT THIS MEANS FOR MULTINATIONAL COMPANIES

Companies now have additional clarity on information previously available in the public domain through FCPA case dispositions, recent guidance associated with the Yates Memo, and speeches given by senior DOJ officials. Additionally, companies now have the benefit of a written framework that details potential fine reductions and other incentives for FCPA matters, which company counsel should find helpful when advising clients on whether to self-disclose a violation to the government. At the same time, while the Pilot Program guidance should lead to more consistency in charging decisions at the DOJ Fraud Section, it may also ultimately result in the prosecution of more individuals, which is an area of renewed emphasis for DOJ in the wake of the financial crisis. Especially in light of this latest guidance, companies should, if they have not yet done so, implement strong risk-based anti-corruption compliance programs to avoid FCPA violations.



V. ABOUT NAVIGANT'S GLOBAL INVESTIGATIONS AND COMPLIANCE PRACTICE

Navigant's Global Investigations and Compliance practice brings critical expertise and resources to clients to assist them with identifying, assessing and managing the compliance and business risks related to financial economic crimes, money laundering, sanctions, bribery and corruption matters, investigative due diligence, FATCA, monitoring and investigations related to fraud, waste and abuse.