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FCPA Pilot Program Extension Not Necessitate “Rush to Disclose”



On March 10, 2017, at the annual ABA White Collar Conference in Miami, Kenneth Blanco, Acting Assistant Attorney General for the DOJ's Criminal Division, announced that the FCPA Pilot Program would stay in place beyond its current April 5, 2017 expiration date so the DOJ could "begin the process of evaluating the utility and the efficacy, whether to extend it and what revisions if any we should make to it."

Blanco went on to say: "The program will continue, however, in full force until we reach a final decision on those issues." Companies should not view this development as reason though to accelerate their self-disclosure analysis. In first announcing this program in April 2016, the DOJ was trying to incentivize companies to voluntarily disclose and remediate FCPA violations by offering up leniency in fines and other penalties as well as providing more transparency on its decision to decline certain cases. (See <http://tinyurl.com/zrdeh2k> for more about the program). However, some of these same incentives had routinely been found in settlements even before the program was piloted. And it's not a sure thing that whatever comes next now—after the DOJ self-examination—would result in harsher fines or penalties even if a company held back from self-disclose after immediately discovering an FCPA issue. In fact, given the administration's prior pronouncements on enforcing the FCPA (or not), it's equally, if not all the more, likely that the next "program" could contain even more significant incentives for companies to proactively engage with the government. And more leniency may be in the offing, regardless of whether companies self-disclosed immediately or only had cooperation to offer where the DOJ had already independently learned of the possible FCPA violations. In sum, the "rush to disclose" should not necessarily trump a company's own full and measured internal evaluation of possible FCPA red flags. Until there is more clarity on the value the current DOJ places on cooperation with or without self-disclosure, the best approach remains to carefully assess whether there is truly something significant worth disclosing and to fully understand the myriad of consequences arising from such disclosure. This is the prudent course even in the face of the "blue light special" that appears to have just been announced.

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