



The [Washington Post reported last week](#) that the DOJ is considering an internal policy that could give some companies a "free pass" if they voluntarily disclose violations of the FCPA, including information regarding culpable employees.

The proposed policy—which is under review and has not yet been adopted—strongly recommends that prosecutors decline to bring criminal charges against companies who self-report violations and cooperate in any resulting government investigations. According to the Post, such declinations could be accompanied by a financial penalty amounting to a disgorgement of company profits. If adopted, the policy would likely increase incentives for companies to be forthcoming about any wrongdoing. And although the DOJ has long-touted the premium it places on self-disclosure in the FCPA sphere, the proposed policy would provide companies with much-needed guidance and certainty regarding the tangible benefits of such cooperation. The DOJ has declined

to comment publicly on the proposed policy. The Post, however, has reported that some within the DOJ fear that the prospective change may be too lenient on companies, especially those who have engaged in egregious misconduct. One official, who spoke on the condition of anonymity, commented that while providing companies with increased transparency is laudable, the draft policy "lets [companies] off the hook too easily." Other commentators, however, see the proposed policy as an incentive to keep compliance programs on their toes. [Last month, DOJ spokesman Peter Carr noted](#) that the department is "currently focusing on bigger, higher impact cases," raising the question of whether a perceived decline in overall enforcement coverage may make it more difficult for the DOJ to keep an eye on smaller and medium-sized companies. By offering clearer incentives for companies to self-monitor and disclose potential violations, the DOJ may be seeking to encourage companies of all sizes to maintain active and robust internal compliance programs in order to take advantage of more lenient treatment in the event of a potential issue. The proposed policy may also be seen as a reaction to the Yates Memorandum issued earlier this fall, and the possible chilling effect on self-disclosure that may have accompanied the memo. [As previously discussed on this blog](#), the Yates Memorandum details a plan to strengthen the DOJ's pursuit of individual corporate wrongdoers, and notes that companies will only receive cooperation credit if they provide information related to any individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority. Some commentators have argued that this "all or nothing" approach to cooperation credit may dampen self-disclosure, as companies reassess the relative benefits of cooperation with the extensive resources—and potential individual exposure—that are arguably required to receive such credit in a post-Yates framework. If the DOJ does in fact issue new guidance regarding the effects of self-disclosure and cooperation on charging decisions, companies will have another factor to add to this analysis.

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