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DOJ CRIMINAL DIVISION'S CORPORATE ENFORCEMENT POLICY: IS 2023 THE YEAR OF THE CARROT?

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The US Department of Justice (DOJ) continues to try to dispel lingering skepticism over the benefits of corporate disclosure and cooperation. In remarks delivered on January 17, Assistant Attorney General (AAG) Kenneth A. Polite, Jr. announced the first significant changes to the DOJ Criminal Division's Corporate Enforcement Policy (CEP) since the CEP was initially announced in 2017. The revised CEP provides guidance to prosecutors for how to assess and treat corporate offenders.

The January 17 updates outlined the DOJ's goal to provide greater clarity and incentives to companies for voluntary self-disclosure of wrongdoing and cooperation with DOJ investigations. Practitioners could easily characterize 2022 as the "Year of the Sticks," defined by a renewed focus on individual accountability as evidenced by the 250 individuals the Fraud Section convicted, the reemergence of corporate monitors, and the still-to-be-better-understood chief compliance officer certification. Given that, these "carrots" are a noteworthy effort at counterbalancing.

THE CARROTS

The Criminal Division of the DOJ has been encouraging companies to self-disclose misconduct voluntarily for years, dating back well before the announcement of the Foreign Corrupt Practices Act Pilot Program back in April 2016, which became the CEP over time. However, the lack of clarity and concrete benefits of disclosure, as well as the significant discretion that was left in the hands of prosecutors, engendered both concern and skepticism.

Recognizing that companies may be hesitant to affirmatively raise misconduct to the DOJ, the prior CEP guidance sought to provide a significant incentive for voluntary self-disclosure—the potential for a declination rather than a criminal resolution. However, the

AUTHORS

AMY E. SCHUH
PARTNER
Philadelphia

AMANDA B. ROBINSON
PARTNER
Washington, DC

SANDRA MOSER
PARTNER
Washington, DC / Philadelphia

JUSTIN D. WEITZ
PARTNER
Washington, DC

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presumption that the DOJ would decline to prosecute only applied if the company had voluntarily self-disclosed the misconduct, fully cooperated in the DOJ investigation, and timely and appropriately remediated the wrongdoing, and only in the absence of certain aggravating circumstances.

Some examples of aggravating circumstances include "involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct [defined as significant proportionally relative to the company's overall profits]; egregiousness or pervasiveness of the misconduct within the company; or criminal recidivism."

Incentives Even Where Aggravating Factors Exist

In recognition of the importance of voluntary self-disclosure to DOJ enforcement efforts, the revised CEP seeks to provide an incentive for companies, even where aggravating circumstances exist. The revisions state that a company may still receive a declination if the company can demonstrate that it has met each of the following three factors:

1. The voluntary self-disclosure was ***made immediately upon the company becoming aware*** of the allegation of misconduct.
2. ***At the time of the misconduct and the disclosure***, the company had an ***effective compliance program and system of internal accounting controls*** that enabled the identification of the misconduct and led to the company's voluntary self-disclosure.
3. The company provided ***extraordinary cooperation*** with the DOJ's investigation and undertook extraordinary remediation.

Companies facing facts and circumstances that prevent a declination do not walk away empty-handed from the revised CEP. If the above factors are met and a criminal resolution is still warranted, the new guidance permits the Criminal Division to recommend "at least 50%, and up to 75% off of the low end of the U.S. Sentencing Guidelines fine range, except in the case of a criminal recidivist." Prior guidance offered a maximum of 50% off the low end. Further, in these circumstances, the DOJ generally will neither require a corporate guilty plea nor generally require the imposition of a corporate monitor.

Incentives Absent Voluntary Self-Disclosure

Voluntary self-disclosure is not the only behavior that the DOJ wants to incentivize—full cooperation and full and timely remediation are also critical components of any corporate enforcement action. Under the revised CEP, the Criminal Division will now recommend up to a 50% reduction off the low end of the US Federal Sentencing Guidelines' fine range for companies who failed to voluntarily self-disclose, but fully cooperated with the government and fully and timely remediated the issue—in other words, twice the maximum amount of a reduction available under the prior version of the CEP.

THE PERILS AND CHALLENGES OF COMPLYING WITH THE REVISED CEP

The January 17 updates are consistent with prior DOJ pronouncements and the Biden administration's more aggressive

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enforcement approach to corporate crime. As AAG Polite warned, "failing to self-report, failing to fully cooperate, failing to remediate, can lead to dire consequences." Moreover, the remarks were peppered with public policy pronouncements, reinforcing the DOJ's number one focus of holding individual wrongdoers accountable and ensuring that companies invest in compliance to prevent and detect criminal conduct from occurring in the first place.

The Company Voluntarily Self-Disclosed Immediately Upon Becoming Aware of the Misconduct Allegation

As previously outlined in the Monaco memo, the DOJ is seeking companies to voluntarily self-disclose issues "immediately upon the company becoming aware of the allegation of misconduct." In practice, rushing into the Criminal Division upon receipt of an allegation of criminal conduct is unlikely. Unlike prior standards, like "credible evidence" of illegal conduct, the mere receipt of an allegation of criminal conduct is an extremely low bar for disclosure. Allegations can sometimes be vague or can include the names of employees and even senior executives just for affect or impact. Internal investigation teams have a responsibility to fully understand the nature of the allegation through intake and initial assessments before they can make informed decisions about the credibility and import of the allegation and even who might be involved in the alleged misconduct, all of which should occur prior to disclosure. It will be interesting to watch just how "immediate" DOJ's expectations are.

Requirement to Demonstrate the Existence of an Effective Compliance Program at the Time of the Misconduct and at the Time of Voluntary Self-Disclosure

In order to benefit from the DOJ's revisions, companies faced with aggravating factors are now required to demonstrate that their compliance program was effective at both the time of the misconduct and at the time of the disclosure—a potentially insurmountable hurdle for companies faced with an aggravating factor. It is arguable that the presence of an aggravating factor could by definition mean the company lacked an effective program at the time of the misconduct.

Companies will be well served to ensure that they have a strong "speak up" culture, coupled with a robust reporting and investigations process, which enables immediate escalation of allegations regarding criminal misconduct to its legal and/or compliance-led investigations team to ensure timely assignment of the investigation to qualified resources who can adequately and timely investigate the allegations.

Is It Feasible To Be "Extraordinary"?

As part of his remarks excerpted above, AAG Polite noted that companies must provide "extraordinary" cooperation and remediation if they hope to qualify for a declination in the face of aggravating circumstances, under the new policy. "Extraordinary" goes above and beyond the expectations of "full" cooperation and remediation as outlined in the prior CEP—and the expectations for "full" cooperation are not a low bar. The DOJ is no longer looking for "gold standard cooperation"—they want companies to go platinum. What that means remains unclear.

As outlined in the prior and revised CEP, to receive credit for "full cooperation" many criteria must be met: companies are expected to disclose "all non-privileged facts relevant to the wrongdoing at issue" on a timely basis; 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;" all relevant documents—as well as "information related to their provenance"—are expected to be collected, preserved, and disclosed; and companies are expected to "mak[e] company officers and employees who possess relevant information available for [DOJ] interviews."

There is no bright line in the revised policy for when cooperation goes from just "full" to "extraordinary," but it will invariably include all the above aspects and more. In his remarks, AAG Polite suggested a few actions that prosecutors highly value, focused on individuals, that may help tip the scale toward "extraordinary": immediate individual cooperation, with individuals available for interviews and allowing for the collection evidence from hard-to-get sources, such as personal electronic devices; and testifying at a trial or providing information that leads to additional convictions.

To be sure, there are potential perils associated with trying to achieve "extraordinary cooperation" credit. For example, the DOJ is expecting companies to provide to it documents from foreign countries that may have challenging or prohibitive privacy or blocking statutes, and for those who cannot legally do so, it is placing the onus on those companies to explain why, articulate what steps they have taken to facilitate the document production, and problem solve for the government on how the company may obtain access to such documents.

In addition, the DOJ has stated that failure to retain, collect and produce business records residing on personal devices or in ephemeral messaging applications may evidence a failure to cooperate. The Monaco memo promised future guidance to companies on how to accomplish this demanding and potentially impossible task; that guidance is still forthcoming.

Further and importantly, companies risk the potential for others, including plaintiffs in shareholder derivative suits or individual defendants, to claim the company waived the attorney-client privilege as a result of its "extraordinary cooperation" with the DOJ, which could have a significant follow-on impact to the company.

Given the DOJ's opaque "we know it when we see it" guidance regarding what constitutes "extraordinary cooperation," companies and boards may not find this carrot particularly appealing. A key consideration for companies will be whether their "extraordinary cooperation" comes at a price long term—what may help a company secure this brass ring may hurt it in future shareholder derivative and other follow-on litigations.

So, as always, the decision to self-disclose and parameters around cooperation will continue to present thorny issues for companies and their boards. The question remains, of course, whether companies and their boards will find these carrots appetizing.

CONTACTS

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following:

Authors
Amy E. Schuh
Amanda B. Robinson
Sandra Moser
Justin D. Weitz
Erica A. Jaffe

Chicago
Megan R. Braden
Tinos Diamantatos

Houston
B. Scott McBride
John W. Petrelli

Miami
Alison Tanchyk

New York
Kelly A. Moore
Martha B. Stolley
Daniel B. Tehrani

Philadelphia
Meredith S. Auten
John C. Dodds
Lisa C. Dykstra
Rebecca J. Hillyer
Ryan P. McCarthy
Zane David Memeger
John J. Pease III
Amy E. Schuh
Eric W. Sitarchuk
Jaclyn Unis Whittaker

Seattle
Angelo Calfo
Patty Eakes
Harold Malkin
David Howard

Washington, DC
W. Barron A. Avery
Douglas W. Baruch
Giovanna M. Cinelli
Brad Fagg
Kathleen McDermott
Scott A. Memmott
Sandra Moser
Kenneth J. Nunnenkamp
Amanda B. Robinson
Justin D. Weitz
Jennifer M. Wollenberg
Howard J. Young