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How Appetizing Will Cos. Find The DOJ's New Carrots?

By **Amy Schuh, Amanda Robinson and Erica Jaffe** (January 26, 2023, 2:30 PM EST)

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The U.S. Department of Justice continues to try to dispel lingering skepticism over the benefits of corporate disclosure and cooperation.

In remarks delivered Jan. 17, Assistant Attorney General Kenneth Polite announced the first significant changes to the DOJ Criminal Division's corporate enforcement policy since the CEP was initially announced in 2017.

The revised CEP provides guidance to prosecutors for how to assess and treat corporate offenders.

The Jan. 17 updates outline the DOJ's goal to provide greater clarity and incentives to companies for voluntary self-disclosure of wrongdoing and cooperation with DOJ investigations.[1]

Practitioners could easily characterize 2022 as the year of the sticks, defined by a renewed focus on individual accountability as evidenced by more than 250 Fraud Section convictions of individuals, corporate monitors' reemergence, and the introduction of chief compliance officer certifications, which still require more clarity.

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 later evolved into the CEP.

However, the lack of clarity as to the 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 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, according to the new CEP, 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.[2]

Incentives Even Where Aggravating Factors Exist

In recognition of the importance of voluntary self-disclosure to DOJ enforcement efforts, the revised CEP — which extends beyond the FCPA space to the Criminal Division as a whole — 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 disclosure, the company had an effective compliance program and system of internal accounting controls, which 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 under 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 U.S. 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 Jan. 17 updates are consistent with prior DOJ pronouncements and the Biden administration's more aggressive enforcement approach to corporate crime.

As Polite warned, "failing to self-report, failing to fully cooperate, failing to remediate, can lead to dire consequences."

Moreover, the remarks reinforced the DOJ's stated chief objectives: holding individual wrongdoers accountable and ensuring that companies invest in compliance to detect and prevent criminal conduct from occurring in the first place.

Immediate Voluntary Self-Disclosure Upon Learning of Misconduct Allegation

As previously outlined in Deputy Attorney General Lisa Monaco's memo from last September,[3] the DOJ wants 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, which incentivized disclosure upon learning of credible evidence of illegal conduct, the mere awareness of an allegation of potential criminal conduct is an extremely low bar for disclosure. Allegations can sometimes be vague, or they can include the names of employees and even senior executives just for effect 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.

Still, as ever, companies that receive a potentially disclosable allegation should weigh the potential for the DOJ discovering the misconduct through other means. And, in view of the Monaco memo's emphasis on timely cooperation, companies should be mindful of potential investigative hurdles that the DOJ may face in light of delayed disclosures.

Demonstrating an Effective Compliance Program at Time of Misconduct and 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.

Arguably the presence of an aggravating factor could, by definition, signal that 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 promptly investigate the allegations.

Is It Feasible, or Desirable, to Be Extraordinary?

As part of his remarks excerpted above, 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 relating to their provenance" — are expected to be collected, preserved and disclosed.

- 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 transitions from full to extraordinary, but it will invariably include all the above aspects and more.

In his remarks, Polite suggested a few actions 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 produce documents from foreign countries that may have challenging or prohibitive privacy or blocking statutes.

When local laws preclude such production, the DOJ has placed 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.

Were a court to agree that a company has waived the privilege, it could result in the company being compelled to expose legal advice it has received to adversaries.

It might also compromise the privileged nature of internal investigations, potentially exposing the company and individuals to additional civil and criminal liability.

Additionally, companies that provide exemplary cooperation could run the risk of opening the door to claims by any charged employees that the company essentially became part of the prosecution team, potentially opening a Pandora's box of additional headaches and obligations.

Courts have been increasingly interested in such claims in recent years; followed to their logical conclusion, such claims seek to impose the government's discovery obligations in criminal cases — which include the duty to produce various classes of exculpatory evidence — on cooperating companies.

Such an obligation would put a cooperating company in the awkward position of being both a subject of an investigation and, in such a scenario, a member of the investigative team.

Given the DOJ's undefined, we-know-it-when-we-see-it guidance regarding what constitutes extraordinary cooperation, companies and boards may not find this carrot particularly appetizing.

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.

Finally, the Monaco memo instructed that each DOJ component promulgate a voluntary self-disclosure regime by the end of 2022. We have yet to see these standards published outside of the Criminal Division; other components' policies, when released, may provide guidance as to the DOJ's overall view of self-disclosure.

As always, the decisions to self-disclose and cooperate 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, and, if so, to which department component they choose to disclose.

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[1] https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law.

[2] https://www.justice.gov/opa/speech/file/1562851/download.

[3] https://www.justice.gov/opa/speech/file/1535301/download.