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WHITE-COLLAR CRIME

The Justice Department's Corporate Enforcement Policy: What's Really Changed?

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Early in the Biden administration, the Department of Justice sent a clear message: white-collar criminal enforcement would be a lot tougher—and a higher priority—than during the Trump administration. Years of undue leniency toward companies and executives would be coming to an end.

An October 2021 speech to the ABA White-Collar Institute by Deputy Attorney General Lisa Monaco signaled the new approach. The speech coincided with issuance of an Oct. 28, 2021, memorandum, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," which was followed about one year later by a Sept. 15, 2022, memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," (the Monaco Memoranda). The Monaco Memoranda stated, among other things, that in deciding whether a company was deserving of leniency a company's entire history of misconduct would be considered (not just conduct similar to the matter under investigation), and to receive credit for cooperation, a company would be required to provide information about all individuals involved in misconduct (not just those who were substantially involved in the misconduct). The memoranda also said that deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) would be "disfavored" for corporations with a prior record of misconduct, especially if the past conduct was similar to the present investigation.

Yet many observers believe the new approach has not had an appreciable impact on white-collar enforcement. To the extent this is an accurate assessment, it may be due to any number of factors, including delays in filling leadership positions in a new administration; the time devoted to finishing cases and investigations from the Trump administration; and the lengthy lead-time for many white-collar investigations, perhaps exacerbated by lingering effects from the COVID-19 pandemic. Whatever the reasons, the expected pick-up in white-collar criminal enforcement has not seemed to follow the new policy and tone.

These circumstances may partly explain the Justice Department's most recent corporate enforcement pronouncements in January 2023, which were called the "first significant changes to the Criminal Division's [Corporate Enforcement Policy] since 2017." The changes to policy give companies additional opportunities for declinations of prosecution and incentives for cooperation. The greatest change in policy applies to companies with aggravating factors, such as prior misconduct, which may now be eligible for a declination of prosecution if they meet certain heightened conditions.

In this article, after discussing the evolution of the Corporate Enforcement Policy, we analyze a recent DPA and related remarks by Criminal Division leadership, which shed light on how prosecutors will deal with companies with aggravating factors, such as prior misconduct. We conclude with observations about how the changes in tone and policy from Main Justice

may affect companies' thinking about voluntary disclosure and cooperation. By articulating a policy of increased eligibility for leniency, the Criminal Division appears to be softening the tone of 2021 and, arguably, making a reluctant acknowledgement that earlier policy statements may have had the effect of discouraging companies from coming forward with information.

Corporate Enforcement Policy

What is now commonly known as the Criminal Division's "Corporate Enforcement Policy" came into being in 2016 as the Foreign Corrupt Practices Act (FCPA) Pilot Program. In the pilot program, the Criminal Division encouraged companies to volunteer information and cooperate in exchange for a "consideration" of nonprosecution, so long as three conditions were met: "voluntary self-disclosure" of FCPA-related misconduct; "full cooperation" with DOJ's investigation; and "timely and appropriate remediation" of the misconduct, including disgorgement of ill-gotten gains, when appropriate. The pilot program set forth explicit requirements for each of these conditions. For example, voluntary self-disclosure required disclosure "within a reasonably prompt time after becoming aware of the offense;" full cooperation required a company's proactive disclosure and preservation of certain information and documents, provision of timely updates, and translations of documents; and timely, appropriate remediation required implementation of an effective compliance and ethics program with criteria for evaluating "effectiveness" and appropriate discipline procedures for employees. Under the pilot program, DOJ entered into seven public declinations.

By 2018, the pilot program had become formal Criminal Division policy, and the Criminal Division said that the same principles would be applied to all white-collar corporate investigations. See Justice Manual Section 9-47.120. Under this policy, companies would be given a "presumption" of declination if they met the three core requirements for leniency— voluntary disclosure, cooperation, and remediation—but that presumption could be overcome by "aggravating circumstances." Examples of aggravating circumstances included involvement by executive management in the misconduct, a significant profit to the company from the misconduct, pervasiveness of the misconduct, and criminal recidivism. Since this policy took effect, DOJ has entered into nine public corporate declinations, with seven occurring during the Trump administration.

The Biden administration, as noted above, said that prosecuting and deterring corporate misconduct would be a priority. The Monaco Memoranda sought to articulate and implement this shift toward a more aggressive approach to corporate crime. The memoranda emphasized that cooperation credit would depend heavily on a company's timeliness of disclosure and the Criminal Division would "disfavor" DPAs or NPAs for corporations with prior misconduct; any exceptions requiring high-level approval. The new administration also sought to heighten the requirements for full company cooperation and make clear that companies with any sort of prior regulatory or criminal blemishes would be viewed harshly.

On Jan. 17, Assistant Attorney General Kenneth Polite announced "significant changes" to the existing Corporate Enforcement Policy. A particularly important change applies to companies with aggravating factors, most significantly, companies with a history of criminal or regulatory problems. Previously, these companies were generally not eligible for a declination and thus lacked the same incentive to disclose misconduct and cooperate. Other adjustments to the policy include a fine reduction of up to twice the amount previously offered for companies that do not voluntarily self-disclose but otherwise meet the conditions for leniency, and the opportunity for a recommended fine reduction of 50% to 75% for companies that meet all conditions but nonetheless face criminal charges.

Under the Corporate Enforcement Policy, as revised, prosecutors may consider a declination for companies with aggravating circumstances if they go above and beyond the baseline conditions of timely "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation." Now, if such companies show "immediate" self-disclosure, and "extraordinary" cooperation and remediation (including an "effective" compliance program), they will also be eligible for a declination. The net result seems to be a new test for companies with aggravating factors: they may qualify for leniency if they meet the three core requirements in an "extraordinary" way.

Recent remarks by AAG Polite make clear that the ambiguity as to what "extraordinary" means is intentional; in his words, DOJ "can never articulate, in advance, what exactly will or will not satisfy these provisions." This is an ambiguity that may limit the significance of the new policy, as we discuss further below.

ABB

Though coming about one month before the January 2023 policy changes described above, the recent resolution with Swiss-based technology company, ABB Ltd., may provide some guidance on how the DOJ will be exercising its discretion going forward. In December

2022, despite a "decade-old criminal history," including two prior criminal resolutions by company entities for FCPA violations and a guilty plea by an ABB entity for bid rigging, the DOJ entered into a three-year DPA with ABB for FCPA charges stemming from bribery of a high-ranking official at South Africa's state-owned energy company because ABB demonstrated "extraordinary cooperation" and "extensive remediation."

In an address on March 23, AAG Polite noted that ABB's efforts "shed light on what can constitute 'extraordinary'" efforts for companies with aggravating factors. In the DOJ's view, ABB demonstrated "extraordinary" cooperation by facilitating foreign efforts during the investigation and performing some of the investigatory work of prosecutors. ABB also voluntarily made foreign-based employees available for interviews in the United States, produced relevant foreign documents, and collected, analyzed, and organized evidence for prosecutors, which included translating certain documents.

In addition to its cooperation, the DOJ found ABB demonstrated "extraordinary" remediation. ABB carried out a root-cause analysis of its misconduct, which AAG Polite noted is the most effective mode of remediation. This analysis prompted ABB to take action to prevent misconduct from recurring in the future. The DPA emphasizes ABB's significant investments in compliance personnel, compliance testing, and monitoring throughout the organization, as well as the company's commitment to further enhance its compliance program and internal controls. AAG Polite noted that these efforts are crucial "even in the face of substantial cost or pressure from the business." Other extraordinary remediation may entail "significant structural changes" to a company to ensure that compliance and legal personnel have access to corporate decisionmakers to make employment decisions that hold wrongdoers accountable.

Prosecutors will consider whether a company's remediation efforts have been comprehensive, meaning that they are tailored to the causes of misconduct and prevention of future wrongdoing. As for whether a compliance program is "effective" under the revised standard, AAG Polite recommends that companies look to the criteria established in the Criminal Division's Evaluation of Corporate Compliance Programs (updated March 2023) (available at: **https://www.justice.gov/criminal-fraud/page/file/937501/download**).

AAG Polite compared ABB's "extraordinary" efforts with those of Corsa Coal Corp., which was given the first public declination under the revised policy. On March 8, the DOJ entered into an NPA with Corsa Coal in lieu of FCPA charges because the company met the three conditions of the policy (voluntary disclosure, cooperation and remediation), which included terminating a sales representative involved in the misconduct, substantially improving its compliance program and internal controls, and agreeing to continue to cooperate with ongoing investigations and prosecutions. AAG Polite remarked that Corsa Coal's cooperation had already led to charges against two individuals in the matter. While the resolution with Corsa Coal establishes a baseline for a company without aggravating factors, the resolution with ABB suggests what may be the sort of "extraordinary" actions needed when aggravating factors such as recidivism are present.

An important issue left unaddressed by the ABB resolution is what qualifies as "immediate" versus "prompt" disclosure. AAG Polite did not comment on this heightened condition as ABB had demonstrated an "intent to disclose the misconduct promptly." The DOJ's comments regarding ABB's DPA and Corsa Coal's declination provide some guidance for companies that wish to put themselves in the best position for a declination should criminal misconduct occur.

Conclusion

While recent Criminal Division comments and actions suggest a less harsh approach to corporate offenders, the discretion that surrounds consideration of such matters as "immediate" disclosure and "extraordinary" cooperation and remediation leave substantial risk for corporations that choose to disclose misconduct. AAG Polite's remarks concerning the ABB DPA are constructive, but far from definitive. Ultimately, key decisions as to how a cooperating company will be treated remain highly subjective and uncertain. This degree of prosecutorial discretion may lead some companies to question whether the benefits of disclosing misconduct outweigh the risks and costs.

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