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NEWS

INVIGORATING THE CORPORATE CRIMINAL ENFORCEMENT PROGRAM: U.S. DEPARTMENT OF JUSTICE SEEKS TO ENTICE COMPANIES TO SELF-REPORT

In January 2023, the Criminal Division of the U.S. Department of Justice (DOJ) released a revised Corporate Enforcement and Voluntary Self-Disclosure (VSD) Policy (CEP) that offers significant incentives for companies to self-disclose corporate misconduct, cooperate with DOJ, and remediate. Some of the most notable changes include (1) the possibility for companies to obtain a declination even in the presence of aggravating circumstances, (2) the ability for a recidivist company to obtain cooperation credit, and (3) increased reductions on fines for companies that either self-disclose or cooperate extensively with DOJ’s investigation and fully remediate the misconduct but failed to self-disclose.

These revisions build on — and in some instances revise — those announced by Deputy Attorney General Lisa Monaco (DAG Monaco) in September 2022 and are the product of extensive, coordinated review within DOJ in response to a call from DAG Monaco in October 2021 for DOJ to evaluate and recommend further guidance, revisions, and reforms to its approach to corporate criminal enforcement. DAG Monaco announced in October 2021 that she had established the Corporate Crime Advisory Group, made up of representatives from throughout DOJ involved in corporate criminal enforcement, to review issues such as how DOJ should measure a company’s cooperation and monitorship selection and to recommend changes to “further invigorate the department’s efforts to combat corporate crime.”

In this article, we explain the new CEP, highlight the changes from the previous version, and offer our thoughts on whether the new CEP is likely to help “invigorate” DOJ’s efforts to combat corporate crime. We also draw a line back to DAG Monaco’s announcements last fall to provide a more comprehensive read of this new policy and outline any remaining gray areas in DOJ’s corporate enforcement guidelines.

For a side-by-side comparison of the key provisions of DOJ’s November 2019 policy and the revised CEP, please refer to the CEP comparison chart at the end of this article.



The revised policy contemplates three possible outcomes for companies that cooperate with DOJ: (1) a presumption of declination, (2) a discretionary declination, or (3) a criminal resolution with significant credits for companies that voluntarily self-disclose misconduct.

The Criminal Division's New CEP

The revised policy contemplates three possible outcomes for companies that cooperate with DOJ: (1) a presumption of declination, (2) a discretionary declination, or (3) a criminal resolution with significant credits for companies that voluntarily self-disclose misconduct.

The presumption of declination is reserved for situations in which no aggravating circumstances are present and the company voluntarily self-discloses the misconduct to the Criminal Division, fully cooperates in the investigation, and timely and appropriately remediates the misconduct.

Even if aggravating circumstances make a presumption of declination unavailable, prosecutors now have discretion to consider a declination if the company (1) voluntarily self-discloses the misconduct "immediately upon the company becoming aware of the allegation of misconduct," (2) shows that at the time of the misconduct and disclosure it had an effective compliance program and system of internal controls, (3) goes above and beyond to provide "extraordinary" cooperation with DOJ's investigation, and (4) undertakes "extraordinary" remediation.

Finally, even if, despite the company's cooperation, the prosecutor decides that a declination is inappropriate and a criminal resolution is warranted, the prosecutor can recommend "at least a 50% and up to a 75% reduction off the low end of the U.S. Sentencing Guidelines (USSG) fine range" if the aggravating circumstance is not recidivism. In the case of a recidivist company, the reduction generally will not be from the low end of the fine range but rather a different starting point, to be determined at the prosecutor's discretion. In addition, DOJ generally will not require a corporate guilty plea, including for recidivists, absent "particularly egregious or multiple aggravating circumstances" and generally will not require the appointment of a monitor, assuming the company can demonstrate that, at the time of the resolution, it has implemented and tested an effective compliance program and remediated the root cause of the misconduct.

Like the old policy, the new CEP allows for limited credit even for a company that did not self-disclose — with two notable changes. First, under the new CEP, where a company does not self-disclose but later fully cooperates and timely and appropriately remediates, DOJ has increased the amount of reduction in fine it may recommend from no more than 25% under the old policy to up to 50% off the low end of the USSG fine range under the new policy, assuming no aggravating circumstances. Second, in cases in which the company does not self-disclose and aggravating circumstances are present, prosecutors will still have discretion to provide a reduction of up to 50% of the USSG fine, but it generally will not be off of the low end of the fine range. Previously, a recidivist company could not obtain any reduction off the fine it had to pay.

The revised policy also contemplates self-disclosures in the context of mergers and acquisitions and provides acquiring companies a presumption of a declination when no aggravating circumstances are present and the company timely self-discloses the misconduct, fully cooperates, and remediates the misconduct by implementing an effective compliance program at the merged or acquired entity. If aggravating circumstances existed at the acquired entity, acquiring companies may still be eligible for a declination if they timely disclose the misconduct and otherwise take action consistent with the policy (i.e., fully cooperate and remediate).

In all cases, whether a declination is granted or the issue is resolved through some form of criminal disposition, DOJ will require the company to pay a criminal penalty/fine as well as, where applicable, disgorgement, forfeiture, and/or restitution.



The Changes Between the Previous Policy and the Revised Version

Applies to all criminal cases. One of the most significant changes to the policy is perhaps not a surprising one: The new CEP applies to all corporate criminal matters handled by the Criminal Division, whereas previously the CEP applied exclusively to Foreign Corrupt Practices Act (FCPA) cases.

The new CEP also expands the range of cases in which a company may qualify for a declination, including some in which aggravating circumstances exist, if the company voluntarily self-reports the misconduct, shows that at the time of the misconduct it had an effective compliance program, provides “extraordinary” cooperation with DOJ’s investigation, and undertakes “extraordinary” remediation.

A broader range of cases may qualify for a declination. The new CEP also expands the range of cases in which a company may qualify for a declination, including some in which aggravating circumstances exist, if the company voluntarily self-reports the misconduct, shows that at the time of the misconduct it had an effective compliance program, provides “extraordinary” cooperation with DOJ’s investigation, and undertakes “extraordinary” remediation. DOJ’s willingness to consider declinations despite aggravating circumstances may be one example of DOJ looking to “invigorate” its corporate criminal enforcement efforts by enticing more companies, including those that might be understandably reluctant under prior DOJ guidance, to come forward and self-report.

Increased reductions on applicable fines and reductions available for nonrecidivist and recidivist companies that self-disclose, as well as companies that do not self-disclose, in certain circumstances. Under the previous policy, *nonrecidivist* companies that self-disclosed misconduct could get a 50% reduction off the low end of the USSG fine range. Notably, the previous policy did not make clear how aggravating circumstances, other than recidivism, affected this 50% reduction. The new policy increases the reduction for nonrecidivist companies to as much as 75% off the low end of the applicable fine range if they can show that at the time of the misconduct they had an effective compliance program and system of internal controls in place, demonstrate extraordinary cooperation with DOJ’s investigation, and undertake extraordinary remedial measures.

In a departure from the prior policy, under which recidivist companies could not obtain any reduction in fine amount even when they self-reported the misconduct, the new CEP allows recidivist companies that voluntarily self-report to obtain anywhere from a 50% to a 75% reduction when, aside from self-reporting, they can also show that at the time of the misconduct they had an effective compliance program and system of internal controls, demonstrate extraordinary cooperation with the investigation, and undertake extraordinary remediation. An important caveat here is that unlike for nonrecidivist companies, the reduction for recidivist companies generally will *not* be from the low end of the applicable fine range but rather a different starting point, as determined by the prosecutor.

The new policy also increases the available reductions for companies that do not self-disclose but fully cooperate with DOJ’s investigation and timely and appropriately remediate the misconduct. Previously, companies were eligible for only up to 25% off the low end of the applicable fine range in such circumstances, but under the new policy, even in the presence of aggravating circumstances, companies that do not self-disclose but fully cooperate and remediate the misconduct are eligible for up to 50% off either the low end of the applicable fine range for nonrecidivist companies or another point on the fine range for recidivist companies.

Definitions or guidance regarding key terms in the policy. First, the new policy expands what is required for a company to satisfy the standard of VSD to include providing DOJ with “*all relevant, non-privileged facts known to the company, including facts and evidence about all individuals involved,¹ whether inside or outside the company.*” Previously, the duty was to disclose relevant facts about “*individuals substantially involved in or responsible for*” the misconduct.²

¹ Notably, in her September 2022 memorandum, DAG Monaco stated that for a company to receive full cooperation credit, it had to disclose all nonprivileged information about individuals involved in or responsible for the misconduct at issue, *regardless of their position, status, or seniority* (or presumably even degree of involvement).

² The new policy also states that the disclosure has to be to the Criminal Division. This is a new requirement. However, the policy notes that the Criminal Division will also apply the provisions of this new policy “where a company made a good faith disclosure to another office or component of the DOJ, and the matter is partnered with or transferred to, and resolved within, the Criminal Division.”



Second, the new CEP explains a number of the factors that DOJ considers when evaluating whether a company has provided “full cooperation.” This information generally is not new. The new CEP relies in several respects on the concept of “extraordinary cooperation,” which DOJ has somewhat opaquely indicated should be understood as anything that exceeds the factors outlined in the policy as reflecting full cooperation. It seems likely that defense counsel will have the opportunity to advocate to DOJ on whether their clients have achieved “extraordinary cooperation” given the lack of clarity surrounding *how much more* than full cooperation rises to the level of “extraordinary.”

Last, in defining “timely and appropriate remediation,” the new policy emphasizes the need for compliance programs to be tailored not only to the size and resources of the company in question (as was the case in the previous policy) but importantly to the risks attached to the company’s business. In particular, among the factors DOJ will consider in determining whether a company has an adequate compliance program, the new CEP includes the effectiveness of the company’s compliance risk assessment and the manner in which the company’s compliance program has been tailored to address the identified risks.

Important Reminders From the Departmentwide Changes Announced by DAG Monaco Last September That Directly Affect This New CEP

Two policy directives from DAG Monaco’s September memorandum must be kept in mind when reading this new CEP.

First, regarding the issue of aggravating circumstances and specifically the way DOJ now evaluates a company’s criminal or disciplinary history, DAG Monaco directed prosecutors to consider the full criminal, civil, and regulatory record of the company — both domestically and internationally — when deciding what resolution is appropriate. She further asked prosecutors to consider the form of prior resolutions, the associated sanctions or penalties, as well as the elapsed time among the instant misconduct, the prior resolution, and the conduct underlying the prior resolution. Indeed, DOJ now “disfavors” entering into a deferred prosecution agreement (DPA) or nonprosecution agreement (NPA) with a corporation that has a prior DPA or NPA, especially if the matters involve “similar types of misconduct” or if the misconduct “occurs under the same management team and executive leadership.”

Second, DAG Monaco emphasized three important aspects DOJ will consider when evaluating a company’s cooperation with an investigation: the company’s actions around the preservation of key documents, the production of those documents, and the timeliness of those actions. Regarding preservation, DOJ’s guidance remains the same that companies seeking to obtain credit for cooperation must *timely* preserve and collect relevant documents located both within the United States and overseas. For documents located overseas, companies that demonstrate diligence in the way they navigate issues of foreign law will be credited accordingly. Regarding the production of documents, DAG Monaco clarified that “even in the absence of a specific request from the prosecutors,” companies should prioritize and *timely* produce evidence “that is most relevant for assessing individual culpability.”

Conclusion

The new CEP provides companies with additional incentives to self-disclose that companies and their counsel should weigh carefully when facing potential criminal exposure. Not surprisingly, those incentives are tied to greater expectations for the conduct of the reporting company than existed under DOJ’s prior policies. The following chart provides a side-by-side comparison of the key provisions in the prior and new policies. This space bears watching as DOJ puts the new policies into practice.

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	November 2019 CEP	January 2023 CEP
Scope	Applied to all FCPA matters nationwide	Applies to all matters handled by DOJ's Criminal Division
Presumption of Declination [No aggravating circumstances]	Conditions: <ol style="list-style-type: none">1. no aggravating circumstances³2. voluntary self-disclosure3. full cooperation4. full remediation	No change
Potential Declination [Aggravating circumstances present]	If aggravating circumstances were present, companies <i>could not</i> obtain a declination	Prosecutors can provide a declination if, despite the presence of aggravating circumstances, the company <ol style="list-style-type: none">1. voluntarily self-discloses the misconduct immediately2. at the time of the misconduct, had an effective compliance program and system of internal accounting controls that enabled identification of the misconduct3. provides "extraordinary" cooperation4. undertakes "extraordinary" remediation

³ According to both the 2019 and 2023 policies, aggravating circumstances include, but are not limited to, involvement by executive management of the company in the misconduct, a significant profit to the company from the misconduct, egregiousness or pervasiveness of the misconduct within the company, or criminal recidivism.



<p>Aggravating Circumstances but Voluntary-Self Disclosure (VSD)</p> <p>Criminal disposition [including conviction, guilty plea, DPA, or NPA]</p>	<p>Nonrecidivist companies could obtain a <i>50% reduction</i> from the low end of the corresponding USSG fine range if, aside from VSD,</p> <ol style="list-style-type: none">1. full cooperation2. full remediation <p>A recidivist company <i>could not</i> obtain any discount or credit for cooperation or remediation</p> <p><i>The 2019 policy did not make clear how aggravating circumstances other than recidivism affected the 50% reduction of a potential fine</i></p> <p>Monitor: not required if company had implemented an effective compliance program</p>	<p>Companies can obtain anywhere from 50% to 75% discount from the corresponding USSG fine range if, aside from VSD, they</p> <ol style="list-style-type: none">1. at the time of the misconduct, had an effective compliance program and system of internal controls in place2. provide “extraordinary” cooperation3. undertake “extraordinary” remediation <p>The starting point for reducing the fine will either be the low end of the USSG fine range for nonrecidivist companies or generally not from the low end for recidivist companies, with prosecutors having discretion to determine the starting point on the fine range for the reduction</p> <p>Monitor: not required if company has implemented and tested an effective compliance program and remediated the root of the misconduct</p>
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No Voluntary-Self Disclosure but Full Cooperation and Remediation [Whether with or without aggravating circumstances] Criminal disposition with limited credit	Companies could obtain <i>up to 25% reduction</i> from the low end of the corresponding USSG fine range if <ol style="list-style-type: none">1. later fully cooperates2. timely and appropriately remediates A recidivist company <i>could not</i> obtain any reduction or credit for cooperation or remediation	Companies can obtain <i>up to 50% reduction</i> from the low end of the corresponding USSG fine range if <ol style="list-style-type: none">1. later fully cooperates2. timely and appropriately remediates The starting point for reducing the fine will either be the low end of the USSG range for nonrecidivist companies or generally not from the low end for recidivist companies, with prosecutors having discretion to determine the starting point on the fine range for the reduction
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IMPLICATIONS OF DOJ'S CORPORATE VOLUNTARY SELF-DISCLOSURE POLICY

On February 22, 2023, DOJ issued a [Corporate Voluntary Self-Disclosure Policy](#) (VSD Policy) to formalize its efforts to incentivize voluntary self-disclosure. The VSD Policy builds on DOJ's revised CEP from January 2023 discussed in the previous article in this newsletter. While the CEP applies to DOJ's Criminal Division, the VSD Policy applies to all of the nearly 100 United States Attorney's Offices (USAOs) within DOJ that are located in each of the federal districts in the United States.

The new VSD Policy codifies a host of substantial benefits afforded to companies that voluntarily and timely self-disclose misconduct to DOJ. Perhaps unsurprisingly, companies seeking those benefits must meet exacting requirements. Companies should scrutinize whether the situation before them warrants disclosure to the government and, if so, should plan to make any such disclosure expeditiously.

Along with analyzing the rationale underlying the VSD Policy, the applicable standard, and potential benefits to the companies that engage in VSD, this article also provides key considerations when assessing whether to voluntarily self-disclose known misconduct to DOJ.

The VSD Policy

Purpose of the VSD Policy. Consistent with previous DOJ pronouncements (including the revised CEP discussed in the previous article), the purpose of the VSD Policy is a simple one: to incentivize companies to timely disclose misconduct by its employees or agents to DOJ. According to the VSD Policy, "[c]ompanies that voluntarily self-disclose misconduct to the USAO pursuant to this policy will receive resolutions under more favorable terms than if the government had learned of the misconduct through other means." Prompt self-disclosures of information will be considered favorably even if the government may already have been aware of the misconduct through other means.

Applicable Standard. The VSD Policy requires the pertinent USAO to engage in a case-by-case analysis to determine whether a disclosure qualifies as a voluntary self-disclosure. While the decision is at the sole discretion of the USAO, the VSD Policy lays out foundational principles governing its application:

Consistent with previous DOJ pronouncements, the purpose of the VSD Policy is a simple one: to incentivize companies to timely disclose misconduct by its employees or agents to DOJ.



1. *Voluntary.* Self-disclosures are credited only when they are truly voluntary (i.e., a disclosure made pursuant to a preexisting obligation, such as a regulation or contract, will not qualify).
2. *Timing.* All three of the following timeliness criteria are credited:
 - a. The disclosure is made “prior to an imminent threat of disclosure or government investigation”;
 - b. The disclosure is made prior to public disclosure of the misconduct or to when the misconduct is otherwise known to the government; and
 - c. The disclosure is made within a reasonably prompt time after the company becomes aware of the misconduct.
3. *Substance of the Disclosure.* The disclosure must include all relevant facts concerning the misconduct that the company is aware of at the time. A disclosing company is permitted to make clear that the disclosure is based on a preliminary investigation or assessment of information. In the event that the company conducts an internal investigation, it will be expected to provide factual updates.

Benefits of Meeting the VSD Standard. The benefits of meeting the VSD standard can be substantial.

Absent aggravating factors, the USAO will not seek a guilty plea when the company has (1) voluntarily self-disclosed in accordance with the criteria set forth above, (2) fully cooperated, and (3) timely and appropriately remediated the criminal conduct.

Absent aggravating factors, the USAO will not seek a guilty plea when the company has (1) voluntarily self-disclosed in accordance with the criteria set forth above, (2) fully cooperated, and (3) timely and appropriately remediated the criminal conduct. In addition, when a company meets the applicable standard, the USAO may choose to seek a lower criminal penalty or decline all criminal penalties. The company would still be required to pay all disgorgement, forfeiture, and restitution resulting from the misconduct.

When aggravating factors exist that lead the government to require a guilty plea, such as current executive management's involvement in the misconduct, the USAO may recommend at least a 50% to 75% reduction to the low end of the USSG and may also decline to require appointment of a monitor if the company has a sufficient compliance program.

Key Takeaways

The VSD Policy raises a number of important takeaways for companies:

- *Move quickly.* If a company becomes aware of possible misconduct, it is in the company's interest to move quickly to investigate. That may involve engaging outside counsel expeditiously to begin an internal investigation.
- *Any disclosure must include all relevant facts known at the time.* If a company discloses, it should be careful to disclose all relevant facts known at the time. The VSD Policy anticipates, and permits for the reality, that a company may learn additional facts after its disclosure. However, the failure to be comprehensive regarding known facts at the time of disclosure may disqualify a company from meeting the voluntary self-disclosure standard.
- *Timely preservation, collection, and production of evidence is key.* As discussed in the previous article in this newsletter, DOJ and this VSD Policy continue to emphasize that a company must preserve, collect, and produce documents and evidence in a timely manner to reap the benefits of the VSD Policy.

DOJ WEIGHS IN ON CORPORATE COMPENSATION AND CLAWBACKS

On March 2, 2023, DAG Monaco, in a [speech](#) at the American Bar Association's annual National Institute on White Collar Crime, announced a number of updated policies and resource allocations aimed at combatting corporate fraud. The most significant of the announcements related to a new pilot program intended to shift accountability for corporate



wrongdoing from shareholders to executives and other personnel identified as responsible for the misconduct. This article discusses each of DAG Monaco's announcements.

First, DAG Monaco reiterated DOJ's recent revisions to its corporate self-disclosure programs discussed in the previous articles in this newsletter. While Monaco made no new policy pronouncements, she reiterated DOJ's goal behind the policy: If a company discovers criminal misconduct, "the pathway to the best resolution will involve prompt voluntary self-disclosure to the Department of Justice."

... DAG Monaco announced DOJ's first-ever Pilot Program on Compensation Incentives and Clawbacks, which is intended to shift accountability for corporate malfeasance from corporate shareholders to executives and employees determined to be responsible for the misconduct.

Second, DAG Monaco announced DOJ's first-ever Pilot Program on Compensation Incentives and Clawbacks, which is intended to shift accountability for corporate malfeasance from corporate shareholders to executives and employees determined to be responsible for the misconduct.

This Pilot Program has direct links to Attorney General Merrick Garland's keynote address nearly a year ago at the same conference (which we analyzed in detail [here](#)), in which he stated that "corporations only act through individuals." The Pilot Program comes with two elements:

1. Every corporate resolution involving the Criminal Division must include a requirement that the resolving company develop compliance-promoting criteria within its compensation and bonus system. Under this Program, resolving companies will need to revise their performance and bonus metrics to include compliance-related components. Companies might implement a system whereby executives and staff are required to forfeit their bonuses if they fail to meet certain compliance-related objectives.
2. The Criminal Division will provide fine reductions to companies who seek to claw back compensation from corporate wrongdoers. Notably, recognizing the reality of how difficult clawbacks can be, DAG Monaco announced that companies that pursue clawbacks in good faith, but are unsuccessful, may still be eligible for a fine reduction.

Third, DAG Monaco announced two resource commitments to address instances where there is an intersection of corporate crime and national security implications. First, DOJ intends to increase resources to the National Security Division (NSD) through the hiring of 25 new prosecutors and the creation of a new Chief Counsel for Corporate Enforcement. The NSD will also issue joint advisories with the Commerce and Treasury Departments going forward, similar to FCPA guidance issued by DOJ and the SEC. Second, Monaco announced additional investments in the Bank Integrity Unit, with details forthcoming.

Each of the above policy directives is intended to reflect DOJ's increased focus on, as DAG Monaco stated, "empower[ing] companies to do the right thing by investing in compliance, in culture, and in good corporate citizenship." Companies and outside counsel should continue to take note of these developments, because DOJ continues to tailor its policies and practices around corporate malfeasance with emphasis on the importance of strong corporate compliance programs, individual accountability, self-disclosure, and cooperation. Additionally, companies should consider conducting an internal national security risk assessment to include, for example, an assessment of sanctions and export control exposure. Risk assessments along these lines can often help companies better align resources and tailor their processes to address and mitigate national security risks and other compliance risks.

DOJ UNVEILS NEW COMPONENTS OF EFFECTIVE CORPORATE COMPLIANCE PROGRAMS

On March 3, 2023, Assistant Attorney General (AAG) Kenneth Polite delivered [remarks](#) at the American Bar Association's annual National Institute on White Collar Crime. In his speech, he unveiled updates to DOJ's Evaluation of Corporate Compliance Programs (ECCP). This article focuses on two of the most notable changes. Companies should review these developments and take steps to critically assess their compliance programs to help prepare for and align with DOJ's new expectations for effective compliance programs.



First, following up on DAG Monaco's statements in September 2022 (covered in a prior article available [here](#)), AAG Polite announced "significant changes to the ECCP, including how [DOJ] consider[s] a corporation's approach to the use of personal devices as well as various communications platforms and messaging applications, including those offering ephemeral messaging." Polite explained that in practice, prosecutors will consider corporate policies on messaging applications, bring-your-own-device programs, and preservation of such communications when considering the corporation's risk profile and business needs. Notably, prosecutors will more actively seek data from third-party messaging applications, and a company's failure to preserve and produce such data may affect any plea offer that it receives.

Second, Polite offered further clarification regarding how the government will assess corporate compensation structures. Under the ECCP, prosecutors will affirmatively review compensation structures when evaluating compliance programs. Further, and as discussed in detail in the previous article in this newsletter, Polite reiterated two aspects of the DOJ's new [pilot program](#): that (1) criminal resolutions will take into account corporate compliance programs, including compensation-related criteria, and (2) DOJ will offer fine reductions for companies that seek to claw back compensation in appropriate cases.

Polite also reemphasized the significant benefits available to companies that self-report misconduct and demonstrate an effective "tone at the top," noting that "there is enormous gulf between the benefits associated with doing the right thing and the punishment associated with not."

Polite also reemphasized the significant benefits available to companies that self-report misconduct (discussed in previous articles in this newsletter) and demonstrate an effective "tone at the top," noting that "there is enormous gulf between the benefits associated with doing the right thing and the punishment associated with not."

Companies and their counsel should continue to monitor the recent uptick of DOJ policy announcements, especially those relating to DOJ's evolving expectations on effective compliance program components. With such considerations in mind, below are some steps companies should consider, as appropriate, when evaluating their own compliance posture and readiness to confront these shifts:

1. *Tone at the Top*: Assess routine management emphasis and promotion of a commitment to a culture of compliance and lawfulness through words and actions.
2. *Mobile Devices and Messaging*: Evaluate policies regarding the permissible use of mobile devices and third-party messaging applications, including retention and preservation policies, to ensure alignment with best practices and, if applicable, regulatory record-keeping requirements. Ensure employees receive periodic training on the company's permissible-use policies, and conduct regular monitoring of communications to ensure compliance with those policies.
3. *Compensation*: Assess management compensation structures to ensure that compliance-related metrics are taken into account, for example, that employees are rewarded for improving compliance programs and demonstrating ethical leadership. Assess whether, under applicable law and in consideration of possible employment suits, clawing back, deferring, or withholding compensation in the event of misconduct is worth the incentives offered by the government.
4. *Periodic Risk Assessments*: Ensure that the company is engaging in regular periodic compliance risk assessments to align resources and tailor procedures to address and mitigate entity-specific material risk areas. DOJ will evaluate the sufficiency of a corporate compliance program based in part on the company's particular risk profile.
5. *Whistleblower Hotline and Investigations*: Implement a widely publicized whistleblower hotline or other confidential reporting mechanism for employees and others to anonymously identify compliance issues and raise complaints.



6. *Investigations*: Have a process in place for ensuring that investigations are conducted efficiently and effectively and fully documented. Additionally, root-cause analysis of misconduct will be essential to enhancing policies and procedures to guard against recidivism. When misconduct is discovered, companies should move quickly to consider voluntary self-disclosure.

IN THE INTERIM

1/19/2023: Ammar Kanaan, after evading arrest for two decades, pleaded guilty in the District of Columbia for conspiracy to defraud the United States and pay gratuities to a federal official. Kanaan, a dual citizen of the United States and Syria, while working as contractor for the U.S. Department of Transportation Federal Highway Administration (FHWA), provided unlawful cash payments to a FHWA official and was then reimbursed through false invoices submitted to the FHWA. Kanaan made these payments from 1993 to 1998 but fled to Syria when questioned by investigators in 1998. He was arrested by Italian authorities in August 2022 and extradited to the United States.

<https://www.justice.gov/opa/pr/former-contractor-pleads-guilty-conspiracy-defraud-united-states>

2/2/2023: The UK Serious Fraud Office (SFO) obtained the convictions of two executives of British steel trading business Balli Steel PLC and the guilty plea of another executive for fraudulent trading activities. The three defendants, Melis Erda, Nassar Alaghband, and Liuiise Worsell, provided misleading information, false shipping documents, and forged signatures on fake sales contracts to deceive trade finance banks. These fraudulent activities allowed Balli to obtain a series of loans that permitted the company to continue to trade while disguising the fact that the company was not paying down its overall loan balance. This led the company to accumulate debts of over \$500 million to over 20 banks and the company's subsequent collapse in 2013.

<https://www.sfo.gov.uk/2023/02/02/serious-fraud-office-secures-three-convictions-in-500-million-trade-finance-fraud/>

2/17/2023: Glenn Oztemel, a citizen of the United States, and Eduard Innecco, a dual citizen of Brazil and Italy, were charged in the District of Connecticut with conspiracy, money laundering, and multiple violations of the FCPA in an alleged scheme to win contracts with Brazil's state-owned energy company, Petróleo Brasileiro S.A. (Petrobras). According to DOJ, from mid-2010 until 2018 Oztemel and Innecco paid bribes to Petrobras officials to obtain and retain business and to secure confidential Petrobras oil trading information. Allegedly, two associated trading companies made payments to Oztemel and Innecco where those payments would be used to bribe Petrobras officials for business.

<https://www.justice.gov/opa/pr/senior-oil-and-gas-trader-and-brazil-based-intermediary-charged-bribery-and-money-laundering>

3/2/2023: Ericsson AB, a Swedish telecommunications company, agreed to plead guilty and pay a criminal penalty of \$206 million after breaching a 2019 DPA with DOJ. Additionally, Ericsson agreed to plead guilty to the original charges deferred by the 2019 DPA, including conspiracy to violate the anti-bribery and internal controls and books and records provisions of the FCPA. Ericsson agreed to serve a term of probation through June 2024 and extend the term of its independent compliance monitor by one year.

Ericsson reached the 2019 DPA to resolve claims of bribery and slush fund schemes in Asia, Africa, and the Middle East. Ericsson breached the agreement by failing to disclose all factual



evidence related to its bribery scheme and for failing to disclose all allegations of misconduct as required by the agreement. As part of the 2019 DPA, Ericsson agreed to pay \$520 million in criminal penalties and supervision by an independent compliance monitor for three years.

<https://www.justice.gov/opa/pr/ericsson-plead-guilty-and-pay-over-206m-following-breach-2019-fcpa-deferred-prosecution>

3/6/2023: Rio Tinto, a global metals and mining company, agreed to pay a \$15 million civil penalty to settle charges by the SEC for a bribery scheme involving a consultant in Guinea. In 2011, Rio Tinto hired a French investment banker and friend of a senior Guinean government official as a consultant to help the company retain mining rights in the Simandou mountain region in Guinea. The consultant was paid \$10.5 million for his services without a written agreement defining the scope of his services or his deliverables. The consultant additionally attempted to make an improper payment of \$822,000 to a Guinean official in connection with Rio Tinto's mining rights. Rio Tinto consented to the SEC's bribery control failures order without admitting or denying it violated the FCPA's books and records and internal accounting control provisions.

<https://www.sec.gov/news/press-release/2023-46>

3/6/2023: Flutter Entertainment, a gaming and sports betting company based in Ireland with an interest in The Stars Group, agreed to enter into a cease-and-desist order with the SEC in connection with books and records and internal accounting controls violations stemming from third-party consultant use in Russia. From 2015 to 2020, The Stars Group paid \$8.9 million to consultants in Russia to support its operations and to advance its efforts to legalize poker in the country. The Stars Group failed to maintain internal accounting controls and keep accurate books and records because those payments funded gifts to Russian government officials and payments to Roskomnadzor, the Russian state agency responsible for internet censorship including for online poker sites. Flutter agreed to pay a penalty of \$4 million without admitting or denying the SEC's findings. The SEC order noted Flutter's remediation efforts and that Flutter had withdrawn from the Russian market following Russia's invasion of Ukraine in 2022.

<https://www.sec.gov/enforce/34-97044-s>

3/8/2023: Corsa Coal Corporation, a coal mining company based in the United States, entered into a DPA with DOJ over a scheme to bribe Egyptian officials for lucrative coal contracts. According to DOJ, Corsa employees paid more than \$4.8 million to Egyptian government officials through a third-party intermediary to secure coal contracts worth \$143 million with Al Nasr Company for Coke and Chemicals, an Egyptian-owned and state-run coke company. DOJ cited Corsa's timely and voluntary self-disclosure, proactive cooperation, remediation efforts, and agreement to disgorge profits as support for the DPA. Corsa agreed to pay \$1.2 million in disgorgement, less than the \$32.7 million of ill-gotten profits from the scheme as DOJ agreed with Corsa's claim that it was unable to pay the full amount without collapsing.

<https://www.justice.gov/criminal-fraud/file/1573526/download>

3/8/2023: The World Bank Group announced the two-year debarment of Burhani Engineers Ltd., a Kenyan engineering, procurement, and construction company, as part of a settlement agreement for fraudulent practices related to the Energy for Rural Transformation III Project located in Uganda. The Energy for Rural Transformation III Project was designed to increase electricity to rural parts of Uganda. Burhani Engineers misrepresented its prior experience in multiple submissions to fraudulently obtain project contracts. In addition to debarment, Burhani Engineers committed to developing a compliance program and to fully cooperate with World Bank Group investigators.

<https://www.worldbank.org/en/news/press-release/2023/03/08/world-bank-group-debars-burhani-engineers-ltd>



3/9/2023: Roger Ng, a citizen of Malaysia, was sentenced to 10 years in prison after a jury in April 2022 found him guilty of conspiring to violate the FCPA and conspiring to launder billions of dollars for a scheme involving Malaysia's state-owned investment and development fund 1Malaysia Development Berhad (1MDB). From 2009 to 2014, Ng and his coconspirators laundered billions of dollars of 1MDB funds through three bond transactions executed with an investment bank. To execute the scheme, Ng and his coconspirators paid more than \$1 billion in bribes to government officials in Malaysia and the United Arab Emirates to obtain lucrative business for the bank. The scheme misappropriated more than \$2.7 billion from 1MDB. The bank received approximately \$600 million in revenue, and Ng received \$35 million for his participation in the scheme.

<https://www.justice.gov/opa/pr/former-goldman-sachs-investment-banker-sentenced-27b-bribery-and-money-laundering-scheme>

3/9/2023: Frank Rafaraci, a citizen of the United States, was indicted in the District of Columbia for bribery in a scheme to offer payments to U.S. Navy officials in exchange for favorable opportunities for defense contracts. According to DOJ, from 2013 to 2021, Rafaraci offered and provided money to a Navy official to influence the award of defense contracts. Rafaraci was an executive in a defense contracting company headquartered in Malta that engages in the procurement of goods and services requested by ships when they arrive at port.

<https://www.justice.gov/opa/pr/ceo-major-defense-contractor-charged-bribery>

3/28/2023: Sam Bankman-Fried, founder and former head of the cryptocurrency companies FTX and Alameda Research, was indicted in the Southern District of New York for bribery in violation of the FCPA. According to DOJ, in 2021 Bankman-Fried instructed employees to pay a bribe of approximately \$40 million to Chinese officials to help unfreeze trading accounts associated with Alameda Research. Allegedly, the bribe was paid in cryptocurrency through a number of fraudulent accounts to mislead authorities. Bankman-Fried's cryptocurrency exchange, FTX, collapsed in late 2022 over concerns related to its balance sheet and association with Alameda Research.

3/29/2023: The World Bank Group announced the 15-month debarment of PCS Limited, a Vanuatu-based communication and power company, in connection with fraudulent practices related to the Vanuatu Rural Electrification Project. The project was designed to improve access to electricity services for rural households and aid posts in remote areas in Vanuatu. PCS Limited claimed subsidies on a nonsubsidized item when submitting its reimbursement application and then knowingly misled World Bank authorities to obtain a financial benefit from the project. The agreement acknowledged a reduced debarment period due to PCS's admission of the misconduct, voluntary remedial actions, and cooperation. In addition to debarment, PCS Limited agreed to developing a code of conduct and a corporate compliance program.

<https://www.worldbank.org/en/news/press-release/2023/03/29/world-bank-group-debars-pcs-limited>



THE FCPA/ANTI-CORRUPTION PRACTICE OF SIDLEY AUSTIN LLP

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