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ALERT

DOJ Announces Changes to White Collar Enforcement Policies, Focusing on "Most Egregious" Crimes

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This week, the U.S. Department of Justice (DOJ) announced the Criminal Division's new white collar enforcement plan, changes to its Corporate Whistleblower Pilot Program, and revisions to the Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP). In remarks about these significant changes, which have since been memorialized in a memorandum, Matthew R. Galeotti, the head of the Criminal Division, explained that, consistent with the Administration's priorities, the Division's resources will be focused on the "most egregious" white collar crimes – those that harm U.S. taxpayers and markets, threaten American competitiveness, and endanger U.S. national security. Updates to the CEP are designed to provide companies with greater clarity on the outcomes they can expect from voluntary self-disclosure, thereby incentivizing them to come forward with information about their own misconduct and remediate the same. DOJ also announced guidance curtailing the use of costly corporate monitors in resolutions.

Ultimately, companies should review and potentially update their existing policies and compliance programs to ensure that they are well-designed to prevent and detect conduct highlighted in the white collar enforcement plan. Doing so will not only reduce the risk of enforcement actions, but also better position companies to potentially take advantage of favorable resolutions under the CEP.

White Collar Enforcement Plan

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The new white collar enforcement plan confirms that despite recalibrating enforcement in certain areas, the Criminal Division will continue to focus on combating fraud, waste, and abuse; Medicare/Medicaid fraud; violations of the Controlled Substances Act and the FDCA, and other practices that harm consumers; and market manipulation, among others. DOJ will continue to aggressively pursue companies that harm U.S. interests in these areas. At the same time, the Division will allocate more resources to address corporate misconduct that poses a threat to the economy and U.S. national security, including areas traditionally overseen by the National Security Division. Particular focus will be on these "high-impact" areas:

- Waste, fraud, and abuse that "harm the public fisc"
- Trade and customs fraud, including tariff evasion
- Sanctions violations
- Market manipulation or other fraud, especially if perpetrated by or through Chinese-affiliated companies listed on U.S. exchanges
- Investment fraud
- Money laundering offenses
- Material support by corporations to foreign terrorist organizations
- Unlawful manufacturing or distribution of narcotics and opioids
- Bribery that impacts U.S. national interests, undermines U.S. national security, harms the competitiveness of U.S. businesses, or enriches foreign corrupt officials
- Crimes involving digital assets, including investor or consumer fraud and the use of digital assets in furtherance of criminal activity

While the Fraud Section has yet to announce updated Foreign Corrupt Practices Act (FCPA) enforcement guidance, it is notable that DOJ's priorities include "bribery" that harms U.S. business and national security interests or enriches corrupt foreign officials.

Along with these enforcement priorities, DOJ highlighted the need to ensure the Criminal Division efficiently and fairly handles corporate investigations and prosecutions. DOJ will work to minimize the length and cost of investigations, recognizing the actual and intrinsic costs associated with lengthy (and often public) investigations. Prosecutors must now take "all reasonable steps to minimize the length and collateral impact of their investigations, and to ensure that bad actors are brought to justice swiftly and resources are marshaled efficiently" with the goal of making "expeditious" charging decisions.

In addressing fairness, DOJ emphasized that prosecuting individuals (including executives, officers, and employees) alone could be enough to address "low-level corporate misconduct," noting that "not all corporate misconduct warrants federal prosecution." While DOJ's aggressive pursuit of individual wrongdoers is not new, this pronouncement appears to acknowledge that prosecuting a lone bad actor does not necessarily result in a resolution or charges for the company – a potentially significant shift for non-culpable investors and employees who may have traditionally been adversely affected by costly corporate resolutions.

Changes to the Corporate Whistleblower Program

The Criminal Division also announced amendments to its nascent Corporate Whistleblower Pilot Program to encourage reporting in priority areas. Whistleblowers are now also encouraged to submit information about corporate misconduct that falls into the following additional categories: federal program fraud; trade, tariff, and customs fraud; federal immigration law violations; violations involving material support of terrorism; and violations that enable international cartels or transnational criminal organizations, including money laundering, narcotics, and Controlled Substances Act violations.

CEP Revisions

Through revisions to the CEP, the Criminal Division seeks to provide increased transparency to companies considering voluntary self-disclosure. Lack of certainty has long been the chief complaint from corporations and the defense bar. As revised, the CEP provides that companies that meet all voluntary self-disclosure criteria (i.e., that voluntarily self-disclose misconduct that is previously unknown to DOJ, fully cooperate, remediate in a timely and appropriate manner, and have no aggravating circumstances) will receive a declination, not just a presumption of a declination, as had been the case previously. Companies that self-disclose but have aggravating circumstances can still be eligible for a declination based on a weighing of the seriousness of those circumstances against the company's cooperation and remediation efforts. And companies that voluntarily self-disclose in good faith but have not done so quickly enough, or before DOJ became aware of the misconduct, still receive significant benefits – namely, a non-prosecution agreement with a term of fewer than three years, a 75% reduction on the criminal fine, and no corporate monitor.

Corporate Monitors

Accompanying these announcements, DOJ published the *Memorandum on Selection of Monitors in Criminal Division Matters*. The memo, issued on the heels of recent monitor terminations and reviews, narrows the circumstances under which monitors should be imposed and adds guardrails and oversight when monitors are required. While the memo can be read to generally disfavor monitors in all but rare circumstances, when determining the appropriateness of a monitor, DOJ will consider: (1) the risk of reoccurrence and harm to U.S. interests, (2) the availability of existing regulatory oversight, and (3) whether the company has proactively used consultants, auditors, or experts to enhance compliance programs. At bottom, this new approach to monitors may facilitate quicker resolutions, as the specter of such costly collateral consequences will no longer loom so large over negotiations with the government.

The memo goes on to discuss guardrails if DOJ requires the imposition of a monitor. These include ensuring that the costs associated with the monitor are proportionate to the underlying conduct; capping the hourly rates charged by monitors and holding them to proposed budgets; and establishing routine meetings among the monitor, the DOJ, and the company.

Takeaways

While the above announcements are generally in line with other pro-business priorities from the new Administration, DOJ has made clear that it will still aggressively pursue white collar corporate crime that threatens American interests. This is especially true when companies harm U.S. consumers, businesses, or interests; defraud federal programs; or circumvent tariffs and trade regulations. DOJ also continued a common refrain across Administrations: Timely and voluntary self-disclosure of misconduct, coupled with proactive remediation, puts a company in the best position to avoid a criminal resolution or charges.

To that end, it is increasingly important for companies to review compliance programs with an eye towards these priorities and policy pronouncements. This review should include whistleblower and internal investigation procedures to ensure companies are in the best position to promptly detect misconduct and decide whether to self-report. As the new guidance makes clear, effective compliance programs are a good first step towards receiving a declination and avoiding a corporate monitor. Finally, with DOJ calling out individual misconduct at the executive level, companies should review their director and officer (D&O) policies and procedures on indemnification and advancement related to criminal prosecutions.

Wiley has a team of skilled practitioners with knowledge and experience in relevant areas (including White Collar Defense & Government Investigations, Securities Enforcement, Litigation, Employment & Labor, and Government Contracts) to help private-sector businesses navigate changes to federal policies. Our team can guide those seeking advice regarding these updates and how they impact ongoing enforcement actions, future investigations, or corporate compliance programs.

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