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# U.S. DOJ Corporate Enforcement and Compliance Developments

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# Presenters



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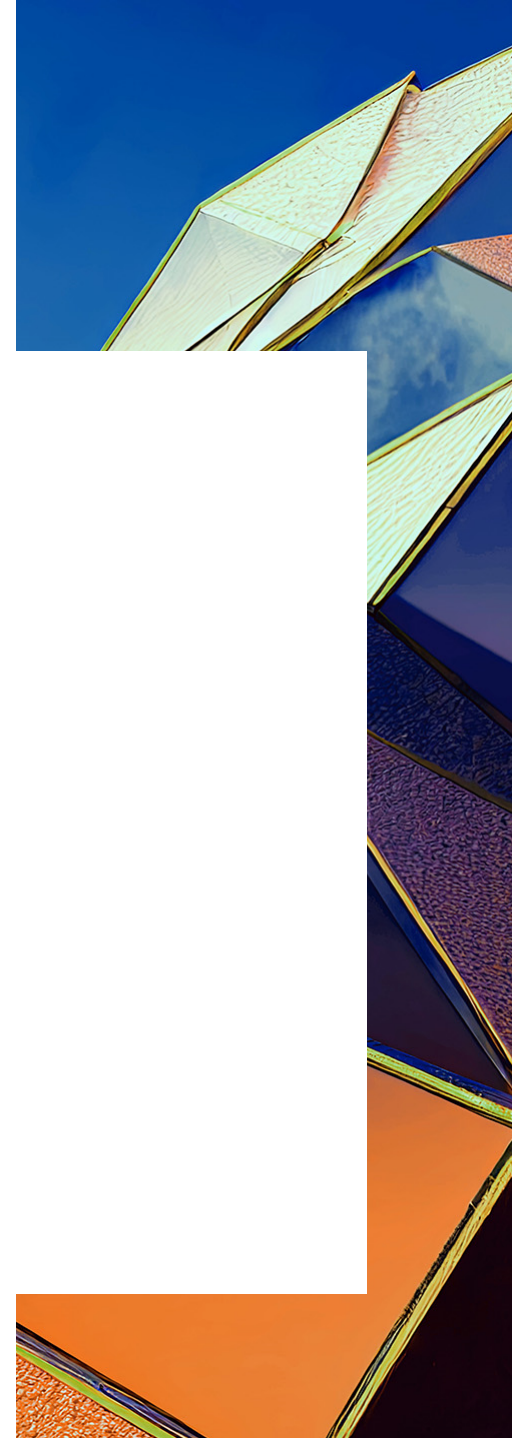


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# Agenda

1. Current State of Corporate Criminal Enforcement
2. Evolving Expectations for Compliance Programs
3. Expectations for Companies Cooperating in Investigations







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# **Current State of DOJ Corporate Criminal Enforcement**



# DOJ Under the Biden Administration

- Under Biden, DOJ has ***pledged*** increased corporate criminal enforcement
- More resources to Criminal Fraud Section, Bank Integrity Unit, and National Security Division
- Major updates to corporate enforcement policies:
  - Encouraging voluntary self-disclosure
  - New expectations for corporate compliance programs
  - Increasing requirements for cooperation credit



## Tysers to pay nearly US\$47 million to resolve overseas probe

Parent company confirms whether or not earnings will be impacted

Society & Equity | Social Impact | Regulatory Oversight

## Albemarle to pay more than \$218 mln to settle bribery probe, U.S. says

Reuters

September 29, 2023 9:18 AM CDT · Updated 2 months ago



Aa



### REGULATORY ENFORCEMENT

## HealthSun Health Plans earns DOJ declination in employee fraud case

By Kyle Brasseur | Wed, Nov 1, 2023 5:49 PM

Government | Government | Healthcare Providers | Lawsuits | Health

## Former HealthSun exec accused of Medicare fraud resulting in \$53 mln overpayment

By Brendan Pierson

October 26, 2023 2:52 PM CDT · Updated a month ago

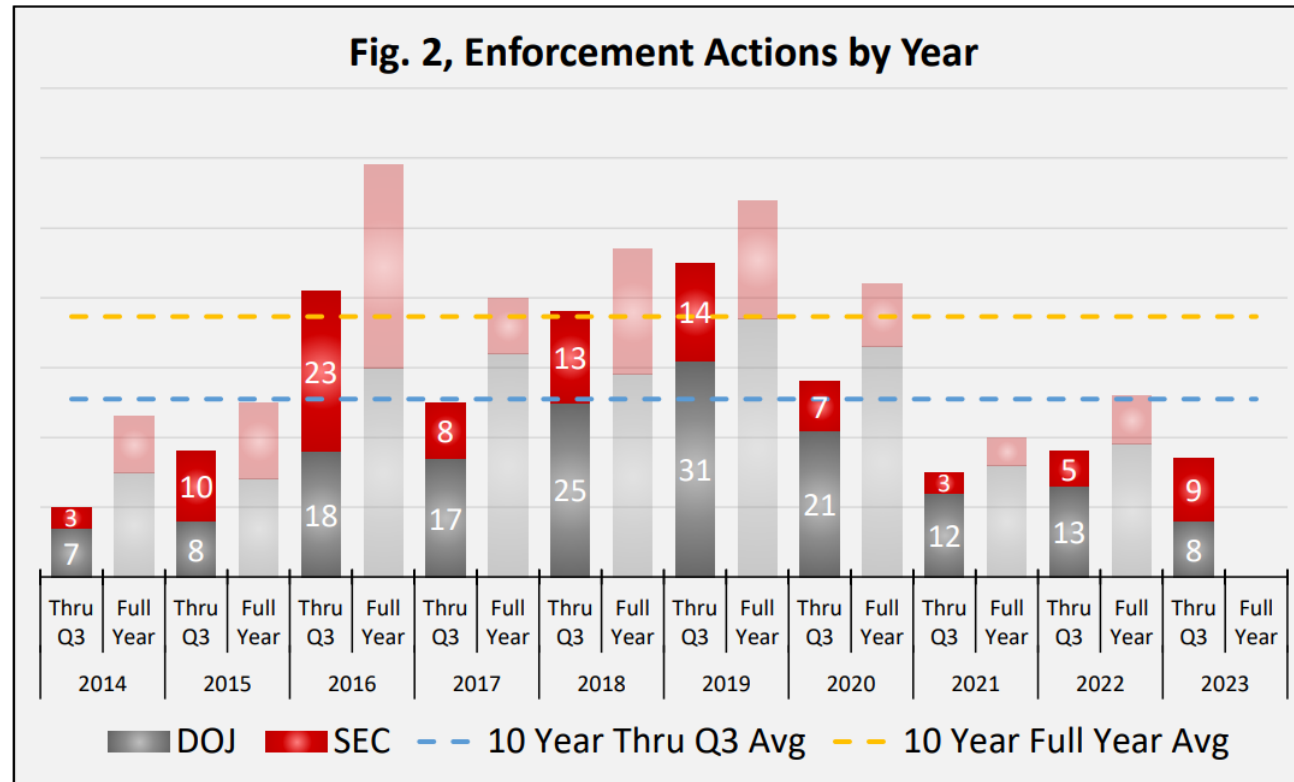


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# Will Quantity of Actions Increase?

## FCPA Enforcement



Source: Stanford Law School, 2023 Q3 Report, *Foreign Corrupt Practices Act Clearinghouse* (available [here](#))

# National Security Focus

- Broad conception of National Security:
  - Sanctions & Export Controls
  - Cybersecurity
  - Trade Secret Theft / Economic Espionage
  - Foreign Corrupt Practice Act and AML
- “Sanctions are the new FCPA.”
  - Dep. Attorney General Lisa Monaco (Sept. 2022)
- 25 new prosecutors being hired into National Security Division specifically for economic crimes







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# **Evolving Expectations for Compliance Programs**



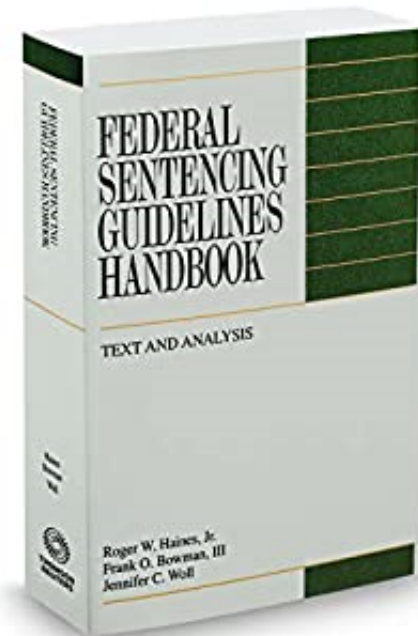
# DOJ – Evolution of Compliance Expectations

U.S. Federal Sentencing Guidelines ([1991](#), [2004 Amendments](#))

- Under Chapter 8 (“Sentencing of Organizations”), listed the expectations for effective compliance programs

## Seven Elements of an Effective Compliance Program

1. Standards and Procedures
2. Governance and Oversight
3. Education and Training
4. Monitoring and Auditing
5. Reporting
6. Internal Enforcement and Discipline
7. Response and Prevention





# DOJ – Evolution of Compliance Expectations

DOJ/SEC's *Resource Guide to the U.S. FCPA* (November 2012)

- Identified the Hallmarks of an Effective Compliance Program
- Basic framework adopted by other DOJ sections (e.g., antitrust, FCA)

## Hallmarks of an Effective Compliance Program

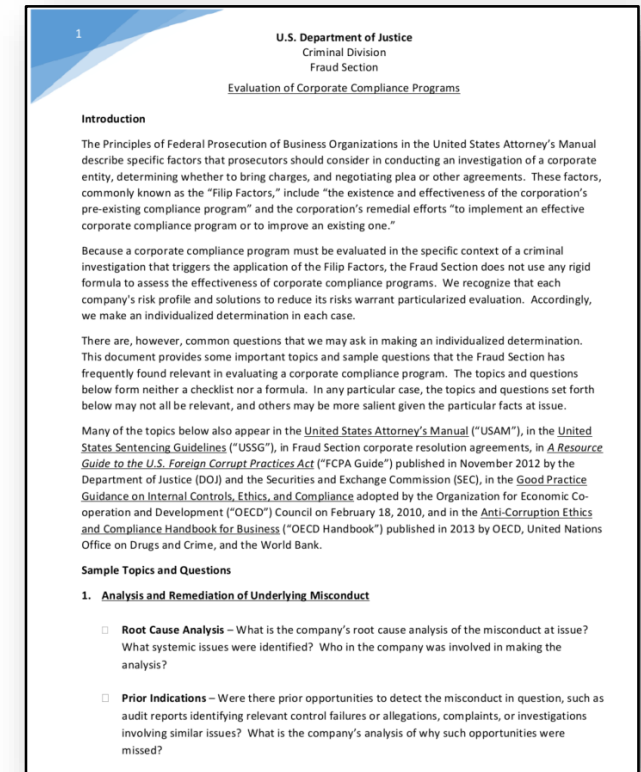
1. Commitment from Senior Management
2. Code of Conduct, Compliance Policies, & Procedures
3. Oversight, Autonomy, & Resources
4. Risk Assessment
5. Training & Continuing Advice
6. Incentives & Disciplinary Measures
7. Third-Party Due Diligence and Payments
8. Confidential Reporting & Internal Investigation
9. Ongoing Improvement: Periodic Testing & Review
10. M&A Due Diligence & Integration



# DOJ – Evolution of Compliance Expectations

## DOJ's *Evaluation of Corporate Compliance Programs* (February 2017)

- Originally published by DOJ's Fraud Section on its website
  - Intended to help inform prosecutorial decisions related to: (i) form of resolution or prosecution; (ii) monetary penalty, if any; and (iii) compliance obligations in corporate resolution (e.g., monitorship, reporting obligations)
- 119 separate questions, organized by the hallmarks, that address a wide range of specific, practical aspects of a company's compliance program
  - The document provides “[s]ome important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program”

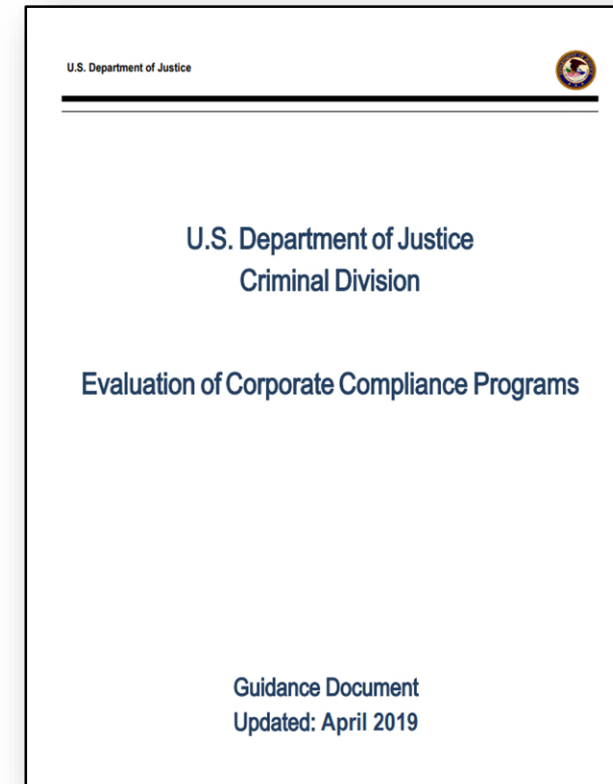




# DOJ – Evolution of Compliance Expectations

DOJ's *Evaluation of Corporate Compliance Programs* (Revised April 2019)

- Substantive and thoughtful revision that structures prior and additional hallmark-related questions/guidance around three “fundamental questions”:
  1. “Is the corporation’s compliance program well designed?”
  2. “Is the program being applied earnestly and in good faith?”
  3. “Does the corporation’s compliance program work in practice?”



# Questions DOJ Will Ask – Examples

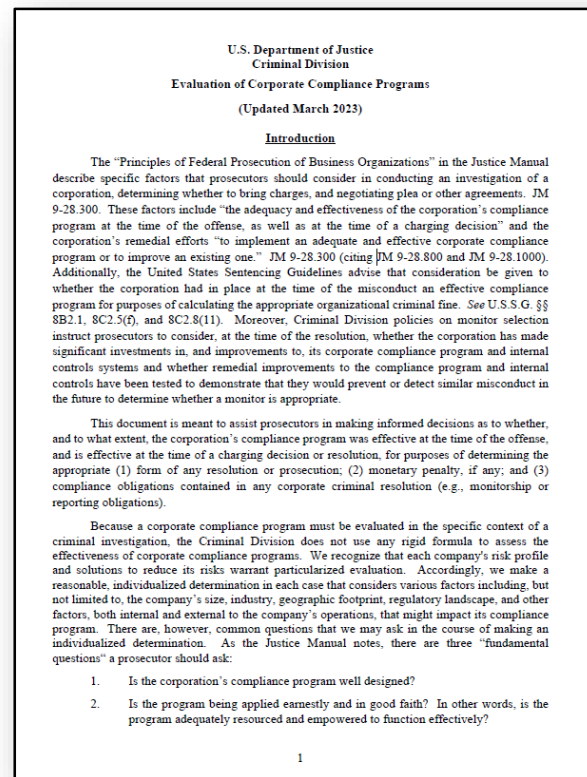
- What specific actions have senior leaders and other stakeholders taken to demonstrate their commitment to compliance?
- Is the compliance budget adequate? Is sufficiently independent? Are other functions (e.g., internal audit) leveraged for compliance?
- Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions?
- What role has compliance played in the company's strategic/operational decisions?
- Who has been responsible for integrating policies and procedures? With whom have they consulted? How have they been rolled out? Do compliance personnel assess whether employees understand the policies?
- How has the company measured the effectiveness of the training?
- How has the company ensured that the investigations have been properly scoped and were independent, objective, appropriately conducted, and properly documented?
- How has the company incentivized compliance and ethical behavior? Have there been specific examples of actions taken as a result of compliance and ethics considerations?



# DOJ – Evolution of Compliance Expectations

## DOJ's *Evaluation of Corporate Compliance Programs* (Revised March 2023)

- The most current version
- Updates made “based on [DOJ’s] own experience and important feedback from the business and compliance communities”
  - March 2023 Update retains existing structure around the three fundamental questions
- Evolution of several compliance themes
  - Emphasis on adequate incentives for compliance and discipline for misconduct (and communicating same through organization)



# DOJ – Evolution of Compliance Expectations

## DOJ's *Evaluation of Corporate Compliance Programs* (Revised March 2023)

- Promoting compliance through compensation structure and clawbacks
  - “Every corporate resolution involving the Criminal Division will require that the resolving company include compliance-promoting criteria within its compensation and bonus system.” – PADAG Marshall Miller (Sept. 2023)
- Use of personal devices and messaging platforms/applications for business
  - Effective compliance program and full cooperation credit require being able to preserve and produce all communications, on any platform.
  - Do your executives or sales team communicate via texts?
  - Can you preserve and collect them?





# Compliance: It's All About Process, Procedures, Systems, and Controls

- “We rely on good people” doesn’t work
  - Highly skeptical of compliance programs based solely on policies and training and an expectation that properly trained employees will do the right thing and follow the law
- DOJ and SEC want to see a compliance program based on process, procedures, systems, and controls – i.e., procedures that prevent crooked employees from violating policies and breaking the law

## Examples

- Controls that prevent money from leaving the company on transactions that present FCPA risk without compliance signoff
- Multiple signoffs from different functions on high-risk transactions
- Enforceable workflows that prevent expenditures for foreign officials without prior compliance approval

# Compliance: If You Ain't Testing, You Ain't Trying

So how do you know that your policies, procedures, and training are actually effective?

- Agencies will expect you to show the steps you've taken to test the efficacy of your anti-bribery/anti-corruption compliance measures
- E.g., periodic audits addressing anti-bribery/anti-corruption issues; spot-checking processes in high-risk jurisdictions

TEST AREA	TEST NAME	TEST OBJECTIVE	TEST PROCEDURES	FREQUENCY	OWNER	REVIEWER	ISSUES IDENTIFIED
FCPA & Anti-bribery	GMET Review - Meals	Confirm no meals provided to foreign officials without appropriate approvals and documentation	Obtain and review quarterly expense reports; obtain and review logs of approval requests for meals.	Quarterly	Steve Smith	Mary Cottingham	Several China meals lacked supporting invoices; see summary chart.
FCPA & Anti-bribery	Customs expense review - Brazil	Confirm that all customs expenses are appropriate and documented	Review sample of customs transactions; review fees associated with same; comparison of historical customs rates; request full documentation for sample customs.	Bi-annual	Antenor Gonzalez	Hector Guerrero	None





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# **DOJ Expectations for Companies Cooperating in Investigations**



# FCPA Corporate Enforcement Policy

## USAM Insert

### 9-47.120 – FCPA Corporate Enforcement Policy

#### 1. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters

Due to the unique issues presented in FCPA matters, including their inherently international character and other factors, the FCPA Corporate Enforcement Policy is aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct. When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution 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; pervasiveness of the misconduct within the company; and criminal recidivism.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and
- generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.

#### 2. Limited Credit for Full Cooperation and Timely and Appropriate Remediation in FCPA Matters Without Voluntary Self-Disclosure

If a company did not voluntarily disclose its misconduct to the Department of Justice (the Department) in accordance with the standards set forth above, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth above, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.

If a Company...

- (i) Voluntarily self-discloses potential FCPA violations,
- (ii) Fully cooperates with the DOJ investigation, and
- (iii) Enacts timely and appropriate remediation,

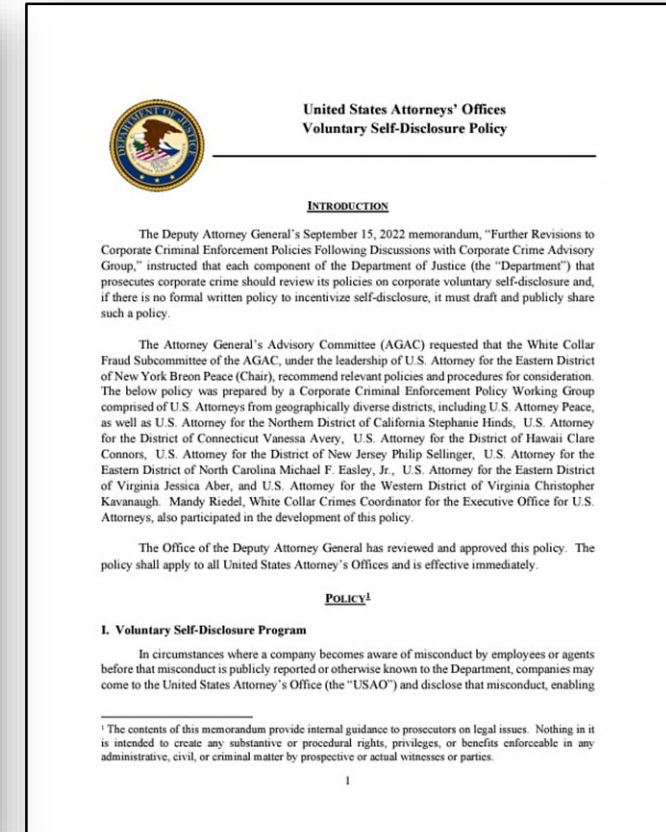
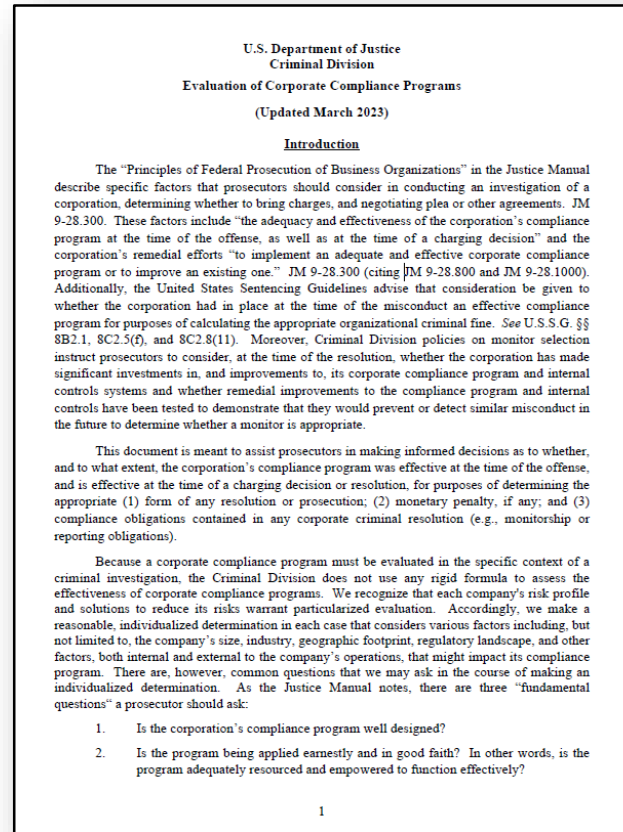
then...

- ✓ Rebuttable **presumption** that DOJ will **decline to prosecute**



# DOJ-Wide Corporate Enforcement Policy

- In 2022, the Deputy Attorney General directed *all* DOJ components to adopt written guidance that followed those same principles, including that, absent aggravating factors, DOJ will not pursue a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the misconduct
- DOJ components and U.S. Attorney's Offices have been issuing policies that adopt these principles for their areas of enforcement



# Cooperation Credit – the Lodestar for Corporations

- Even outside the new paradigm, cooperation credit makes a major difference for companies in the cross-hairs
- Cooperation can be a **20x** difference maker

U.S. Sentencing Guidelines Manual § 8C2.5(g)(1)

- 1) If the organization [...] reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, **subtract 5 points.**

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	.80	1.60
3	.60	1.20
2	.50	.80
1	.20	.40
0	.05	.20



# “Fully Cooperates in DOJ Investigation . . .”

USAM Insert

**9-47.120 – FCPA**

**b. Full Cooperation in FCPA Matters**

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations, *see* USAM 9-28.000, the following items will be required for a company to receive credit for full cooperation for purposes of USAM 9-47-120(1) (beyond the credit available under the U.S.S.G.):

- “independent investigation”
- “timely updates”
- “attribution to specific sources”
- “all facts related to officers, employees, agents”
- “de-confliction of witness interviews”
- “conduct by third-party companies”
- “facilitate interviews of former employees and third-party witnesses”
- “rolling disclosures”
- “provision of translations”
- “disclosure of overseas documents”
- “identify opportunities to obtain evidence”
- “facilitate third-party productions”

Due to the unique international character of the FCPA, the Department is aimed at providing credit for full cooperation once the disclosed misconduct is appropriately resolved. A company will be a present aggravating circumstance for the offender. A company in the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and completely disclosed the facts of the case, the Department will recommend a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.

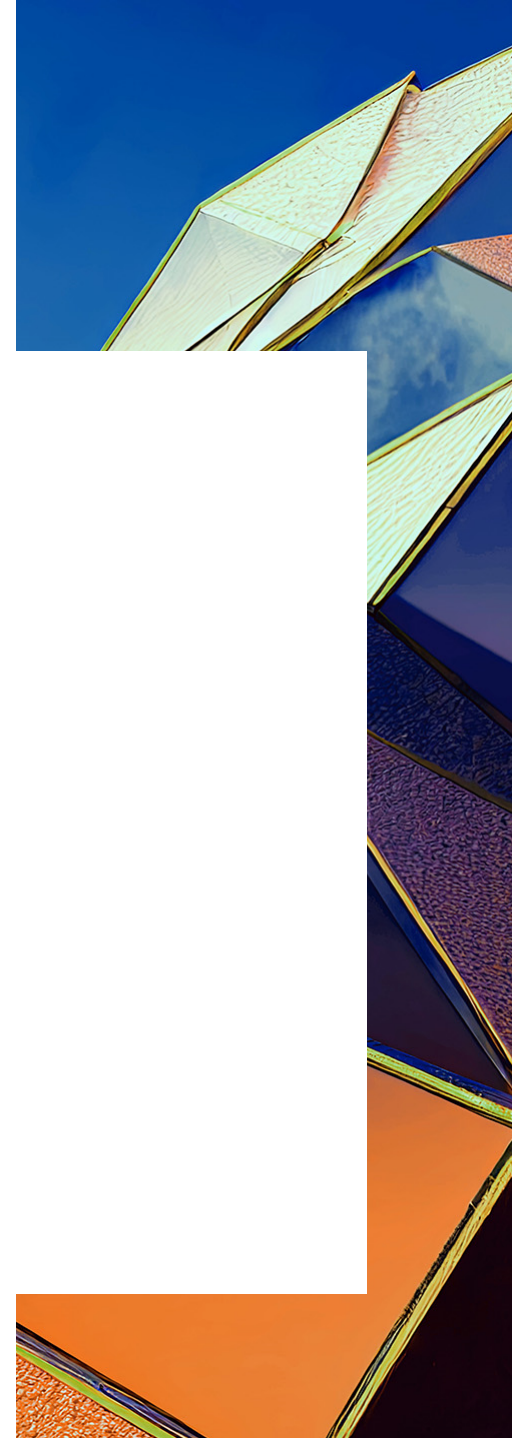
**“Nice business you got there. It would be a shame if something bad happened to it. . . .”**





# So What Does Cooperation Really Mean?

- Cooperation is not for the timid
  - **Proactive posture.**
    - *“We’d appreciate it if you could tell us where to look for evidence before we ask.”*
  - **Expansive document requests.**
    - *“Could you just give us his whole inbox?” “Would it be possible to just give us her phone?”*
  - **Do the work for us.**
    - *“If it is not too much trouble, could you share your translations of these documents.”*
    - *“We’d be most grateful to see your summaries of this data.”*
  - **Contacting former employees / third parties.**
    - *“Would you mind figuring out where he works now and get us his new contact information?”*
  - **Specific attribution.**
    - *“Tell us exactly who knew what, when, and how.”*
    - *“Could you please provide a download of each of your employee interviews conducted in during your internal investigation??*



# So, What Does Cooperation Really Mean?

- “Deputizing” defense counsel; “suggestions” that challenge traditional roles of defense attorneys and prosecutors
  - **Deconfliction requests.**
    - *“Don’t speak with these employees before we do.”*
    - *“Don’t share key documents for counsel for individuals under investigation.”*
  - **Employee screens.**
    - *“Let’s screen off your General Counsel for now.”*
  - **Employment decisions.**
    - *“Wait, don’t fire that guy until we give you the green light.”*
  - **Privilege waivers?**





# Corporate Defense Counsel as DOJ Deputy???



# “Enacts Timely and Appropriate Remediation”

USAM Insert

9-47.120 – FCPA Corporate Enforcement Policy

1. Credit for Voluntary Self-Reporting and Timely and Appropriate Remediation

Due to the unique issues presented by the international character and other factors, this Policy is aimed at providing additional credit for behavior once they learn of the misconduct. If a company discloses misconduct in an appropriate manner, all items will be a presumption that aggravating circumstances involving the offender. Aggravating circumstances include, but are not limited to, a significant profit to the company from the misconduct, or a history of recidivism.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

- will accord, or recommend to a sentencing court, a fine at the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and

To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct.

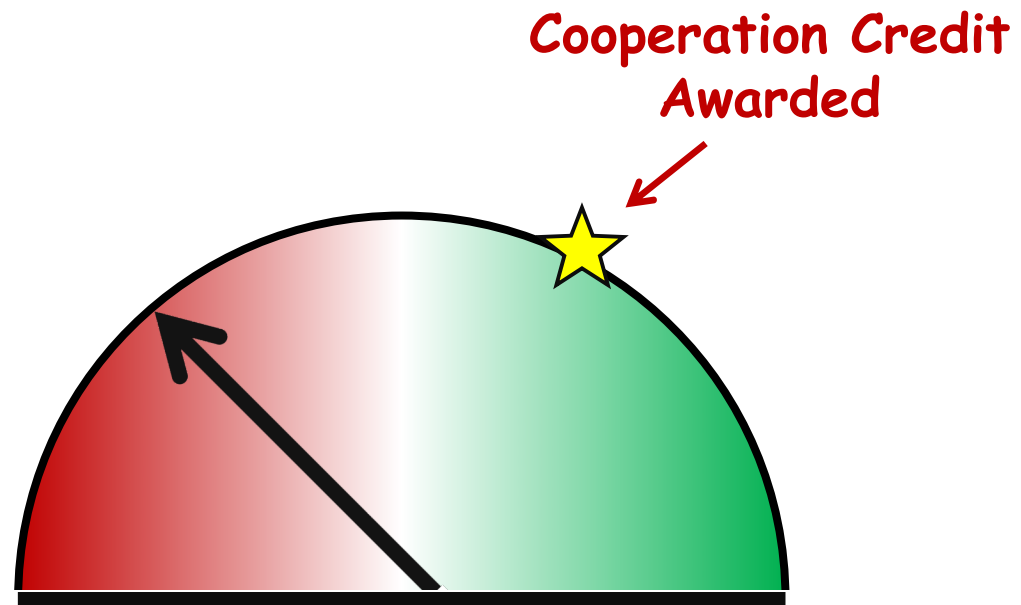
2. Limited Credit for Full Cooperation and Timely and Appropriate Remediation in FCPA Matters Without Voluntary Self-Disclosure

If a company did not voluntarily disclose its misconduct to the Department of Justice, the company may be eligible for a limited credit for full cooperation and timely and appropriate remediation. To qualify for this credit, the company must:

The following items will be required for a company to receive full credit for timely and appropriate remediation for purposes of USAM 9-47-120(1) (beyond the credit available under the U.S.S.G.):

- “thorough analysis of causes of underlying conduct”
- “remediation to address the root causes”
- “culture of compliance”
- “resources dedicated to compliance”
- “quality and experience of compliance personnel”
- “authority and independence of compliance function”
- “effectiveness of company’s risk assessment”
- “compliance program tailored to risk assessment”
- “compensation and promotion of compliance personnel”
- “auditing of compliance program”
- “compliance reporting structure”
- “discipline of employees and supervisors”

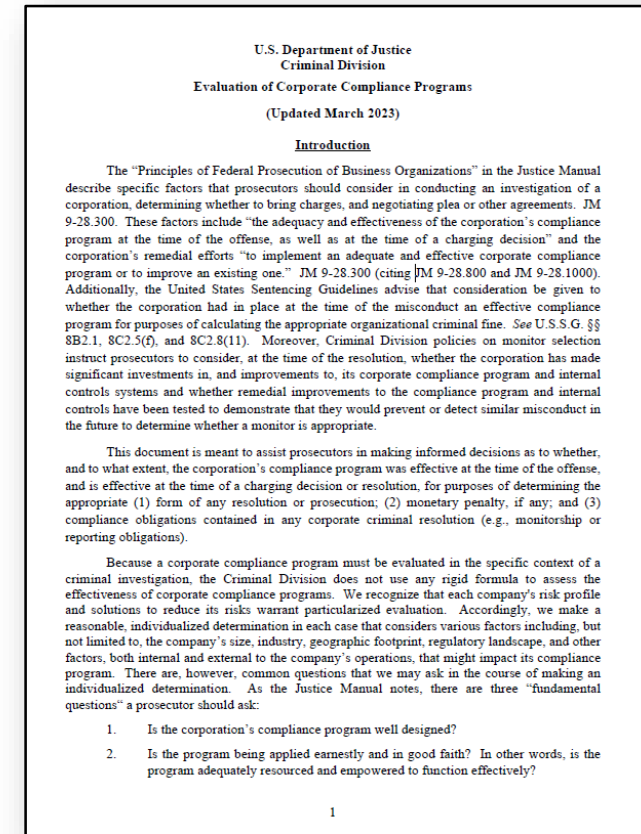
# How Much Is Enough?





# Recent Guidance on Cooperation Credit

- Recent guidance from the DOJ makes clear that a corporate compliance program will not insulate individuals or entities from prosecution or DOJ policy requiring companies to provide **“all non-privileged information relevant to all individuals involved in the misconduct”**
- DOJ has directed its prosecutors to assess the **timeliness** of a company’s disclosures, stressing that DOJ has wants companies to prioritize information that is most relevant for assessing individual culpability
- To be eligible for cooperation credit, a company must share with DOJ evidence of wrongdoing by its employees, including (perhaps especially) by senior executives
- DOJ has emphasized that cooperating companies must **prioritize** disclosing facts about potentially culpable individuals and be ready to produce all relevant communications, including those coming from personal devices or messaging applications



# New Safe Harbor Policy for Voluntary Self-Disclosures in M&A Context

- Policy announced October 4, 2023 by U.S. DOJ's Deputy Attorney General Lisa Monaco
  - Presumption of declination of prosecution where acquiring companies:
    - Promptly and voluntarily disclose criminal misconduct during 6-month safe-harbor period after closing of M&A transaction
    - Cooperate with DOJ's investigation; and
    - Engage in appropriate remediation, restitution, and disgorgement.
  - Other considerations:
    - Policy applies department-wide
    - Misconduct must be fully remediated within 1 year
    - Misconduct relating to national security must be reported immediately



U.S. DOJ Lisa Monaco

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