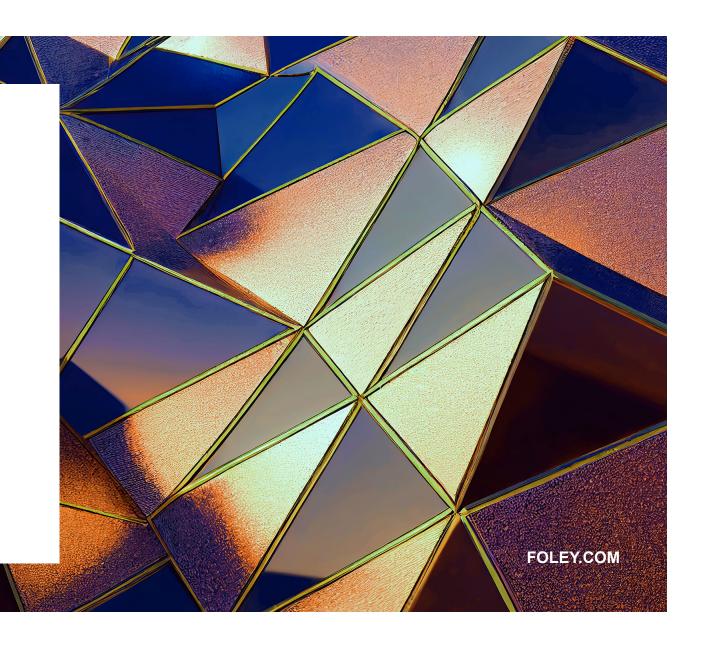


U.S. DOJ Corporate Enforcement and Compliance Developments



Presenters



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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





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





🕯 · Insurance News · Tysers to pay nearly US\$47 million to resolve overseas probe

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

Parent company confirms whether or not earnings will be impacted



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







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

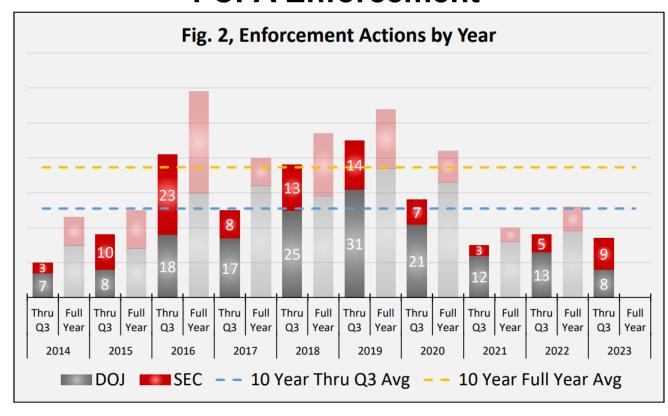
October 26, 2023 2:52 PM CDT · Updated a month ago





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 <u>economic</u> crimes







Evolving Expectations for Compliance Programs

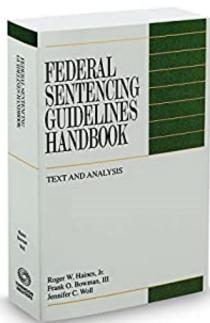


U.S. Federal Sentencing Guidelines (1991, 2004 Amendments)

 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/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'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"

U.S. Department of Justice Criminal Division

Evaluation of Corporate Compliance Programs

Introduction

The Principles of Federal Prosecution of Business Organizations in the United States Attorney's Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporate entity, determining whether to bring charges, and negotiating plea or other agreements. These factors commonly known as the "Filip Factors," include "the existence and effectiveness of the corporation's pre-existing compliance program" and the corporation's remedial efforts "to implement an effective corporate compliance program or to improve an existing one."

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation that triggers the application of the Filip Factors, the Fraud Section does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make an individualized determination in each case.

There are, however, common questions that we may ask in making an individualized determination. This document provides some important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program. The topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient evien the natricular facts at issue.

Many of the topics below also appear in the <u>United States Attorney's Manual</u> ("USAM"), in the <u>United States Sentencing Guidelines</u> ("USSG"), in Fraud Section corporate resolution agreements, in <u>A Resource Guide to the U.S. Foreign Corrupt Practices Act</u> ("ECPA Guide") published in November 2012 by the Department of Justice (DOI) and the Securities and Exchange Commission (ECI), in the <u>Good Practice Guidance on Internal Controls, Ethics, and Compliance adopted by the Organization for Economic Cooperation and Development ("OECD") Council on February 18, 2010, and in the <u>Anti-Corruption Ethics and Compliance Handbook for Business</u> ("OECD Handbook") published in 2013 by OECD, United Nations Office on Drugs and Crime, and the World Bank.</u>

Sample Topics and Question

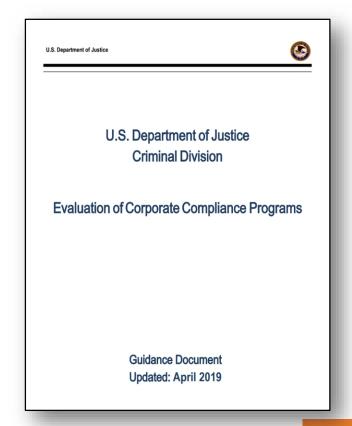
1. Analysis and Remediation of Underlying Misconduc

- Root Cause Analysis What is the company's root cause analysis of the misconduct at issue
 What systemic issues were identified? Who in the company was involved in making the
 analysis?
- Prior Indications Were there prior opportunities to detect the misconduct in question, such a audit reports identifying relevant control failures or allegations, complaints, or investigations involving similar issues? What is the company's analysis of why such opportunities were missed?



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

- Substantive and thoughtful revision that structures prior and additional hallmarkrelated 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'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)

U.S. Department of Justice Criminal Division

Evaluation of Corporate Compliance Programs

(Updated March 2023

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This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three "fundamental ousetions" a prosecutor should ask:

- Is the corporation's compliance program well designed?
- Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?

1



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 <u>preserve</u> 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





DOJ Expectations for Companies Cooperating in Investigations



FCPA Corporate Enforcement Policy

USAM Insert

9-47.120 - FCPA Corporate Enforcement Policy

 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.

 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 selfdisclosed, 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

U.S. Department of Justice Criminal Division Evaluation of Corporate Compliance Programs (Updated March 2023)

Introduction

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This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company's size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company's operations, that might impact its compliance program. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three "fundamental questions" a prosecutor should ask:

- Is the corporation's compliance program well designed?
- Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?

1



United States Attorneys' Offices Voluntary Self-Disclosure Policy

INTRODUCTION

The Deputy Attorney General's September 15, 2022 memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," instructed that each component of the Department of Justice (the "Department") that prosecutes corporate crime should review its policies on corporate voluntary self-disclosure and, if there is no formal written policy to incentivize self-disclosure, it must draft and publicly share such a policy.

The Attorney General's Advisory Committee (AGAC) requested that the White Collar Fraud Subcommittee of the AGAC, under the leadership of U.S. Attorney for the Eastern District of New York Breon Peace (Chair), recommend relevant policies and procedures for consideration. The below policy was prepared by a Corporate Criminal Enforcement Policy Working Group comprised of U.S. Attorney for megographically diverse districts, including U.S. Attorney for the District of Connecticut Vanessa Avery, U.S. Attorney for the District of Connecticut Vanessa Avery, U.S. Attorney for the District of Connecticut Vanessa Avery, U.S. Attorney for the District of Connecticut Vanessa Avery, U.S. Attorney for the District of Sentence Vanessa Very Philip Sellinger, U.S. Attorney for the Eastern District of Virginia Positical Virginia Christopher Kavanaugh, Mandy Riedel, White Collar Crimes Coordinator for the Executive Office for U.S. Attorneys, slos participated in the development of this policy.

The Office of the Deputy Attorney General has reviewed and approved this policy. The policy shall apply to all United States Attorney's Offices and is effective immediately.

POLICY1

I. Voluntary Self-Disclosure Program

In circumstances where a company becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the Department, companies may come to the United States Attorney's Office (the "USAO") and disclose that misconduct, enabling

1



¹ The contents of this memorandum provide internal guidance to prosecutors on legal issues. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties.

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)
 - 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 - FCP

b. Full Cooperation in FCPA Matters

Due to the uniquinternational chais aimed at probehavior once the disclosed misca appropriately remails be a presaggravating circathe offender. A include, but are company in the 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.):

misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the the case of a c "provision of translations" ept in
- 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 to pay all disgorger at issue.

U.S.S.G. fine range.

"facilitate third-party productions"

2. Limited Coulis for Full Connection and Timely and Assessed

"disclosure of overseas documents"

Justice (the Department) in accordance with the standards set forth above, but later fully cooperated and timely and standards set forth above, the recommend to a sentencing court, up to a 25% reduction of of the lower depth above but later.

"independent investigation"

"attribution to specific sources"

"timely updates"

"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"



"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

 Credit for Voluntary S Appropriate Remediat

Due to the unique issues preinternational character and other is aimed at providing additional behavior once they learn of redisclosed misconduct in an appropriately remediated, all in a light or the state of the

appropriately remediated, all is will be a presumption that aggravating circumstances in the offender. Aggravating circlude, but are not limited

c. Timely and Appropriate Remediation in FCPA Matters

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.):

company in the misconduct; a significant profit to the company from the

"thorough analysis of causes of underlying conduct"

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

will accord, or recommend to a sentencial sentenci

"remediation to address the root causes"

"resources dedicated to compliance"

"quality and experience of compliance personnel"

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

"effectiveness of company's risk assessment"

Remediation in FCPA Matters Without Voluntary Self-Disclosure

If a company did not voluntarily disclose its misconduct to the Department of

"authority and independence of compliance function"

"compliance program tailored to risk assessment"

"compensation and promotion of compliance personnel"

recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.

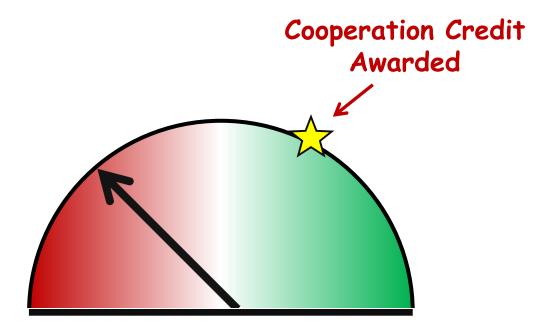
"auditing of compliance program"

"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

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs
(Undated March 2023)

Introduction

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1



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 safeharbor 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



About Foley

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