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DOJ's Corporate Enforcement Policies: 2022 Updates and Tips for Compliance

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DOJ's Corporate Enforcement Policies: 2022 Updates and Tips for Compliance

November 2022

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WHO WE ARE

Lindsay E. Ray, Of Counsel

Lindsay Ray, a member of Baker Donelson's Government Enforcement and Investigations Group, represents clients in litigation matters, with a focus on white collar defense, complex commercial litigation, securities litigation, labor and employment disputes, and governmental investigations.

Ms. Ray represents clients in a variety of industries, including investment firms, health care, real estate developers, entertainment and media companies, companies in the power generation industry, pharmaceutical companies, and hedge funds, as well as individuals subject to governmental investigations and criminal prosecution.

WHO WE ARE

Annie M. Kenville, Associate

Annie M. Kenville is a member of Baker Donelson's Government Enforcement and Investigations group, where she assists clients with government investigations, enforcement actions, internal investigations, and white collar criminal prosecutions. She represents and counsels clients in a wide variety of industries, including health care and government contracts.

From 2020–2022, Ms. Kenville served as a Special Assistant United States Attorney in the U.S. Attorney's Office for the District of Maryland in the Violent Crimes and Gangs Section.

WHY WE'RE HERE

- Several recent updates concerning DOJ's Corporate Enforcement Policies ("CEP") are likely to change the landscape of corporate criminal enforcement into 2023 and beyond:
  - On September 12, 2022, Glenn Leon, the former chief ethics and compliance officer at Hewlett Packard Enterprise, became the new chief of the DOJ Criminal Division's Fraud Section
  - On September 15, 2022, Deputy Attorney General Lisa Monaco issued a Memorandum, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (now known as the "Monaco Memo")
  - Deputy Attorney General Monaco delivered remarks on "Corporate Criminal Enforcement" addressing the CEP initiative on September 15, 2022
  - Assistant Attorney General for the Criminal Division, Kenneth A. Polite, then delivered remarks on September 16, 2022, addressing the CEP initiative and other corporate crime enforcement updates

WHY WE'RE HERE

"If any corporation still thinks criminal resolutions can be priced in as the cost of doing business, we have a message—times have changed."

– Deputy AG Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement

"We may all have different roles—prosecutors, defense attorneys, business leaders, compliance officials. But know that regardless of our different perspectives, we share the common vision of prevention being the most effective tool we have in stemming crime."

– Assistant AG Kenneth A. Polite Delivers Remarks at the University of Texas law School

AGENDA

1. An Overview of DOJ's Fraud Section
2. The History of DOJ's Existing CEP Program
3. Recent Corporate Enforcement Actions
4. Formation of the Corporate Crime Advisory Group
5. Key Updates from the Monaco Memorandum
    a) Limited corporate accountability with cooperation
    b) Individual accountability before corporate liability
    c) Guidance on avoiding compliance monitorships
    d) Public resolution of corporate liability
6. Tips for Compliance
7. Questions

1. DOJ'S FRAUD SECTION

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DOJ FRAUD SECTION
INTRODUCTION

- Investigates and prosecutes sophisticated economic crime, including complex white collar crime, assists with the development of DOJ policy, and implements enforcement initiatives
- Three litigating units:
  - Foreign Corrupt Practices Act Unit: investigates and prosecutes violations of the FCPA and works in parallel with the Securities and Exchange Commission (SEC), which has civil enforcement authority for violations of the FCPA by publicly traded companies
  - Health Care Fraud Unit: prosecutes complex health care fraud matters and cases involving the illegal prescription, distribution, and diversion of opioids
  - Market Integrity Major Frauds Unit: prosecutes complex and sophisticated securities, commodities, corporate, investment, and cryptocurrency-related fraud cases
- Chief Glenn Leon
  - Well-situated to balance DOJ's enforcement practices with the practicalities of running a business

2. DOJ'S CEP PROGRAM

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DOJ'S CORPORATE ENFORCEMENT POLICY ("CEP") PROGRAM

2016 FCPA "PILOT" PROGRAM

- April 5, 2016 – DOJ announces Fraud Section's FCPA Enforcement Plan and Guidance
  - Announced three steps to enhance FCPA enforcement
    - First two steps involved (1) increasing FCPA law enforcement resources and (2) strengthening coordination with the DOJ's foreign counterparts
  - **Third step - FCPA enforcement pilot program, the origin of DOJ's CEP programming**
    - To promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and remediate flaws in their controls and compliance programs
    - Goal: deter individuals from engaging in FCPA violations, encourage companies to implement strong anti-corruption compliance programs, and increase DOJ's ability to prosecute individual wrongdoers

DOJ'S CORPORATE ENFORCEMENT POLICY ("CEP") PROGRAM

2016 FCPA "PILOT" PROGRAM

- Requirements for a company to qualify for credit for voluntary self-disclosure, cooperation, and timely and appropriate remediation:
  - Voluntary self-disclosure
    - Factors included: whether disclosure was "prior to an imminent threat of disclosure or government investigation," "within a reasonably prompt time after becoming aware of the offense," and included all relevant facts known to the company
  - Full cooperation
    - Factors included: proactive disclosure of all relevant facts, preservation, collection and disclosure of relevant documents and information (including overseas documents), timely updates on internal investigations, provision of facts regarding third-party companies and facts gathered during internal investigations
  - Timely and appropriate remediation
    - Implementation of an effective compliance and ethics program

DOJ'S CORPORATE ENFORCEMENT POLICY ("CEP") PROGRAM

REVISED FCPA CORPORATE ENFORCEMENT POLICY

- November 29, 2017 – Former Deputy AG Rosenstein announced inclusion of Pilot Program into the U.S. Attorney's Manual (now referred to as the Justice Manual ("J.M.”))
  - Noted that in the first year and a half of the program, the FCPA Unit received 30 voluntary disclosures compared to 18 during the previous year and a half
  - Enhancements:
    - Created presumption for declination in cases where corporations satisfied the standards of self-disclosure, full cooperation, and timely and appropriate remediation
    - If aggravating circumstances rebutted presumption, still provided that DOJ would recommend a 50% reduction off the low end of the U.S.S.G's fine range
    - Provided guidance on effective compliance and ethics programs

DOJ'S CORPORATE ENFORCEMENT POLICY ("CEP") PROGRAM

SUBSEQUENT UPDATES

- JM 9-47.120 FCPA Corporate Enforcement Policy
  - March 2019
    - Updated policies on instant-messaging and communications, de-confliction, mergers and acquisitions, and disclosure of individuals "substantially involved"

- July 2020 – *A Resource Guide to the* U.S. FCPA, Second Edition
    - Chapter 5 – Guiding Principles of Enforcement
      - Reiterated the "Principles of Federal Prosecution of Business organizations" from JM 9-47.120
      - Reviews the factors included in the CEP used to evaluate whether declination is appropriate
      - Includes three examples of CEP Declinations in applying those principles and the CEP factors

FCPA DECLINATIONS

1. In re: Jardine Lloyd Thompson Group Holdings Ltd. (3/22/22)
2. In re: World Acceptance Corporation (8/5/20)
3. In re: Quad/Graphics Inc. (9/19/19)
4. In re: Cognizant Technology Solutions Corporation (2/13/19)
5. In re: Polycom Inc. (12/20/18)
6. In re: Insurance Corporation of Barbados Limited (8/23/18)
7. In re: Guralp Systems Limited (8/20/18)
8. In re: Dun & Bradstreet Corporation (4/23/18)
9. In re: CDM Smith, Inc. (6/21/17)
10. In re: Linde North America Inc. (6/16/17)
11. In re: NCH Corporation (9/29/2016)
12. In re: HMT LLC (9/29/2016)
13. In re: Johnson Controls, Inc. (6/21/2016)
14. In re: Akamai Technologies, Inc. (6/6/2016)
15. In re: Nortek, Inc. (6/3/2016)

https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations (updated March 24, 2022)

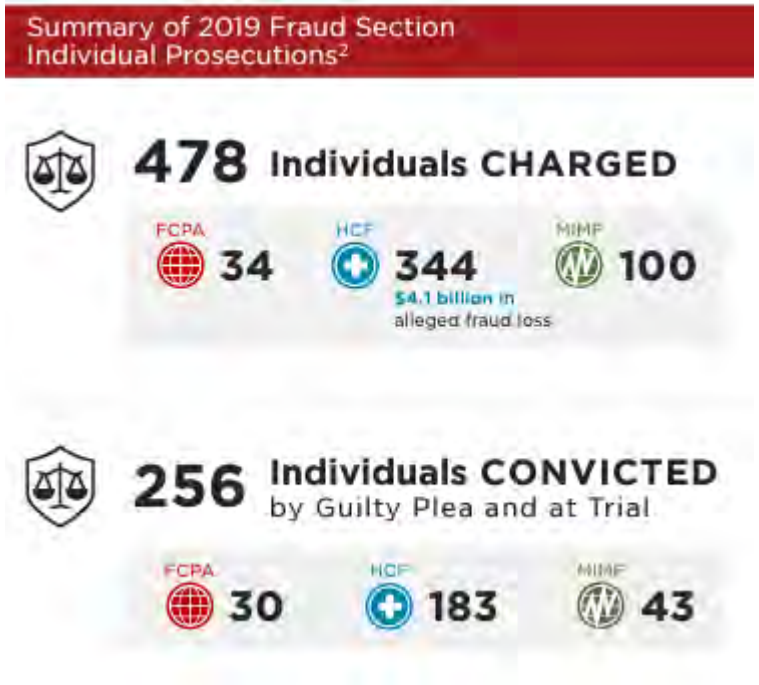
FCPA DECLINATIONS

In re Jardine Lloyd Thompson Group Holdings LTD ("JLT)

- From 2014 through 2016, JLT paid approximately $10,800,000 to a Florida-based third-party intermediary that the employee and agents knew would be used, in part, to pay bribes to Ecuadorian government officials. DOJ declined prosecution given:
  - JLT's voluntary self-disclosure of the misconduct
  - JLT's full and proactive cooperation and agreement to continue to cooperate in DOJ's ongoing investigations
  - Nature and seriousness of the offense
  - JLT's timely and full remediation, and
  - JLT's agreement to disgorge the full amount of its ill-gotten gains

3. RECENT CORPORATE ENFORCEMENT ACTIONS

RECENT ENFORCEMENT ACTIONS



RECENT FCPA ACTIONS

- June 2019 – TechnipFMC
  - Involved two schemes whereby TechnipFMC plc, a global provider of oil and gas services, paid bribes to Brazilian officials and FMC, Technip's wholly owned subsidiary, paid bribes to officials in Iraq
  - Total coordinated resolution amount between the SEC and E.D.N.Y. exceeded $300 million
- December 2019 – Ericsson
  - Beginning in 2000 and continuing until 2016, the Company conspired with others to violate the FCPA by engaging in a long-standing scheme to pay bribes, to falsify books and records, and to fail to implement reasonable internal accounting control. Total penalties exceeded $1 billion
- October 2020 – Goldman Sachs
  - Between 2009 and 2014, Goldman employees and agents conspired to violate the anti-bribery provisions of the FCPA by engaging in a scheme to pay high-level government officials in Malaysia and Abu Dhabi to obtain and retain business for Goldman from a Malaysian state-owned and state-controlled investment and development fund
  - "Although Goldman control functions knew of significant red flags surrounding the transactions, they failed to take reasonable steps to investigate and mitigate corruption risks so that the highly lucrative transactions would be approved"
- January 2021 – Deutsche Bank
  - Charges arose out of a scheme to conceal corrupt payments and bribes by falsely recording them in books and records and a separate scheme to engage in fraudulent and manipulative commodities trading practices
  - Employees conspired to fail to implement internal accounting controls by failing to conduct meaningful due diligence regarding business development consultants (BDCs), making payments to certain BCDs that did not have a contract with the bank, and making payments to certain BDCs without invoices or adequate documentations

OTHER RECENT ENFORCEMENT ACTIONS

2021

- January 2021 – The Boeing Company
  - Entered into a DPA resolving a criminal charge for conspiracy to defraud the Federal Aviation Administration's Aircraft Evaluation Group by deceiving the FAA AEG (which evaluated and mandated pilot-training requirements for U.S. based airlines flying the Boeing 737 MAX airplane) about the speed range in which part of the airplane could operate
- June - September 2021 – Individual prosecutions for unlawful opioid prescriptions
- July 2021 – Michael and Leah Hagen
  - Jury convicted two owners and operators of durable medical equipment companies for an illegal kickback and money laundering conspiracy to pay illegal bribes and kickbacks resulting in the submission of over $59 million in claims to Medicare
  - Were each sentenced to 168 months in prison
- July 2021 – Avanos Medical, Inc.
  - Entered into a DPA resolving criminal charges relating to introducing misbranded surgical gowns into interstate commerce, including misbranding gowns to be used by medical professionals on the front lines of the 2014 Ebola outbreak

OTHER RECENT ENFORCEMENT ACTIONS

2022

- May 2022 – Glencore International A.G. and Glencore Ltd.
  - Each entity, both part of a multi-national commodity training and mining firm, pleaded guilty and agreed to pay over $1.1 billion to resolve the government's investigations into violations of the FCPA and a commodity price manipulation scheme
  - Glencore agreed to retain an independent compliance monitor for three years
- September 2022 – Feeding Our Future Fraud Scheme
  - DOJ announced charge against 47 defendants for alleged roles in $250 million fraud scheme that exploited a federally-funded child nutrition program during the COVID-19 pandemic
- September 2022 – GOL Linhas Aereas Inteligentes S.A. ("GOL")
  - Airline headquartered in Sao Paulo, Brazil, agreed to pay over $41 million to resolve parallel bribery investigations by criminal and civil authorities in the U.S. and Brazil
  - A member of GOL's Board of Directors caused GOL to enter into sham contracts with, and make payments to, various entities connected to the relevant Brazilian officials to secure the passage of two pieces of favorable legislation
- October 2022 – Curtiss and Jamey Jackson
  - CEO and President of Hawaii Shipbuilding company charged with engaging in a scheme to fraudulently obtain money by deceiving purchasers of Semisub securities about the company's business and operations
  - Raised over $28 million from more than 400 investors

4. THE CORPORATE CRIME ADVISORY GROUP

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CREATION OF THE CORPORATE CRIME ADVISORY GROUP

- The October 2021 Guidance called for the creation of a "Corporate Crime Advisory Group" to consider and recommend additional guidance concerning the three-fold revisions to the DOJ's corporate criminal enforcement policies and practices

- Included representatives from public interest groups, consumer advocacy organizations, experts in corporate ethics and compliance, representatives from the academic community, audit committee members, in-house attorneys, and individuals who previously served as corporate monitors, as well as members of the business community and defense bar

CREATION OF THE CORPORATE CRIME ADVISORY GROUP

OCTOBER 2021 GUIDANCE

- October 2021 Guidance *Corporate Crime Advisory Group and Initial Revisions to Corporate Enforcement Policies*
  - "Fighting corporate crime is a top priority of the Department of Justice"
  - Introduced three-fold revisions to the DOJ's corporate criminal enforcement policies and practices
    - Instructed attorneys to consider a corporation's entire criminal history
    - Clarified a corporation's obligation to provide all information concerning all persons involved in corporate misconduct in order to receive cooperation credit
    - Addressed the use of monitorships
  - Deputy AG Lisa Monaco's October 2021 Keynote Address on White Collar Crime stressed that the DOJ's "first priority in corporate criminal matters [is] to prosecute the individuals who commit and profit from corporate malfeasance."

5. THE MONACO MEMO

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THE MONACO MEMORANDUM

- The September 15, 2022 Memorandum provides guidance on:
  - Individual accountability
  - Corporate accountability
  - Independent compliance monitorships
  - DOJ's commitment to transparency in corporate criminal enforcement

- Demonstrates DOJ's stated priorities to:
  - Encourage corporate cooperation and self-disclosure
  - Carefully measure corporate compliance programs
  - Penalize the specific individuals accountable for violations, and
  - Ensure that resolutions mirror these and other DOJ priorities

a) Limited corporate accountability with cooperation

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Limited corporate accountability with cooperation

"Voluntary self-disclosure, cooperation, and remediation can save a company hundreds of millions of dollars, and it can make or break a company's chances to avoid indictment or a guilty plea."

- Principal Associate Deputy AG Marshall Miller Keynote Address at Global Investigations Review

- Emphasis on rewarding self-disclosure is consistent with prior guidance, but the Memorandum provides greater detail on how the entire DOJ footprint will now consider particular facts and circumstances of a company's cooperation
- Companies will only be given cooperation credit if the self-disclosure is:
  - Timely,
  - Thorough, and
  - Transparent

Limited corporate accountability with cooperation

"Absent the presence of aggravating factors, the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct."

- Monaco Memo

- Instructed each department to identify what circumstances would constitute aggravating factors
- Assistant AG Kenneth Polite announced that aggravating factors in the criminal division will include:
  - Involvement by executive management of the company in the misconduct
  - Significant profit to the company from the misconduct, or
  - Pervasive or egregious misconduct

Limited corporate accountability with cooperation

Closely monitor and regulate any use of personal devices and third-party messaging platforms

"Companies need to prevent circumvention of compliance protocols through off-system activity, preserve all key data and communications and have the capability to promptly produce that information for government investigations."

- Principal Associate Deputy AG Miller Delivers Live Keynote Address at Global Investigations Review

- Data preservation remains a key concern of the Department
- As the number of third-party messaging applications only continues to grow, companies must ensure that policies are in place to prevent unauthorized use of messaging applications and preserve business-related electronic data communications

Limited corporate accountability with cooperation

"While multiple deferred or non-prosecution agreements are generally disfavored, nothing [] should disincentivize corporations that have been the subject of prior resolutions from voluntarily disclosing misconduct to the Department."

- Memorandum

- DOJ wants companies with histories of misconduct to still be incentivized to self-disclose
- The Memorandum indicates that less weight will be given to:
  - Criminal records more than 10 years old and regulatory and civil records more than 5 years old, *except* that the DOJ will consider repeated misconduct as potentially indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards
  - Prior misconduct by an acquired entity if the acquired entity "has been integrated into an effective, well-designed compliance program" and the acquiring corporation "addressed the root cause of the prior misconduct" and "full and timely remediation occurred within the acquired entity" before the current investigation

Limited corporate accountability with cooperation

- Prosecutors will consider the history of a corporation in a highly regulated industry by comparing similarly situated corporations in that industry
- Prosecutors will also consider whether the conduct at issue in the prior and current matters reflects broader weaknesses in a corporation' s compliance culture or practices
- DOJ will ask:
  - Did the conduct occur under the same management team and executive leadership?
  - Is there overlap in involved personnel at any level?
  - Does the present and prior instances of misconduct share the same root causes?
  - What remediation was taken to address the root causes of prior misconduct?

Limited corporate accountability with cooperation

- Parallel investigations are not a reason to decline to commence a prosecution in the United States
- Prosecutors will carefully consider
  - The foreign jurisdiction's interest in the prosecution and ability and willingness to prosecute the crimes at issues; and
  - The probable sentence and/or other consequences the individual will face if convicted in the foreign jurisdiction before making a decision on declination.
- When facing an investigation—whether internal or in cooperation with a DOJ investigation—companies should carefully consider not only the risk to the company but the risk to any potentially culpable individuals involved, both domestically and abroad

CASE EXAMPLES

- A “prototypical investigation” in the Canned Tuna Market
  - Antitrust investigation into a conspiracy among three canned tuna companies to keep the price of canned tuna high
  - Chicken of the Sea – voluntarily self-disclosed, received leniency, was not prosecuted, and paid no fine
  - Bumble Bee Foods – pleaded guilty and paid $25m fine
  - StarKist – pleaded guilty and paid $100m fine

- Declination with disgorgement - FCPA resolution
  - March 2022 – Jardine Lloyd Thompson Group Holdings Ltd
  - DOJ found evidence that between 2014 and 2016, JLT paid more than $10m to a Florida-based third-party intermediary that a JLT employee and agents knew would be used, in part, to pay brides to Ecuadorian government officials to obtain and retain contracts with an Ecuadorian state-owned and controlled surety company
  - Despite these findings, the DOJ declined prosecution given:
    - JLT’s voluntary self-disclosure of the misconduct;
    - JLT’s full and proactive cooperation and agreement to continue to cooperate in the DOJ’s ongoing investigations and any resulting prosecutions
    - Nature and seriousness of the offense;
    - JLT’s timely and full remediation; and
    - Fact that JLT agreed to disgorge the full amount of its ill-gotten gains

b) Individual accountability before corporate liability

Individual accountability before corporate liability

"The Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime."

- Memorandum

- Companies can maximize cooperation credit by self-disclosing individual misconduct
- The cooperation should prioritize evidence bearing on individual culpability
- Prosecutors will now generally be prevented from closing an investigation against a company until they have completed related investigations into potentially culpable individuals
  - Here, The DOJ seeks to overcome the delay to individual prosecutions that can result when corporations and the government go back-and-forth to reach a resolution. If the DOJ is going to resolve a corporate case first, prosecutors must draft a full investigative plan and outline for advancing the individual case

Individual accountability before corporate liability

IMPLICATIONS

- The Memorandum states that *"to receive full cooperation, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals."*
- Given DOJ's focus on holding individuals, and not just companies, accountable can put companies and counsel in a difficult spot
  - *Upjohn* warnings – it is crucial that employees are encouraged to cooperate with internal investigations, but have a clear understanding of the scope of the attorney-client privilege
  - When to recommend independent counsel – companies need to carefully consider whether and when employees require individual counsel

Individual accountability before corporate liability

USE OF CHIEF COMPLIANCE OFFICER (COO) CERTIFICATIONS

- Initially announced by Assistant AG Kenneth Polite in March
- Consistent with the DOJ's interest in holding individuals personally accountable
- Assistant AG Polite further addressed the Criminal Division's use of COO certifications in corporate resolutions on September 16
- With every corporate resolution, the DOJ considers whether to require both the Chief Executive Officer and Chief Compliance Officer to certify that the company's compliance program is:
  - Reasonably designed
  - Implemented to detect and prevent violations of the law, and
  - Is functioning effectively

Individual accountability before corporate liability

USE OF CHIEF COMPLIANCE OFFICER (COO) CERTIFICATIONS

- Material statement and representation under 18 U.S.C. 1001

  "[W]however, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

  - (1) falsifies, conceals or covers up by any trick, scheme, or device a material fact;
  - (2) makes any materially false, fictitious, or fraudulent statement or representation; or
  - (3) makes or uses any false writing or document knowing the same to contain any materially false, fictious, or fraudulent statement or entry

  shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism."

- What is "reasonably designed"?
  - What constitutes a reasonably designed compliance program is inherently subjective
  - Potentially creating a unique risk to executives expected to attest to this unspecified standard, subjecting themselves to individual liability if the attestation is deemed "false"
  - Further complicated when a company's compliance program extends to multiples business operations with numerous employees

c) Guidance on avoiding compliance monitorships

Guidance on avoiding compliance monitorships

- Monitorships are costly and cumbersome, and the Memorandum provides some guidance on factors it will consider when determining whether to require a monitor
- DOJ is less likely to declare a need for a compliance monitorship when:
  - The company voluntarily disclosed,
  - Has a tested compliance program and internal controls,
  - Took adequate investigative or remedial measures to address the underlying conduct, and
  - Is subject to oversight from industry regulators or a monitor
  - The underlying conduct was isolated and not long-lasting or pervasive across the business,
  - Was not approved, facilitated or ignored by senior management,
  - Did not involve active participation by compliance personnel, and
  - Did not exploit an inadequate compliance program or system of internal controls

CASE EXAMPLES

Stericycle

- April 2022 - International waste management company agreed to pay more than $84m to resolve parallel investigations by the US and Brazil relating to the bribery of foreign officials
- Entered into a three-year DPA in connection with a criminal information charging two counts of FCPA violations
- “Although Stericycle has taken extensive remedial measures, it has not fully implemented or tested its enhanced compliance program, necessitating the imposition of an independent compliance monitor for a term of two years.”

Glencore International A.G.

- May 2022 – Multi-national commodity trading and mining firm agreed, along with Glencore Ltd, to pay over $1.1b to resolve the government’s investigations into FCPA violations and a commodity price manipulation scheme
- Guilty plea
- “Although Glencore has taken remedial measures, some of the compliance enhancements are new and have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, necessitating the imposition of an independent compliance monitor for a term of three years.”

CASE EXAMPLES

GOL Airlines

- September 2022 – airline agreed to pay more than $41m to resolve parallel bribery investigations by criminal and civil authorities in the United States and Brazil
- Entered into a three-year DPA in connection with a criminal information charging one county charging conspiracy to violate the anti-bribery and books and records provisions of the FCPA
- “We did not impose a monitor in that case because at the time of the resolution, the company had redesigned its entire anti-corruption compliance program, demonstrated through testing that the program was functioning effectively, and committed to continuing to enhance its compliance program and internal controls.”

d) Public resolution of corporate liability

Public resolution of corporate liability

- DOJ will publish agreements resolving corporate criminal liability on the DOJ's website, absent exceptional circumstances
- Published agreements are expected to include:
  - A statement of facts and statement of relevant considerations, including the company's voluntary self-disclosure;
  - Cooperation and remedial efforts, and corresponding cooperation credit, if any;
  - The seriousness and pervasiveness of the criminal conduct;
  - The company's history of misconduct and status with respect to a compliance program at the time of the underlying conduct and resolution; and
  - The reasons for imposing a compliance monitor, if applicable.

6. TIPS FOR COMPLIANCE

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TIPS FOR COMPLIANCE

"With a combination of carrots and sticks—with a mix of incentives and deterrence—we're giving general counsels and chief compliance officers the tools they need to make a business case for responsible corporate behavior."

- Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement

- The Memorandum and public remarks are the latest showing of the DOJ's commitment to its tough-on-crime approach to corporate fraud
- In a clear effort to incentivize company cooperation in the reduction of corporate crime, the DOJ is promoting transparency and predictability in how decisions regarding cooperation will be made and the factors that will be considered

TIPS FOR COMPLIANCE

- To maximize cooperation credit, a company's policies and practices should:
  - Reward compliant behavior and penalize misconduct, including through financial incentives; and
  - Closely monitor and regulate any use of personal devices and third-party messaging platforms.

- To secure a non-prosecution or deferred prosecution agreement, a company should:
  - Have robust compliance programs and ethical corporate culture from the top down; and
  - Not only ensure that robust policies and practices are in place, but regularly audit and test their programs.

TIPS FOR COMPLIANCE

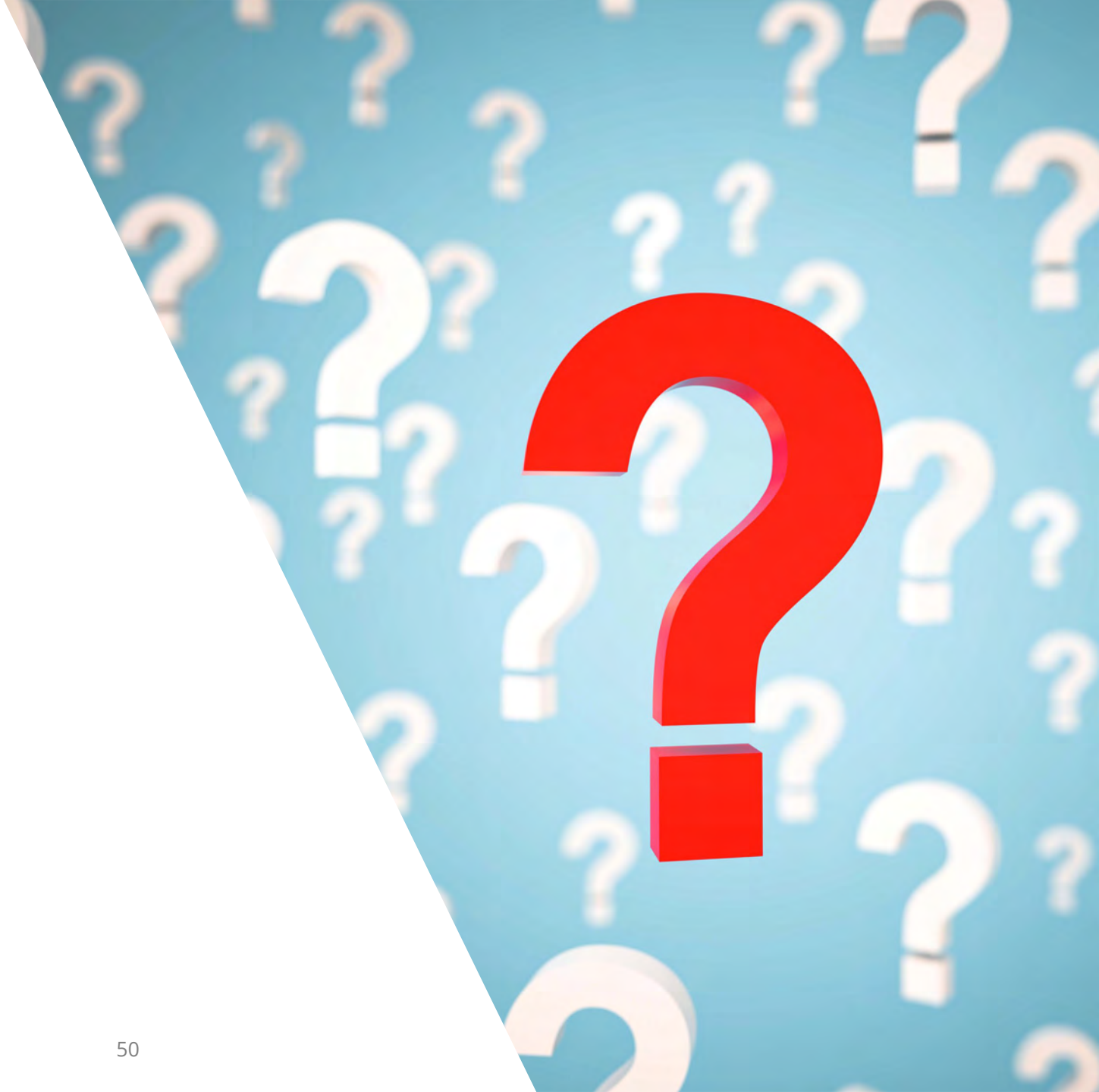
Reward compliant behavior and penalize misconduct, including through financial incentives

- The Memorandum puts repeated emphasis on considering whether a company's compliance program includes a compensation system that incentivizes good behavior and deters wrongdoing
- Compensation arrangements, agreements, and packages
- Principal Associate Deputy AG Miller asks:
  - Has the company clawed back incentives paid out to employees and supervisors who engaged in or did not stop wrongdoing?
  - Is the company targeting bonuses to employees and supervisors who set the right tone, make compliance a priority, and build an ethical culture?

TIPS FOR COMPLIANCE

- Investigate any complaints—whether formal or informal, and regardless of their source—promptly and thoroughly
  - Investigations should: thoroughly document the investigation and any resulting analyses and recommendations; and put into place and verify any suggested remediation promptly
- Establish robust compliance programs that are regularly audited and tested and include financial incentives to ensure personal accountability
- Develop and maintain an established protocol for consideration of whether and when self-disclosure may be warranted
- Ensure ample document preservation policies are in place and employees are not utilizing unauthorized messaging applications

Q&A DISCUSSION



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DOJ's Corporate Enforcement Policies: 2022 Updates and Tips for Compliance

Presented by: Baker Donelson Bearman Caldwell & Berkowitz

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and

Annie M. Kenville

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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 15, 2022

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION
ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Lisa Monaco

SUBJECT: Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group

By combating corporate crime, the Department of Justice protects the public, strengthens our markets, discourages unlawful business practices, and upholds the rule of law. Strong corporate criminal enforcement also assures the public that there are not two sets of rules in this country—one for corporations and executives, and another for the rest of America. Corporate criminal enforcement will therefore always be a core priority for the Department.

In October 2021, the Department announced three steps to strengthen our corporate criminal enforcement policies and practices with respect to individual accountability, the treatment of a corporation's prior misconduct, and the use of corporate monitors. *See* Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021 ("October 2021 Memorandum"). Simultaneously, we established the Corporate Crime Advisory Group ("CCAG")[1] within the Department to evaluate and recommend further guidance and consider

[1] CCAG members included leaders and experienced prosecutors from all components of the Department that handle corporate criminal matters: the Criminal Division; the Antitrust Division; the Executive Office of United States

revisions and reforms to enhance our approach to corporate crime, provide additional clarity on what constitutes cooperation by a corporation, and strengthen the tools our attorneys have to prosecute responsible individuals and companies.[2] This review considered and incorporated helpful input from a broad cross-section of individuals and entities with relevant expertise and representing diverse perspectives, including public interest groups, consumer advocacy organizations, experts in corporate ethics and compliance, representatives from the academic community, audit committee members, in-house attorneys, and individuals who previously served as corporate monitors, as well as members of the business community and defense bar.

With the benefit of this input, this memorandum announces additional revisions to the Department's existing corporate criminal enforcement policies and practices. This memorandum provides guidance on how prosecutors should ensure individual and corporate accountability, including through evaluation of: a corporation's history of misconduct; self-disclosure and cooperation provided by a corporation; the strength of a corporation's existing compliance program; and the use of monitors, including their selection and the appropriate scope of a monitor's work. Finally, this memorandum emphasizes the importance of transparency in corporate criminal enforcement.

In order to promote consistency across the Department, these policy revisions apply Department-wide. Some announcements herein establish the first-ever Department-wide policies on certain areas of corporate crime, such as guidance on evaluating a corporation's compensation plans; others supplement and clarify existing guidance. The policies set forth in this Memorandum, as well as additional guidance on subjects like cooperation, will be incorporated into the Justice Manual through forthcoming revisions, including new sections on independent corporate monitors.[3]

I. Guidance on Individual Accountability

The Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime. Such accountability deters future illegal activity, incentivizes changes in individual and corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system. *See* Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015. Many existing Department policies promote the identification and investigation of the individuals responsible for corporate crimes. The following policies reinforce this priority.

Attorneys; multiple United States Attorneys' Offices; the Civil Division; the National Security Division; the Environment and Natural Resources Division; the Tax Division; and the Federal Bureau of Investigation.

[2] While this Memorandum refers to corporations and companies, the terms apply to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations. *See* Justice Manual ("JM") § 9-28.200.

[3] Department prosecutors will continue to employ the Principles of Federal Prosecution of Business Organizations—as amended by the October 2021 Memorandum and this memorandum—to guide investigations and prosecutions of corporate crime, including with respect to prosecutors' assessment and evaluation of just and efficient resolutions in corporate criminal cases. *See* JM §§ 9-28.000 *et seq.* ("Principles of Federal Prosecution of Business Organizations").

A. Timely Disclosures and Prioritization of Individual Investigations

To be eligible for any cooperation credit, corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct. *See* October 2021 Memorandum, at 3. The mere disclosure of records, however, is not enough. If disclosures come too long after the misconduct in question, they reduce the likelihood that the government may be able to adequately investigate the matter in time to seek appropriate criminal charges against individuals. The expiration of statutes of limitations, the dissipation of corroborating evidence, and other factors can inhibit individual accountability when the disclosure of facts about individual misconduct is delayed.

In particular, it is imperative that Department prosecutors gain access to all relevant, non-privileged facts about individual misconduct swiftly and without delay. Therefore, to receive full cooperation credit, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals. Companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit. Companies seeking cooperation credit ultimately bear the burden of ensuring that documents are produced in a timely manner to prosecutors.

Likewise, production of evidence to the government that is most relevant for assessing individual culpability should be prioritized. Such priority evidence includes information and communications associated with relevant individuals during the period of misconduct. Department prosecutors will frequently identify the priority evidence they are seeking from a cooperating corporation, but in the absence of specific requests from prosecutors, cooperating corporations should understand that information pertaining to individual misconduct will be most significant.

Going forward, in connection with every corporate resolution, Department prosecutors must specifically assess whether the corporation provided cooperation in a timely fashion. Prosecutors will consider, for example, whether a company promptly notified prosecutors of particularly relevant information once it was discovered, or if the company instead delayed disclosure in a manner that inhibited the government's investigation. Where prosecutors identify undue or intentional delay in the production of information or documents—particularly with respect to documents that impact the government's ability to assess individual culpability—cooperation credit will be reduced or eliminated.

Finally, prosecutors must strive to complete investigations into individuals—and seek any warranted individual criminal charges—prior to or simultaneously with the entry of a resolution against the corporation. If prosecutors seek to resolve a corporate case prior to completing an investigation into responsible individuals, the prosecution or corporate resolution authorization memorandum must be accompanied by a memorandum that includes a discussion of all potentially culpable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. *See* JM § 9-28.210. In such cases,

prosecutors must obtain the approval of the supervising United States Attorney or Assistant Attorney General of both the corporate resolution and the memorandum addressing responsible individuals.

B. Foreign Prosecutions of Individuals Responsible for Corporate Crime

The prosecution by foreign counterparts of individuals responsible for cross-border corporate crime plays an increasingly important role in holding individuals accountable and deterring future criminal conduct. Cooperation with foreign law enforcement partners—both in terms of evidence-sharing and capacity-building—has become a significant part of the Department's overall efforts to fight corporate crime. At the same time, the Department must continue to pursue forcefully its own individual prosecutions, as U.S. federal prosecution serves as a particularly significant instrument for accountability and deterrence.

At times, Department criminal investigations take place in parallel to criminal investigations by foreign jurisdictions into the same or related conduct. In such situations, the Department may learn that a foreign jurisdiction intends to bring criminal charges against an individual whom the Department is also investigating. The Principles of Federal Prosecution recognize that effective prosecution in another jurisdiction may be grounds to forego federal prosecution. JM § 9-27.220. Going forward, before declining to commence a prosecution in the United States on that basis, prosecutors must make a case-specific determination as to whether there is a significant likelihood that the individual will be subject to effective prosecution in the other jurisdiction. To determine whether an individual is subject to effective prosecution in another jurisdiction, prosecutors should consider, *inter alia*: (1) the strength of the other jurisdiction's interest in the prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction. JM § 9-27.240.

When appropriate, Department prosecutors may wait to initiate a federal prosecution in order to better understand the scope and effectiveness of a prosecution in another jurisdiction. However, prosecutors should not delay commencing federal prosecution to the extent that delay could prevent the government from pursuing certain charges (*e.g.*, on statute of limitations grounds), reduce the chance of arresting the individual, or otherwise undermine the strength of the federal case.

Similarly, prosecutors should not be deterred from pursuing appropriate charges just because an individual liable for corporate crime is located outside the United States.

II. Guidance on Corporate Accountability

A. Evaluating a Corporation's History of Misconduct

As discussed in the October 2021 Memorandum, in determining how best to resolve an investigation of corporate criminal activity, prosecutors should, among other factors, consider the corporation's record of past misconduct, including prior criminal, civil, and regulatory resolutions,

both domestically and internationally.[4] Consideration of a company's historical misconduct harmonizes the way the Department treats corporate and individual criminal histories, and ensures that prosecutors give due weight to an important factor in evaluating the proper form of resolution.

Not all instances of prior misconduct, however, are equally relevant or probative. To that end, prosecutors should consider the form of prior resolution and the associated sanctions or penalties, as well as the elapsed time between the instant misconduct, the prior resolution, and the conduct underlying the prior resolution. In general, prosecutors weighing these factors should assign the greatest significance to recent U.S. criminal resolutions, and to prior misconduct involving the same personnel or management. Dated conduct addressed by prior criminal resolutions entered into more than ten years before the conduct currently under investigation, and civil or regulatory resolutions that were finalized more than five years before the conduct currently under investigation, should generally be accorded less weight as such conduct may be generally less reflective of the corporation's current compliance culture, program, and risk tolerance.[5] However, depending on the facts of the particular case, even if it falls outside these time periods, repeated misconduct may be indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards.

In addition to its form, Department prosecutors should consider the facts and circumstances underlying a corporation's prior resolution, including any factual admissions by the corporation. Prosecutors should consider the seriousness and pervasiveness of the misconduct underlying each prior resolution and whether that conduct was similar in nature to the instant misconduct under investigation, even if it was prosecuted under different statutes. Prosecutors should also consider whether at the time of the misconduct under review, the corporation was serving a term of probation or was subject to supervision, monitorship, or other obligation imposed by the prior resolution.

Corporations operate in varying regulatory and other environments, and prosecutors should be mindful when comparing corporate track records to ensure that any comparison is apt. For example, if a corporation operates in a highly regulated industry, a corporation's history of regulatory compliance or shortcomings should likely be compared to that of similarly situated companies in the industry. Prior resolutions that involved entities that do not have common management or share compliance resources with the entity under investigation, or that involved conduct that is not chargeable as a criminal violation under U.S. federal law, should also generally receive less weight. Prior misconduct committed by an acquired entity should receive less weight if the acquired entity has been integrated into an effective, well-designed compliance program at the acquiring corporation and if the acquiring corporation addressed the root cause of the prior

[4] The term "resolution" covers both post-trial adjudications and stipulated non-trial resolutions, such as plea agreements, non-prosecution agreements, deferred prosecution agreements, civil consent decrees and stipulated orders, and pre-trial regulatory enforcement actions.

[5] Corporations should be prepared to produce a list and summary of all prior criminal resolutions within the last ten years and all civil or regulatory resolutions within the last five years, as well as any known pending investigations by U.S. (federal and state) and foreign government authorities. Attorneys for the government may tailor (or expand) this request to obtain the information that would be most relevant to the Department's analysis.

misconduct before the conduct currently under investigation occurred, and full and timely remediation occurred within the acquired entity before the conduct currently under investigation.

Department prosecutors should also evaluate whether the conduct at issue in the prior and current matters reflects broader weaknesses in a corporation's compliance culture or practices. One consideration is whether the conduct occurred under the same management team and executive leadership. Overlap in involved personnel—at any level—could indicate a lack of commitment to compliance or insufficient oversight of compliance risk at the management or board level. Beyond personnel, prosecutors should consider whether the present and prior instances of misconduct share the same root causes. Prosecutors should also consider what remediation was taken to address the root causes of prior misconduct, including employee discipline, compensation clawbacks, restitution, management restructuring, and compliance program upgrades.

Multiple non-prosecution or deferred prosecution agreements are generally disfavored, especially where the matters at issue involve similar types of misconduct; the same personnel, officers, or executives; or the same entities. Before making a corporate resolution offer that would result in multiple non-prosecution or deferred prosecution agreements for a corporation (including its affiliated entities), Department prosecutors must secure the written approval of the responsible U.S. Attorney or Assistant Attorney General and provide notice to the Office of the Deputy Attorney General (ODAG) in the manner set forth in JM § 1-14.000. Notice provided to ODAG pursuant to JM § 1-14.000 must be made at least 10 business days prior to the issuance of an offer to the corporation, except in extraordinary circumstances.

While multiple deferred or non-prosecution agreements are generally disfavored, nothing in this memorandum should disincentivize corporations that have been the subject of prior resolutions from voluntarily disclosing misconduct to the Department. Department prosecutors must weigh and appropriately credit voluntary and timely self-disclosures of current or prior conduct. Indeed, timely voluntary disclosures do not simply reveal misconduct at a corporation; they can also reflect that a corporation is appropriately working to detect misconduct and takes seriously its responsibility to instill and act upon a culture of compliance. As set forth in the next section of this Memorandum, when determining the appropriate form and substance of a corporate criminal resolution for any corporation, including one with a prior resolution, prosecutors should consider whether the criminal conduct at issue came to light as a result of the corporation's timely, voluntary self-disclosure and credit such disclosure appropriately.

B. Voluntary Self-Disclosure by Corporations

In many circumstances, a corporation becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the Department. In those cases, corporations may come to the Department and disclose this misconduct, enabling the government to investigate and hold wrongdoers accountable more quickly than would otherwise be the case. Department policies and procedures must ensure that a corporation benefits from its decision to come forward to the Department and voluntarily self-disclose misconduct, through resolution under more favorable terms than if the government had learned of the misconduct

through other means. And Department policies and procedures should be sufficiently transparent such that the benefits of voluntary self-disclosure are clear and predictable.

Many Department components that prosecute corporate criminal misconduct have already adopted policies regarding the treatment of corporations who voluntarily disclose their misconduct. *See, e.g.*, Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division); Export Control and Sanctions Enforcement Policy for Business Organizations (National Security Division); and Factors in Decisions on Criminal Prosecutions (Environment & Natural Resources Division). Of course, voluntary self-disclosure only occurs when companies disclose misconduct promptly and voluntarily (*i.e.*, where they have no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior Department resolution) and when they do so prior to an imminent threat of disclosure or government investigation.[6]

Through this memorandum, I am directing each Department of Justice component that prosecutes corporate crime to review its policies on corporate voluntary self-disclosure, and if the component lacks a formal, written policy to incentivize such self-disclosure, it must draft and publicly share such a policy. Any such policy should set forth the component's expectations of what constitutes a voluntary self-disclosure, including with regard to the timing of the disclosure, the need for the disclosure to be accompanied by timely preservation, collection, and production of relevant documents and/or information, and a description of the types of information and facts that should be provided as part of the disclosure process.[7] The policies should also lay out the benefits that corporations can expect to receive if they meet the standards for voluntary self-disclosure under that component's policy.

All Department components must adhere to the following core principles regarding voluntary self-disclosure. First, absent the presence of aggravating factors, the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct. Each component will, as part of its written guidance on voluntary self-disclosure, provide guidance on what circumstances would constitute such aggravating factors, but examples may include misconduct that poses a grave threat to national security or is deeply pervasive throughout the company. Second, the Department will not require the imposition of an independent compliance monitor for a cooperating corporation that voluntarily self-discloses the relevant conduct if, at the time of resolution, it also demonstrates that it has implemented and tested an effective compliance program. Such decisions about the

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[6] Voluntary self-disclosure of misconduct is distinct from cooperation with the government's investigation, and prosecutors should thus consider these factors separately. *See, e.g.*, JM § 9-28.900 (addressing voluntary disclosures generally); JM § 9-47.120 (describing credit for voluntary self-disclosure in FCPA matters).

[7] For example, the FCPA Corporate Enforcement policy sets forth the following requirements for a corporation to receive credit for voluntary self-disclosure of wrongdoing: the disclosure must qualify under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation"; the corporation must disclose the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden on the corporation to demonstrate timeliness; and the corporation must disclose all relevant facts known to it, "including as to any individuals substantially involved in or responsible for the misconduct at issue." JM § 9-47.120.

imposition of a monitor will continue to be made on a case-by-case basis and at the sole discretion of the Department.

C. Evaluation of Cooperation by Corporations

Cooperation can be a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that is appropriate for indictment and prosecution. JM § 9-28.700. Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. JM § 9-28.720.[8]

Credit for cooperation takes many forms and is calculated differently based on the degree to which a corporation cooperates with the government's investigation and the commitment that the corporation demonstrates in doing so. The level of a corporation's cooperation can affect the form of the resolution, the applicable fine range, and the undertakings involved in the resolution.

Many existing Department policies discuss the Department's expectations for full and effective cooperation. *See, e.g.*, JM § 9-28.720 (Cooperation: Disclosing the Relevant Facts); JM § 9-47.120, ¶ 1.3(b) (Full Cooperation in FCPA Matters). The Department will update the Justice Manual to ensure greater consistency across components as to the steps that a corporation will need to take to receive maximum credit for full cooperation.

Companies seeking credit for cooperation must timely preserve, collect, and disclose relevant documents located both within the United States and overseas. In some cases, data privacy laws, blocking statutes, or other restrictions imposed by foreign law may complicate the method of production of documents located overseas. In such cases, the cooperating corporation bears the burden of establishing the existence of any restriction on production and of identifying reasonable alternatives to provide the requested facts and evidence, and is expected to work diligently to identify all available legal bases to preserve, collect, and produce such documents, data, and other evidence expeditiously.[9]

Department prosecutors should provide credit to corporations that find ways to navigate such issues of foreign law and produce such records. Conversely, where a corporation actively seeks to capitalize on data privacy laws and similar statutes to shield misconduct inappropriately from detection and investigation by U.S. law enforcement, an adverse inference as to the corporation's cooperation may be applicable if such a corporation subsequently fails to produce foreign evidence.

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[8] Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and the individual's attorneys. *Id.*

[9] This requirement now applies to all corporations under investigation that are seeking to cooperate. The requirement already applies to investigations involving potential violations of the FCPA. *See* JM § 9-47.120.

D. Evaluation of a Corporation's Compliance Program

Although an effective compliance program and ethical corporate culture do not constitute a defense to prosecution of corporate misconduct, they can have a direct and significant impact on the terms of a corporation's potential resolution with the Department. Prosecutors should evaluate a corporation's compliance program as a factor in determining the appropriate terms for a corporate resolution, including whether an independent compliance monitor is warranted.[10] Prosecutors should assess the adequacy and effectiveness of the corporation's compliance program at two points in time: (1) the time of the offense; and (2) the time of a charging decision. The same criteria should be used in each instance.

Prosecutors should evaluate the corporation's commitment to fostering a strong culture of compliance at all levels of the corporation—not just within its compliance department. For example, as part of this evaluation, prosecutors should consider how the corporation has incentivized or sanctioned employee, executive, and director behavior, including through compensation plans, as part of its efforts to create a culture of compliance.

There are many factors that prosecutors should consider when evaluating a corporate compliance program. The Criminal Division has developed resources to assist prosecutors in assessing the effectiveness of a corporation's compliance program. *See* Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020). Additional guidance has been provided by other Department components as to specialized areas of corporate compliance. *See, e.g.*, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019). Prosecutors should consider, among other factors, whether the corporation's compliance program is well designed, adequately resourced, empowered to function effectively, and working in practice. Prior guidance has identified numerous considerations for this evaluation, including, *inter alia*, how corporations measure and identify compliance risk; how they monitor payment and vendor systems for suspicious transactions; how they make disciplinary decisions within the human resources process; and how senior leaders have, through their words and actions, encouraged or discouraged compliance.

In addition to those factors, this Memorandum identifies additional metrics relevant to prosecutors' evaluation of a corporation's compliance program and culture.

1. Compensation Structures that Promote Compliance

Corporations can help to deter criminal activity if they reward compliant behavior and penalize individuals who engage in misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can incentivize compliant conduct, deter risky behavior, and instill a corporate culture in which employees follow the law and avoid legal "gray areas." When conducting this evaluation, prosecutors should consider how the corporation

[10] At the same time, the mere existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. *See* JM 9-28.800.

has incentivized employee behavior as part of its efforts to create a culture of ethics and compliance within its organization.

Corporations can best deter misconduct if they make clear that all individuals who engage in or contribute to criminal misconduct will be held personally accountable. In assessing a compliance program, prosecutors should consider whether the corporation's compensation agreements, arrangements, and packages (the "compensation systems") incorporate elements—such as compensation clawback provisions—that enable penalties to be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. Since misconduct is often discovered after it has occurred, prosecutors should examine whether compensation systems are crafted in a way that allows for retroactive discipline, including through the use of clawback measures, partial escrowing of compensation, or equivalent arrangements.

Similarly, corporations can promote an ethical corporate culture by rewarding those executives and employees who promote compliance within the organization. Prosecutors should therefore also consider whether a corporation's compensation systems provide affirmative incentives for compliance-promoting behavior. Affirmative incentives include, for example, the use of compliance metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior, both as to the employee and any subordinates whom they supervise. When effectively implemented, such provisions incentivize executives and employees to engage in and promote compliant behavior and emphasize the corporation's commitment to its compliance programs and its culture.

Prosecutors should look to what has happened in practice at a corporation—not just what is written down. As part of their evaluation of a corporation's compliance program, prosecutors should review a corporation's policies and practices regarding compensation and determine whether they are followed in practice. If a corporation has included clawback provisions in its compensation agreements, prosecutors should consider whether, following the corporation's discovery of misconduct, a corporation has, to the extent possible, taken affirmative steps to execute on such agreements and clawback compensation previously paid to current or former executives whose actions or omissions resulted in, or contributed to, the criminal conduct at issue.

Finally, prosecutors should consider whether a corporation uses or has used non-disclosure or non-disparagement provisions in compensation agreements, severance agreements, or other financial arrangements so as to inhibit the public disclosure of criminal misconduct by the corporation or its employees.

The use of financial incentives to align the interests of the C-suite with the interests of the compliance department can greatly amplify a corporation's overall level of compliance. To that end, I have asked the Criminal Division to develop further guidance by the end of the year on how to reward corporations that develop and apply compensation clawback policies, including how to shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible.

2. Use of Personal Devices and Third-Party Applications

The ubiquity of personal smartphones, tablets, laptops, and other devices poses significant corporate compliance risks, particularly as to the ability of companies to monitor the use of such devices for misconduct and to recover relevant data from them during a subsequent investigation. The rise in use of third-party messaging platforms, including the use of ephemeral and encrypted messaging applications, poses a similar challenge.

Many companies require all work to be conducted on corporate devices; others permit the use of personal devices but limit their use for business purposes to authorized applications and platforms that preserve data and communications for compliance review. How companies address the use of personal devices and third-party messaging platforms can impact a prosecutor's evaluation of the effectiveness of a corporation's compliance program, as well as the assessment of a corporation's cooperation during a criminal investigation.

As part of evaluating a corporation's policies and mechanisms for identifying, reporting, investigating, and remediating potential violations of law, prosecutors should consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved. To assist prosecutors in this evaluation, I have asked the Criminal Division to further study best corporate practices regarding use of personal devices and third-party messaging platforms and incorporate the product of that effort into the next edition of its Evaluation of Corporate Compliance Programs, so that the Department can address these issues thoughtfully and consistently.

As a general rule, all corporations with robust compliance programs should have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, should provide clear training to employees about such policies, and should enforce such policies when violations are identified. Prosecutors should also consider whether a corporation seeking cooperation credit in connection with an investigation has instituted policies to ensure that it will be able to collect and provide to the government all non-privileged responsive documents relevant to the investigation, including work-related communications (*e.g.*, texts, e-messages, or chats), and data contained on phones, tablets, or other devices that are used by its employees for business purposes.

III. Independent Compliance Monitorships[11]

As set forth in the October 2021 Memorandum, Department prosecutors will not apply any general presumption against requiring an independent compliance monitor ("monitor") as part of a corporate criminal resolution, nor will they apply any presumption in favor of imposing one.

[11] In September 2021, the Associate Attorney General issued a memorandum concerning the use of monitorships in civil settlements involving state and local governmental entities. Memorandum from Associate Attorney General Vanita Gupta, "Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Government Entities," Sept. 13, 2021. That memorandum continues to govern the use of monitors in those cases.

Rather, the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case.

A. Factors to Consider When Evaluating Whether a Monitor is Appropriate

Independent compliance monitors can be an effective means of reducing the risk of further corporate misconduct and rectifying compliance lapses identified during a corporate criminal investigation. Prosecutors should analyze and carefully assess the need for a monitor on a case-by-case basis, using the following non-exhaustive list of factors when evaluating the necessity and potential benefits of a monitor:[12]

1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy;

2. Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;

3. Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;

4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns);

5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;

6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;

7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;

8. Whether, at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;

[12] For components or U.S. Attorney's Offices that do not have extensive corporate resolution experience, consultation with DOJ components that more routinely assess such compliance programs, internal controls, and remedial measures is recommended.

9. Whether the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates or the nature of the corporation's customers; and

10. Whether and to what extent the corporation is subject to oversight from industry regulators or a monitor imposed by another domestic or foreign enforcement authority or regulator.

The factors listed above are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Department attorneys should determine whether a monitor is required based on the facts and circumstances presented in each case.

B. Selection of Monitors

In selecting a monitor, prosecutors should employ consistent and transparent procedures. Monitor selection should be performed pursuant to a documented selection process that is readily available to the public. *See, e.g.,* Memorandum of Assistant Attorney General Brian A. Benczkowski, Selection of Monitors in Criminal Division Matters, Oct. 11, 2018, Section E ("The Selection Process"); Environment and Natural Resources Division, Environmental Crimes Section, Corporate Monitors: Selection Best Practices (Mar. 2018); Antitrust Division, Selection of Monitors in Criminal Cases (July 2019).[13] Every component involved in corporate criminal resolutions that does not currently have a public monitor selection process must adopt an already existing Department process, or develop and publish its own selection process before December 31, 2022.[14] All new selection processes must be approved by ODAG and made public before their implementation as part of any corporate criminal resolution. The appropriate United States Attorney or Department Component Head shall also provide a copy of the process to the Assistant Attorney General for the Criminal Division, who shall maintain a record of such processes.

Any selection process must incorporate elements that promote consistency, predictability, and transparency. First, per existing policy, the consideration of monitor candidates shall be done by a standing or *ad hoc* committee within the office or component where the case originated. To the extent that such committees did not previously do so, every monitorship committee must now include as a member an ethics official or professional responsibility officer from that office or component, who shall ensure that the other members of the committee do not have any conflicts of interest in selection of the monitor. There shall be a written memorandum to file confirming that no conflicts exist in the committee prior to the selection process or as to the monitor prior to the commencement of the monitor's work. Second, monitor selection processes shall be conducted in keeping with the Department's commitment to diversity and inclusion. Third, prosecutors shall

[13] This requirement does not apply to cases involving court-appointed monitors, where prosecutors must give due regard to the appropriate role and procedures of the court.

[14] Unless they adopt and publish their own processes pursuant to the principles set forth herein, U.S. Attorney's Offices should follow the selection process developed by the Criminal Division, unless partnering with a Department component that has its own preexisting selection process.

notify the appropriate United States Attorney or Department Component Head of their decision regarding whether to require an independent compliance monitor. In order to promote greater transparency, any agreement imposing a monitorship should describe the reasoning for requiring a monitor.[15] ODAG must approve the monitor selection for all cases in which a monitor is recommended, unless the monitor is court-appointed.[16]

C. Continued Review of Monitorships

In matters where an independent corporate monitor is imposed pursuant to a resolution with the Department, prosecutors should ensure that the monitor's responsibilities and scope of authority are well-defined and recorded in writing, and that a clear workplan is agreed upon between the monitor and the corporation—all to ensure agreement among the corporation, monitor, and Department as to the proper scope of review.

For the term of the monitorship, Department prosecutors must remain apprised of the ongoing work conducted by the monitor.[17] Continued review of the monitorship requires ongoing communication with both the monitor and the corporation.[18]

Prosecutors should receive regular updates from the monitor about the status of the monitorship and any issues presented. Monitors should promptly alert prosecutors if they are being denied access to information, resources, or corporate employees or agents necessary to execute their charge. Prosecutors should also regularly receive information about the work the monitor is doing to ensure that it remains tailored to the workplan and scope of the monitorship. In reviewing information relating to the monitor's work, prosecutors should consider the reasonableness of the monitor's review, including, where appropriate, issues relating to the cost of the monitor's work. In certain cases, prosecutors may determine that the initial term of the monitorship is longer than necessary to address the concerns that created the need for the monitor, or that the scope of the monitorship is broader than necessary to accomplish the goals of the monitorship. For example, a corporation may demonstrate significant and faster-than-anticipated improvements to its compliance program, and this could reduce the need for continued monitoring. Conversely, prosecutors may determine that newly identified concerns require lengthening the term or amending the scope of the monitorship.

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[15] The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

[16] *See* Morford Memorandum, at p. 3 (requiring, for cases involving the use of monitors in DPAs and NPAs, that "the Office of the Deputy Attorney General must approve the monitor").

[17] In cases of court-appointed monitors, the court may elect to oversee this inquiry.

[18] Per existing policy, any agreement requiring a monitor should also explain what role the Department could play in resolving disputes that may arise between the monitor and the corporation, given the facts and circumstances of the case. *See* Acting Deputy Attorney General Gary C. Grindler, "Additional Guidance on the Use of Monitors in Deferred Prosecutions and Non-Prosecution Agreements with Corporation," May 25, 2010.

IV. Commitment to Transparency in Corporate Criminal Enforcement

Transparency regarding the Department's corporate criminal enforcement priorities and processes—including its expectations as to corporate cooperation and compliance, and the consequences of meeting or failing to meet those expectations—can encourage companies to adopt robust compliance programs, voluntarily disclose misconduct, and cooperate fully with the Department's investigations. Transparency can also instill public confidence in the Department's work.

When the Department elects to enter into an agreement to resolve corporate criminal liability, the agreement should, to the greatest extent possible, include: (1) an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement; and (2) a statement of relevant considerations that explains the Department's reasons for entering into the agreement. Relevant considerations may, for example, include the corporation's voluntary self-disclosure, cooperation, and remedial efforts (or lack thereof); the cooperation credit, if any, that the corporation is receiving; the seriousness and pervasiveness of the criminal conduct; the corporation's history of misconduct; the state of the corporation's compliance program at the time of the underlying criminal conduct and the time of the resolution; the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable; other applicable factors listed in JM § 9-28.300; and any other key considerations related to the Department's decision regarding the resolution.

Absent exceptional circumstances, corporate criminal resolution agreements will be published on the Department's public website.

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Robust corporate criminal enforcement remains central to preserving the rule of law—ensuring the same accountability for all, regardless of station or privilege. Thank you for the work you do every day to fulfill the Department's mission.

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement

New York City, NY ~ Thursday, September 15, 2022

Remarks as Prepared for Delivery

Photo credit NYU Program on Corporate Compliance and Enforcement

Good afternoon. Thank you, Dean McKenzie, for the introduction and for hosting us today. I'm happy to be back at NYU, and to see so many friends and former colleagues in the room.

Let me start by acknowledging some of my DOJ colleagues who are here. That includes the U.S. Attorneys for the Southern and Eastern Districts of New York, New Jersey, and Connecticut.

But just as importantly, we're joined in person and on the livestream by line prosecutors, agents, and investigative analysts—the career men and women who do the hard work, day in and day out, to make great cases and hold wrongdoers accountable.

I also want to recognize our federal and state partners who play a critical role in corporate enforcement. And of course, let me also thank Professor Arlen and the NYU Program on Corporate Compliance and Enforcement for arranging this event and for serving as a bridge between the worlds of policymaking and academia.

Addressing corporate crime is not a new subject for the Justice Department. In the aftermath of Watergate, Attorney General Edward Levi was tasked not only with restoring the Department's institutional credibility, but also with rebuilding its corporate enforcement program.

In a 1975 speech, he told prosecutors that there was great demand to be more aggressive against, what he called, "white collared crime." He explained his distaste for that term, saying that it suggested a distinction in law enforcement

based upon social class. But, nonetheless, he acknowledged that it was an area that needed to be given "greater emphasis." These words are as true today as they were then.

But Attorney General Levi also said that efforts to fight corporate crime were hampered by a lack of resources, specially trained investigators, and other issues. He answered those complaints as all great Attorneys General do—he said his Deputy Attorney General would take care of it. For at least a half-century, therefore, it has been the responsibility of my predecessors to set corporate criminal policy for the Department, and I follow in their footsteps.

Last October, I announced immediate steps the Justice Department would take to tackle corporate crime.

I also formed the Corporate Crime Advisory Group, a group of DOJ experts tasked with a top-to-bottom review of our corporate enforcement efforts.

To get a wide range of perspectives, we met with a broad group of outside experts, including public interest groups, ethicists, academics, audit committee members, in-house attorneys, former corporate monitors, and members of the business community and defense bar. Many of these people are here today.

Our meetings sparked discussions on individual accountability and corporate responsibility; on predictability and transparency; and on the ways enforcement policies must square with the realities of the modern economy. Every meeting resulted in some idea or insight that was helpful and that we sought to incorporate into our work. Today, you will hear how these new policies reflect this diverse input.

Let me turn now to substance—and the changes the Department is implementing to further strengthen how we prioritize and prosecute corporate crime.

First, I'll reiterate that the Department's number one priority is individual accountability—something the Attorney General and I have made clear since we came back into government. Whether wrongdoers are on the trading floor or in the C-suite, we will hold those who break the law accountable, regardless of their position, status, or seniority.

Second, I'll discuss our approach to companies with a history of misconduct. I previously announced that prosecutors must consider the full range of a company's prior misconduct when determining the appropriate resolution. Today, I will outline additional guidance for evaluating corporate recidivism.

Third, I'll highlight new Department policy on voluntary self-disclosures, including the concrete and positive consequences that will flow from self-disclosure. We expect good companies to step up and own up to misconduct. Voluntary self-disclosure is an indicator of a working compliance program and a healthy corporate culture. Those companies who own up will be appropriately rewarded in the Department's approach to corporate crime.

Fourth, I'll detail when compliance monitors are appropriate and how we can select them equitably and transparently. Today, I am also directing Department prosecutors to monitor those monitors: to ensure they remain on the job, on task, and on budget.

Finally, I'll discuss how the Department will encourage companies to shape financial compensation around promoting compliance and avoiding improperly risky behavior. These steps include rewarding companies that claw back compensation from employees, managers, and executives when misconduct happens. No one should have a financial interest to look the other way or ignore red flags. Corporate wrongdoers—rather than shareholders—should bear the consequences of misconduct.

Taken together, the policies we're announcing today make clear that we won't accept business as usual. With a combination of carrots and sticks—with a mix of incentives and deterrence—we're giving general counsels and chief compliance officers the tools they need to make a business case for responsible corporate behavior. In short, we're empowering companies to do the right thing—and empowering our prosecutors to hold accountable those that don't.

Photo credit NYU Program on Corporate Compliance and Enforcement

Individual Accountability

Let me start with our top priority for corporate criminal enforcement: going after individuals who commit and profit from corporate crime.

In the last year, the Department of Justice has secured notable trial victories, including convictions of the founder and chief operating officer of Theranos; convictions of J.P. Morgan traders for commodities manipulation; the conviction of a managing director at Goldman Sachs for bribery; and the first-ever conviction of a pharmaceutical CEO for unlawful distribution of controlled substances.

Despite those steps forward, we cannot ignore the data showing overall decline in corporate criminal prosecutions over the last decade. We need to do more and move faster. So, starting today, we will take steps to empower our prosecutors, to clear impediments in their way, and to expedite our investigations of individuals.

To do that, we will require cooperating companies to come forward with important evidence more quickly.

Sometimes we see companies and counsel elect—for strategic reasons—to delay the disclosure of critical documents or information while they consider how to mitigate the damage or investigate on their own. Delayed disclosure undermines efforts to hold individuals accountable. It limits the Department's ability to proactively pursue leads and preserve evidence before it disappears. As time goes on, the lapse of statutes of limitations, dissipation of evidence, and the fading of memories can all undermine a successful prosecution.

In individual prosecutions, speed is of the essence.

Going forward, undue or intentional delay in producing information or documents—particularly those that show individual culpability—will result in the reduction or denial of cooperation credit. Gamesmanship with disclosures and productions will not be tolerated.

If a cooperating company discovers hot documents or evidence, its first reaction should be to notify the prosecutors. This requirement is in addition to prior guidance that corporations must provide all relevant, non-privileged facts about individual misconduct to receive any cooperation credit.

Separately, Department prosecutors will work to complete investigations and seek warranted criminal charges against individuals prior to or at the same time as entering a resolution against a corporation. Sometimes the back-and-forth of resolving with a company can bog down individual prosecutions, since our prosecutors have finite resources.

In cases where it makes sense to resolve a corporate case first, there must be a full investigative plan outlining the remaining work to do on the individual cases and a timeline for completing that work.

Collectively, this new guidance should push prosecutors and corporate counsel alike to feel they are "on the clock" to expedite investigations, particularly as to culpable individuals. While many companies and prosecutors follow these principles now, this guidance sets new expectations about the sequencing of investigations and clarifies the Department's priorities.

History of Misconduct

Now, it's safe to say that no issue garnered more commentary in our discussions than the commitment we made last year to consider the full criminal, civil, and regulatory record of any company when deciding the appropriate resolution.

That decision was driven by the fact that between 10% and 20% of large corporate criminal resolutions have involved repeat offenders.

We received many recommendations about how to contextualize historical misconduct, to develop a full and fair picture of the misconduct and corporate culture under review. We heard about the need to evaluate the regulatory environment that companies operate in, as well as the need to consider the age of the misconduct and subsequent reforms to the company's compliance culture.

In response to that feedback, today, we are releasing additional guidance about how such histories will be evaluated. Now let me emphasize a few points.

First, not all instances of prior misconduct are created equal. For these purposes, the most significant types of prior misconduct will be criminal resolutions here in the United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct. But past actions may not always reflect a company's current culture and commitment to compliance. So, dated conduct will generally be accorded less weight.

And what do we mean by dated? Criminal resolutions that occurred more than 10 years before the conduct currently under investigation, and civil or regulatory resolutions that took place more than five years before the current conduct.

We will also consider the nature and circumstances of the prior misconduct, including whether it shared the same root causes as the present misconduct. Some facts might indicate broader weaknesses in the compliance culture or practices, such as wrongdoing that occurred under the same management team or executive leadership. Other facts might provide important mitigating context.

For example, if a corporation operates in a highly regulated industry, its history should be compared to others similarly situated, to determine if the company is an outlier.

Separately, we do not want to discourage acquisitions that result in reformed and improved compliance structures. We will not treat as recidivists companies with a proven track record of compliance that acquire companies with a history of compliance problems, so long as those problems are promptly and properly addressed post-acquisition.

Finally, I want to be clear that this Department will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company. Before a prosecution team extends an offer for a successive NPA or DPA, Department leadership will scrutinize the proposal. That will ensure greater consistency across the Department and a more holistic approach to corporate recidivism.

Companies cannot assume that they are entitled to an NPA or a DPA, particularly when they are frequent flyers. We will not shy away from bringing charges or requiring guilty pleas where facts and circumstances require. If any corporation still thinks criminal resolutions can be priced in as the cost of doing business, we have a message—times have changed.

Voluntary Self-Disclosure

That said, the clearest path for a company to avoid a guilty plea or an indictment is voluntary self-disclosure. The Department is committed to providing incentives to companies that voluntarily self-disclose misconduct to the

government. In many cases, voluntary self-disclosure is a sign that the company has developed a compliance program and has fostered a culture to detect misconduct and bring it forward.

Our goal is simple: to reward those companies whose historical investments in compliance enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward.

Voluntary self-disclosure programs, in various Department components, have already been successful. Take, for example, the Antitrust Division's Leniency Program, the Criminal Division's voluntary disclosure program for FCPA violations, and the National Security Division's program for export control and sanctions violations. We now want to expand those policies Department-wide.

We also want to clarify the benefits of promptly coming forward to self-report, so that chief compliance officers, general counsels, and others can make the case in the boardroom that voluntary self-disclosure is a good business decision.

So, for the first time ever, every Department component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure. If a component currently lacks a formal, documented policy, it must draft one.

Predictability is critical. These policies must provide clear expectations of what self-disclosure entails. And they must identify the concrete benefits that a self-disclosing company can expect.

I am also announcing common principles that will apply across these voluntary self-disclosure policies. Absent aggravating factors, the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct. In addition, the Department will not require an independent compliance monitor for such a corporation if, at the time of resolution, it also has implemented and tested an effective compliance program.

Simply put, the math is easy: voluntary self-disclosure can save a company hundreds of millions of dollars in fines, penalties, and costs. It can avoid reputational harms that arise from pleading guilty. And it can reduce the risk of collateral consequences like suspension and debarment in relevant industries.

If you look at recent cases, you can see the value proposition. Voluntary self-disclosure cases have resulted in declinations and non-prosecution agreements with no significant criminal penalties. By contrast, recent cases that did not involve self-disclosure have resulted in guilty pleas and billions of dollars in criminal penalties, this year alone. I expect that resolutions over the next few months will reaffirm how much better companies fare when they come forward and self-disclose.

Independent Compliance Monitors

Let me turn to monitors. Over the past year of discussions, we heard a call for more transparency to reduce suspicion and confusion about monitors. Today, we're addressing those concerns.

First, we are releasing new guidance for prosecutors about how to identify the need for a monitor, how to select a monitor, and how to oversee the monitor's work to increase the likelihood of success.

Second, going forward, all monitor selections will be made pursuant to a documented selection process that operates transparently and consistently.

Finally, Department prosecutors will ensure that the scope of every monitorship is tailored to the misconduct and related compliance deficiencies of the resolving company. They will receive regular updates to verify that the monitor stays on task and on budget. We at the Department of Justice are not regulators, nor do we aspire to be. But where we impose a monitor, we recognize our obligations to stay involved and monitor the monitor.

Corporate Culture

As everyone here knows, it all comes back to corporate culture. Having served as both outside counsel and a board member in the past, I know the difficult decisions and trade-offs companies face about how to invest corporate resources, structure compliance programs, and foster the right corporate culture.

In our discussions leading to this announcement, we identified encouraging trends and new ways in which compliance departments are being strengthened and sharpened. But resourcing a compliance department is not enough; it must also be backed by, and integrated into, a corporate culture that rejects wrongdoing for the sake of profit. And companies can foster that culture through their leadership and the choices they make.

To promote that culture, an increasing number of companies are choosing to reflect corporate values in their compensation systems.

On the deterrence side, those companies employ clawback provisions, the escrowing of compensation, and other ways to hold financially accountable individuals who contribute to criminal misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance.

On the incentive side, companies are building compensation systems that use affirmative metrics and benchmarks to reward compliance-promoting behavior.

Going forward, when prosecutors evaluate the strength of a company's compliance program, they will consider whether its compensation systems reward compliance and impose financial sanctions on employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. They will evaluate what companies say and what they do, including whether, after learning of misconduct, a company actually claws back compensation or otherwise imposes financial penalties.

I have asked the Criminal Division to develop further guidance by the end of the year on how to reward corporations that employ clawback or similar arrangements. This will include how to help shift the burden of corporate financial penalties away from shareholders—who frequently play no role in misconduct—onto those more directly responsible.

Conclusion

But we're not done.

We will continue to engage and protect victims—workers, consumers, investors, and others.

We will continue to find ways to improve our approach to corporate crime, such as by enhancing the effectiveness of the federal government's system for debarment and suspension.

We will continue to seek targeted resources for corporate criminal enforcement, including the $250 million we are requesting from Congress for corporate crime initiatives next year.

Today's announcements are fundamentally about individual accountability and corporate responsibility. But they are also about ownership and choice.

Companies should feel empowered to do the right thing—to invest in compliance and culture, and to step up and own up when misconduct occurs. Companies that do so will welcome the announcements today. For those who don't, however, our Department prosecutors will be empowered, too—to hold accountable those who don't follow the law.

Thank you again for having me here today. I look forward to taking some questions.

Speaker:
Lisa O. Monaco, Deputy Attorney General

Attachment(s):
Download Memo

Component(s):
Office of the Deputy Attorney General

Updated September 23, 2022

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Assistant Attorney General Kenneth A. Polite Delivers Remarks at the University of Texas Law School

Dallas, TX ~ Friday, September 16, 2022

Thank you, Kit, for the kind introduction. I know how much all of us appreciate the opportunity to convene in person. It's a pleasure to be here in Dallas, with so many friends and former colleagues.

Let me just start by thanking my corporate prosecutors and support staff in both the Fraud and Money Laundering and Asset Recovery Sections for their tremendous work. They travel across the country, and indeed, across the globe, in an effort to combat corruption and fraud in our corporate sector. Since September of last year, a few of their accomplishments include:

- Conducting 42 trials against 61 defendants in 18 districts and obtaining convictions in hard-fought trials against multiple defendants, including the president of a publicly traded medical technology company for securities and health care fraud, a former senior U.S. Navy employee on bribery charges, and two former director-level traders at J.P. Morgan for engaging in a widespread scheme to manipulate the precious metals markets.

- With the verdict against those two traders, we have now secured convictions of ten former traders at Wall Street financial institutions, including J.P. Morgan, Bank of America/Merrill Lynch, Deutsche Bank, The Bank of Nova Scotia, and Morgan Stanley—all of which underscore our steadfast commitment to prosecuting those who undermine the investing public's trust in the integrity of our commodities markets. In connection with these individual cases, and as part of the Section's commodities-enforcement program, we have resolved six corporate cases with banks and proprietary-trading firms with combined criminal monetary penalty amounts of over $1.1 billion.

- As part of our FCPA enforcement efforts against multiple individuals involved in financial crime, we have brought bribery-related money laundering charges against the former Comptroller General of Ecuador and a former Minister of Government of Bolivia; charges against three businessmen relating to an alleged bribery and money laundering scheme in Ecuador; charges against two former coal company executives relating to an alleged bribery scheme in Egypt; and charges against five individuals for their roles in laundering the proceeds of food and medicine contracts in Venezuela that were allegedly obtained through bribery. In the anti-corruption space, in addition to charging individuals and corporations, we are committed to seeking out foreign partners and working in parallel to support the global fight against corruption.

- We have charged nine defendants for their alleged involvement in cryptocurrency-related fraud, including 1) the largest known Non-Fungible Token (NFT) scheme charged to date involving a fraudulent investment fund that purportedly traded on cryptocurrency exchanges, 2) multiple global Ponzi schemes involving the sale of unregistered crypto securities, and 3) fraudulent initial coin offering cases.

- We have reached appropriately tailored resolutions with eight companies, including both DPAs and guilty pleas, and, in one instance, a declination with disgorgement. These resolutions involved foreign corruption in multiple industries and regions of the world, emissions testing fraud, and fraud by one of the largest providers of privatized military housing to the U.S. Armed Forces, among other misconduct.

- We established the New England Prescription Opioid Strike Force (NEPO) as part of our ongoing response to the nation's opioid epidemic.

- Through the Kleptocracy Asset Recovery Initiative, we have focused our efforts on identifying and forfeiting proceeds of corruption connected to Russian oligarchs, including the seizure of a $300 million yacht owned by a sanctioned oligarch.

- We are continuing the longstanding victim remission work that MLARS leads, which includes returning forfeited funds to the victims of financial crime. To cite just two examples of this ongoing work, to date, we have returned over $366 million in forfeited money to 148,000 victims of fraud through the successful criminal resolution with Western Union; and we have overseen the return of over $3.7 billion to 40,000 victims of the Madoff Ponzi scheme.

- Finally, we have created the National Cryptocurrency Enforcement Team, which consists of dedicated prosecutors from MLARS, the Computer Crime and Intellectual Property Section, and United States Attorney's Offices focused on individuals and entities that exploit or otherwise enable the use of cryptocurrency for criminal ends.

And even with all of our important enforcement efforts, it bears repeating: we cannot rely exclusively on prosecutions to ensure public safety or good corporate governance. Indeed, as with any area of criminality, our ultimate goal is to *prevent* corporate crime in the first instance. Preventing the victimization of innocent investors, the loss of faith in the integrity of our markets, the corrosive effects of corruption, the fleecing of taxpayers—has been and remains my highest priority in these cases.

Deterrence plays a key role in accomplishing that objective. We deter corporate crime both by holding individual wrongdoers accountable *and* by creating an enforcement regime that incentivizes responsible corporate citizenship.

I have been fortunate in my career to have previously worked as a chief compliance officer in addition to serving as a line prosecutor, a U.S. Attorney, and defense counsel. I know the incredible challenges that compliance personnel face. But I have also seen how a strong compliance program can ward off misconduct and empower ethical employees. That is why I have made this issue—giving companies strong incentives to deter misconduct through effective compliance programs—a top focus of the Criminal Division.

Our commitment to elevating prevention is reflected in our policies, our practices, and our personnel, the same methods in which our companies reflect their commitment to building a strong compliance program.

DAG Policy Revisions

As you all well know, just yesterday, the Deputy Attorney General announced additional policies in this area.

It is important to highlight how our DAG, and the department, arrived at these new policy announcements. On the heels of her October 2021 announcement regarding individual accountability, recidivism and monitorships, the DAG formed the Corporate Crime Advisory Group (CCAG), to discuss ways to enhance our efforts to combat corporate crime. Its membership included representatives from the various Department components, including the Criminal Division and U.S. Attorney's Offices across the country—including our Deputy Assistant Attorney Generals over the Fraud Section and the Money Laundering and Asset Recovery Section, Lisa Miller and Kevin Driscoll.

But our Deputy Attorney General didn't stop there. The CCAG also included consultations with academicians, practitioners, and business leaders who all offered valuable insight.

Yesterday, the DAG announced several Department-wide policy revisions.

In brief, those revisions provide guidance addressing (1) how prosecutors should continue to prioritize individual accountability; (2) how a corporation's history of misconduct should be considered in determining the appropriate resolution of a corporate case; (3) the benefits companies can expect from voluntary self-disclosure of misconduct; (4) how the Department evaluates cooperation provided by a corporation; (5) how prosecutors will evaluate certain components of a corporation's compliance program; and (6) the use of monitors, including their selection and the appropriate scope of a monitor's work.

The DAG specifically tasked the Criminal Division with assisting further policy revisions in two areas:

First, the Criminal Division will examine whether additional guidance is necessary regarding best corporate practices on use of personal devices and third-party messaging applications, including those offering ephemeral (or disappearing) messaging.

We have seen a rise in companies and individuals using these types of messaging systems, and companies must ensure that they can monitor and retain these communications as appropriate. Indeed, there was a panel at the conference on this very topic yesterday.

Second, the Criminal Division will examine whether, in some cases, we may be able to shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible.

In the coming months, our team will be meeting with, among others, our agency partners and experts on executive compensation, and gathering relevant data points. Based on these inputs, the Criminal Division will then provide further guidance on how prosecutors will consider and reward corporations that develop and apply compensation claw back policies.

Other revisions announced by the Deputy Attorney General provided new points of emphasis in the Department's approach to corporate criminal enforcement, including and in particular, regarding voluntary self-disclosure.

As many of you know, the Criminal Division's Corporate Enforcement Policy has long recognized the potential significance of timely disclosure and cooperation.

However, under the CEP, recidivism may make a company ineligible for a declination. So what would be your incentive to voluntarily self-disclose when your company has a long history of prior misconduct?

The new department-wide policy makes clear that even under those circumstances, there is still a potential benefit. A history of misconduct will not necessarily mean an automatic guilty plea unless aggravating factors—such as misconduct posing a national security threat, or deeply pervasive conduct—are present. The new DAG guidance directs all components to make their own voluntarily self-disclosure policies, but does not spell out aggravating factors beyond that. Today, I am announcing that, going forward, in the Criminal Division, those aggravating factors we will consider will include, but are not limited to, involvement by executive management of the company in the misconduct, significant profit to the company from the misconduct, or pervasive or egregious misconduct.

Unless these factors are present, even a company with a history of misconduct has a powerful incentive to make a timely self-disclosure. Why? Because it could make all the difference between a DPA and a guilty plea resolution, assuming that the company has also cooperated, and timely and appropriately remediated the criminal conduct.

CCO Cert

As to our practices, I want to address our use of Chief Compliance Officer (CCO) certifications. To ensure that compliance officials are empowered to create and maintain effective compliance programs, in March 2022, I announced that, for all Criminal Division corporate resolutions (including guilty pleas, deferred prosecution agreements, and non-prosecution agreements), we would consider requiring both the Chief Executive Officer *and* the Chief Compliance Officer (CCO) to sign a certification at the end of the term of the agreement. This document certifies that the company's compliance program is reasonably designed, implemented to detect and prevent violations of the law, and is functioning effectively. These certifications are designed to give compliance officers an additional tool that enables them to raise and address compliance issues within a company or directly with the department early and clearly.

These certifications underscore our message to corporations: investing in and supporting effective compliance programs and internal controls systems is smart business and the department will take notice.

These certifications take into account, as appropriate, the nature and circumstances of the criminal violation that gave rise to the resolution. For example, we used this new CCO certification in our recent resolutions with Glencore. Even the world's largest companies are not above the law. When—at the time of resolution—a company's compliance program is inadequate, remediation is not complete, and the criminal conduct was serious and pervasive, the

consequences are serious. Both Glencore International AG, a multi-national commodity trading and mining firm headquartered in Switzerland, and Glencore Limited, the U.S.-based subsidiary, pleaded guilty to criminal offenses.

Glencore Limited pleaded guilty to engaging in a scheme to manipulate fuel oil prices at two of the busiest commercial shipping ports in the U.S. Motivated by a desire to augment corporate profits, Glencore Ltd. placed trades to artificially move the benchmark for oil, increasing the company's profits and reducing its costs on contracts to buy and sell physical fuel oil, and affecting prices market-wide. This scheme lasted for eight years. Glencore Limited's compliance program was ineffective both during the time of the misconduct and at the time of the resolution and thus, as a term of the plea agreement, we imposed a monitorship. And, because the facts of the case involved a scheme to commit commodities fraud by manipulating fuel oil prices, the CCO certification was tailored to that misconduct: Both the CEO and Head of Compliance will be required to certify at the end of the term that Glencore Limited's "compliance program is reasonably designed to detect and prevent violations of the Commodities Laws . . . throughout the Company's operations."

This certification is meant to guarantee a seat at the table that all compliance officers should have in an organization with a functioning compliance program.

We similarly used this certification in the Glencore International AG FCPA guilty plea announced the same day, tailoring the language to foreign corruption. Separate and apart from the price manipulation scheme at Glencore Ltd., Glencore International engaged in a massive, decade-long scheme to make and conceal corrupt payments and bribes for the benefit of foreign officials, in order to obtain and retain business. Despite some investments in compliance, Glencore's program was not fully implemented or tested to demonstrate that its new enhancements would prevent and detect similar misconduct in the future, necessitating the imposition of an independent compliance monitor.

We have now also used the CCO certification in a DPA. Just yesterday, we announced an FCPA DPA with Brazil-based GOL Airlines, which related to the company's participation in a scheme to pay millions in bribes to Brazilian officials and politicians to influence two pieces of legislation favorable to the company. We did not impose a monitor in that case because at the time of the resolution, the company had redesigned its entire anti-corruption compliance program, demonstrated through testing that the program was functioning effectively, and committed to continuing to enhance its compliance program and internal controls. However, to ensure follow-through on this commitment, and because the GOL case involved bribery of foreign officials, we will require the CEO and CCO to certify at the end of the DPA term that the "compliance program is reasonably designed to detect and prevent violations of the [FCPA] and other applicable anti-corruption laws throughout the Company's operations."

We will continue to use similar certifications in our corporate resolutions as appropriate for each case.

Let me add that there has been some concern raised about this certification process. I know and trust compliance personnel. I appreciate the challenges they often face. For too long, they have complained that compliance doesn't have the same voice in corporate decision-making. These certifications and other resources are empowering you to demand that voice. A corporate leader who ignores the emphasis we are placing on compliance does so at his or her own risk. But you cannot shy away from this role. You cannot run away from the responsibility. My call is that you embrace it, knowing full well that stronger, more empowered compliance voices are exactly what we need.

Compliance Related Personnel

Speaking of strong compliance voices, let me address some of my recent personnel decisions. There is no more important legacy than the people we hire. Because of the critical role that analysis of corporate compliance programs plays in our enforcement efforts, I have made it a priority to steadily expand our capabilities in this area. First, in 2021, we restructured a dedicated group within the Fraud Section—the Corporate Enforcement, Compliance, & Policy (CECP) Unit—to ensure that it is comprised of not just veteran prosecutors, but also former defense lawyers and in-house counsel with experience in compliance, monitorships, and corporate enforcement matters.

Second, we have prioritized hiring individuals with deep compliance expertise. Earlier this week, we onboarded Matt Galvin into the CECP Unit. Matt previously served as the global compliance chief for Anheuser-Busch, and brings incredible expertise in the use of data analytics. Also this week, we welcomed Glenn Leon as our new Fraud Section Chief. In addition to his experience as prosecutor in both the DC U.S. Attorney's Office and the Fraud Section, Glenn

now joins us from his last role as Chief Ethics & Compliance Officer for Hewlett Packard Enterprise. We do not simply have one individual serving as a compliance expert for the Fraud Section—we now have a team of multiple attorneys in the CECP Unit with significant compliance and monitorship experience in different industries. And we don't stop there. We are training our line prosecutors so that top to bottom, from our Chief to the newest hires, we are equipped to assess companies' compliance programs. There is no greater measure of the import and trust I place in compliance professionals than the fact that I have now asked them to serve in some of the Division's most critical leadership roles.

In MLARS, which routinely deals with highly regulated financial institutions, we have similarly taken pains to hire prosecutors with a deep understanding of financial institution compliance programs; who are experts at evaluating whether those programs comply with the law (most notably the Bank Secrecy Act); who understand how those compliance programs support financial institutions in detecting and preventing criminal conduct occurring at or through the financial institution; and who have significant experience working closely with financial regulators.

Last but not least, I want to thank Nick McQuaid, who is departing as my trusted Principal Deputy. Nick and I previously served as colleagues in SDNY, and it was my great fortune to work with him once again in leading the Division. He will be sorely missed.

Replacing him as our Acting Principal Deputy is a young woman who I also had the honor of working alongside in the formative years of our legal careers. Nicole Argentieri served for over a decade in the U.S. Attorney's Office for EDNY, including as Chief of the Organized Crime and Gang Section, the General Crimes Section, and Public Integrity Section. She recently rejoined the Department from private practice, where she routinely provided counsel on white collar and compliance matters. Nicole's experience and energy will only strengthen the Division's already outstanding work.

Taken together, these policies, practices, and personnel decisions demonstrate our unwavering commitment to both individual and corporate accountability, while incentivizing those same actors to invest in strong compliance and internal control measures that consistently, quickly, and effectively prevent, detect, report, and remediate wrongdoing.

We may all have different roles—prosecutors, defense attorneys, business leaders, compliance officials. But know that regardless of our different perspectives, we share the common vision of prevention being the most effective tool we have in stemming crime.

Thank you, and I look forward to working with you, individually and collectively, to ensure that our world remains a safe place to live and a fair place to do business.

Speaker:
Assistant Attorney General Kenneth A. Polite, Jr.

Topic(s):
Financial Fraud

Component(s):
Criminal Division
Criminal - Criminal Fraud Section
Criminal - Money Laundering and Asset Recovery Section

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U.S. Department of Justice

Criminal Division

Fraud Section

Washington, D.C. 20530

The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance[1]

Bribery of foreign officials to gain or retain a business advantage poses a serious systemic criminal problem across the globe. It harms those who play by the rules, siphons money away from communities, and undermines the rule of law.

Accordingly, the Department of Justice (Department) is committed to enhancing its efforts to detect and prosecute both individuals and companies for violations of the Foreign Corrupt Practices Act (FCPA), which criminalizes various acts of bribery and related accounting fraud. This memorandum sets forth three steps in our enhanced FCPA enforcement strategy.

As the first and most important step in combatting FCPA violations, the Department is intensifying its investigative and prosecutorial efforts by substantially increasing its FCPA law enforcement resources. These new resources will significantly augment the ability of the Criminal Division's Fraud Section and the Federal Bureau of Investigation (FBI) to detect and prosecute individuals and companies that violate the FCPA. Specifically, the Fraud Section is increasing its FCPA unit by more than 50% by adding 10 more prosecutors to its ranks. At the same time, the FBI has established three new squads of special agents devoted to FCPA investigations and prosecutions.[2] The Department's demonstrated commitment to devoting additional resources to FCPA investigations and prosecutions should send a message to

[1] This memorandum is for internal use only and does not create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, organization, party or witness in any administrative, civil, or criminal matter.

[2] The Fraud Section of the Criminal Division has been given the authority to investigate and prosecute criminal violations of the FCPA, *see* USAM 9-47-110, exclusively administers the FCPA Opinion program and, together with the Securities and Exchange Commission, publishes comprehensive centralized guidance on the FCPA. As recognized by theDepartment, FCPA investigations involve unique challenges that present a compelling need for centralized supervision, guidance, and resolution, including complex issues involving transnational detection, collection of evidence, and enforcement. The Fraud Section, however, will frequently partner with the United States Attorneys' Offices on such matters.

wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light.

Second, the United States is not going at this alone. The Department is strengthening its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable. Law enforcement around the globe has increasingly been working collaboratively to combat bribery schemes that cross national borders. In short, an international approach is being taken to combat an international criminal problem. We are sharing leads with our international law enforcement counterparts, and they are sharing them with us. We are also coordinating to more effectively share documents and witnesses. The fruits of this increased international cooperation can be seen in the prosecutions of both individuals and corporations, in cases involving Archer Daniels Midland, Alcoa, Alstom, Dallas Airmotive, Hewlett-Packard, IAP, Marubeni, Vadim Mikerin, Parker Drilling, PetroTiger, Total, and VimpelCom, among many others.

Third, as set forth below, the Fraud Section is conducting an FCPA enforcement pilot program. The principal goal of this program is to promote greater accountability for individuals and companies that engage in corporate crime by motivating companies to voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs. If successful, the pilot program will serve to further deter individuals and companies from engaging in FCPA violations in the first place, encourage companies to implement strong anti-corruption compliance programs to prevent and detect FCPA violations, and, consistent with the memorandum of the Deputy Attorney General dated September 9, 2015 ("DAG Memo on Individual Accountability"), increase the Fraud Section's ability to prosecute individual wrongdoers whose conduct might otherwise have gone undiscovered or been impossible to prove.

We aim to accomplish this goal of greater accountability in part through the increased enforcement measures discussed above – adding additional agents and prosecutors to investigate criminal activity, and enhancing our cooperation with foreign law enforcement authorities where possible. And we also aim to accomplish the same goal by providing greater transparency about what we require from companies seeking mitigation credit for voluntarily self-disclosing misconduct, fully cooperating with an investigation, and remediating, and what sort of credit those companies can receive if they do so consistent with these requirements. Mitigation credit will be available only if a company meets the mandates set out below, including the disclosure of all relevant facts about the individuals involved in the wrongdoing. Moreover, to be eligible for such credit, even a company that voluntarily self-discloses, fully cooperates, and remediates will be required to disgorge all profits resulting from the FCPA violation.

The balance of this memorandum sets forth the Fraud Section's guidance ("Guidance") to our FCPA attorneys about how the Fraud Section will pursue the pilot program. The Guidance first sets forth the standards for what constitutes (1) voluntary self-disclosure of criminality, (2)

full cooperation, and (3) remediation by business organizations, for purposes of qualifying for mitigation credit from the Fraud Section in an FCPA matter. Next, the Guidance explains the credit that the Fraud Section will accord under this pilot to business organizations that voluntarily self-disclose, fully cooperate, and remediate. As set forth below, that credit may affect the type of disposition, the reduction in fine, or the determination of the need for a monitor.

By way of background, the Principles of Federal Prosecution of Business Organizations (the "USAM Principles") have long provided guidance on whether a criminal disposition against a company is appropriate and what form that disposition should take. *See* USAM 9-28.000. In addition, the United States Sentencing Guidelines ("Sentencing Guidelines") provide for reduced fines for business organizations that voluntarily disclose criminal conduct, fully cooperate, and accept responsibility for the criminal conduct. To provide incentives for organizations to self-disclose misconduct, fully cooperate with a criminal investigation, and timely and appropriately remediate, the Fraud Section has historically provided business organizations that do such things with a reduction below the low end of the Sentencing Guidelines fine range. These fine reductions and other incentives have not previously been articulated in a written framework. By setting forth this Guidance, we intend to provide a clear and consistent understanding of the circumstances in which the Fraud Section may accord additional credit in FCPA matters to organizations that voluntarily disclose misconduct, fully cooperate, and timely and appropriately remediate.

The Guidance does not supplant the USAM Principles. Prosecutors must consider the ten factors set forth in the USAM when determining how to resolve criminal investigations of organizations. Prosecutors must also calculate the appropriate fine range under Chapter 8 of the Sentencing Guidelines. This Guidance, by contrast, sets forth the circumstances in which an organization can receive additional credit in FCPA matters, above and beyond any fine reduction provided for under the Sentencing Guidelines, and the manner in which that additional credit should be determined, whether it be in the type of disposition, the extent of reduction in fine, or the determination of the need for a monitor. Organizations that voluntarily self-disclose, fully cooperate, and remediate will be eligible for significant credit in all three categories. But, as noted above, to receive this additional credit under the pilot program, organizations must meet the standards described below, which are more exacting than those required under the Sentencing Guidelines.

The pilot program will be effective April 5, 2016 as part of a one-year program applicable to all FCPA matters handled by the Fraud Section. The Guidance is being applied by the Fraud Section to organizations that voluntarily self-disclose or cooperate in FCPA matters during the pilot period, even if the pilot thereafter expires. By the end of this pilot period, the Fraud Section will determine whether the Guidance will be extended in duration and whether it should be modified in light of the pilot experience. The Guidance applies only to the Fraud Section's FCPA Unit and not to any other part of the Fraud Section, the Criminal Division, the

United States Attorneys' Offices, any other part of the Department of Justice, or any other agency.

Nothing in the Guidance is intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options and forego the credit available under the pilot program.

This Guidance first sets forth the requirements for a company to qualify for credit for voluntary self-disclosure, cooperation, and timely and appropriate remediation under this pilot program, including exceptions to the general rules. It then sets forth the credit that should be accorded if a company meets these criteria.

A. Requirements

1. Voluntary Self-Disclosure in FCPA Matters

Voluntary self-disclosure of an FCPA violation is encouraged. Indeed, in implementing the DAG Memo on Individual Accountability, the Department recently revised the USAM Principles to underscore the importance of voluntary self-reporting of corporate wrongdoing. Under the current USAM Principles, prosecutors are to consider a corporation's timely and voluntary self-disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the company's compliance program. USAM 9-28.900.

In evaluating self-disclosure during this pilot, the Fraud Section will make a careful assessment of the circumstances of the disclosure. A disclosure that a company is required to make, by law, agreement, or contract, does not constitute voluntary self-disclosure for purposes of this pilot. Thus, the Fraud Section will determine whether the disclosure was already required to be made. In addition, the Fraud Section will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing under this pilot:

- The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation";
- The company discloses the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and
- The company discloses all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.

2. Full Cooperation in FCPA Matters

In addition to the USAM Principles, the following items will be required for a company to receive credit for full cooperation under this pilot (beyond the credit available under the Sentencing Guidelines)[3]:

- As set forth in the DAG Memo on Individual Accountability, disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the corporation's officers, employees, or agents;

- Proactive cooperation, rather than reactive; that is, the company must disclose facts that are relevant to the investigation, even when not specifically asked to do so, and must identify opportunities for the government to obtain relevant evidence not in the company's possession and not otherwise known to the government;

- Preservation, collection, and disclosure of relevant documents and information relating to their provenance;

- Provision of timely updates on a company's internal investigation, including but not limited to rolling disclosures of information;

- Where requested, de-confliction of an internal investigation with the government investigation;

- Provision of all facts relevant to potential criminal conduct by all third-party companies (including their officers or employees) and third-party individuals;

- Upon request, making available for Department interviews those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers and employees located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights);

- Disclosure of all relevant facts gathered during a company's independent investigation, including attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general

[3] If a company claims that it is impossible to meet one of these requirements, for example because of conflicting foreign law, the Fraud Section should closely evaluate the validity of that claim and should take the impediment into consideration in assessing whether the company has fully cooperated. The company will bear the burden of establishing why it cannot meet one of these requirements.

narrative of the facts;

- Disclosure of overseas documents, the location in which such documents were found, and who found the documents (except where such disclosure is impossible due to foreign law, including but not limited to foreign data privacy laws);
    - Note: Where a company claims that disclosure is prohibited, the burden is on the company to establish the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents.
- Unless legally prohibited, facilitation of the third-party production of documents and witnesses from foreign jurisdictions; and
- Where requested and appropriate, provision of translations of relevant documents in foreign languages.

Cooperation comes in many forms. Once the threshold requirements of the DAG Memo on Individual Accountability have been met, the Fraud Section should assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company's cooperation under this pilot. For example, the Fraud Section does not expect a small company to conduct as expansive an investigation in as short a period of time as a Fortune 100 company.[4] Nor do we generally expect a company to investigate matters unrelated in time or subject to the matter under investigation in order to qualify for full cooperation credit. An appropriately tailored investigation is what typically should be required to receive full cooperation credit; the company may, of course, for its own business reasons seek to conduct a broader investigation.[5]

As set forth in USAM 9-28.720, eligibility for full cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection and none of the requirements above require such waiver. Nothing in the Guidance or the DAG Memo on Individual Accountability alters that policy, which remains in full force and effect. Furthermore, not all companies will satisfy all the components of full cooperation, either because they decide

[4] Where a company of any size asserts that its financial condition impairs its ability to cooperate more fully, the company will bear the burden to provide factual support for such an assertion.

[5] For instance, absent facts to suggest a more widespread problem, evidence of criminality in one country, without more, would not lead to an expectation that an investigation would need to extend to other countries. By contrast, evidence that the corporate team engaged in criminal misconduct in overseeing one country also oversaw other countries would normally trigger the need for a broader investigation. In order to provide clarity as to the scope of an appropriately tailored investigation, the business organization (whether through internal or outside counsel, or both) is encouraged to consult with Fraud Section attorneys.

to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies should be eligible for some cooperation credit under this pilot if they meet the DAG Memo on Individual Accountability criteria, but the credit generally will be markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.

3. Timely and Appropriate Remediation in FCPA Matters

Remediation can be difficult to ascertain and highly case specific. In spite of these difficulties, encouraging appropriate and timely remediation is important to reducing corporate recidivism and detecting and deterring individual wrongdoing. The Fraud Section's Compliance Counsel is assisting us in refining our benchmarks for assessing compliance programs and for thoroughly evaluating an organization's remediation efforts.

In evaluating remediation efforts under this pilot program, the Fraud Section will first determine whether a company is eligible for cooperation credit; in other words, a company cannot fail to cooperate and then expect to receive credit for remediation despite that lack of cooperation. The following items generally will be required for a company to receive credit for timely and appropriate remediation under this pilot (beyond the credit available under the Sentencing Guidelines):

- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but will include:
    - Whether the company has established a culture of compliance, including an awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
    - Whether the company dedicates sufficient resources to the compliance function;
    - The quality and experience of the compliance personnel such that they can understand and identify the transactions identified as posing a potential risk;
    - The independence of the compliance function;
    - Whether the company's compliance program has performed an effective risk assessment and tailored the compliance program based on that assessment;
    - How a company's compliance personnel are compensated and promoted compared to other employees;
    - The auditing of the compliance program to assure its effectiveness; and

- The reporting structure of compliance personnel within the company.

- Appropriate discipline of employees, including those identified by the corporation as responsible for the misconduct, and a system that provides for the possibility of disciplining others with oversight of the responsible individuals, and considers how compensation is affected by both disciplinary infractions and failure to supervise adequately; and

- Any additional steps that demonstrate recognition of the seriousness of the corporation's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

B. Credit for Business Organizations under the Pilot Program

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

If a company has not voluntarily disclosed its FCPA misconduct in accordance with the standards set forth above, it may receive limited credit under this pilot program if it later fully cooperates and timely and appropriately remediates. Such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing, as described immediately below in category B.2. Specifically, in circumstances where no voluntary self-disclosure has been made, the Fraud Section's FCPA Unit will accord at most a 25% reduction off the bottom of the Sentencing Guidelines fine range.

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

When a company has voluntarily self-disclosed misconduct in an FCPA matter in accordance with the standards set forth above; has fully cooperated in a manner consistent with the DAG Memo on Individual Accountability and the USAM Principles; has met the additional stringent requirements of the pilot program; and has timely and appropriately remediated, the company qualifies for the full range of potential mitigation credit.

In such cases, if a criminal resolution is warranted, the Fraud Section's FCPA Unit:

- may accord up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought; and

- generally should not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

Where those same conditions are met, the Fraud Section's FCPA Unit will consider a declination of prosecution.[6] As noted above, this pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement. Such voluntary self-disclosures thus promote aggressive enforcement of the FCPA and the investigation and prosecution of culpable individuals. Of course, in considering whether declination may be warranted, Fraud Section prosecutors must also take into account countervailing interests, including the seriousness of the offense: in cases where, for example, there has been involvement by executive management of the company in the FCPA misconduct, a significant profit to the company from the misconduct in relation to the company's size and wealth, a history of non-compliance by the company, or a prior resolution by the company with the Department within the past five years, a criminal resolution likely would be warranted.

As stated above, this Guidance applies only to the Fraud Section's FCPA Unit during the term of this pilot program. It does not apply to any other part of the Fraud Section, the Criminal Division, the United States Attorneys' Offices, any other part of the Department of Justice, or any other agency.

Andrew Weissmann
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[6] As noted above, to qualify for any mitigation credit under this pilot (whether in categories B.1 or B.2), the company should be required to disgorge all profits from the FCPA misconduct at issue.

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act

Oxon Hill, MD ~ Wednesday, November 29, 2017

Remarks as prepared for delivery

Good morning and thank you, Sandra for that thoughtful and brief introduction.

It is a pleasure for me to be here with so many compliance officers, lawyers, auditors, and corporate executives for ACI's 34th annual conference on the Foreign Corrupt Practices Act.

I must admit that I was amused by a marketing blurb for this event. It promised that the audience would hear from "anti-corruption" leaders and other "highly respected" experts.

Then, it noted that you also would hear from government officials. I hope those categories are not mutually exclusive!

As a matter of fact, the experts you will hear from include some of the federal government's leading fraud prosecutors and investigators. I am proud to work with them.

This year, we mark four decades since Congress enacted the FCPA. It was the first effort by any country in the world to make it a crime to pay bribes to foreign officials.

There was a time in the 1960s and '70s when paying bribes was viewed as a necessary part of doing business abroad. Some American companies were unapologetic about making corrupt payments.

Corruption was rife in many parts of the world. There were European countries that allowed companies to deduct bribes on their corporate tax returns, as business expenses.

In 1976, the U.S. Senate Banking Committee revealed that hundreds of U.S. companies had made corrupt foreign payments. The payments totaled hundreds of millions of dollars.

The Committee concluded that there was a need for anti-bribery legislation. Its report reasoned that "[c]orporate bribery is bad business" and "fundamentally destructive" in a free market society.

Paying bribes may still be common in some places. But that does not make it right. As Thomas Jefferson famously said: "On matters of style, swim with the current. On matters of principle, stand like a rock."

Some people refer to me as a career prosecutor, but I studied management, marketing, and finance at an undergraduate business school. I expected to put those skills to use in corporate America. Law enforcement took me in a different direction, but understanding the business world remains valuable to my work.

One of the lessons I learned in business school is that ethical conduct is a good investment. Companies sometimes gain a short-term advantage over competitors by cutting corners, but in the long run, companies with a culture of integrity usually prevail in the marketplace.

Good people want to work for honest businesses. Investors trust them. Customers like to do business with them.

I visited the nation of Armenia in 1994, just as it was emerging from seven decades of Soviet domination. I gave a talk about public corruption at the University of Yerevan, the oldest university in the country. After I finished, a student raised his hand with a question. He asked me, “If you cannot pay bribes in America, how do you get electricity?”

It was a pragmatic question that illustrated how that young man had learned to think about his society. Corruption may start small, but it has a tendency to spread like an infection. It stifles innovation, fuels inefficiency, and inculcates distrust of government.

I offer those thoughts in the spirit of the open dialogue of this conference. But it is not for the Department of Justice to say whether the FCPA reflects sound policymaking. The United States Congress made that judgment. Our mission is to detect, deter, and punish violations of the laws of the United States.

The Attorney General and I have been faithful to that principle. We plan to continue to emphasize it as an essential step in promoting respect for the rule of law.

The FCPA is the law of the land. We will enforce it against both foreign and domestic companies that avail themselves of the privileges of the American marketplace.

The United States plays a central role in the worldwide fight against corruption, and we serve as a role model. Following our lead, many other countries have joined America by implementing their own anti-corruption laws. Those laws do not just encourage good business. They promote good government.

The Organization for Economic Co-operation and Development adopted an Anti-Bribery Convention in 1997. That convention fuels the growing international rejection of corruption.

Forty-three nations participate in the OECD Anti-Bribery Convention. The agreement establishes legally binding standards. Member countries are required to adopt laws that criminalize bribery of foreign public officials in international business transactions. Just a few months ago, a new country, Costa Rica, ratified the convention.

These forty-three nations recognize the importance of a level playing field that protects citizens and honest businesses.

Earlier this year, Attorney General Sessions spoke about the harmful consequences of corruption. It leads to increased prices, substandard products and services, and reduced investment.

It is no coincidence that crime syndicates and authoritarian rulers use corruption to enrich themselves. They engage in corruption to consolidate political power and defeat legitimate political adversaries.

Working together with international partners, we are making headway in combatting corruption. Federal prosecutors in our Criminal Division’s Fraud Section, together with Assistant U.S. Attorneys and law enforcement partners, continue to secure convictions in important FCPA-related cases.

Recently, the FCPA Unit worked with the U.S. Attorney’s Office for the Southern District of New York to obtain a trial conviction against a former Guinean Minister of Mines, for laundering proceeds from $8 million in bribes.

The FCPA Unit and the U.S. Attorney’s Office for the Southern District of New York secured another trial victory against a Chinese billionaire for bribing United Nations officials.

In a third case, FCPA prosecutors worked with Assistant U.S. Attorneys in the Central District of California, and prevailed at trial against a South Korean earthquake research center director who laundered the bribery proceeds in the United States.

In total, 19 individuals have pleaded guilty or been convicted in FCPA-related cases so far this year.

The Department of Justice announced another significant case earlier this month. Two former executives of Rolls-Royce and its subsidiaries, along with a former employee and a consultant, all pleaded guilty to conspiracy in connection with a scheme to bribe foreign officials.

That results reflects tremendous work by the FCPA Unit, Assistant U.S. Attorneys for the Southern District of Ohio, U.S. Postal Inspectors, and the FBI, as well as cooperation with law enforcement authorities in the United Kingdom, Brazil, Austria, Germany, the Netherlands, Singapore, and Turkey. We look forward to continuing to work with our international partners.

Those cases and others like them reinforce the Department's commitment to hold individuals accountable for criminal activity.

Effective deterrence of corporate corruption requires prosecution of culpable individuals. We should not just announce large corporate fines and celebrate penalizing shareholders.

Most American companies are serious about engaging in lawful business practices. Those companies want to do the right thing. They need our support to protect them from criminals who seek unfair advantages.

Law enforcement agencies prosecute criminal wrongdoing only after it occurs. Those prosecutions achieve deterrence indirectly. But a company with a robust compliance program can prevent corruption and reduce the need for enforcement.

That frees agents and prosecutors to focus on people who are committing other financial crimes. It also allows them to focus on different threats to the American people, including terrorism, gang violence, drug trafficking, child exploitation, and human smuggling. People who commit those horrendous crimes do not make voluntary disclosures.

Threats to American safety and security will grow more complex over time. We need corporate America to help us detect and fight those threats.

As Attorney General Jeff Sessions explained, "Societies where the rule of law is treasured … tend to flourish and succeed. Societies where the rule of law is subject to political whims and personal biases tend to become … afflicted by corruption, poverty, and human suffering."

The most fundamental mission of the Department of Justice is to protect the American people by enforcing the rule of law.

The rule of law is good for business. It allows businesses to compete for work, enter contracts, make investments, and project revenue with some assurance about the future. It establishes a mechanism to resolve disputes, and it provides a degree of protection from arbitrary government action.

Corporate America should regard law enforcement as an ally. We support the rule of law, which establishes and safeguards a vibrant economic marketplace for your products and services.

The government should provide incentives for companies to engage in ethical corporate behavior. That means fully cooperating with government investigations, and doing what is necessary to remediate misconduct – including implementing a robust compliance program. Good corporate behavior also means notifying law enforcement about wrongdoing.

The incentive system set forth in the Department's FCPA Pilot Program motivates and rewards companies that want to do the right thing and voluntarily disclose misconduct.

In the first year of the Pilot Program, the FCPA Unit received 22 voluntary disclosures, compared to 13 during the previous year. In total, during the year and a half that the Pilot Program was in effect, the FCPA Unit received 30 voluntary disclosures, compared to 18 during the previous 18-month period.

We analyzed the Pilot Program and concluded that it proved to be a step forward in fighting corporate crime. We also determined that there were opportunities for improvement.

So today, I am announcing a revised FCPA Corporate Enforcement Policy.

The new policy enables the Department to efficiently identify and punish criminal conduct, and it provides guidance and greater certainty for companies struggling with the question of whether to make voluntary disclosures of wrongdoing.

Before I speak about the substance of the policy, let me digress for a moment to make a process point.

I know that previous corporate fraud policies often were identified by the name of the Deputy Attorney General who wrote the memo. It is nice to be remembered. But one of my goals is not to be remembered for writing a memo.

After spending nearly three decades trying to keep track of prolix memos, I want the Department to issue concise policy statements. Historical background and commentary should go in a cover memo or a press release. In most instances, the substance of a policy should be in the United States Attorneys' Manual, and it should be readily understood and easily applied by busy prosecutors.

So, the FCPA Corporate Enforcement Policy I am announcing today will be incorporated into the United States Attorneys' Manual.

We expect the new policy to reassure corporations that want to do the right thing. It will increase the volume of voluntary disclosures, and enhance our ability to identify and punish culpable individuals.

The new policy, like the rest of the Department's internal operating policies, creates no private rights and is not enforceable in court. But it does promote consistency by attorneys throughout the Department.

Establishing internal policies helps guide our exercise of discretion and combat the perception that prosecutors act in an arbitrary manner.

The new policy does not provide a guarantee. We cannot eliminate all uncertainty. Preserving a measure of prosecutorial discretion is central to ensuring the exercise of justice.

But with this new policy, we strike the balance in favor of greater clarity about our decision-making process.

The advantage of the policy for businesses is to provide transparency about the benefits available if they satisfy the requirements. We want corporate officers and board members to better understand the costs and benefits of cooperation. The policy therefore specifies what we mean by voluntary disclosure, full cooperation, and timely and appropriate remediation.

Even if a company does not make a voluntary disclosure, benefits are still available for cooperation and remediation. Those steps assist the Department in running an efficient investigation that identifies culpable individuals. They also reduce the likelihood that crimes will be committed again.

I want to highlight a few of the policy's enhancements.

First, the FCPA Corporate Enforcement Policy states that when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the Department will resolve the company's case through a declination. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist.

It makes sense to treat corporations differently than individuals, because corporate liability is vicarious; it is only derivative of individual liability.

Second, if a company voluntarily discloses wrongdoing and satisfies all other requirements, but aggravating circumstances compel an enforcement action, the Department will recommend a 50% reduction off the low end of the Sentencing Guidelines fine range. Here again, criminal recidivists may not be eligible for such credit. We want to provide an incentive for good conduct. And scrutiny of repeat visitors.

Third, the Policy provides details about how the Department evaluates an appropriate compliance program, which will vary depending on the size and resources of a business.

The Policy therefore specifies some of the hallmarks of an effective compliance and ethics program. Examples include fostering a culture of compliance; dedicating sufficient resources to compliance activities; and ensuring that experienced compliance personnel have appropriate access to management and to the board.

We expect that these adjustments, along with adding the FCPA Corporate Enforcement Policy to the U.S. Attorneys' Manual, will incentivize responsible corporate behavior and reduce cynicism about enforcement.

Of course, companies are free to choose not to comply with the FCPA Corporate Enforcement Policy. A company needs to adhere to the policy only if it wants the Department's prosecutors to follow the policy's guidelines.

Companies that violate the FCPA are always free to choose a different path. In those instances, if crimes come to our attention through whistleblowers or other means, the Department will take appropriate action consistent with the facts, the law, and the Principles of Federal Prosecution of Business Organizations.

Since 2016, the Fraud Section's FCPA Unit has secured criminal resolutions in 17 FCPA-related corporate cases, resulting in penalties and forfeiture to the Department in excess of $1.6 billion. Of those 17 corporate criminal resolutions, only two were voluntary disclosures under the Pilot Program.

Significantly, each of the two voluntary disclosure cases was resolved through a non-prosecution agreement, and in neither case did we impose a compliance monitor.

Of the 15 corporate resolutions that were not voluntary disclosures, all but three were resolved through guilty pleas, deferred prosecution agreements, or some combination of the two. In ten of those cases, the company was required to engage an independent compliance monitor.

Over that same time period, seven additional matters that came to our attention through voluntary disclosures were resolved under the Pilot Program through declinations with the payment of disgorgement. Clearly, this is not immunity.

Allow me to conclude with the observation that corrupt government officials and criminals who bribe them learn from the cases we bring and the investigative techniques we use.

Criminals try to evade law enforcement. But they also need to evade internal controls and compliance programs, if those internal controls and programs exist. Honest companies pose a meaningful deterrent to corruption.

Companies can protect themselves by exercising caution in choosing their business associates and by ensuring appropriate oversight of their activities.

There is an ancient proverb that counsels, "If you want to know a person's character, consider his friends."

My advice is to make sure that you can stand proudly with the company you keep.

Thank you very much.

Speaker:
Deputy Attorney General Rod J. Rosenstein

Component(s):
Office of the Deputy Attorney General

Updated November 29, 2017

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.

3. Definitions

a. *Voluntary Self-Disclosure in FCPA Matters*

In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing:

- The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation";
- The company discloses the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and
- The company discloses all relevant facts known to it, including all relevant facts about all individuals substantially involved in or responsible for the violation of law.

b. *Full Cooperation in FCPA Matters*

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations to satisfy the threshold for any cooperation credit, see JM 9-28.000, the following items will be required for a company to receive maximum credit for full cooperation for purposes of JM 9-47.120(1) (beyond the credit available under the U.S.S.G.):

- Disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);
- Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession and not otherwise known to the Department, it must identify those opportunities to the Department;
- Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;
    - Note: Where a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to

foreign law, the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents;

- Where requested and appropriate, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation[1]; and
- Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

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 JM 9-47.120(1) (beyond the credit available under the U.S.S.G.):

- Demonstration of thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and, where appropriate, remediation to address the root causes;
- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but may include:
    - The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
    - The resources the company has dedicated to compliance;
    - The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
    - The authority and independence of the compliance function and the availability of compliance expertise to the board;
    - The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
    - The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
    - The auditing of the compliance program to assure its effectiveness; and
    - The reporting structure of any compliance personnel employed or contracted by the company.
- Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;

- Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations; and
- Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

4. Comment

Cooperation Credit: Cooperation comes in many forms. Once the threshold requirements set out at JM 9-28.700 have been met, the Department will assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company's cooperation under the FCPA Corporate Enforcement Policy.

"De-confliction" is one factor that the Department may consider in appropriate cases in evaluating whether and how much credit that a company will receive for cooperation. When the Department does make a request to a company to defer investigative steps, such as the interview of company employees or third parties, such a request will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.

Where a company asserts that its financial condition impairs its ability to cooperate more fully, the company will bear the burden to provide factual support for such an assertion. The Department will closely evaluate the validity of any such claim and will take the impediment into consideration in assessing whether the company has fully cooperated.

As set forth in JM 9-28.720, eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver. Nothing herein alters that policy, which remains in full force and effect. Furthermore, not all companies will satisfy all the components of full cooperation for purposes of JM 9-47.120(2) and (3)(b), either because they decide to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies will be eligible for some cooperation credit if they meet the criteria of JM 9-28.700, but the credit generally will be markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.

Remediation: In order for a company to receive full credit for remediation and avail itself of the benefits of the FCPA Corporate Enforcement Policy, the company must have effectively remediated at the time of the resolution.

The requirement that a company pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue may be satisfied by a parallel resolution with a relevant regulator (e.g., the United States Securities and Exchange Commission).

M&A Due Diligence and Remediation: The Department recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), there will be a presumption of a declination in accordance with and subject to the other requirements of this Policy.[2]

Public Release: A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy. Declinations awarded under the FCPA Corporate Enforcement Policy will be made public.

[1]: Although the Department may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Department will not take any steps to affirmatively direct a company's internal investigation efforts.

[2]: In appropriate cases, an acquiring company that discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

[updated March 2019]

THE UNITED STATES DEPARTMENT of JUSTICE

7.000 - FOREIGN CORRUPT PRACTICES ACT OF 1977

9-47.100 - Introduction

This chapter contains the Department's policy regarding investigations and prosecutions of violations of the Foreign Corrupt Practices Act (FCPA). The FCPA prohibits both United States and foreign corporations and nationals from offering or paying, or authorizing the offer or payment, of anything of value to a foreign government official, foreign political party, party official, or candidate for foreign public office, or to an official of a public international organization in order to obtain or retain business. In addition, the FCPA requires publicly-held United States companies to make and keep books and records which, in reasonable detail, accurately reflect the disposition of company assets and to devise and maintain a system of internal accounting controls sufficient to reasonably assure that transactions are authorized, recorded accurately, and periodically reviewed.

Further guidance on the FCPA is available in *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), published by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[updated October 2016]

9-47.110 - Policy Concerning Criminal Investigations and Prosecutions of the Foreign Corrupt Practices Act

No investigation or prosecution of cases involving alleged violations of the antibribery provisions of the Foreign Corrupt Practices Act (FCPA) of 1977 (15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3) or of related violations of the FCPA's record keeping provisions (15 U.S.C. § 78m(b)) shall be instituted without the express authorization of the Criminal Division.

Any information relating to a possible violation of the FCPA should be brought immediately to the attention of the Fraud Section of the Criminal Division. Even when such information is developed during the course of an apparently unrelated investigation, the Fraud Section should be notified immediately. Close coordination of such investigations and prosecutions with the United States Securities and Exchange Commission (SEC) and other interested agencies is essential. Additionally, the Department has established a FCPA Opinion Procedure concerning proposed business conduct. *See* A Resource Guide to the U.S. Foreign Corrupt Practices Act.

Unless otherwise agreed upon by the AAG, Criminal Division, investigations and prosecutions of alleged violations of the antibribery provisions of the FCPA will be conducted by Trial Attorneys of the Fraud Section. Prosecutions of alleged violations of the record keeping provisions, when such violations are related to an antibribery violation, will also be conducted by Fraud Section Trial Attorneys, unless otherwise directed by the AAG, Criminal Division.

The investigation and prosecution of particular allegations of violations of the FCPA will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction. For example, part of the

investigation may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials. In addition, relevant accounts maintained in United States banks and subject to subpoena may be directly or beneficially owned by senior foreign government officials. For these reasons, the need for centralized supervision of investigations and prosecutions under the FCPA is compelling.

[updated January 2020]

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.

3. Definitions

a. *Voluntary Self-Disclosure in FCPA Matters*

In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing:

- The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring “prior to an imminent threat of disclosure or government investigation”;
- The company discloses the conduct to the Department “within a reasonably prompt time after becoming aware of the offense,” with the burden being on the company to demonstrate timeliness; and

- The company discloses all relevant facts known to it at the time of the disclosure, including as to any individuals substantially involved in or responsible for the misconduct at issue.[1]

b. *Full Cooperation in FCPA Matters*

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations to satisfy the threshold for any cooperation credit, see JM 9-28.000, the following items will be required for a company to receive maximum credit for full cooperation for purposes of JM 9-47.120(1) (beyond the credit available under the U.S.S.G.):

- Disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);
- Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so. Additionally, where the company is aware of relevant evidence not in the company's possession, it must identify that evidence to the Department;
- Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;
    - Note: Where a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents;
- Where requested and appropriate, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation[2]; and
- Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

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 JM 9-47.120(1) (beyond the credit available under the U.S.S.G.):

- Demonstration of thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and, where appropriate, remediation to address the root causes;
- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but may include:
    - The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
    - The resources the company has dedicated to compliance;
    - The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;

  - The authority and independence of the compliance function and the availability of compliance expertise to the board;
  - The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
  - The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
  - The auditing of the compliance program to assure its effectiveness; and
  - The reporting structure of any compliance personnel employed or contracted by the company.
- Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;
- Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations; and
- Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

4. Comment

Cooperation Credit: Cooperation comes in many forms. Once the threshold requirements set out at JM 9-28.700 have been met, the Department will assess the scope, quantity, quality, and timing of cooperation based on the circumstances of each case when assessing how to evaluate a company's cooperation under the FCPA Corporate Enforcement Policy.

"De-confliction" is one factor that the Department may consider in appropriate cases in evaluating whether and how much credit that a company will receive for cooperation. When the Department does make a request to a company to defer investigative steps, such as the interview of company employees or third parties, such a request will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request.

Where a company asserts that its financial condition impairs its ability to cooperate more fully, the company will bear the burden to provide factual support for such an assertion. The Department will closely evaluate the validity of any such claim and will take the impediment into consideration in assessing whether the company has fully cooperated.

As set forth in JM 9-28.720, eligibility for cooperation or voluntary self-disclosure credit is not in any way predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver. Nothing herein alters that policy, which remains in full force and effect. Furthermore, not all companies will satisfy all the components of full cooperation for purposes of JM 9-47.120(2) and (3)(b), either because they decide to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria listed above. In general, such companies will be eligible for some cooperation credit if they meet the criteria of JM 9-28.700, but the credit generally will be markedly less than for full cooperation, depending on the extent to which the cooperation was lacking.

Remediation: In order for a company to receive full credit for remediation and avail itself of the benefits of the FCPA Corporate Enforcement Policy, the company must have effectively remediated at the time of the resolution.

The requirement that a company pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue may be satisfied by a parallel resolution with a relevant regulator (e.g., the United States Securities and Exchange Commission).

M&A Due Diligence and Remediation: The Department recognizes the potential benefits of corporate mergers and

acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), there will be a presumption of a declination in accordance with and subject to the other requirements of this Policy.[3]

Public Release: A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy. Declinations awarded under the FCPA Corporate Enforcement Policy will be made public.

[1]: The Department recognizes that a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible. In such circumstances, a company should make clear that it is making its disclosure based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at that time.

[2]: Although the Department may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Department will not take any steps to affirmatively direct a company's internal investigation efforts.

[3]: In appropriate cases, an acquiring company that discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

[updated November 2019]

9-47.130 - Civil Injunctive Actions

The SEC has authority to obtain civil injunctions against future violations of the record keeping and antibribery provisions of the FCPA by issuers. *See* 15 U.S.C. § 78u. Civil injunctions against violations of the antibribery provisions by domestic concerns and foreign nationals and companies shall be instituted by Trial Attorneys of the Fraud Section in cooperation with the appropriate United States Attorney, unless otherwise directed by the AAG, Criminal Division. *See* §§ 78dd-2(d), 78dd-3(d).

[updated November 2000]

‹ 9-46.000 - Program Fraud And Bribery up 9-48.000 - Computer Fraud and Abuse Act ›

FCPA

A Resource Guide to the U.S. Foreign Corrupt Practices Act
Second Edition

By the Criminal Division of the U.S. Department of Justice and
the Enforcement Division of the U.S. Securities and Exchange Commission

This guide is intended to provide information for businesses and individuals regarding the U.S. Foreign Corrupt Practices Act (FCPA). The guide has been prepared by the staff of the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission. This guidance reflects the views of the Division of Enforcement, but it is not a statement by the Commission and the Commission has neither approved nor disapproved its content. It is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter. It is not intended to substitute for the advice of legal counsel on specific issues related to the FCPA. It does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.

Companies or individuals seeking an opinion concerning specific prospective conduct are encouraged to use the U.S. Department of Justice's opinion procedure discussed in Chapter 9 of this guide.

This guide is United States Government property. It is available to the public free of charge online at https://www.justice.gov/criminal-fraud/fcpa-resource-guide and https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT SECOND EDITION

By the Criminal Division of the U.S. Department of Justice and
the Enforcement Division of the U.S. Securities and Exchange Commission

GUIDING PRINCIPLES OF ENFORCEMENT

What Does DOJ Consider When Deciding Whether to Open an Investigation or Bring Charges?

Whether and how DOJ will commence, decline, or otherwise resolve an FCPA matter is guided by the *Principles of Federal Prosecution* in the case of individuals, and the *Principles of Federal Prosecution of Business Organizations* and *FCPA Corporate Enforcement Policy* in the case of companies.

DOJ Principles of Federal Prosecution

The *Principles of Federal Prosecution*, set forth in Chapter 9-27.000 of the Justice Manual,[295] provide guidance for DOJ prosecutors regarding initiating or declining prosecution, selecting charges, and plea-bargaining. The *Principles of Federal Prosecution* provide that prosecutors should recommend or commence federal prosecution if the putative defendant's conduct constitutes a federal offense and the admissible evidence will probably be sufficient to obtain and sustain a conviction unless: (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) an adequate non-criminal alternative to prosecution exists. In assessing the existence of a substantial federal interest, the prosecutor is advised to "weigh all relevant considerations," including the nature and seriousness of the offense; the deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the person is convicted. The *Principles of Federal Prosecution* also set out the considerations to be weighed when deciding whether to enter into a plea agreement with an individual defendant, including the nature and seriousness of the offense and the person's willingness to cooperate, as well as the desirability of prompt and certain disposition of the case and the expense of trial and appeal.[296]

DOJ Principles of Federal Prosecution of Business Organizations

The *Principles of Federal Prosecution of Business Organizations*, set forth in Chapter 9-28.000 of the

Justice Manual,[297] provide guidance regarding the resolution of cases involving corporate wrongdoing. The Principles of Federal Prosecution of Business Organizations recognize that resolution of corporate criminal cases by means other than indictment, including non-prosecution and deferred prosecution agreements, may be appropriate in certain circumstances. Ten factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements:

- the nature and seriousness of the offense, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation's willingness to cooperate with the government's investigation, including as to potential wrongdoing by the corporation's agents;
- the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging or resolution decision;
- the corporation's timely and voluntary disclosure of wrongdoing;
- the corporation's remedial actions, including any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution;
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

As these factors illustrate, in many investigations it will be appropriate for a prosecutor to consider a corporation's pre-indictment conduct, including voluntary disclosure, cooperation, and remediation, in determining whether to seek an indictment. In assessing a corporation's cooperation, prosecutors are prohibited from requesting attorney-client privileged materials with two exceptions—when a corporation or its employee asserts an advice-of-counsel defense and when the attorney-client communications were in furtherance of a crime or fraud. Otherwise, an organization's cooperation may only be assessed on the basis of whether it disclosed the relevant facts underlying an investigation—and not on the basis of whether it has waived its attorney-client privilege or work product protection.[298]

DOJ FCPA Corporate Enforcement Policy

The *FCPA Corporate Enforcement Policy* (CEP), contained in the Justice Manual, provides that, where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances.[299] CEP declinations are public and available on the Fraud Section's website at https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations. Aggravating circumstances that may warrant a criminal resolution instead of a declination 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.[300] Even where aggravating circumstances exist, DOJ may still

decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme.[301]

If a criminal resolution is appropriate, where a company that voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, DOJ will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (Guidelines) 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.[302]

The CEP also recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with the CEP, there will be a presumption of a declination in accordance with and subject to the other requirements of the CEP. In appropriate cases, an acquiring company that discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

Where a company does not voluntarily self-disclose the misconduct, but nevertheless fully cooperates, and timely and appropriately remediates, 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 Guidelines fine range.[303]

To be eligible for the benefits of the CEP, including a declination, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.[304]

The CEP also provides definitions of the terms "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation." By outlining in the Justice Manual how DOJ defines these terms and the benefits that will accrue to a company that engages in such behavior, companies can make an informed decision as to whether they believe such behavior is in their best interest. Of course, if a company chooses not to engage in such behavior, and DOJ learns of the misconduct and establishes sufficient proof for prosecution, the company should not expect to receive any benefits outlined in the CEP or to otherwise receive leniency.[305]

The CEP applies only to DOJ, and does not bind or apply to SEC.[306] The CEP and the declinations that have been announced pursuant to it are posted on DOJ's website.[307] Three such cases are as follows:

CEP Declination Example 1

In 2018, DOJ declined prosecution of a privately held company based in the United Kingdom that manufactures and sells equipment used to detect earthquakes and other seismic events. The company had voluntarily self-disclosed to DOJ that it had made numerous payments amounting to nearly $1 million to the director of a Korean government-funded research center. Following the disclosure of these payments, DOJ indicted the director and in July 2017 tried and convicted him in the Central District of California of one count of money laundering in violation of 18 U.S.C. § 1957. The director was subsequently sentenced to 14 months in prison in October 2017.

The company received a declination under

the CEP because it voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated pursuant to the CEP. In addition, the company was the subject of a parallel investigation by the United Kingdom's Serious Fraud Office (SFO) for legal violations relating to the same conduct and committed to accepting responsibility with the SFO (the company subsequently entered into a deferred prosecution with the SFO and agreed to pay approximately £2.07M of gross profits arising from the payments to the director).

CEP Declination Example 2

In 2018, DOJ declined prosecution of an insurance company incorporated and headquartered in Barbados. DOJ's investigation found that the company, through its employees and agents, paid approximately $36,000 in bribes to a Barbadian government official in exchange for insurance contracts resulting in approximately $686,827 in total premiums for the contracts and approximately $93,940 in net profits. Specifically, in or around August 2015 and April 2016, high-level employees of the company took part in a scheme to pay approximately $36,000 in bribes to the Minister of Industry in Barbados, and to launder the bribe payments into the United States.

Despite the high-level involvement of corporate officers in the misconduct, DOJ declined prosecution based on a number of factors, including but not limited to: (1) the company's timely, voluntary self-disclosure of the conduct; (2) the company's thorough and comprehensive investigation; (3) the company's cooperation (including its provision of all known relevant facts about the misconduct) and its agreement to continue to cooperate in DOJ's ongoing investigations and/or prosecutions; (4) the company's agreement to disgorge to DOJ all profits it made from the illegal conduct, which equaled $93,940; (5) the steps the company had taken to enhance its compliance program and its internal accounting controls; (6) the company's remediation, including but not limited to terminating all of the executives and employees who were involved in the misconduct; and (7) the fact that DOJ had been able to identify and charge the culpable individuals.

CEP Declination Example 3

In 2019, DOJ declined prosecution of a publicly traded technology services company. DOJ's investigation found that the company, through its employees, authorized its agents to pay an approximately $2 million bribe to one or more government officials in India in exchange for securing and obtaining a statutorily required planning permit in connection with the development of an office park, as well as other improper payments in connection with other projects in India. Despite the fact that certain members of senior management participated in and directed the criminal conduct at issue, DOJ declined prosecution of the company based on an assessment of the factors set forth in the CEP and the Principles of Federal Prosecution of Business Organizations, including but not limited to: (1) the company's voluntary self-disclosure within two weeks of the Board learning of the criminal conduct; (2) the company's thorough and comprehensive investigation; (3) the company's full and proactive cooperation in the matter (including its provision of all known relevant facts about the misconduct) and its agreement to continue to cooperate in DOJ's ongoing investigations and any prosecutions that might result; (4) the nature and seriousness of the offense; (5) the company's lack of prior criminal history; (6) the existence and effectiveness of the company's pre-existing compliance program, as well as steps that it had taken to enhance its

compliance program and internal accounting controls; (7) the company's full remediation, including but not limited to terminating the employment of, and disciplining, employees and contractors involved in misconduct; (8) the adequacy of remedies such as civil or regulatory enforcement actions, including the company's resolution with SEC and agreement to pay a civil penalty of $6 million and disgorgement; (9) the company's agreement to disgorge the full amount of its cost savings from the bribery; and (10) the fact that, as a result of the company's timely voluntary disclosure, DOJ was able to conduct an independent investigation and identify individuals with culpability for the corporation's malfeasance.

What Does SEC Staff Consider When Deciding Whether to Open an Investigation or Recommend Charges?

SEC's *Enforcement Manual*, published by SEC's Enforcement Division and available on SEC's website,[308] sets forth information about how SEC conducts investigations, as well as the guiding principles that SEC staff considers when determining whether to open or close an investigation and whether civil charges are merited. There are various ways that potential FCPA violations come to the attention of SEC staff, including: tips from informants or whistleblowers; information developed in other investigations; self-reports or public disclosures by companies; referrals from other offices or agencies; public sources, such as media reports and trade publications; and proactive investigative techniques, including risk-based initiatives. Investigations can be formal, such as where SEC has issued a formal order of investigation that authorizes its staff to issue investigative subpoenas for testimony and documents, or informal, such as where the staff proceeds with the investigation without the use of investigative subpoenas.

In determining whether to open an investigation and, if so, whether an enforcement action is warranted, SEC staff considers a number of factors, including: the statutes or rules potentially violated; the egregiousness of the potential violation; the potential magnitude of the violation; whether the potentially harmed group is particularly vulnerable or at risk; whether the conduct is ongoing; whether the conduct can be investigated efficiently and within the statute of limitations period; and whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct. SEC staff also may consider whether the case involves a possibly widespread industry practice that should be addressed, whether the case involves a recidivist, and whether the matter gives SEC an opportunity to be visible in a community that might not otherwise be familiar with SEC or the protections afforded by the securities laws.

For more information about the Enforcement Division's procedures concerning investigations, enforcement actions, and cooperation with other regulators, see the *Enforcement Manual* at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

Self-Reporting, Cooperation, and Remedial Efforts

While the conduct underlying any FCPA investigation is obviously a fundamental and threshold consideration in deciding what, if any, action to take, both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.

Criminal Cases

Under DOJ's *Principles of Federal Prosecution of Business Organizations* and the *CEP*, federal prosecutors consider whether the company made a voluntary and timely disclosure as well as the company's willingness to provide relevant information and evidence and identify relevant actors inside and outside the company, including senior executives.

In addition, prosecutors may consider a company's remedial actions, including efforts to improve an existing compliance program or appropriate disciplining of wrongdoers.[309] A company's remedial measures should be meaningful and illustrate its recognition of the seriousness of the misconduct, for example, by taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.[310]

The *Principles of Federal Prosecution* similarly provide that prosecutors may consider an individual's willingness to cooperate in deciding whether a prosecution should be undertaken and how it should be resolved. Although a willingness to cooperate will not, by itself, generally relieve a person of criminal liability, it may be given "serious consideration" in evaluating whether to enter into a plea agreement with a defendant, depending on the nature and value of the cooperation offered.[311]

The U.S. Sentencing Guidelines similarly take into account an individual defendant's cooperation and voluntary disclosure. Under § 5K1.1, a defendant's cooperation, if sufficiently substantial, may justify the government filing a motion for a reduced sentence. And under § 5K2.16, a defendant's voluntary disclosure of an offense prior to its discovery—if the offense was unlikely to have been discovered otherwise—may warrant a downward departure in certain circumstances. Chapter 8 of the Sentencing Guidelines, which governs the sentencing of organizations, takes into account an organization's remediation as part of an "effective compliance and ethics program." One of the seven elements of such a program provides that after the detection of criminal conduct, "the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program."[312] Having an effective compliance and ethics program may lead to a three-point reduction in an organization's culpability score under § 8C2.5, which affects the fine calculation under the Guidelines. Similarly, an organization's self-reporting, cooperation, and acceptance of responsibility may lead to fine reductions under § 8C2.5(g) by decreasing the culpability score. Conversely, an organization will not qualify for the compliance program reduction when it unreasonably delayed reporting the offense.[313] Similar to § 5K1.1 for individuals, organizations can qualify for departures pursuant to § 8C4.1 of the Guidelines for cooperating in the prosecution of others.

Civil Cases

SEC's Framework for Evaluating Cooperation by Companies

SEC's framework for evaluating cooperation by companies is set forth in its 2001 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, which is commonly known as the Seaboard Report.[314] The report, which explained the Commission's decision not to take enforcement action against a public company

for certain accounting violations caused by its subsidiary, details the many factors SEC considers in determining whether, and to what extent, it grants leniency to companies for cooperating in its investigations and for related good corporate citizenship. Specifically, the report identifies four broad measures of a company's cooperation:

- self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
- self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins, and consequences of the misconduct, and promptly, completely, and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;
- remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
- cooperation with law enforcement authorities, including providing SEC staff with all information relevant to the underlying violations and the company's remedial efforts.

Since every enforcement matter is different, this analytical framework sets forth general principles but does not limit SEC's broad discretion to evaluate every case individually on its own unique facts and circumstances. Similar to SEC's treatment of cooperating individuals, credit for cooperation by companies may range from taking no enforcement action to pursuing reduced sanctions in connection with enforcement actions.

SEC's Framework for Evaluating Cooperation by Individuals

In 2010, SEC announced a new cooperation program for individuals.[315] SEC staff has a wide range of tools to facilitate and reward cooperation by individuals, from taking no enforcement action to pursuing reduced sanctions in connection with enforcement actions. Although the evaluation of cooperation depends on the specific circumstances, SEC generally evaluates four factors to determine whether, to what extent, and in what manner to credit cooperation by individuals:

- the assistance provided by the cooperating individual in SEC's investigation or related enforcement actions, including, among other things: the value and timeliness of the cooperation, including whether the individual was the first to report the misconduct to SEC or to offer his or her cooperation; whether the investigation was initiated based upon the information or other cooperation by the individual; the quality of the cooperation, including whether the individual was truthful and the cooperation was complete; the time and resources conserved as a result of the individual's cooperation; and the nature of the cooperation, such as the type of assistance provided;
- the importance of the matter in which the individual provided cooperation;
- the societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct, including the severity of the individual's misconduct, the culpability of the individual, and the efforts undertaken by the individual to remediate the harm; and
- the appropriateness of a cooperation credit in light of the profile of the cooperating individual.

Corporate Compliance Program

In a global marketplace, an effective compliance program reinforces a company's internal controls and is essential to detecting and preventing FCPA violations.[316] Effective compliance programs are tailored to the company's specific business and to the risks associated with that business. They are dynamic and evolve as the business and the markets change.

An effective compliance program promotes "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[317] Such a program protects a company's

reputation, ensures investor value and confidence, reduces uncertainty in business transactions, and secures a company's assets.[318] A company's compliance and ethics program can help prevent, detect, remediate, and report misconduct, including FCPA violations, where it is well-constructed, effectively implemented, appropriately resourced, and consistently enforced.

In addition to considering whether a company has self-reported, cooperated, and taken appropriate remedial actions, DOJ and SEC also consider the adequacy and effectiveness of a company's compliance program at the time of the misconduct and at the time of the resolution when deciding what, if any, action to take. In criminal resolutions, the compliance program factors into three key areas of decision: (1) the form of resolution or prosecution, if any; (2) the monetary penalty, if any; and (3) the compliance obligations to be included in any corporate criminal resolution (e.g., whether a compliance monitor is appropriate and the length and nature of any reporting obligations).[319] For example, compliance program adequacy may influence whether or not charges should be resolved through a guilty plea, deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation.[320] As discussed above, SEC's Seaboard Report focuses, among other things, on a company's self-policing prior to the discovery of the misconduct, including whether it had established effective compliance procedures.[321] Likewise, three of the ten factors set forth in DOJ's Principles of Federal Prosecution of Business Organizations relate, either directly or indirectly, to a compliance program's design, implementation, and effectiveness, including the pervasiveness of wrongdoing within the company, the adequacy and effectiveness of the company's compliance program, and the nature of the company's remedial actions.[322] DOJ also considers the U.S. Sentencing Guidelines' elements of an effective compliance program, as set forth in § 8B2.1 of the Guidelines.

These considerations reflect the recognition that a company's failure to prevent every single violation does not necessarily mean that a particular company's compliance program was not generally effective. DOJ and SEC understand that "no compliance program can ever prevent all criminal activity by a corporation's employees,"[323] and they do not hold companies to a standard of perfection. An assessment of a company's compliance program, including its design and good faith implementation and enforcement, is an important part of the government's assessment of whether a violation occurred, and if so, what action should be taken. In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company's effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation.[324]

DOJ and SEC have no formulaic requirements regarding compliance programs. Rather, they employ a common-sense and pragmatic approach to evaluating compliance programs, making inquiries related to three basic questions:

- Is the company's compliance program well designed?
- Is it being applied in good faith? In other words, is the program adequately resourced and empowered to function effectively?
- Does it work in practice?[325]

This guide contains information regarding some of the basic elements DOJ and SEC consider when evaluating compliance programs. Although

the focus is on compliance with the FCPA, given the existence of anti-corruption laws in many other countries, businesses should consider designing programs focused on anti-corruption compliance more broadly.[326]

Hallmarks of Effective Compliance Programs

Individual companies may have different compliance needs depending on their size and the particular risks associated with their businesses, among other factors. When it comes to compliance, there is no one-size-fits-all program. Thus, the discussion below is meant to provide insight into the aspects of compliance programs that DOJ and SEC assess, recognizing that companies may consider a variety of factors when making their own determination of what is appropriate for their specific business needs.[327] Indeed, small and medium-size enterprises likely will have different compliance programs from large multinational corporations, a fact DOJ and SEC take into account when evaluating companies' compliance programs.

Compliance programs that employ a "check-the-box" approach may be inefficient and, more importantly, ineffective. Because each compliance program should be tailored to an organization's specific needs, risks, and challenges, the information provided below should not be considered a substitute for a company's own assessment of the corporate compliance program most appropriate for that particular business organization. In the end, if designed carefully, implemented earnestly, and enforced fairly, a company's compliance program—no matter how large or small the organization—will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately.

Commitment from Senior Management and a Clearly Articulated Policy Against Corruption

Within a business organization, compliance begins with the board of directors and senior executives setting the proper tone for the rest of the company. Managers and employees take their cues from these corporate leaders. Thus, DOJ and SEC consider the commitment of corporate leaders to a "culture of compliance"[328] and look to see if this high-level commitment is also reinforced and implemented by middle managers and employees at all levels of a business. A well-designed compliance program that is not enforced in good faith, such as when corporate management explicitly or implicitly encourages employees to engage in misconduct to achieve business objectives, will be ineffective. DOJ and SEC have often encountered companies with compliance programs that are strong on paper but that nevertheless have significant FCPA violations because management has failed to effectively implement the program even in the face of obvious signs of corruption. This may be the result of aggressive sales staff preventing compliance personnel from doing their jobs effectively and of senior management, more concerned with securing a valuable business opportunity than enforcing a culture of compliance, siding with the sales team. The higher the financial stakes of the transaction, the greater the temptation for management to choose profit over compliance.

A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure.[329]

In short, compliance with the FCPA and ethical rules must start at the top. DOJ and SEC thus

evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.

Code of Conduct and Compliance Policies and Procedures

A company's code of conduct is often the foundation upon which an effective compliance program is built. As DOJ has repeatedly noted in its charging documents, the most effective codes are clear, concise, and accessible to all employees and to those conducting business on the company's behalf. Indeed, it would be difficult to effectively implement a compliance program if it was not available in the local language so that employees in foreign subsidiaries can access and understand it. When assessing a compliance program, DOJ and SEC will review whether the company has taken steps to make certain that the code of conduct remains current and effective and whether a company has periodically reviewed and updated its code.

Whether a company has policies and procedures that outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures will also be considered by DOJ and SEC. These types of policies and procedures will depend on the size and nature of the business and the risks associated with the business. Effective policies and procedures require an in-depth understanding of the company's business model, including its products and services, third-party agents, customers, government interactions, and industry and geographic risks. The risks that a company may need to address include the nature and extent of transactions with foreign governments, including payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; charitable and political donations; and facilitating and expediting payments. For example, some companies with global operations have created web-based approval processes to review and approve routine gifts, travel, and entertainment involving foreign officials and private customers with clear monetary limits and annual limitations. Many of these systems have built-in flexibility so that senior management, or in-house legal counsel, can be apprised of and, in appropriate circumstances, approve unique requests. These types of systems can be a good way to conserve corporate resources while, if properly implemented, preventing and detecting potential FCPA violations.

Regardless of the specific policies and procedures implemented, these standards should apply to personnel at all levels of the company.

Oversight, Autonomy, and Resources

In appraising a compliance program, DOJ and SEC also consider whether a company has assigned responsibility for the oversight and implementation of a company's compliance program to one or more specific senior executives within an organization.[330] Those individuals must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company's compliance program is implemented effectively.[331] Adequate autonomy generally includes direct access to an organization's governing authority, such as the board of directors and committees of the board of directors (e.g., the audit committee).[332] Depending on the size and structure of an organization, it may be appropriate for day-to-day operational responsibility to be

delegated to other specific individuals within a company.[333] DOJ and SEC recognize that the reporting structure will depend on the size and complexity of an organization. Moreover, the amount of resources devoted to compliance will depend on the company's size, complexity, industry, geographical reach, and risks associated with the business. In assessing whether a company has reasonable internal controls, DOJ and SEC typically consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business.

Risk Assessment

Assessment of risk is fundamental to developing a strong compliance program, and is another factor DOJ and SEC evaluate when assessing a company's compliance program.[334] One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective. A $50 million contract with a government agency in a high-risk country warrants greater scrutiny than modest and routine gifts and entertainment. Similarly, performing identical due diligence on all third-party agents, irrespective of risk factors, is often counterproductive, diverting attention and resources away from those third parties that pose the most significant risks. DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area. Conversely, a company that fails to prevent an FCPA violation on an economically significant, high-risk transaction because it failed to perform a level of due diligence commensurate with the size and risk of the transaction is likely to receive reduced credit based on the quality and effectiveness of its compliance program.

As a company's risk for FCPA violations increases, that business should consider increasing its compliance procedures, including due diligence and periodic internal audits. The degree of appropriate due diligence is fact-specific and should vary based on industry, country, size, and nature of the transaction, and the method and amount of third-party compensation. Factors to consider, for instance, include risks presented by: the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs. When assessing a company's compliance program, DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces.

Training and Continuing Advice

Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where

appropriate, agents and business partners.[335] For example, many larger companies have implemented a mix of web-based and in-person training conducted at varying intervals. Such training typically covers company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies. Regardless of how a company chooses to conduct its training, however, the information should be presented in a manner appropriate for the targeted audience, including providing training and training materials in the local language. For example, companies may want to consider providing different types of training to their sales personnel and accounting personnel with hypotheticals or sample situations that are similar to the situations they might encounter. In addition to the existence and scope of a company's training program, a company should develop appropriate measures, depending on the size and sophistication of the particular company, to provide guidance and advice on complying with the company's ethics and compliance program, including when such advice is needed urgently. Such measures will help ensure that the compliance program is understood and followed appropriately at all levels of the company.

Incentives and Disciplinary Measures

In addition to evaluating the design and implementation of a compliance program throughout an organization, enforcement of that program is fundamental to its effectiveness.[336] A compliance program should apply from the board room to the supply room—no one should be beyond its reach. DOJ and SEC will thus consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation. Many companies have found that publicizing disciplinary actions internally, where appropriate under local law, can have an important deterrent effect, demonstrating that unethical and unlawful actions have swift and sure consequences.

DOJ and SEC recognize that positive incentives can also drive compliant behavior. The incentives can take many forms such as personnel evaluations and promotions, rewards for improving and developing a company's compliance program, and rewards for ethics and compliance leadership.[337] Some organizations, for example, have made adherence to compliance a significant metric for management's bonuses so that compliance becomes an integral part of management's everyday concern. Beyond financial incentives, some companies have highlighted compliance within their organizations by recognizing compliance professionals and internal audit staff. Others have made working in the company's compliance organization a way to advance an employee's career.

SEC, for instance, has encouraged companies to embrace methods to incentivize ethical and lawful behavior:

> [M]ake integrity, ethics and compliance part of the promotion, compensation and evaluation processes as well. For at the end of the day, the most effective way to communicate that "doing the right thing" is a priority, is to reward it. Conversely, if employees are led to believe that, when it comes to compensation and career advancement, all that counts is short-term profitability, and that cutting ethical corners is an acceptable way of getting there, they'll perform to that measure. To cite an example from a different walk of life: a college football coach can be told that the graduation rates of his players are what matters, but he'll know differently if the sole focus of his contract extension talks or the decision to fire him is his win-loss record.[338]

No matter what the disciplinary scheme or potential incentives a company decides to adopt, DOJ and SEC will consider whether they are fairly and consistently applied across the organization. No executive should be above compliance, no employee below compliance, and no person within an organization deemed too valuable to be disciplined, if warranted. Rewarding good behavior and sanctioning bad behavior reinforces a culture of compliance and ethics throughout an organization.

Third-Party Due Diligence and Payments

DOJ's and SEC's FCPA enforcement actions demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business transactions. Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company's compliance program.

Although the degree of appropriate due diligence may vary based on industry, country, size and nature of the transaction, and historical relationship with the third party, some guiding principles always apply.

First, as part of risk-based due diligence, companies should understand the qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with foreign officials. The degree of scrutiny should increase as red flags surface.

Second, companies should have an understanding of the business rationale for including the third party in the transaction. Among other things, the company should understand the role of and need for the third party and ensure that the contract terms specifically describe the services to be performed. Additional considerations include payment terms and how those payment terms compare to typical terms in that industry and country, as well as the timing of the third party's introduction to the business. Moreover, companies may want to confirm and document that the third party is actually performing the work for which it is being paid and that its compensation is commensurate with the work being provided.

Third, companies should undertake some form of ongoing monitoring of third-party relationships.[339] Where appropriate, this may include updating due diligence periodically, exercising audit rights, providing periodic training, and requesting annual compliance certifications by the third party.

In addition to considering a company's due diligence on third parties, DOJ and SEC also assess whether the company has informed third parties of the company's compliance program and commitment to ethical and lawful business practices and, where appropriate, whether it has sought assurances from third parties, through certifications and otherwise, of reciprocal commitments. These can be meaningful ways to mitigate third-party risk.

Hypothetical: Third-Party Vetting

Part 1: Consultants

Company A, a U.S. issuer headquartered in Delaware, wants to start doing business in a country that poses high risks of corruption. Company A learns about a potential $50 million contract with the country's Ministry of Immigration. This is a very attractive opportunity to Company A, both for its profitability and to open the door to future projects with the government. At the suggestion of the company's senior vice president of international sales (Sales Executive), Company A hires a local businessman who assures them that he has strong ties to political and government leaders in the country and can help them win the contract. Company A enters into a consulting contract with the local businessman (Consultant). The agreement requires Consultant to use his best efforts to help the company win the business and provides for Consultant to receive a significant monthly retainer as well as a success fee of 3% of the value of any contract the company wins.

What steps should Company A consider taking before hiring Consultant?

There are several factors here that might lead Company A to perform heightened FCPA-related due diligence prior to retaining Consultant: (1) the market (high-risk country); (2) the size and significance of the deal to the company; (3) the company's first time use of this particular consultant; (4) the consultant's strong ties to political and government leaders; (5) the success fee structure of the contract; and (6) the vaguely defined services to be provided. In order to minimize the likelihood of incurring FCPA liability, Company A should carefully vet Consultant and his role in the transaction, including close scrutiny of the relationship between Consultant and any Ministry of Immigration officials or other government officials. Although there is nothing inherently illegal about contracting with a third party that has close connections to politicians and government officials to perform legitimate services on a transaction, this type of relationship can be susceptible to corruption. Among other things, Company A may consider conducting due diligence on Consultant, including background and reference checks; ensuring that the contract spells out exactly what services and deliverables (such as written status reports or other documentation) Consultant is providing; training Consultant on the FCPA and other anti-corruption laws; requiring Consultant to represent that he will abide by the FCPA and other anti-corruption laws; including audit rights in the contract (and exercising those rights); and ensuring that payments requested by Consultant have the proper supporting documentation before they are approved for payment.

Part 2: Distributors and Local Partners

Assume the following alternative facts:

Instead of hiring Consultant, Company A retains an often-used local distributor (Distributor) to sell Company A's products to the Ministry of Immigration. In negotiating the pricing structure, Distributor, which had introduced the project to Company A, claims that the standard discount price to Distributor creates insufficient margin for Distributor to cover warehousing, distribution, installation, marketing, and training costs and requests an additional discount or rebate, or, in the alternative, a contribution to its marketing efforts, either in the form of a lump sum or as a percentage of the total contract. The requested discount/allowance is significantly larger than usual, although there is precedent at Company A for granting this level of discount in unique circumstances. Distributor further advises Company A that the Ministry's procurement officials responsible for awarding the contract have expressed a strong preference for including a particular local company (Local Partner) in the transaction as a subcontractor of Company A

(cont'd)

to perform installation, training, and other services that would normally have been performed by Distributor of Company A. According to Distributor, the Ministry has a solid working relationship with Local Partner, and it would cause less disruption for Local Partner to perform most of the on-site work at the Ministry. One of the principals (Principal 1) of the Local Partner is an official in another government ministry.

What additional compliance considerations do these alternative facts raise?

As with Consultant in the first scenario above, Company A should carefully vet Distributor and Local Partner and their roles in the transaction in order to minimize the likelihood of incurring FCPA liability. While Company A has an established relationship with Distributor, the fact that Distributor has requested an additional discount warrants further inquiry into the economic justification for the change, particularly where, as here, the proposed transaction structure contemplates paying Local Partner to provide many of the same services that Distributor would otherwise provide. In many cases, it may be appropriate for distributors to receive larger discounts to account for unique circumstances in particular transactions. That said, a common mechanism to create additional margin for bribe payments is through excessive discounts or rebates to distributors. Accordingly, when a company has pre-existing relationships with distributors and other third parties, transaction-specific due diligence—including an analysis of payment terms to confirm that the payment is commensurate with the work being performed—can be critical even in circumstances where due diligence of the distributor or other third party raises no initial red flags.

Company A should carefully scrutinize the relationship among Local Partner, Distributor, and Ministry of Immigration officials. While there is nothing inherently illegal about contracting with a third party that is recommended by the end-user, or even hiring a government official to perform legitimate services on a transaction unrelated to his or her government job, these facts raise additional red flags that warrant significant scrutiny. Among other things, Company A would be well-advised to require Principal 1 to verify that he will have no role in the Ministry of Immigration's decision to award the contract to Company A, notify the Ministry of Immigration and his own ministry of his proposed involvement in the transaction, and certify that he will abide by the FCPA and other anti-corruption laws and that his involvement in the transaction is permitted under local law.

Assume the following additional facts:

Under its company policy for a government transaction of this size, Company A requires both finance and compliance approval. The finance officer is concerned that the discounts to Distributor are significantly larger than what they have approved for similar work and will cut too deeply into Company A's profit margin. The finance officer is also skeptical about including Local Partner to perform some of the same services that Company A is paying Distributor to perform. Unsatisfied with Sales Executive's explanation, she requests a meeting with Distributor and Principal 1. At the meeting, Distributor and Principal 1 offer vague and inconsistent justifications for the payments and fail to provide any supporting analysis, and Principal 1 seems to have no real expertise in the industry. During a coffee break, Distributor comments to Sales Executive that the finance officer is naïve about "how business is done in my country." Following the meeting, Sales Executive dismisses the finance officer's concerns, assuring her that the proposed transaction structure is reasonable and legitimate. Sales Executive also reminds the finance officer that "the deal is key to their growth in the industry."

The compliance officer focuses his due diligence on vetting Distributor and Local Partner and hires a business investigative firm to conduct a background check. Distributor appears reputable, capable, and financially stable and is willing to take on real risk in the project, financial and otherwise. However, the compliance officer learns that Distributor has established an offshore bank account for the transaction.

(cont'd)

The compliance officer further learns that Local Partner's business was organized two years ago and appears financially stable but has no expertise in the industry and has established an offshore shell company and bank account to conduct this transaction. The background check also reveals that Principal 1 is a former college roommate of a senior official of the Ministry of Immigration. The Sales Executive dismisses the compliance officer's concerns, commenting that what Local Partner does with its payments "isn't our problem." Sales Executive also strongly objects to the compliance officer's request to meet with Principal 1 to discuss the offshore company and account, assuring him that it was done for legitimate tax purposes and complaining that if Company A continues to "harass" Local Partner and Distributor, they would partner with Company A's chief competitor. The compliance officer and the finance officer discuss their concerns with each other but ultimately sign off on the deal even though their questions had not been answered. Their decision is motivated in large part by their conversation with Sales Executive, who told them that this was the region's most important contract and that the detailed FCPA questionnaires and robust anti-corruption representations in the contracts placed the burden on Distributor and Local Partner to act ethically.

Company A goes forward with the Distributor and Local Partner agreements and wins the contract after six months. The finance officer approves Company A's payments to Local Partner via the offshore account, even though Local Partner's invoices did not contain supporting detail or documentation of any services provided. Company A recorded the payments as legitimate operational expenses on its books and records. Sales Executive received a large year-end bonus due to the award of the contract. In fact, Local Partner and Distributor used part of the payments and discount margin, respectively, to funnel bribe payments to several Ministry of Immigration officials, including Principal 1's former college roommate, in exchange for awarding the contract to Company A. Thousands of dollars are also wired to the personal offshore bank account of Sales Executive.

How would DOJ and SEC evaluate the potential FCPA liability of Company A and its employees?

This is not the case of a single "rogue employee" circumventing an otherwise robust compliance program. Although Company A's finance and compliance officers had the correct instincts to scrutinize the structure and economics of the transaction and the role of the third parties, their due diligence was incomplete. When the initial inquiry identified significant red flags, they approved the transaction despite knowing that their concerns were unanswered or the answers they received raised additional concerns and red flags. Relying on due diligence questionnaires and anti-corruption representations is insufficient, particularly when the risks are readily apparent. Nor can Company A or its employees shield themselves from liability because it was Distributor and Local Partner—rather than Company A directly—that made the payments.

The facts suggest that Sales Executive had actual knowledge of or was willfully blind to the consultant's payment of the bribes. He also personally profited from the scheme (both from the kickback and from the bonus he received from the company) and intentionally discouraged the finance and compliance officers from learning the full story. Sales Executive is therefore subject to liability under the anti-bribery, books and records, and internal controls provisions of the FCPA, and others may be as well. Company A may also be liable for violations of the anti-bribery, books and records, and internal controls provisions of the FCPA given the number and significance of red flags that established a high probability of bribery and the role of employees and agents acting on the company's behalf.

Confidential Reporting and Internal Investigation

An effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation.[340] Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response, including any disciplinary or remediation measures taken. Companies will want to consider taking "lessons learned" from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program and focus future training on such issues, as appropriate.

Continuous Improvement: Periodic Testing and Review

Finally, a good compliance program should constantly evolve. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its industry. In addition, compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and do not allow them to become stale.

An organization should take the time to review and test its controls, and it should think critically about its potential weaknesses and risk areas. For example, some companies have undertaken employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas. Other companies periodically test their internal controls with targeted audits to make certain that controls on paper are working in practice. DOJ and SEC will give meaningful credit to thoughtful efforts to create a sustainable compliance program if a problem is later discovered. Similarly, undertaking proactive evaluations before a problem strikes can lower the applicable penalty range under the U.S. Sentencing Guidelines.[341] Although the nature and the frequency of proactive evaluations may vary depending on the size and complexity of an organization, the idea behind such efforts is the same: continuous improvement and sustainability.[342]

Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

In the context of the FCPA, mergers and acquisitions present both risks and opportunities. A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks.[343] Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business' profitability and reputation, as well as potential civil and criminal liability.

In contrast, companies that conduct effective FCPA due diligence on their acquisition targets are able to evaluate more accurately each target's value and negotiate for the costs of the bribery to be borne by the target. In addition, such actions demonstrate to DOJ and SEC a company's commitment to compliance and are taken into account when evaluating any potential enforcement action. For example, DOJ and SEC declined to take enforcement action against an acquiring issuer when the issuer, among other things, uncovered the corruption at the company being acquired as part of due diligence, ensured that the corruption was voluntarily disclosed to the government,

cooperated with the investigation, and incorporated the acquired company into its compliance program and internal controls. On the other hand, SEC took action against the acquired company, and DOJ took action against a subsidiary of the acquired company.[344] When pre-acquisition due diligence is not possible, DOJ has described procedures, contained in Opinion Procedure Release No. 08-02, pursuant to which companies can nevertheless be rewarded if they choose to conduct thorough post-acquisition FCPA due diligence.[345]

FCPA due diligence, however, is normally only a portion of the compliance process for mergers and acquisitions. DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units.

For example, as a result of due diligence conducted by a California-based issuer before acquiring the majority interest in a joint venture, the issuer learned of corrupt payments to obtain business. However, the issuer only implemented its internal controls "halfway" so as not to "choke the sales engine and cause a distraction for the sales guys." As a result, the improper payments continued, and the issuer was held liable for violating the FCPA's internal controls and books and records provisions.[346]

Investigation, Analysis, and Remediation of Misconduct

The truest measure of an effective compliance program is how it responds to misconduct. Accordingly, for a compliance program to be truly effective, it should have a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company's response, including any disciplinary or remediation measures taken.

In addition to having a mechanism for responding to the specific incident of misconduct, the company's program should also integrate lessons learned from any misconduct into the company's policies, training, and controls. To do so, a company will need to analyze the root causes of the misconduct to timely and appropriately remediate those causes to prevent future compliance breaches.

Other Guidance on Compliance and International Best Practices

In addition to this guide, DOJ has published guidance concerning the Evaluation of Corporate Compliance Programs.[347] The Evaluation of Corporate Compliance Programs 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). The DOJ compliance guidance provides companies insight into the types of questions that prosecutors ask to evaluate and assess a company's compliance program.

In addition, the U.S. Departments of Commerce and State have both issued publications that contain guidance regarding compliance programs. The Department of Commerce's International Trade Administration

has published *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*,[348] and the Department of State has published *Fighting Global Corruption: Business Risk Management*.[349]

There is also a developing international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance.[350] Most notably, the OECD's 2009 Anti-Bribery Recommendation and its Annex II, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*,[351] published in February 2010, were drafted based on consultations with the private sector and civil society and set forth specific good practices for ensuring effective compliance programs and measures for preventing and detecting foreign bribery. In addition, businesses may wish to refer to the following resources:

- Asia-Pacific Economic Cooperation—*Anti-Corruption Code of Conduct for Business*[352]
- International Chamber of Commerce—*ICC Rules on Combating Corruption*[353]
- Transparency International—*Business Principles for Countering Bribery*[354]
- United Nations Global Compact—*The Ten Principles*[355]
- World Bank—*Integrity Compliance Guidelines*[356]
- World Economic Forum—*Partnering Against Corruption–Principles for Countering Bribery*[357]

Compliance Program Case Study

DOJ and SEC actions relating to a financial institution's real estate transactions with a government agency in China illustrate the benefits of implementing and enforcing a comprehensive risk-based compliance program. The case involved a joint venture real estate investment in the Luwan District of Shanghai, China, between a U.S.-based financial institution and a state-owned entity that functioned as the District's real estate arm. The government entity conducted the transactions through two special purpose vehicles ("SPVs"), with the second SPV purchasing a 12% stake in a real estate project.

The financial institution, through a robust compliance program, frequently trained its employees, imposed a comprehensive payment-approval process designed to prevent bribery, and staffed a compliance department with a direct reporting line to the board of directors. As appropriate given the industry, market, and size and structure of the transactions, the financial institution (1) provided extensive FCPA training to the senior executive responsible for the transactions and (2) conducted extensive due diligence on the transactions, the local government entity, and the SPVs. Due diligence on the entity included reviewing Chinese government records; speaking with sources familiar with the Shanghai real estate market; checking the government entity's payment records and credit references; conducting an on-site visit and placing a pretextual telephone call to the entity's offices; searching media sources; and conducting background checks on the entity's principals. The financial institution vetted the SPVs by obtaining a letter with designated bank account information from a Chinese official associated with the government entity (the "Chinese Official"); using an international law firm to request and review 50 documents from the SPVs' Canadian attorney; interviewing the attorney; and interviewing the SPVs' management.

Notwithstanding the financial institution's robust compliance program and good faith enforcement of it, the company failed to learn that the Chinese Official personally owned nearly 50% of the second SPV (and therefore a nearly 6% stake in the joint venture) and that the SPV was used as a vehicle for corrupt payments. This failure was due, in large part, to misrepresentations by the Chinese Official, the financial institution's executive in charge of the project, and the SPV's attorney that the SPV was 100% owned and controlled by the government entity. DOJ and SEC declined to take enforcement action against the financial institution, and its executive pleaded guilty to conspiracy to violate the FCPA's internal control provisions and also settled with SEC.

U.S. Department of Justice

Criminal Division

Fraud Section

Bond Building
1400 New York Avenue, NW
Washington, D.C. 20530

March 18, 2022

F. Joseph Warin
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Jardine Lloyd Thompson Group Holdings Ltd.

Dear Mr. Warin,

Consistent with the FCPA Corporate Enforcement Policy, the Department of Justice, Criminal Division, Fraud Section (the "Department") has declined prosecution of your client, Jardine Lloyd Thompson Group Holdings Ltd., formerly Jardine Lloyd Thompson Group plc ("JLT" or the "Company") for violations of the Foreign Corrupt Practices Act (the "FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*[1] We have reached this conclusion despite the bribery committed by an employee and agents of the Company and its subsidiaries.

The Department's investigation found evidence that beginning in 2014 and continuing through 2016, JLT, through its employee and agents, paid approximately $10,800,000 to a Florida-based third-party intermediary that the employee and agents knew would be used, in part, to pay approximately $3,157,000 in bribes to Ecuadorian government officials in order to obtain and retain contracts with Seguros Sucre, the Ecuadorian state-owned and -controlled surety company. Approximately $1.2 million of these bribe payments were laundered through and into bank accounts in the United States.

The Department has decided to decline prosecution of this matter based on an assessment of the factors set forth in the Corporate Enforcement Policy, Justice Manual ("JM") 9-47.120, and the Principles of Federal Prosecution of Business Organizations, JM 9-28.300, including but not limited to: (1) JLT's voluntary self-disclosure of the misconduct; (2) JLT's full and proactive cooperation in this matter (including its provision of all known relevant facts about the misconduct, including information about the individuals involved in the conduct) and its agreement to continue to cooperate in the Department's ongoing investigations and any prosecutions that might result; (3) the nature and seriousness of the offense; (4) JLT's timely and full remediation, including separation from the executive and third-party intermediary company involved in the misconduct and the efforts to enhance its anti-corruption training and compliance program; and (5) the fact that JLT agrees to and will disgorge the full amount of its ill-gotten gains (as described below).

[1] On April 1, 2019, JLT was acquired by Marsh & McLennan Companies, Inc.

Pursuant to this letter agreement, JLT agrees to continue to fully cooperate in the Department's ongoing investigations and/or prosecutions, including but not limited to the continued provision of any information and making available for interviews and/or testimony those officers, employees, or agents who possess relevant information, as determined in the sole discretion of the Department.

JLT further agrees to disgorge $29,081,951 USD (the "Disgorgement Amount"), which represents the profit to JLT from the corruptly obtained and retained contracts, as calculated by the Department. The Department agrees to credit the Disgorgement Amount against the amount JLT pays to the U.K. Serious Fraud Office ("SFO"), up to 100 percent of the Disgorgement Amount, so long as JLT pays the Disgorgement Amount to the SFO pursuant to the Company's separate resolution with the SFO that addresses the same underlying conduct. If the Company does not pay the SFO any part of the Disgorgement Amount within 12 months after this letter is fully executed, the Company will be required to pay the full remaining amount to the United States Treasury on or before March 22, 2023.

This letter agreement does not provide any protection against prosecution of any individuals, regardless of their affiliation with JLT. If the Department learns information that changes its assessment of any of the factors outlined above, it may reopen its inquiry.

Sincerely,

JOSEPH S. BEEMSTERBOER
Acting Chief, Fraud Section
Criminal Division
Department of Justice

BY: _____
ALEXANDER KRAMER
KATHERINE RAUT
DREW BRADYLYONS
JAMES MANDOLFO
Trial Attorneys, Fraud Section

I have read this letter agreement and carefully reviewed every part of it with outside counsel for Marsh & McLennan Companies, Inc. The Board of Directors of Marsh McLennan has been advised of the terms of this letter agreement. I understand the terms of this letter agreement and, on behalf of Marsh McLennan, as the successor in interest to Jardine Lloyd Thompson Group plc, voluntarily agree and consent to the facts and conditions set forth herein, including to pay the Disgorgement Amount and to continue to cooperate with the Department.

Date: 3/22/22

BY: _____
KATHERINE BRENNAN
General Counsel
Marsh & McLennan Companies, Inc.

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, June 25, 2019

TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case

Guilty Plea by Former Consultant

TechnipFMC plc (TFMC), a publicly traded company in the United States and a global provider of oil and gas services, and its wholly-owned U.S. subsidiary, Technip USA, Inc. (Technip USA), have agreed to pay a combined total criminal fine of more than $296 million to resolve foreign bribery charges with authorities in the United States and Brazil. TFMC is the product of a 2017 merger between two predecessor companies, Technip S.A. (Technip) and FMC Technologies, Inc. (FMC). The charges arose out of two independent bribery schemes: a scheme by Technip to pay bribes to Brazilian officials and a scheme by FMC to pay bribes to officials in Iraq. Technip USA and Technip's former consultant pleaded guilty today in connection with the resolution. In 2010, Technip entered into a $240 million resolution with the Department over bribes paid in Nigeria.

Assistant Attorney General Brian A. Benczkowski of the Justice Department's Criminal Division, U.S. Attorney Richard P. Donoghue of the Eastern District of New York, Assistant Director Robert Johnson of the FBI's Criminal Investigative Division and Acting Special Agent in Charge Charles A. Dayoub of the FBI's Washington Field Office Criminal Division made the announcement.

"Today's resolution takes aim at the scourge of bribery, but does so in a fair and evenhanded way," said Assistant Attorney General Benczkowski. "It is a testament to the strength and effectiveness of international coordination in the fight against corruption, but also an acknowledgement that the Department is fully committed to reaching fair and just resolutions with companies that fully cooperate and remediate."

"Today's resolutions are the result of a continuing multinational effort to hold accountable corporations and individuals who seek to win business through corrupt payments to foreign officials, and who attempt to use the U.S. financial system to carry out those crimes," said U.S. Attorney Donoghue. "We will continue to prioritize identifying and bringing to justice those who would corrupt the legitimate functions of government for personal financial gain."

"Today's charges demonstrate not only the capabilities of the FBI personnel who investigate international corruption, but the successful results of strong partnerships in the international community," said Assistant Director Johnson. "In attempting to cheat the system, Technip violated the FCPA. Through the collaboration and dedicated efforts of the FBI and our foreign partners, Technip is being held accountable for perpetrating illegal schemes and justice is served."

"This case shows the FBI will continue to work tirelessly to hold those accountable who treat corruption and bribery as a common business practice," said Acting Special Agent in Charge Dayoub. "Today's agreement is the culmination of the hard work of the FBI and Department of Justice and our international partners."

TFMC entered into a deferred prosecution agreement with the Department in connection with a criminal information filed today in the Eastern District of New York charging the company with two counts of conspiracy to violate the anti-

bribery provisions of the Foreign Corrupt Practices Act (FCPA). In addition, Technip USA pleaded guilty and was sentenced on a one-count criminal information charging it with conspiracy to violate the anti-bribery provisions of the FCPA. Pursuant to its agreement with the Department, TechnipFMC will pay a total criminal fine of over $296 million, including a $500,000 criminal fine paid by Technip USA. As part of the deferred prosecution agreement, TechnipFMC committed to implementing rigorous internal controls and to cooperate fully with the Department's ongoing investigation.

In connection with the scheme to bribe Brazilian officials, Technip's former consultant also pleaded guilty in the Eastern District of New York to a one-count criminal information charging him with conspiracy to violate the FCPA. He is awaiting sentencing.

All three cases are assigned to U.S. District Judge Kiyo A. Matsumoto of the Eastern District of New York.

In related proceedings, the company settled with the Advogado-Geral da União (AGU), the Controladoria-Geral da União (CGU) and the Ministério Público Federal (MPF) in Brazil over bribes paid in Brazil. The United States will credit the amount the company pays to the Brazilian authorities under their respective agreements, with TechnipFMC paying Brazil approximately $214 million in penalties.

According to admissions and court documents, beginning in at least 2003 and continuing until at least 2013, Technip conspired with others, including Singapore-based Keppel Offshore & Marine Ltd. (KOM) and their former consultant, to violate the FCPA by making more than $69 million in corrupt payments and "commission payments" to the consultant, companies associated with the consultant and others, who passed along portions of these payments as bribes to Brazialin government officials who were employees at the Brazilian state-owned oil company, Petrobras, in order to secure improper business advantages and obtaining and retaining business with Petrobas for Technip, Technip USA and Joint Venture. In addition, Technip made more than $6 million in corrupt payments to the Workers' Party in Brazil and Workers' party officials in furtherance of the bribery scheme.

The admissions and court documents also establish that beginning by at least 2008 and continuing until at least 2013, FMC conspired to violate the FCPA by paying bribes to at least seven government officials in Iraq, including officials at the Ministry of Oil, the South Oil Company and the Missan Oil Company, through a Monaco-based intermediary company in order to win secure improper business advantages and to influence those foreign officials to obtain and retain business for FMC Technologies in Iraq.

In the resolutions with the Department, TFMC received credit for its substantial cooperation with the Department's investigation and for taking extensive remedial measures. For example, the company separated from or took disciplinary action against former and current employees in relation to the misconduct described in the statement of facts to which it admitted as part of the resolution; made changes to its business operations in Brazil to no longer participate in the type of work where the misconduct at issue arose; required that certain employees and third parties undergo additional compliance training; and made specific enhancements to the company's internal controls and compliance program. Accordingly, the criminal fine reflects a 25 percent reduction off the applicable U.S. Sentencing Guidelines fine for the company's full cooperation and remediation.

In a related enforcement action, in December of 2017, KOM and its U.S. subsidiary, Keppel Offshore & Marine USA, Inc., agreed to pay a combined total criminal fine of more than $422 million to resolve charges with authorities in the United States, Brazil and Singapore on related conduct. A former senior member of KOM's legal department also pleaded guilty and is awaiting sentencing.

The case is being investigated by the FBI's Washington Field Office International Corruption Squad. Trial Attorneys Dennis R. Kihm, Derek J. Ettinger and Gerald M. Moody, Jr. of the Criminal Division's Fraud Section, as well as Assistant U.S. Attorneys Alixandra Smith and Patrick Hein of the Eastern District of New York, are prosecuting the case.

The governments of Australia, Brazil, France, Guernsey, Italy, Monaco and the United Kingdom provided significant assistance in this matter, as did the Criminal Division's Office of International Affairs.

The Fraud Section is responsible for investigating and prosecuting all FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal/fraud/fcpa.

Attachment(s):

Download TechnipUSA Plea Agreement
Download TechnipUSA Information
Download TechnipFMC Deferred Prosecution Agreement
Download TechnipFMC Information

Topic(s):

Foreign Corruption

Component(s):

Criminal Division
Criminal - Criminal Fraud Section
Federal Bureau of Investigation (FBI)
USAO - New York, Eastern

Press Release Number:

19-714

Updated November 19, 2020

THE UNITED STATES DEPARTMENT of JUSTICE
JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Friday, December 6, 2019

Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case

Ericsson Subsidiary Pleads Guilty to FCPA Violations

Telefonaktiebolaget LM Ericsson (Ericsson or the Company), a multinational telecommunications company headquartered in Stockholm, Sweden, has agreed to pay total penalties of more than $1 billion to resolve the government's investigation into violations of the Foreign Corrupt Practices Act (FCPA) arising out of the Company's scheme to make and improperly record tens of millions of dollars in improper payments around the world. This includes a criminal penalty of over $520 million and approximately $540 million to be paid to the U.S. Securities and Exchange Commission (SEC) in a related matter. An Ericsson subsidiary pleaded guilty today for its role in the scheme.

Ericsson entered into a deferred prosecution agreement with the department in connection with a criminal information filed today in the Southern District of New York charging the Company with conspiracies to violate the anti-bribery, books and records, and internal controls provisions of the FCPA. The Ericsson subsidiary, Ericsson Egypt Ltd, pleaded guilty today in the Southern District of New York to a one-count criminal information charging it with conspiracy to violate the anti-bribery provisions of the FCPA. The case is assigned to U.S. District Judge Alison J. Nathan of the Southern District of New York. Pursuant to its agreement with the department, Ericsson has committed to pay a total criminal penalty of $520,650,432 within 10 business days of the sentencing hearing, and has agreed to the imposition of an independent compliance monitor.

"Ericsson's corrupt conduct involved high-level executives and spanned 17 years and at least five countries, all in a misguided effort to increase profits," said Assistant Attorney General Brian A. Benczkowski of the Justice Department's Criminal Division. "Such wrongdoing called for a strong response from law enforcement, and through a tenacious effort with our partners in the Southern District of New York, the SEC, and the IRS, today's action not only holds Ericsson accountable for these schemes, but should deter other companies from engaging in similar criminal conduct."

"Today, Swedish telecom giant Ericsson has admitted to a years-long campaign of corruption in five countries to solidify its grip on telecommunications business," said U.S. Attorney Geoffrey S. Berman of the Southern District of New York. "Through slush funds, bribes, gifts, and graft, Ericsson conducted telecom business with the guiding principle that 'money talks.' Today's guilty plea and surrender of over a billion dollars in combined penalties should communicate clearly to all corporate actors that doing business this way will not be tolerated."

"Implementing strong compliance systems and internal controls are basic principles that international companies must follow to steer clear of illegal activity," said Don Fort, Chief, IRS Criminal Investigation. "Ericsson's shortcomings in these areas made it easier for its executives and employees to pay bribes and falsify its books and records. We will continue to pursue cases such as these in order to preserve a global commerce system free of corruption."

According to admissions by Ericsson, beginning in 2000 and continuing until 2016, the Company conspired with others to violate the FCPA by engaging in a longstanding scheme to pay bribes, to falsify books and records and to fail to implement reasonable internal accounting controls. Ericsson used third party agents and consultants to make bribe

payments to government officials and/or to manage off-the-books slush funds. These agents were often engaged through sham contracts and paid pursuant to false invoices, and the payments to them were improperly accounted for in Ericsson's books and records. The resolutions cover the Company's criminal conduct in Djibouti, China, Vietnam, Indonesia and Kuwait.

Between 2010 and 2014, Ericsson, via a subsidiary, made approximately $2.1 million in bribe payments to high-ranking government officials in Djibouti in order to obtain a contract with the state-owned telecommunications company valued at approximately €20.3 million to modernize the mobile networks system in Djibouti. In order to effectuate the scheme, an Ericsson subsidiary entered into a sham contract with a consulting company and approved fake invoices to conceal the bribe payments. Ericsson employees also completed a draft due diligence report that failed to disclose the spousal relationship between the owner of the consulting company and one of the high-ranking government officials.

In China, between 2000 and 2016, Ericsson subsidiaries caused tens of millions of dollars to be paid to various agents, consultants and service providers, a portion of which was used to fund a travel expense account in China that covered gifts, travel and entertainment for foreign officials, including customers from state-owned telecommunications companies. Ericsson used the travel expense account to win business with Chinese state-owned customers. In addition, between 2013 and 2016, Ericsson subsidiaries made payments of approximately $31.5 million to third party service providers pursuant to sham contracts for services that were never performed. The purpose of these payments was to allow Ericsson's subsidiaries in China to continue to use and pay third party agents in China in contravention of Ericsson's policies and procedures. Ericsson knowingly mischaracterized these payments and improperly recorded them in its books and records.

In Vietnam, between 2012 and 2015, Ericsson subsidiaries made approximately $4.8 million in payments to a consulting company in order to create off-the-books slush funds, associated with Ericsson's customers in Vietnam, that were used to make payments to third parties who would not be able to pass Ericsson's due diligence processes. Ericsson knowingly mischaracterized these payments and improperly recorded them in Ericsson's books and records. Similarly, in Indonesia, between 2012 and 2015, an Ericsson subsidiary made approximately $45 million in payments to a consulting company in order to create off-the-books slush funds, and concealed the payments on Ericsson's books and records.

In Kuwait, between 2011 and 2013, an Ericsson subsidiary promised a payment of approximately $450,000 to a consulting company at the request of a sales agent, and then entered into a sham contract with the consulting company and approved a fake invoice for services that were never performed in order to conceal the payment. The sales agent provided an Ericsson employee with inside information about a tender for the modernization of a state-owned telecommunications company's radio access network in Kuwait. An Ericsson subsidiary was awarded the contract valued at approximately $182 million; Ericsson subsequently made the $450,000 payment to the consulting company and improperly recorded it in its books.

As part of the deferred prosecution agreement, Ericsson has agreed to continue to cooperate with the department in any ongoing investigations and prosecutions relating to the conduct, including of individuals; to enhance its compliance program; and to retain an independent compliance monitor for three years.

The department reached this resolution with Ericsson based on a number of factors, including the Company's failure to voluntarily disclose the conduct to the department and the nature and seriousness of the offense, which included FCPA violations in five countries and the involvement of high-level executives at the Company. Ericsson received partial credit for its cooperation with the department's investigation, which included conducting a thorough internal investigation, making regular factual presentations to the department, voluntarily making foreign-based employees available for interviews in the United States, producing extensive documentation and disclosing some conduct of which the department was previously unaware.

Ericsson did not receive full credit for cooperation and remediation because it did not disclose allegations of corruption with respect to two relevant matters; it produced certain materials in an untimely manner; and it did not fully remediate, including by failing to take adequate disciplinary measures with respect to certain employees involved in the misconduct. The Company has been enhancing and committed to further enhance its compliance program and internal

accounting controls. Accordingly, the total criminal penalty reflects a 15 percent reduction off the bottom of the applicable United States Sentencing Guidelines fine range.

In the related matter, Ericsson agreed to pay to the SEC disgorgement and prejudgment interest totaling approximately $540 million.

The case is being investigated by IRS-CI. Acting Assistant Chief Andrew Gentin and Trial Attorney Michael Culhane Harper of the Criminal Division's Fraud Section and Assistant U.S. Attorney David Abramowicz of the Southern District of New York are prosecuting the case. The Criminal Division's Office of International Affairs provided assistance.

The department appreciates the significant cooperation provided by the SEC and law enforcement authorities in Sweden in this case.

The Fraud Section is responsible for investigating and prosecuting all FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

Attachment(s):
Download Ericsson Egypt Ltd. Information
Download Ericsson Egypt Ltd. Plea Agreement
Download Telefonaktiebolaget LM Ericsson Information
Download Telefonaktiebolaget LM Ericsson DPA

Topic(s):
Financial Fraud
Foreign Corruption

Component(s):
Criminal Division
Criminal - Criminal Fraud Section
Criminal - Office of International Affairs
USAO - New York, Southern

Press Release Number:
19-1360

Updated April 29, 2020

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, October 22, 2020

Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion

The Goldman Sachs Group Inc. (Goldman Sachs or the Company), a global financial institution headquartered in New York, New York, and Goldman Sachs (Malaysia) Sdn. Bhd. (GS Malaysia), its Malaysian subsidiary, have admitted to conspiring to violate the Foreign Corrupt Practices Act (FCPA) in connection with a scheme to pay over $1 billion in bribes to Malaysian and Abu Dhabi officials to obtain lucrative business for Goldman Sachs, including its role in underwriting approximately $6.5 billion in three bond deals for 1Malaysia Development Bhd. (1MDB), for which the bank earned hundreds of millions in fees. Goldman Sachs will pay more than $2.9 billion as part of a coordinated resolution with criminal and civil authorities in the United States, the United Kingdom, Singapore, and elsewhere.

Goldman Sachs entered into a deferred prosecution agreement with the department in connection with a criminal information filed today in the Eastern District of New York charging the Company with conspiracy to violate the anti-bribery provisions of the FCPA. GS Malaysia pleaded guilty in the U.S. District Court for the Eastern District of New York to a one-count criminal information charging it with conspiracy to violate the anti-bribery provisions of the FCPA.

Previously, Tim Leissner, the former Southeast Asia Chairman and participating managing director of Goldman Sachs, pleaded guilty to conspiring to launder money and to violate the FCPA. Ng Chong Hwa, also known as "Roger Ng," former managing director of Goldman and head of investment banking for GS Malaysia, has been charged with conspiring to launder money and to violate the FCPA. Ng was extradited from Malaysia to face these charges and is scheduled to stand trial in March 2021. The cases are assigned to U.S. District Judge Margo K. Brodie of the Eastern District of New York.

In addition to these criminal charges, the department has recovered, or assisted in the recovery of, in excess of $1 billion in assets for Malaysia associated with and traceable to the 1MDB money laundering and bribery scheme.

"Goldman Sachs today accepted responsibility for its role in a conspiracy to bribe high-ranking foreign officials to obtain lucrative underwriting and other business relating to 1MDB," said Acting Assistant Attorney General Brian C. Rabbitt of the Justice Department's Criminal Division. "Today's resolution, which requires Goldman Sachs to admit wrongdoing and pay nearly three billion dollars in penalties, fines, and disgorgement, holds the bank accountable for this criminal scheme and demonstrates the department's continuing commitment to combatting corruption and protecting the U.S. financial system."

"Over a period of five years, Goldman Sachs participated in a sweeping international corruption scheme, conspiring to avail itself of more than $1.6 billion in bribes to multiple high-level government officials across several countries so that the company could reap hundreds of millions of dollars in fees, all to the detriment of the people of Malaysia and the reputation of American financial institutions operating abroad," said Acting U.S. Attorney Seth D. DuCharme of the Eastern District of New York. "Today's resolution, which includes a criminal guilty plea by Goldman Sachs' subsidiary in Malaysia, demonstrates that the department will hold accountable any institution that violates U.S. law anywhere in the world by unfairly tilting the scales through corrupt practices."

"When government officials and business executives secretly work together behind the scenes for their own illegal benefit, and not that of their citizens and shareholders, their behavior lends credibility to the narrative that businesses don't succeed based on the quality of their products, but rather their willingness to play dirty," said Assistant Director in Charge William F. Sweeney Jr. of the FBI's New York Field Office. "Greed eventually exacts an immense cost on society, and unchecked corrupt behavior erodes trust in public institutions and government entities alike. This case represents the largest ever penalty paid to U.S. authorities in an FCPA case. Our investigation into the looting of funds from 1MDB remains ongoing. If anyone has information that could assist the case, call us at 1-800-CALLFBI."

"1MDB was established to drive strategic initiatives for the long-term economic development of Malaysia. Goldman Sachs admitted today that one billion dollars of the money earmarked to help the people of Malaysia was actually diverted and used to pay bribes to Malaysian and Abu Dhabi officials to obtain their business," said Special Agent in Charge Ryan L. Korner of IRS Criminal Investigation's (IRS-CI) Los Angeles Field Office. "Today's guilty pleas demonstrate that the law applies to everyone, including large investment banks like Goldman Sachs. IRS Criminal Investigation will work tirelessly alongside our law enforcement partners to identify and bring to justice those who engage in fraud and deceit around the globe. When the American financial system is misused for corruption, the IRS will take notice and we will take action."

According to Goldman's admissions and court documents, between approximately 2009 and 2014, Goldman conspired with others to violate the FCPA by engaging in a scheme to pay more than $1.6 billion in bribes, directly and indirectly, to foreign officials in Malaysia and Abu Dhabi in order to obtain and retain business for Goldman from 1MDB, a Malaysian state-owned and state-controlled fund created to pursue investment and development projects for the economic benefit of Malaysia and its people. Specifically, the Company admitted to engaging in the bribery scheme through certain of its employees and agents, including Leissner, Ng, and a former executive who was a participating managing director and held leadership positions in Asia (Employee 1), in exchange for lucrative business and other advantages and opportunities. These included, among other things, securing Goldman's role as an advisor on energy acquisitions, as underwriter on three lucrative bond deals with a total value of $6.5 billion, and a potential role in a highly anticipated and even more lucrative initial public offering for 1MDB's energy assets. As Goldman admitted — and as alleged in the indictment pending in the Eastern District of New York against Ng and Low — in furtherance of the scheme, Leissner, Ng, Employee 1, and others conspired to pay bribes to numerous foreign officials, including high-ranking officials in the Malaysian government, 1MDB, Abu Dhabi's state-owned and state-controlled sovereign wealth fund, International Petroleum Investment Company (IPIC), and Abu Dhabi's state-owned and state-controlled joint stock company, Aabar Investments PJS (Aabar).

Goldman admitted today that, in order to effectuate the scheme, Leissner, Ng, Employee 1, and others conspired with Low Taek Jho, aka Jho Low, to promise and pay over $1.6 billion in bribes to Malaysian, 1MDB, IPIC, and Aabar officials. The co-conspirators allegedly paid these bribes using more than $2.7 billion in funds that Low, Leissner, and other members of the conspiracy diverted and misappropriated from the bond offerings underwritten by Goldman. Leissner, Ng and Low also retained a portion of the misappropriated funds for themselves and other co-conspirators. Goldman admitted that, through Leissner, Ng, Employee 1 and others, the bank used Low's connections to advance and further the bribery scheme, ultimately ensuring that 1MDB awarded Goldman a role on three bond transactions between 2012 and 2013, known internally at Goldman as "Project Magnolia," "Project Maximus," and "Project Catalyze."

Goldman also admitted that, although employees serving as part of Goldman's control functions knew that any transaction involving Low posed a significant risk, and although they were on notice that Low was involved in the transactions, they did not take reasonable steps to ensure that Low was not involved. Goldman further admitted that there were significant red flags raised during the due diligence process and afterward — including but not limited to Low's involvement — that either were ignored or only nominally addressed so that the transactions would be approved and Goldman could continue to do business with 1MDB. As a result of the scheme, Goldman received approximately $606 million in fees and revenue, and increased its stature and presence in Southeast Asia.

Under the terms of the agreements, Goldman will pay a criminal penalty and disgorgement of over $2.9 billion. Goldman also has reached separate parallel resolutions with foreign authorities in the United Kingdom, Singapore, Malaysia, and elsewhere, along with domestic authorities in the United States. The department will credit over $1.6 billion in payments with respect to those resolutions.

The department reached this resolution with Goldman based on a number of factors, including the Company's failure to voluntarily disclose the conduct to the department; the nature and seriousness of the offense, which included the involvement of high-level employees within the Company's investment bank and others who ignored significant red flags; the involvement of various Goldman subsidiaries across the world; the amount of the bribes, which totaled over $1.6 billion; the number and high-level nature of the bribe recipients, which included at least 11 foreign officials, including high-ranking officials of the Malaysian government; and the significant amount of actual loss incurred by 1MDB as a result of the co-conspirators' conduct. Goldman received partial credit for its cooperation with the department's investigation, but did not receive full credit for cooperation because it significantly delayed producing relevant evidence, including recorded phone calls in which the Company's bankers, executives, and control function personnel discussed allegations of bribery and misconduct relating to the conduct in the statement of facts. Accordingly, the total criminal penalty reflects a 10 percent reduction off the bottom of the applicable U.S. sentencing guidelines fine range.

Low has also been indicted for conspiracy to commit money laundering and violate the FCPA, along with Ng, E.D.N.Y. Docket No. 18-CR-538 (MKB). Low remains a fugitive. The charges in the indictment as to Low and Ng are merely allegations, and those defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

The investigation was conducted by the FBI's International Corruption Unit and IRS-CI. The prosecution is being handled by the Criminal Division's Fraud Section and the Money Laundering and Asset Recovery Section (MLARS), and the Business and Securities Fraud Section of the U.S. Attorney's Office for the Eastern District of New York. Trial Attorneys Katherine Nielsen, Nikhila Raj, Jennifer E. Ambuehl, Woo S. Lee, Mary Ann McCarthy, Leo Tsao, and David Last of the Criminal Division, and Assistant U.S. Attorneys Jacquelyn M. Kasulis, Alixandra Smith and Drew Rolle of the Eastern District of New York are prosecuting the case. Additional Criminal Division Trial Attorneys and Assistant U.S. Attorneys within U.S. Attorney's Offices for the Eastern District of New York and Central District of California have provided valuable assistance with various aspects of this investigation, including with civil and criminal forfeitures. The Justice Department's Office of International Affairs of the Criminal Division provided critical assistance in this case.

The department also appreciates the significant assistance provided by the U.S. Securities and Exchange Commission; the Board of Governors of the Federal Reserve System, including the Federal Reserve Bank of New York; the New York State Department of Financial Services, the United Kingdom Financial Conduct Authority; the United Kingdom Prudential Regulation Authority; the Attorney General's Chambers of Singapore; the Singapore Police Force-Commercial Affairs Division; the Monetary Authority of Singapore; the Office of the Attorney General and the Federal Office of Justice of Switzerland; the judicial investigating authority of the Grand Duchy of Luxembourg and the Criminal Investigation Department of the Grand-Ducal Police of Luxembourg; the Attorney General's Chambers of Malaysia; the Royal Malaysian Police; and the Malaysian Anti-Corruption Commission. The department also expresses its appreciation for the assistance provided by the Ministry of Justice of France; the Attorney General's Office of the Bailiwick of Guernsey and the Guernsey Economic Crime Division.

The Fraud Section is responsible for investigating and prosecuting all FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

MLARS's Bank Integrity Unit investigates and prosecutes banks and other financial institutions, including their officers, managers, and employees, whose actions threaten the integrity of the individual institution or the wider financial system.

MLARS's Kleptocracy Asset Recovery Initiative, in partnership with federal law enforcement agencies, and often with U.S. Attorney's Offices, seeks to forfeit the proceeds of foreign official corruption and, where appropriate, to use those recovered assets to benefit the people harmed by these acts of corruption and abuse of office.

Relevant court documents will be uploaded throughout the day and available at the following links: The Goldman Sachs Group Inc. and Goldman Sachs Sdn. Bhd.

Topic(s):

Financial Fraud
Securities, Commodities, & Investment Fraud

Component(s):
Criminal Division
Criminal - Criminal Fraud Section
Criminal - Money Laundering and Asset Recovery Section
Federal Bureau of Investigation (FBI)
USAO - New York, Eastern

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THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Friday, January 8, 2021

Deutsche Bank Agrees to Pay over $130 Million to Resolve Foreign Corrupt Practices Act and Fraud Case

Deutsche Bank Aktiengesellschaft (Deutsche Bank or the Company) has agreed to pay more than $130 million to resolve the government's investigation into violations of the Foreign Corrupt Practices Act (FCPA) and a separate investigation into a commodities fraud scheme.

The resolution includes criminal penalties of $85,186,206, criminal disgorgement of $681,480, victim compensation payments of $1,223,738, and $43,329,622 to be paid to the U.S. Securities & Exchange Commission in a coordinated resolution.

Deutsche Bank is a multi-national financial services company headquartered in Frankfurt, Germany. The charges arise out of a scheme to conceal corrupt payments and bribes made to third-party intermediaries by falsely recording them on Deutsche Bank's books and records, as well as related internal accounting control violations, and a separate scheme to engage in fraudulent and manipulative commodities trading practices involving publicly-traded precious metals futures contracts.

Deutsche Bank entered into a three-year deferred prosecution agreement (DPA) with the Criminal Division's Fraud Section and Money Laundering and Asset Recovery Section (MLARS) and with the U.S. Attorney's Office for the Eastern District of New York. The criminal information was filed today in the Eastern District of New York charging Deutsche Bank with one count of conspiracy to violate the books and records and internal accounting controls provisions of the FCPA and one count of conspiracy to commit wire fraud affecting a financial institution in relation to the commodities conduct.

"Deutsche Bank engaged in a seven-year course of conduct, during which it failed to implement a system of internal accounting controls regarding the use of company funds and falsified its books and records to conceal corrupt and improper payments," said Acting Deputy Assistant Attorney General Robert Zink of the Justice Department's Criminal Division. "Separately, Deutsche Bank traders on three continents sought to manipulate our public financial markets through fraud for five years. This resolution exemplifies the department's commitment to help ensure that publicly traded companies devise and implement appropriate and proper systems of internal accounting controls and maintain accurate and truthful corporate documentation. It also stands as an example of the department's efforts to police the public U.S. markets so that all may continue to trust, and rely upon, the integrity of our public financial systems."

"Deutsche Bank engaged in a criminal scheme to conceal payments to so-called consultants worldwide who served as conduits for bribes to foreign officials and others so that they could unfairly obtain and retain lucrative business projects," stated Acting U.S. Attorney Seth D. DuCharme of the Eastern District of New York. "This office will continue to hold responsible financial institutions that operate in the United States and engage in practices to facilitate criminal activity in order to increase their bottom line."

"The U.S. Postal Inspection Service takes pride in investigating complex fraud and corruption cases that impact American investors," said Inspector in Charge Delany De Léon-Colón of the U.S. Postal Inspection Service's Criminal

Investigations Group. “This type of deceptive activity can cause immeasurable economic losses to competitive markets around the world. The combined efforts of our partners at the FBI and Department of Justice helped to bring today’s significant action which illustrates our efforts to protect the United States and the international marketplace.”

The FCPA Case

According to admissions and court documents, between 2009 and 2016, Deutsche Bank, acting through its employees and agents, including managing directors and high-level regional executives, knowingly and willfully conspired to maintain false books, records, and accounts to conceal, among other things, payments to a business development consultant (BDC) who was acting as a proxy for a foreign official and payments to a BDC that were actually bribes paid to a decisionmaker for a client in order to obtain lucrative business for the bank. In some instances, Deutsche Bank made payments to BDCs that were not supported by invoices or evidence of any services provided. In other cases, Deutsche Bank employees created or helped BDC’s create false justifications for payments.

In relation to a Saudi BDC, Deutsche Bank admitted that its employees conspired to contract with a company owned by the wife of a client decisionmaker to facilitate bribe payments of over $1 million to the decisionmaker. Deutsche Bank approved the BDC relationship despite Deutsche Bank employees knowing about the relationship between the Saudi BDC and the decisionmaker, and approved the corrupt payments despite Deutsche Bank employees openly discussing the need to pay the Saudi BDC in order to incentivize her husband to continue to do business with Deutsche Bank. In requesting approval of one payment, Deutsche Bank employees cautioned that the “client and [the Saudi BDC] are intimately linked and . . . any cessation of payment to the [the Saudi BDC] will certainly prompt a significant outflow of [business]” from the client.

Deutsche Bank also contracted with an Abu Dhabi BDC to obtain a lucrative transaction, despite Deutsche Bank employees knowing that the Abu Dhabi BDC lacked qualifications as a BDC, other than his family relationship with the client decisionmaker, and that the Abu Dhabi BDC was in fact acting as proxy for the client decisionmaker. Deutsche Bank paid the Abu Dhabi BDC over $3 million without invoices.

By agreeing to misrepresent the purpose of payments to BDCs and falsely characterizing payments to others as payments to BDCs, Deutsche Bank employees conspired to falsify Deutsche Bank’s books, records, and accounts, in violation of the FCPA. Additionally, Deutsche Bank employees knowingly and willfully conspired to fail to implement internal accounting controls in violation of the FCPA by, among other things, failing to conduct meaningful due diligence regarding BDCs, making payments to certain BDCs who were not under contract with Deutsche Bank at the time, and making payments to certain BDCs without invoices or adequate documentation of the services purportedly performed.

Deutsche Bank will pay a total criminal penalty of $79,561,206 in relation to the FCPA scheme. In a related matter with the U.S. Securities & Exchange Commission, Deutsche Bank will also pay $43,329,622 in disgorgement and prejudgment interest.

The Commodities Fraud Case

According to admissions and court documents, between 2008 and 2013, Deutsche Bank precious metals traders engaged in a scheme to defraud other traders on the New York Mercantile Exchange Inc. and Commodity Exchange Inc., which are commodities exchanges operated by the CME Group Inc. On numerous occasions, traders on Deutsche Bank’s precious metals desk in New York, Singapore, and London placed orders to buy and sell precious metals futures contracts with the intent to cancel those orders before execution, including in an attempt to profit by deceiving other market participants through injecting false and misleading information concerning the existence of genuine supply and demand for precious metals futures contracts.

On Sept. 25, 2020, a Chicago federal jury found two former Deutsche Bank precious metals traders, James Vorley, 42, of the United Kingdom, and Cedric Chanu, 40, of France and the United Arab Emirates, guilty of wire fraud affecting a financial institution for their respective roles in the commodities scheme. A third former Deutsche Bank trader, David Liew, 35, of Singapore, pleaded guilty on June 1, 2017, to conspiracy to commit wire fraud affecting a financial institution and spoofing. A fourth former Deutsche Bank trader, Edward Bases, 58, of New Canaan, Connecticut, was charged in a third superseding indictment on Nov. 12, 2020, and awaits trial on fraud and conspiracy charges. An

indictment is merely an allegation and all defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

Deutsche Bank has agreed to pay a total criminal amount of $7,530,218 in relation to the commodities scheme. This amount includes criminal disgorgement of $681,480, victim compensation payments of $1,223,738, and a criminal penalty of $5,625,000, which will be fully credited against Deutsche Bank's payment of a civil monetary penalty of $30 million to the U.S. Commodity Futures Trading Commission in January 2018 in connection with substantially the same commodities conduct.

The department reached this resolution with Deutsche Bank based on a number of factors, including the Company's failure to voluntarily disclose the conduct to the department and the nature and seriousness of the offense, which included corrupt payments, willful violations of the FCPA accounting provisions, and commodities trading violations in three countries. Deutsche Bank received full credit for its cooperation with the department's investigations and for its significant remediation. Penalties associated with both the FCPA and wire fraud conspiracies reflect a discount of 25 percent off the middle of the otherwise-applicable U.S. Sentencing Guidelines fine range, to account for Deutsche Bank's 2015 resolution in connection with its manipulation of the London Interbank Offered Rate.

The FCPA investigation is being conducted by the U.S. Postal Inspection Service, and is being prosecuted by the Criminal Division's Fraud Section and Money Laundering and Asset Recovery Section, and the U.S. Attorney's Office for the Eastern District of New York. Trial Attorneys Katherine Nielsen, Elizabeth S. Boison and Nikhila Raj, and Assistant U.S. Attorneys Alixandra Smith and Whitman Knapp. The Justice Department's Office of International Affairs provided assistance in this case.

The commodities case is being investigated by the FBI's New York Field Office, and is being prosecuted by the Fraud Section. Deputy Chief Brian R. Young, Assistant Chief Avi Perry, and Trial Attorney Leslie S. Garthwaite of the Fraud Section are prosecuting the case.

The Fraud Section is responsible for investigating and prosecuting all FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

MLARS's Bank Integrity Unit investigates and prosecutes banks and other financial institutions, including their officers, managers, and employees, whose actions threaten the integrity of the individual institution or the wider financial system.

Individuals who believe that they may be a victim in the commodities case should visit the Fraud Section's Victim Witness website for more information.

Attachment(s):
Download DB information
Download Deutsche Bank DPA

Topic(s):
Financial Fraud
Foreign Corruption

Component(s):
Criminal Division
Criminal - Office of International Affairs
USAO - New York, Eastern

Press Release Number:
21-23

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THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, January 7, 2021

Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion

The Boeing Company (Boeing) has entered into an agreement with the Department of Justice to resolve a criminal charge related to a conspiracy to defraud the Federal Aviation Administration's Aircraft Evaluation Group (FAA AEG) in connection with the FAA AEG's evaluation of Boeing's 737 MAX airplane.

Boeing, a U.S.-based multinational corporation that designs, manufactures, and sells commercial airplanes to airlines worldwide, entered into a deferred prosecution agreement (DPA) in connection with a criminal information filed today in the Northern District of Texas. The criminal information charges the company with one count of conspiracy to defraud the United States. Under the terms of the DPA, Boeing will pay a total criminal monetary amount of over $2.5 billion, composed of a criminal monetary penalty of $243.6 million, compensation payments to Boeing's 737 MAX airline customers of $1.77 billion, and the establishment of a $500 million crash-victim beneficiaries fund to compensate the heirs, relatives, and legal beneficiaries of the 346 passengers who died in the Boeing 737 MAX crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302.

"The tragic crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302 exposed fraudulent and deceptive conduct by employees of one of the world's leading commercial airplane manufacturers," said Acting Assistant Attorney General David P. Burns of the Justice Department's Criminal Division. "Boeing's employees chose the path of profit over candor by concealing material information from the FAA concerning the operation of its 737 Max airplane and engaging in an effort to cover up their deception. This resolution holds Boeing accountable for its employees' criminal misconduct, addresses the financial impact to Boeing's airline customers, and hopefully provides some measure of compensation to the crash-victims' families and beneficiaries."

"The misleading statements, half-truths, and omissions communicated by Boeing employees to the FAA impeded the government's ability to ensure the safety of the flying public," said U.S. Attorney Erin Nealy Cox for the Northern District of Texas. "This case sends a clear message: The Department of Justice will hold manufacturers like Boeing accountable for defrauding regulators – especially in industries where the stakes are this high."

"Today's deferred prosecution agreement holds Boeing and its employees accountable for their lack of candor with the FAA regarding MCAS," said Special Agent in Charge Emmerson Buie Jr. of the FBI's Chicago Field Office. "The substantial penalties and compensation Boeing will pay, demonstrate the consequences of failing to be fully transparent with government regulators. The public should be confident that government regulators are effectively doing their job, and those they regulate are being truthful and transparent."

"We continue to mourn alongside the families, loved ones, and friends of the 346 individuals who perished on Lion Air Flight 610 and Ethiopian Airlines Flight 302. The deferred prosecution agreement reached today with The Boeing Company is the result of the Office of Inspector General's dedicated work with our law enforcement and prosecutorial partners," said Special Agent in Charge Andrea M. Kropf, Department of Transportation Office of Inspector General (DOT-OIG) Midwestern Region. "This landmark deferred prosecution agreement will forever serve as a stark reminder of the paramount importance of safety in the commercial aviation industry, and that integrity and transparency may never be sacrificed for efficiency or profit."

As Boeing admitted in court documents, Boeing—through two of its 737 MAX Flight Technical Pilots—deceived the FAA AEG about an important aircraft part called the Maneuvering Characteristics Augmentation System (MCAS) that impacted the flight control system of the Boeing 737 MAX. Because of their deception, a key document published by the FAA AEG lacked information about MCAS, and in turn, airplane manuals and pilot-training materials for U.S.-based airlines lacked information about MCAS.

Boeing began developing and marketing the 737 MAX in or around June 2011. Before any U.S.-based airline could operate the new 737 MAX, U.S. regulations required the FAA to evaluate and approve the airplane for commercial use.

In connection with this process, the FAA AEG was principally responsible for determining the minimum level of pilot training required for a pilot to fly the 737 MAX for a U.S.-based airline, based on the nature and extent of the differences between the 737 MAX and the prior version of Boeing's 737 airplane, the 737 Next Generation (NG). At the conclusion of this evaluation, the FAA AEG published the 737 MAX Flight Standardization Board Report (FSB Report), which contained relevant information about certain aircraft parts and systems that Boeing was required to incorporate into airplane manuals and pilot-training materials for all U.S.-based airlines. The 737 MAX FSB Report also contained the FAA AEG's differences-training determination. After the 737 MAX FSB Report was published, Boeing's airline customers were permitted to fly the 737 MAX.

Within Boeing, the 737 MAX Flight Technical Team (composed of 737 MAX Flight Technical Pilots) was principally responsible for identifying and providing to the FAA AEG all information that was relevant to the FAA AEG in connection with the FAA AEG's publication of the 737 MAX FSB Report. Because flight controls were vital to flying modern commercial airplanes, differences between the flight controls of the 737 NG and the 737 MAX were especially important to the FAA AEG for purposes of its publication of the 737 MAX FSB Report and the FAA AEG's differences-training determination.

In and around November 2016, two of Boeing's 737 MAX Flight Technical Pilots, one who was then the 737 MAX Chief Technical Pilot and another who would later become the 737 MAX Chief Technical Pilot, discovered information about an important change to MCAS. Rather than sharing information about this change with the FAA AEG, Boeing, through these two 737 MAX Flight Technical Pilots, concealed this information and deceived the FAA AEG about MCAS. Because of this deceit, the FAA AEG deleted all information about MCAS from the final version of the 737 MAX FSB Report published in July 2017. In turn, airplane manuals and pilot training materials for U.S.-based airlines lacked information about MCAS, and pilots flying the 737 MAX for Boeing's airline customers were not provided any information about MCAS in their manuals and training materials.

On Oct. 29, 2018, Lion Air Flight 610, a Boeing 737 MAX, crashed shortly after takeoff into the Java Sea near Indonesia. All 189 passengers and crew on board died. Following the Lion Air crash, the FAA AEG learned that MCAS activated during the flight and may have played a role in the crash. The FAA AEG also learned for the first time about the change to MCAS, including the information about MCAS that Boeing concealed from the FAA AEG. Meanwhile, while investigations into the Lion Air crash continued, the two 737 MAX Flight Technical Pilots continued misleading others—including at Boeing and the FAA—about their prior knowledge of the change to MCAS.

On March 10, 2019, Ethiopian Airlines Flight 302, a Boeing 737 MAX, crashed shortly after takeoff near Ejere, Ethiopia. All 157 passengers and crew on board died. Following the Ethiopian Airlines crash, the FAA AEG learned that MCAS activated during the flight and may have played a role in the crash. On March 13, 2019, the 737 MAX was officially grounded in the U.S., indefinitely halting further flights of this airplane by any U.S.-based airline.

As part of the DPA, Boeing has agreed, among other things, to continue to cooperate with the Fraud Section in any ongoing or future investigations and prosecutions. As part of its cooperation, Boeing is required to report any evidence or allegation of a violation of U.S. fraud laws committed by Boeing's employees or agents upon any domestic or foreign government agency (including the FAA), regulator, or any of Boeing's airline customers. In addition, Boeing has agreed to strengthen its compliance program and to enhanced compliance program reporting requirements, which require Boeing to meet with the Fraud Section at least quarterly and to submit yearly reports to the Fraud Section regarding the status of its remediation efforts, the results of its testing of its compliance program, and its proposals to ensure that its compliance program is reasonably designed, implemented, and enforced so that it is effective at deterring and detecting

violations of U.S. fraud laws in connection with interactions with any domestic or foreign government agency (including the FAA), regulator, or any of its airline customers.

The department reached this resolution with Boeing based on a number of factors, including the nature and seriousness of the offense conduct; Boeing's failure to timely and voluntarily self-disclose the offense conduct to the department; and Boeing's prior history, including a civil FAA settlement agreement from 2015 related to safety and quality issues concerning the Boeing's Commercial Airplanes (BCA) business unit. In addition, while Boeing's cooperation ultimately included voluntarily and proactively identifying to the Fraud Section potentially significant documents and Boeing witnesses, and voluntarily organizing voluminous evidence that Boeing was obligated to produce, such cooperation, however, was delayed and only began after the first six months of the Fraud Section's investigation, during which time Boeing's response frustrated the Fraud Section's investigation.

The department also considered that Boeing engaged in remedial measures after the offense conduct, including: (i) creating a permanent aerospace safety committee of the Board of Directors to oversee Boeing's policies and procedures governing safety and its interactions with the FAA and other government agencies and regulators; (ii) creating a Product and Services Safety organization to strengthen and centralize the safety-related functions that were previously located across Boeing; (iii) reorganizing Boeing's engineering function to have all Boeing engineers, as well as Boeing's Flight Technical Team, report through Boeing's chief engineer rather than to the business units; and (iv) making structural changes to Boeing's Flight Technical Team to increase the supervision, effectiveness, and professionalism of Boeing's Flight Technical Pilots, including moving Boeing's Flight Technical Team under the same organizational umbrella as Boeing's Flight Test Team, and adopting new policies and procedures and conducting training to clarify expectations and requirements governing communications between Boeing's Flight Technical Pilots and regulatory authorities, including specifically the FAA AEG. Boeing also made significant changes to its top leadership since the offense occurred.

The department ultimately determined that an independent compliance monitor was unnecessary based on the following factors, among others: (i) the misconduct was neither pervasive across the organization, nor undertaken by a large number of employees, nor facilitated by senior management; (ii) although two of Boeing's 737 MAX Flight Technical Pilots deceived the FAA AEG about MCAS by way of misleading statements, half-truths, and omissions, others in Boeing disclosed MCAS's expanded operational scope to different FAA personnel who were responsible for determining whether the 737 MAX met U.S. federal airworthiness standards; (iii) the state of Boeing's remedial improvements to its compliance program and internal controls; and (iv) Boeing's agreement to enhanced compliance program reporting requirements, as described above.

The Chicago field offices of the FBI and the DOT-OIG investigated the case, with the assistance of other FBI and DOT-OIG field offices.

Trial Attorneys Cory E. Jacobs and Scott Armstrong and Assistant Chief Michael T. O'Neill of the Fraud Section and Assistant U.S. Attorney Chad E. Meacham of the Northern District of Texas are prosecuting this case.

Individuals who believe they may be an heir, relative, or legal beneficiary of one of the Lion Air Flight 610 or Ethiopian Airlines Flight 302 passengers in this case should contact the Fraud Section's Victim Witness Unit by email at: Victimassistance.fraud@usdoj.gov or call (888) 549-3945.

Attachment(s):
Download Boeing criminal information
Download Boeing deferred prosecution agreement

Topic(s):
Securities, Commodities, & Investment Fraud

Component(s):
Criminal Division
Criminal - Criminal Fraud Section
USAO - Texas, Northern

Press Release Number:
21-17

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THE UNITED STATES DEPARTMENT of JUSTICE
JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Friday, July 9, 2021

Jury Convicts Medical Equipment Company Owners of $27 Million Fraud

A federal jury convicted Dallas area owners and operators of two durable medical equipment companies Thursday of one count of conspiracy to defraud the United States and to pay and receive health care kickbacks and one count of conspiracy to commit money laundering.

According to the evidence presented at trial, Leah Hagen, 49, and Michael Hagen, 54, of Arlington, Texas, were owners and operators of two durable medical equipment (DME) companies: Metro DME Supply LLC (Metro) and Ortho Pain Solutions LLC (Ortho Pain), both operated out of the same location in Arlington. The defendants paid a fixed rate per DME item in exchange for prescriptions and paperwork completed by telemedicine doctors that were used to submit false claims to Medicare. The defendants paid illegal bribes and kickbacks and wired money to their co-conspirator's call center in the Philippines that provided signed doctor's orders for orthotic braces. The evidence at trial showed emails exchanged between Leah and Michael Hagen and their co-conspirators showing a per-product pricing structure for orthotic braces but disguising their agreement as one for marketing and other services.

Through this scheme, the defendants billed Medicare Parts B and C approximately $59 million and were paid approximately $27 million. The defendants wired millions of proceeds into their personal bank accounts, both in the U.S. and overseas. At sentencing, the Hagens each face a maximum sentence of 25 years in prison.

Acting Assistant Attorney General Nicholas L. McQuaid of the Justice Department's Criminal Division, Acting U.S. Attorney Prerak Shah of the Northern District of Texas, Special Agent in Charge Miranda Bennett of the U.S. Department of Health and Human Services Office of Inspector General's (HHS-OIG) Dallas Region, and Special Agent in Charge Matthew J. DeSarno of the FBI's Dallas Field Office made the announcement.

This case was investigated by HHS-OIG and the FBI and was brought as part of Operation Brace Yourself, a federal law enforcement action led by the Health Care Fraud Unit of the Criminal Division's Fraud Section, in partnership with the U.S. Attorney's Offices for the Districts of South Carolina, New Jersey, and the Middle District of Florida.

Assistant Deputy Chief Adrienne Frazior and Trial Attorneys Brynn Schiess and Catherine Wagner of the Criminal Division's Fraud Section are prosecuting the case.

The Fraud Section leads the Health Care Fraud Strike Force. Since its inception in March 2007, the Health Care Fraud Strike Force, which maintains 15 strike forces operating in 24 districts, has charged more than 4,200 defendants who have collectively billed the Medicare program for nearly $19 billion. In addition, the Centers for Medicare & Medicaid Services, working in conjunction with the HHS-OIG, are taking steps to increase accountability and decrease the presence of fraudulent providers.

Topic(s):
Health Care Fraud

Component(s):

Criminal Division
Criminal - Criminal Fraud Section
USAO - Texas, Northern

Press Release Number:
21-638

Updated July 9, 2021

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, July 8, 2021

Avanos Medical Inc. to Pay $22 Million to Resolve Criminal Charge Related to the Fraudulent Misbranding of Its MicroCool Surgical Gowns

Avanos Medical Inc., a U.S.-based multinational medical device corporation, has agreed to pay more than $22 million to resolve a criminal charge relating to the company's fraudulent misbranding of its MicroCool surgical gowns.

A criminal information filed yesterday in the U.S. District Court for the Northern District of Texas charges Avanos with one count of introducing misbranded surgical gowns into interstate commerce with the intent to defraud and mislead. According to court filings, Avanos falsely labeled the gowns as providing the highest level of protection against fluid and virus penetration. Under the terms of a deferred prosecution agreement filed with the criminal information, Avanos will pay $22,228,000, composed of a victim compensation payment of $8,939,000, a criminal monetary penalty in the amount of $12,600,000 and a disgorgement payment of $689,000. The deferred prosecution agreement resolves a criminal investigation into Avanos's misbranding of its MicroCool surgical gowns under the Federal Food, Drug, and Cosmetic Act (FDCA) and the company's obstruction of a 2016 for-cause inspection conducted by the U.S. Food and Drug Administration (FDA) into Avanos's surgical gown business.

"Companies that sell medical products put their customers at risk when they misrepresent the quality of those products," said Acting Assistant Attorney General Brian M. Boynton of the Justice Department's Civil Division. "The Department of Justice will work with its law enforcement partners to prosecute companies that put profits over safety, especially when they provide products meant to protect medical professionals in potentially high-risk situations involving infectious diseases."

"Customers of Avanos trusted the company to deliver on the promises it made about the safety of its surgical gowns," said Acting Assistant Attorney General Nicholas L. McQuaid of the Justice Department's Criminal Division. "Avanos betrayed that trust. This resolution emphasizes that the department will hold companies in the medical device industry accountable and shows the Criminal Division's dedication to partnering with the Civil Division's Consumer Protection Branch to root out fraud."

"The last thing health care workers should have to worry about is whether their personal protective equipment lives up to manufacturers' claims," said Acting U.S. Attorney Prerak Shah for the Northern District of Texas. "Misbranded PPE can pose serious risks to medical professionals and patients alike. All companies that do business in Texas, health care or otherwise, will be held accountable for the promises they make about their products."

"Medical devices, such as surgical gowns, must have truthful and accurate labeling," said Assistant Commissioner for Criminal Investigations Catherine A. Hermsen of the FDA. "Surgical gowns with false or misleading labeling can put health care practitioners and patients at risk. The FDA's Office of Criminal Investigations protects the American public by aggressively investigating allegations involving FDA-regulated products and violations of the FDCA. In this case, OCI worked with the Department of Justice to ensure a just resolution, and we applaud the exceptional work done by the team."

According to court documents, surgical gowns sold in the United States are subject to regulation by the FDA, which recognizes a system of classification set forth by the American National Standards Institute (ANSI) and the Association for the Advancement of Medical Instrumentation (AAMI) — known as the ANSI/AAMI PB70 standard. The ANSI/AAMI PB70 standard was first established in 2003 and revised to be more rigorous in 2012. Under the standard, the highest protection level for surgical gowns — AAMI Level 4 — is reserved for gowns intended to be used in surgeries and other high-risk medical procedures on patients suspected of having infectious diseases.

As part of the deferred prosecution agreement, Avanos admitted that between late 2014 and early 2015, it sold hundreds of thousands of MicroCool surgical gowns that were labeled as AAMI Level 4 under the 2012 ANSI/AAMI PB70 standard but did not actually meet that standard. In addition, Avanos made direct misrepresentations to customers about the MicroCool gowns' compliance with the 2012 ANSI/AAMI PB70 standard. For example, in November 2014, Avanos sent letters to certain hospitals and other potential purchasers that falsely claimed that the MicroCool gowns met the revised and more rigorous 2012 ANSI/AAMI PB70 standard for classification as AAMI Level 4 — a standard that Avanos's employees knew the gowns had never met. At least one of these letters was sent in response to a request for assurances made by a health care provider seeking to obtain surgical gowns for use in responding to the 2014 Ebola outbreak. In total, Avanos sold approximately $8,939,000 worth of misbranded MicroCool gowns to customers in the United States and abroad.

In addition, according to court documents, an employee and an agent of Avanos obstructed a July 2016 FDA for-cause inspection of the company's surgical gown business by making numerous false entries in four documents requested by FDA investigators.

As part of the criminal resolution, Avanos has agreed to continue to cooperate with the Justice Department and to report any evidence or allegation of a violation of the FDCA or U.S. obstruction or fraud laws committed by Avanos's employees or agents upon any domestic government agency (including the FDA), regulator or any of Avanos's customers. Avanos has further agreed to strengthen its compliance program and abide by specific reporting requirements, which require the company to submit yearly reports to the government regarding the status of Avanos's enhancements to its compliance program and internal controls, policies and procedures aimed at deterring and detecting violations of the FDCA and U.S. obstruction and fraud laws, and the status of its remediation efforts.

The government reached this resolution with Avanos based on a number of factors, including the nature and seriousness of the offense conduct and Avanos's failure to timely and voluntarily self-disclose the offense conduct to the department. In addition, Avanos fully cooperated with the investigation conducted by the government, including conducting a thorough internal investigation, meeting requests from the government promptly, making factual presentations to the government, assisting in making a key foreign-based employee available for interview, and producing extensive documentation to the government, including documents located in a foreign jurisdiction.

The government also considered that Avanos engaged in remedial measures after the offense conduct, including: (i) changing the manufacturing process for the MicroCool surgical gowns to improve the quality of their sleeve seams; (ii) reorganizing its quality and regulatory departments so that they report directly to the CEO; (iii) substantially increasing the budget and headcount of its compliance and quality departments; (iv) creating a stand-alone Compliance Committee of the Board of Directors; (v) enhancing the independence, autonomy and resources of its compliance function by creating a stand-alone compliance department and appointing a full-time Chief Ethics and Compliance Officer who reports directly to the CEO and presents compliance reports to the Compliance Committee at least five times per year; (vi) enhancing compliance training for its employees; and (vii) implementing revised procedures for the review and approval of all medical device marketing material.

The criminal case was investigated by the FDA's Office of Criminal Investigations.

Senior Litigation Counsel Allan Gordus and Trial Attorneys David Gunn and Max Goldman of the Civil Division's Consumer Protection Branch, Trial Attorney John "Fritz" Scanlon of the Criminal Division's Fraud Section and Assistant U.S. Attorney Katherine Miller of the Northern District of Texas prosecuted the case.

Attachment(s):

Download Avanos Criminal Information.pdf

Download Avanos DPA.pdf

Topic(s):
Consumer Protection
Health Care Fraud

Component(s):
Civil Division
Criminal Division
Criminal - Criminal Fraud Section
USAO - Texas, Northern

Press Release Number:
21-628

Updated July 8, 2021

THE UNITED STATES DEPARTMENT of JUSTICE
JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, May 24, 2022

Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes

Swiss-Based Firm Agrees to Pay Over $1.1 Billion

Glencore International A.G. (Glencore) and Glencore Ltd., both part of a multi-national commodity trading and mining firm headquartered in Switzerland, each pleaded guilty today and agreed to pay over $1.1 billion to resolve the government's investigations into violations of the Foreign Corrupt Practices Act (FCPA) and a commodity price manipulation scheme.

These guilty pleas are part of coordinated resolutions with criminal and civil authorities in the United States, the United Kingdom, and Brazil.

"The rule of law requires that there not be one rule for the powerful and another for the powerless; one rule for the rich and another for the poor," said Attorney General Merrick B. Garland. "The Justice Department will continue to bring to bear its resources on these types of cases, no matter the company and no matter the individual."

The charges in the FCPA matter arise out of a decade-long scheme by Glencore and its subsidiaries to make and conceal corrupt payments and bribes through intermediaries for the benefit of foreign officials across multiple countries. Pursuant to a plea agreement, Glencore has agreed to a criminal fine of more than $428 million and to criminal forfeiture and disgorgement of more than $272 million. Glencore has also agreed to retain an independent compliance monitor for three years. The department has agreed to credit nearly $256 million in payments that Glencore makes to resolve related parallel investigations by other domestic and foreign authorities.

Separately, Glencore Ltd. admitted to engaging in a multi-year scheme to manipulate fuel oil prices at two of the busiest commercial shipping ports in the U.S. As part of the plea agreement, Glencore Ltd. agreed to pay a criminal fine of over $341 million, pay forfeiture of over $144 million, and retain an independent compliance monitor for three years. The department has agreed to credit up to one-half of the criminal fine and forfeiture against penalties Glencore Ltd. pays to the Commodity Futures Trading Commission (CFTC) in a related, parallel civil proceeding.

Sentencing has been scheduled in the market manipulation case for June 24, and a control date for sentencing in the FCPA case has been set for Oct. 3.

"Glencore's guilty pleas demonstrate the Department's commitment to holding accountable those who profit by manipulating our financial markets and engaging in corrupt schemes around the world," said Assistant Attorney General Kenneth A. Polite, Jr. of the Justice Department's Criminal Division. "In the foreign bribery case, Glencore International A.G. and its subsidiaries bribed corrupt intermediaries and foreign officials in seven countries for over a decade. In the commodity price manipulation scheme, Glencore Ltd. undermined public confidence by creating the false appearance of supply and demand to manipulate oil prices."

"The scope of this criminal bribery scheme is staggering," said U.S. Attorney Damian Williams for the Southern District of New York. "Glencore paid bribes to secure oil contracts. Glencore paid bribes to avoid government audits. Glencore bribed judges to make lawsuits disappear. At bottom, Glencore paid bribes to make money – hundreds of millions of dollars. And it did so with the approval, and even encouragement, of its top executives. The criminal charges filed against Glencore in the Southern District of New York are another step in making clear that no one – not even multinational corporations – is above the law."

"Glencore's market price manipulation threatened not just financial harm, but undermined participants' faith in the commodities markets' fair and efficient function that we all rely on," said U.S. Attorney Vanessa Roberts Avery of the District of Connecticut. "This guilty plea, and the substantial financial penalty incurred, is an appropriate consequence for Glencore's criminal conduct, and we are pleased that Glencore has agreed to cooperate in any ongoing investigations and prosecutions relating to their misconduct, and to strengthen its compliance program company-wide. I thank both our partners at the U.S. Postal Inspection Service for their hard work and dedication in investigating this sophisticated set of facts and unraveling this scheme, and the Fraud Section, with whom we look forward to continuing our fruitful partnership of prosecuting complex financial and corporate criminal cases."

"Today's guilty pleas by Glencore entities show that there is no place for corruption and fraud in international markets," said Assistant Director Luis Quesada of the FBI's Criminal Investigative Division. "Glencore engaged in long-running bribery and price manipulation conspiracies, ultimately costing the company over a billion dollars in fines. The FBI and our law enforcement partners will continue to investigate criminal financial activities and work to restore the public's trust in the marketplace."

"The idea of fair and honest trade is at the bedrock of American commerce. It is insult to our shared traditions and values when individuals and corporations use their power, wealth, and influence to stack the deck unfairly in their own favor," said Chief Postal Inspector Gary Barksdale of the U.S. Postal Inspection Service. "The resulting guilty plea by Glencore Limited demonstrates the tenacity of the U.S. Postal Inspection Service and its law enforcement partners in holding criminals accountable who try to enrich themselves by undermining the forces of supply and demand."

The FCPA Case

According to admissions and court documents filed in the Southern District of New York, Glencore, acting through its employees and agents, engaged in a scheme for over a decade to pay more than $100 million to third-party intermediaries, while intending that a significant portion of these payments would be used to pay bribes to officials in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Brazil, Venezuela, and the Democratic Republic of the Congo (DRC).

Between approximately 2007 and 2018, Glencore and its subsidiaries caused approximately $79.6 million in payments to be made to intermediary companies in order to secure improper advantages to obtain and retain business with state-owned and state-controlled entities in the West African countries of Nigeria, Cameroon, Ivory Coast, and Equatorial Guinea. Glencore concealed the bribe payments by entering into sham consulting agreements, paying inflated invoices, and using intermediary companies to make corrupt payments to foreign officials. For example, in Nigeria, Glencore and Glencore's U.K. subsidiaries entered into multiple agreements to purchase crude oil and refined petroleum products from Nigeria's state-owned and state-controlled oil company. Glencore and its subsidiaries engaged two intermediaries to pursue business opportunities and other improper business advantages, including the award of crude oil contracts, while knowing that the intermediaries would make bribe payments to Nigerian government officials to obtain such business. In Nigeria alone, Glencore and its subsidiaries paid more than $52 million to the intermediaries, intending that those funds be used, at least in part, to pay bribes to Nigerian officials.

In the DRC, Glencore admitted that it conspired to and did corruptly offer and pay approximately $27.5 million to third parties, while intending for a portion of the payments to be used as bribes to DRC officials, in order to secure improper business advantages. Glencore also admitted to the bribery of officials in Brazil and Venezuela. In Brazil, the company caused approximately $147,202 to be used, at least in part, as corrupt payments for Brazilian officials. In Venezuela, Glencore admitted to conspiring to secure and securing improper business advantages by paying over $1.2 million to an intermediary company that made corrupt payments for the benefit of a Venezuelan official.

In July 2021, a former senior trader in charge of Glencore's West Africa desk for the crude oil business pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering.

Under the terms of the plea agreement, which remains subject to court approval, Glencore pleaded guilty to one count of conspiracy to violate the FCPA, agreed to a criminal fine of $428,521,173, and agreed to criminal forfeiture and disgorgement in the amount of $272,185,792. Glencore also had charges brought against it by the U.K.'s Serious Fraud Office (SFO) and reached separate parallel resolutions with the Brazilian Ministério Público Federal (MPF) and the CFTC. Under the terms of the plea agreement, the department has agreed to credit nearly $256 million in payments that the company makes to the CFTC, to the court in the U.K., as well as to authorities in Switzerland, in the event that the company reaches a resolution with Swiss authorities within one year.

The department reached its agreement with Glencore based on a number of factors, including the nature, seriousness, and pervasiveness of the offense conduct, which spanned over a 10-year period, in numerous countries, and involved high-level employees and agents of the company; the company's failure to voluntarily and timely disclose the conduct to the department; the state of Glencore's compliance program and the progress of its remediation; the company's resolutions with other domestic and foreign authorities; and the company's continued cooperation with the department's ongoing investigation. Glencore did not receive full credit for cooperation and remediation, because it did not consistently demonstrate a commitment to full cooperation, it was delayed in producing relevant evidence, and it did not timely and appropriately remediate with respect to disciplining certain employees involved in the misconduct. Although Glencore has taken remedial measures, some of the compliance enhancements are new and have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, necessitating the imposition of an independent compliance monitor for a term of three years.

The Commodity Price Manipulation Case

According to admissions and court documents filed in the District of Connecticut, Glencore Ltd. operated a global commodity trading business, which included trading in fuel oil. Between approximately January 2011 and August 2019, Glencore Ltd. employees (including those who worked at Chemoil Corporation, which was majority-owned by Glencore Ltd.'s parent company and then fully-acquired in 2014) conspired to manipulate two benchmark price assessments published by S&P Global Platts (Platts) for fuel oil products, specifically, intermediate fuel oil 380 CST at the Port of Los Angeles (Los Angeles 380 CST Bunker Fuel) and RMG 380 fuel oil at the Port of Houston (U.S. Gulf Coast High-Sulfur Fuel Oil). The Port of Los Angeles is the busiest shipping port in the U.S. by container volume. The Port of Houston is the largest U.S. port on the Gulf Coast and the busiest port in the United States by foreign waterborne tonnage.

As part of the conspiracy, Glencore Ltd. employees sought to unlawfully enrich themselves and Glencore Ltd. itself, by increasing profits and reducing costs on contracts to buy and sell physical fuel oil, as well as certain derivative positions that Glencore Ltd. held. The price terms of the physical contracts and derivative positions were set by reference to daily benchmark price assessments published by Platts — either Los Angeles 380 CST Bunker Fuel or U.S. Gulf Coast High-Sulfur Fuel Oil — on a certain day or days plus or minus a fixed premium. On these pricing days, Glencore Ltd. employees submitted orders to buy and sell (bids and offers) to Platts during the daily trading "window" for the Platts price assessments with the intent to artificially push the price assessment up or down.

For example, if Glencore Ltd. had a contract to buy fuel oil, Glencore Ltd. employees submitted offers during the Platts "window" for the express purpose of pushing down the price assessment and hence the price of the fuel oil that Glencore Ltd. purchased. The bids and offers were not submitted to Platts for any legitimate economic reason by Glencore Ltd. employees, but rather for the purpose of artificially affecting the relevant Platts price assessment so that the benchmark price, and hence the price of fuel oil that Glencore Ltd. bought from, and sold to, another party, did not reflect legitimate forces of supply and demand.

Between approximately September 2012 and August 2016, Glencore Ltd. employees conspired to and did manipulate the price of fuel oil bought from, and sold to, a particular counterparty, Company A, through private, bilateral contracts, by manipulating the Platts price assessment for Los Angeles 380 CST Bunker Fuel. Between approximately January 2014 and February 2016, Glencore Ltd. employees also undertook a "joint venture" with Company A, which involved buying fuel oil from Company A at prices artificially depressed by Glencore Ltd.'s manipulation of the Platts Los Angeles 380 CST Bunker Fuel benchmark. Finally, between approximately January 2011 and August 2019, Glencore Ltd.

employees conspired to and did manipulate the price of fuel oil bought and sold through private, bilateral contracts, as well as derivative positions, by manipulating the Platts price assessment for U.S. Gulf Coast High-Sulfur Fuel Oil.

A former Glencore Ltd. senior fuel oil trader, Emilio Jose Heredia Collado, of Lafayette, California, pleaded guilty in March 2021 to one count of conspiracy to engage in commodities price manipulation in connection with his trading activity related to the Platts Los Angeles 380 CST Bunker Fuel price assessment. Heredia's sentencing is scheduled for June 17, 2022.

Glencore Ltd. pleaded guilty, pursuant to a plea agreement, to one count of conspiracy to engage in commodity price manipulation. Under the terms of Glencore Ltd.'s plea agreement regarding the commodity price manipulation conspiracy, which remains subject to court approval, Glencore Ltd. will pay a criminal fine of $341,221,682 and criminal forfeiture of $144,417,203. Under the terms of the plea agreement, the department will credit over $242 million in payments that the company makes to the CFTC. Glencore Ltd. also agreed to, among other things, continue to cooperate with the department in any ongoing investigations and prosecutions relating to the underlying misconduct, to modify its compliance program where necessary and appropriate, and to retain an independent compliance monitor for a period of three years.

A number of relevant considerations contributed to the department's plea agreement with Glencore Ltd., including the nature and seriousness of the offense, Glencore Ltd.'s failure to fully and voluntarily self-disclose the offense conduct to the department, Glencore Ltd.'s cooperation with the department's investigation, and the state of Glencore Ltd.'s compliance program and the progress of its remediation.

Additionally, the CFTC today announced a separate settlement with Glencore and its affiliated companies in connection with its investigation into FCPA and market manipulation conduct in a related, parallel proceeding. Under the terms of the CFTC resolution, Glencore agreed to pay over $1.1 billion, which includes a civil monetary penalty of over $865 million, as well as disgorgement totaling over $320 million.

The FCPA case is being prosecuted by Trial Attorneys Leila Babaeva and James Mandolfo of the Justice Department's Fraud Section, Trial Attorney Michael Khoo of the Justice Department's Money Laundering and Asset Recovery Section, and Assistant U.S. Attorneys Michael McGinnis and Juliana Murray of the Southern District of New York. The case is being investigated by the FBI.

The Criminal Division's Office of International Affairs provided significant assistance in this case. The department also expresses its appreciation for the assistance provided by law enforcement authorities in Switzerland, the United Kingdom, Brazil, Cyprus, and Luxembourg

The commodity price manipulation case is being prosecuted by Deputy Chief Avi Perry and Trial Attorneys Matthew F. Sullivan and John J. Liolos of the Justice Department's Fraud Section, and Assistant U.S. Attorney Jonathan Francis of the District of Connecticut. The case is being investigated by the U.S. Postal Inspection Service.

The Fraud Section is responsible for investigating and prosecuting FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

The Kleptocracy Asset Recovery Initiative is led by a team of dedicated prosecutors in the Criminal Division's Money Laundering and Asset Recovery Section, in partnership with federal law enforcement agencies, and often with U.S. Attorneys' Offices, to forfeit the proceeds of foreign official corruption and, where appropriate, to use those recovered assets to benefit the people harmed by these acts of corruption and abuse of office.

Topic(s):
Asset Forfeiture
Financial Fraud
Foreign Corruption

Component(s):
Criminal Division

Criminal - Criminal Fraud Section
Criminal - Money Laundering and Asset Recovery Section
Criminal - Office of International Affairs
Federal Bureau of Investigation (FBI)
USAO - Connecticut
USAO - New York, Southern

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22-554

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THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, September 20, 2022

U.S. Attorney Announces Federal Charges Against 47 Defendants in $250 Million Feeding Our Future Fraud Scheme

Nonprofit Feeding Our Future and 200+ Meal Sites in Minnesota Perpetrated the Largest COVID-19 Fraud Scheme in the Nation

The Department of Justice announced today federal criminal charges against 47 defendants for their alleged roles in a $250 million fraud scheme that exploited a federally-funded child nutrition program during the COVID-19 pandemic.

"These indictments, alleging the largest pandemic relief fraud scheme charged to date, underscore the Department of Justice's sustained commitment to combating pandemic fraud and holding accountable those who perpetrate it," said Attorney General Merrick B. Garland. "In partnership with agencies across government, the Justice Department will continue to bring to justice those who have exploited the pandemic for personal gain and stolen from American taxpayers."

"Today's indictments describe an egregious plot to steal public funds meant to care for children in need in what amounts to the largest pandemic relief fraud scheme yet," said FBI Director Christopher Wray. "The defendants went to great lengths to exploit a program designed to feed underserved children in Minnesota amidst the COVID-19 pandemic, fraudulently diverting millions of dollars designated for the program for their own personal gain. These charges send the message that the FBI and our law enforcement partners remain vigilant and will vigorously pursue those who attempt to enrich themselves through fraudulent means."

"This was a brazen scheme of staggering proportions," said U.S. Attorney Andrew M. Luger for the District of Minnesota. "These defendants exploited a program designed to provide nutritious food to needy children during the COVID-19 pandemic. Instead, they prioritized their own greed, stealing more than a quarter of a billion dollars in federal funds to purchase luxury cars, houses, jewelry, and coastal resort property abroad. I commend the work of the skilled investigators and prosecutors who unraveled the lies, deception, and mountains of false documentation to bring this complex case to light."

The 47 defendants are charged across six separate indictments and three criminal informations with charges of conspiracy, wire fraud, money laundering, and bribery.

As outlined in the charging documents, the defendants devised and carried out a massive scheme to defraud the Federal Child Nutrition Program. The defendants obtained, misappropriated, and laundered millions of dollars in program funds that were intended as reimbursements for the cost of serving meals to children. The defendants exploited changes in the program intended to ensure underserved children received adequate nutrition during the COVID-19 pandemic. Rather than feed children, the defendants enriched themselves by fraudulently misappropriating millions of dollars in Federal Child Nutrition Program funds.

The Federal Child Nutrition Program, administered by the U.S. Department of Agriculture (USDA), is a federally-funded program designed to provide free meals to children in need. The USDA's Food and Nutrition Service administers the program throughout the nation by distributing federal funds to state governments. In Minnesota, the Minnesota Department of Education (MDE) administers and oversees the Federal Child Nutrition Program. Meals funded by the Federal Child Nutrition Program are served by "sites." Each site participating in the program must be sponsored by an authorized sponsoring organization. Sponsors must submit an application to MDE for each site. Sponsors are also responsible for monitoring each of their sites and preparing reimbursement claims for their sites. The USDA then provides MDE federal reimbursement funds on a per-meal basis. MDE provides those funds to the sponsoring agency who, in turn, pays the reimbursements to the sites under its sponsorship. The sponsoring agency retains 10 to 15 percent of the funds as an administrative fee.

During the COVID-19 pandemic, the USDA waived some of the standard requirements for participation in the Federal Child Nutrition Program. Among other things, the USDA allowed for-profit restaurants to participate in the program, as well as allowed for off-site food distribution to children outside of educational programs.

Aimee Bock was the founder and executive director of Feeding Our Future, a nonprofit organization that was a sponsor participating in the Federal Child Nutrition Program. The indictments charge Bock with overseeing a massive fraud scheme carried out by sites under Feeding Our Future's sponsorship. Feeding Our Future went from receiving and disbursing approximately $3.4 million in federal funds in 2019 to nearly $200 million in 2021.

As part of the charged scheme, Feeding Our Future employees recruited individuals and entities to open Federal Child Nutrition Program sites throughout the state of Minnesota. These sites, created and operated by the defendants and others, fraudulently claimed to be serving meals to thousands of children a day within just days or weeks of being formed. The defendants created dozens of shell companies to enroll in the program as Federal Child Nutrition Program sites. The defendants also created shell companies to receive and launder the proceeds of their fraudulent scheme.

To carry out the scheme, the defendants also created and submitted false documentation. They submitted fraudulent meal count sheets purporting to document the number of children and meals served at each site. The defendants submitted false invoices purporting to document the purchase of food to be served to children at the sites. The defendants also submitted fake attendance rosters purporting to list the names and ages of the children receiving meals at the sites each day. These rosters were fabricated and created using fake names. For example, one roster was created using names from a website called "www.listofrandomnames.com." Because the program only reimbursed for meals served to children, other defendants used an Excel formula to insert a random age between seven and 17 into the age column of the rosters.

Despite knowing the claims were fraudulent, Feeding Our Future submitted the fraudulent claims to MDE and then disbursed the fraudulently obtained Federal Child Nutrition Program funds to the individuals and entities involved in the scheme.

In exchange for sponsoring these sites' fraudulent participation in the program, Feeding Our Future received more than $18 million in administrative fees to which it was not entitled. In addition to the administrative fees, Feeding Our Future employees solicited and received bribes and kickbacks from individuals and companies sponsored by Feeding Our Future. Many of these kickbacks were paid in cash or disguised as "consulting fees" paid to shell companies created by Feeding Our Future employees to make them appear legitimate.

When MDE attempted to perform necessary oversight regarding the number of sites and amount of claims being submitted, Bock and Feeding Our Future gave false assurances that they were monitoring the sites under its sponsorship and that the sites were serving the meals as claimed. When MDE employees pressed Bock for clarification, Bock accused MDE of discrimination and unfairly scrutinizing Feeding Our Future's sites. When MDE denied Feeding Our Future site applications, Bock and Feeding Our Future filed a lawsuit accusing MDE of denying the site applications due to discrimination in violation of the Minnesota Human Rights Act.

In total, Feeding Our Future opened more than 250 sites throughout the state of Minnesota and fraudulently obtained and disbursed more than $240 million in Federal Child Nutrition Program funds. The defendants used the proceeds of their fraudulent scheme to purchase luxury vehicles, residential and commercial real estate in Minnesota as well as property in Ohio and Kentucky, real estate in Kenya and Turkey, and to fund international travel.

"Exploiting a government program intended to feed children at the time of a national crisis is the epitome of greed," said Special Agent in Charge Justin Campbell of the IRS Criminal Investigation, Chicago Field Office. "As alleged, the defendants charged in this case chose to enrich themselves at the expense of children. Instead of feeding the future, they chose to steal from the future. IRS – Criminal Investigation is pleased to join our law enforcement partners to hold these defendants accountable."

United States v. Aimee Marie Bock, et al., 22-CR-223 (NEB/TNL), charges 14 defendants with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering for their roles the Federal Child Nutrition Program fraud scheme. In April 2020, Safari Restaurant enrolled in the Federal Child Nutrition Program under the sponsorship of Feeding Our Future. The owners of Safari Restaurant and their co-conspirators opened additional sites throughout the state of Minnesota, as well as dozens of shell companies. Over the course of the fraud scheme, the defendants claimed to have served millions of meals. Based on their fraudulent claims, the defendants received more than $32 million in Federal Child Nutrition Program funds, which they misappropriated for their own personal benefit, including expenditures such as vehicles, real estate, and travel.

United States v. Abdiaziz Shafii Farah, et al., 22-CR-124 (NEB/TNL), charges eight defendants with conspiracy, wire fraud, federal programs bribery, and money laundering for their roles the Federal Child Nutrition Program fraud scheme. In April 2020, Empire Cuisine and Market LLC enrolled in the Federal Child Nutrition Program under the sponsorship of Feeding Our Future and Sponsor A. The owners of Empire Cuisine and Market LLC and their co-conspirators opened additional sites throughout the state of Minnesota, as well as dozens of shell companies. Over the course of the fraud scheme, the defendants claimed to have served millions of meals. Based on their fraudulent claims, the defendants received more than $40 million in Federal Child Nutrition Program funds, which they misappropriated for their own personal benefit, including expenditures such as vehicles, travel, real estate, and property in Kenya.

United States v. Qamar Ahmed Hassan, et al., 22-CR-224 (NEB/TNL), charges eight defendants with conspiracy, wire fraud, and money laundering for their roles the Federal Child Nutrition Program fraud scheme. In August 2020, S & S Catering Inc. enrolled in the Federal Child Nutrition Program under the sponsorship of Feeding Our Future. The owner of S & S Catering and other co-conspirators opened sites across the Twin Cities and claimed to have served millions of meals. Based on their fraudulent claims, the defendants received more than $18 million in Federal Child Nutrition Program funds, which they misappropriated for their own personal benefit, including expenditures such as vehicles and real estate.

United States v. Haji Osman Salad, et al., 22-CR-226 (NEB/TNL), charges five defendants with wire fraud, conspiracy to commit money laundering, and money laundering for their roles in the Federal Child Nutrition Program fraud scheme. The owner of Haji's Kitchen LLC and other co-conspirators enrolled in the Federal Child Nutrition Program under the sponsorship of Feeding Our Future and Sponsor A. The co-conspirators opened sites across the state of Minnesota, as well as multiple shell companies. Over the course of the fraud scheme, the defendants claimed to have served millions of meals. Based on their fraudulent claims, the defendants received more than $25 million in Federal Child Nutrition Program funds, which they misappropriated for their own personal benefit, including expenditures such as vehicles, real estate, and travel.

United States v. Liban Yasin Alishire, et al., 22-CR-222 (NEB/TML), charges three defendants with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs, federal programs bribery, and money laundering for their roles in the Federal Child Nutrition Program fraud scheme. The owner of Community Enhancement Services Inc. and other co-conspirators opened multiple sites and shell companies in the JigJiga Business Center in Minneapolis. Over the course of the fraud scheme, the defendants claimed to have served hundreds of thousands of meals. Based on their fraudulent claims, the defendants received more than $1.6 million in Federal Child Nutrition Program funds, which they misappropriated for their own personal benefit, including expenditures such as vehicles, real estate, and beach property in Kenya.

United States v. Sharmake Jama, et al., 22-CR-225 (NEB/TNL), charges six defendants with wire fraud, federal programs bribery, conspiracy to commit money laundering, and money laundering for their roles in the Federal Child Nutrition Program fraud scheme. In September 2020, Brava Restaurant & Café LLC, a site located in Rochester, Minnesota, enrolled in the Federal Child Nutrition Program under the sponsorship of Feeding Our Future. The owners

of Brava Restaurant & Café and other co-conspirators claimed to have served millions of meals from Brava Restaurant & Café and falsely claimed to have a contract with Rochester Public Schools. Based on their fraudulent claims, the defendants received approximately $4.3 million in Federal Child Nutrition Program funds, which they misappropriated for their own personal benefit, including expenditures such as vehicles, real estate, and property on the Mediterranean coast of Turkey.

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The following defendants are named in the *United States v. Aimee Marie Bock, et al.* indictment:

- **Aimee Marie Bock**, 41, of Apple Valley, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery. Bock was the founder and executive director of Feeding Our Future. Bock oversaw the $240 million fraud scheme carried out by sites under Feeding Our Future's sponsorship.
- **Abdikerm Abdelahi Eidleh**, 39, of Burnsville, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Eidleh was an employee of Feeding Our Future who solicited and received bribes and kickbacks from individuals and sites under the sponsorship of Feeding Our Future. Eidleh also created his own fraudulent sites.
- **Salim Ahmed Said**, 33, of Plymouth, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Said was an owner and operator of Safari Restaurant, a site that received more than $16 million in fraudulent Federal Child Nutrition Program funds.
- **Abdulkadir Nur Salah**, 36, of Columbia Heights, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Abdulkadir Salah was an owner and operator of Safari Restaurant, a site that received more than $16 million in fraudulent Federal Child Nutrition Program funds.
- **Ahmed Sharif Omar-Hashim**, 39, of Minneapolis, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Omar-Hashim created a company called Olive Management Inc., a site that received approximately $5 million in fraudulent Federal Child Nutrition Program funds.
- **Abdi Nur Salah**, 34, of Minneapolis, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Abdi Salah registered Stigma-Free International, a non-profit entity used to carry out the scheme with sites throughout Minnesota, including in Willmar, Mankato, St. Cloud, Waite Park, and St. Paul.
- **Abdihakim Ali Ahmed**, 36, of Apple Valley, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Abdihakim Ahmed created ASA Limited LLC, a site that received approximately $5 million in fraudulent Federal Child Nutrition Program funds.
- **Ahmed Mohamed Artan**, 37, of Minneapolis, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, conspiracy to commit money laundering, and money laundering. Artan registered Stigma-Free International, a non-profit entity used to carry out the scheme with sites throughout Minnesota, including in Willmar, Mankato, St. Cloud, Waite Park, and St. Paul.
- **Abdikadir Ainanshe Mohamud**, 30, of Fridley, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Mohamud ran the Stigma-Free Willmar site. This site claimed to have served approximately 1.6 million meals and received more than $4 million in fraudulent Federal Child Nutrition Program funds.
- **Abdinasir Mahamed Abshir**, 30, of Minneapolis, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Abdinasir Abshir ran the Stigma-Free Mankato site. This site claimed to have served more than 1.6 million meals and received approximately $5 million in fraudulent Federal Child Nutrition Program funds.

- **Asad Mohamed Abshir**, 32, of Mankato, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Asad Abshir ran the Stigma-Free Mankato site. This site claimed to have served more than 1.6 million meals and received approximately $5 million in fraudulent Federal Child Nutrition Program funds.
- **Hamdi Hussein Omar**, 26, of St. Paul, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, and conspiracy to commit money laundering. Omar ran the Stigma-Free Waite Park site. This site claimed to have served more than 500,000 meals and received more than $1 million in fraudulent Federal Child Nutrition Program funds.
- **Ahmed Abdullahi Ghedi**, 32, of Minneapolis, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, federal programs bribery, conspiracy to commit money laundering, and money laundering. Ghedi created ASA Limited LLC, a site that received approximately $5 million in fraudulent Federal Child Nutrition Program funds.
- **Abdirahman Mohamud Ahmed**, 54, of Columbus, Ohio, is charged with conspiracy to commit money laundering and money laundering. Abdirahman Ahmed was an owner and operator of Safari Restaurant, a site that received more than $16 million in fraudulent Federal Child Nutrition Program funds.

The following defendants are named in the *United States v. Abdiaziz Shafii Farah, et al.* indictment:

- **Abdiaziz Shafii Farah**, 33, of Savage, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, money laundering, and false statements in a passport application. Abdiaziz Farah was an owner and operator of Empire Cuisine and Market LLC, a for-profit restaurant that participated in the scheme as a site, as a vendor for other sites, and as an entity to launder fraudulent proceeds. Empire Cuisine and Market and other affiliated sites received more than $28 million in fraudulent Federal Child Nutrition Program funds.
- **Mohamed Jama Ismail**, 49, of Savage, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Ismail was an owner and operator of Empire Cuisine and Market LLC, a for-profit restaurant that participated in the scheme as a site, as a vendor for other sites, and as an entity to launder fraudulent proceeds. Empire Cuisine and Market and other affiliated sites received more than $28 million in fraudulent Federal Child Nutrition Program funds.
- **Mahad Ibrahim**, 46, of Lewis Center, Ohio, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Ibrahim was the president and owner of ThinkTechAct Foundation, a Minnesota non-profit organization that also operated under the name Mind Foundry Learning Foundation. ThinkTechAct and Mind Foundry created dozens of sites throughout Minnesota, including in Minneapolis, St. Paul, Bloomington, Burnsville, Faribault, Owatonna, Shakopee, Circle Pines, and Willmar. ThinkTechAct received more than $18 million in fraudulent Federal Child Nutrition Program funds.
- **Abdimajid Mohamed Nur**, 21, of Shakopee, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Abdimajid Nur created Nur Consulting LLC to receive and launder Federal Child Nutrition Program funds from Empire Cuisine and Market, ThinkTechAct, and other entities involved in the scheme.
- **Said Shafii Farah**, 40, of Minneapolis, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Said Farah, the brother of Abdiaziz Farah, was an owner of Bushra Wholesalers LLC, a shell company used to launder fraudulent Federal Child Nutrition Program funds.
- **Abdiwahab Maalim Aftin**, 32, of Minneapolis, Minnesota, is charged with conspiracy to commit wire fraud, conspiracy to commit money laundering, and money laundering. Aftin was an owner of Bushra Wholesalers LLC, a shell company used to launder fraudulent Federal Child Nutrition Program funds.
- **Mukhtar Mohamed Shariff**, 31, of Bloomington, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, conspiracy to commit money laundering, and money laundering. Shariff was the chief executive officer of Afrique Hospitality Group, a shell company used to fraudulent obtain and launder Federal Child Nutrition Program funds.
- **Hayat Mohamed Nur**, 25, of Eden Prairie, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, and money laundering. Hayat Nur, the sister of Abdimajid Nur, participated in the scheme by creating and submitting fraudulent meal count sheets, attendance rosters, and invoices.

The following defendants are named in the *United States v. Qamar Ahmed Hassan, et al.* indictment:

- **Qamar Ahmed Hassan**, 53, of Brooklyn Park, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, money laundering, conspiracy to commit money laundering, and money laundering. Hassan was the owner and operator of S & S Catering Inc., a for-profit restaurant and catering business that participated in the scheme as a distribution site and as a vendor for other sites. S & S Catering received more than $18 million in fraudulent Federal Child Nutrition Program funds.
- **Sahra Mohamed Nur**, 61, of Saint Anthony, Minnesota, is charged with conspiracy to wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Nur ran a site called Academy For Youth Excellence that used S & S Catering as a vendor.
- **Abdiwahab Ahmed Mohamud**, 32, of Brooklyn Park, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Mohamud ran a site called Academy For Youth Excellence that used S & S Catering as a vendor.
- **Filsan Mumin Hassan**, 28, of Brooklyn Park, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Hassan ran a site called Youth Higher Educational Achievement that falsely claimed to serve up to 4,300 meals a day.
- **Guhaad Hashi Said**, 46, of Minneapolis, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, and conspiracy to commit money laundering. Hashi ran a site under the name Advance Youth Athletic Development that falsely claimed to serve up to 5,000 meals a day.
- **Abdullahe Nur Jesow**, 62, of Columbia Heights, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and money laundering. Jesow ran a site called Academy For Youth Excellence that used S & S Catering as a vendor.
- **Abdul Abubakar Ali**, 40, of St. Paul, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, and conspiracy to commit money laundering. Abdul Ali ran a site called Youth Inventors Lab that falsely claimed to have served a total of approximately 1.5 million meals in a seven-month period.
- **Yusuf Bashir Ali**, 40, of Vadnais Heights, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, and conspiracy to commit money laundering. Yusuf Ali ran a site called Youth Inventors Lab that falsely claimed to have served a total of approximately 1.5 million meals in a seven-month period.

The following defendants are named in the *United States v. Haji Osman Salad, et al.* indictment:

- **Haji Osman Salad**, 32, of St. Anthony, Minnesota, is charged with wire fraud, conspiracy to commit money laundering, and money laundering. Salad was the principal of Haji's Kitchen and received approximately $11.6 million in fraudulent Federal Child Nutrition Program funds.
- **Fahad Nur**, 38, of Minneapolis, Minnesota, is charged with wire fraud, conspiracy to commit money laundering, and money laundering. Nur was the principal of The Produce LLC, a vendor and purported food supplier who received more than $5 million in fraudulent Federal Child Nutrition Program funds.
- **Anab Artan Awad**, 52, of Plymouth, Minnesota, is charged with wire fraud, conspiracy to commit money laundering, and money laundering. Awad was the president of Multiple Community Services, MCA. Awad claimed more than $11 million in fraudulent Federal Child Nutrition Program funds.
- **Sharmarke Issa**, 40, of Edina, Minnesota, is charged with wire fraud, conspiracy to commit money laundering, and money laundering. Issa created a company called Minnesota's Somali Community and was the manager of Wacan Restaurant LLC. Issa fraudulently caused MDE to pay out more than $7.4 million in Federal Child Nutrition Program funds.
- **Farhiya Mohamud**, 63, of Bloomington, Minnesota, is charged with conspiracy to commit money laundering, and money laundering. Mohamud was the principal and CEO of Dua Supplies and Distribution Inc., a shell company that laundered millions of dollars of fraudulently obtained Federal Child Nutrition Program funds.

The following defendants are named in the *United States v. Liban Yasin Alishire, et al.* indictment:

- **Liban Yasin Alishire**, 42, of Brooklyn Park, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit federal programs bribery, federal programs bribery, and money laundering. Alishire was the president and owner of Community Enhancement Services Inc., a company located in the JigJiga Business Center in Minneapolis. Community Enhancement Services was a cultural mall owned and operated by

Alishire and co-defendant Khadar Jigre Adan. Community Enhancement Services received more than $1.6 million in fraudulent Federal Child Nutrition Program funds.

- **Ahmed Yasin Ali**, 57, of Brooklyn Park, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, and money laundering. Ali created a second program site, run by Lake Street Kitchen, and located in the JigJiga Business Center in Minneapolis.
- **Khadar Jigre Adan**, 59, of Lakeville, Minnesota, is charged with conspiracy to commit wire fraud, wire fraud, and money laundering. Adan was the CEO of Lake Street Kitchen, which was a program site located in the JigJiga Business Center in Minneapolis.

The following defendants are named in the *United States v. Sharmake Jama, et al.* indictment:

- **Sharmake Jama**, 34, of Rochester, Minnesota, is charged with wire fraud, federal programs bribery, conspiracy to commit money laundering, and money laundering. Sharmake Jama was a principal of Brava Restaurant and Café LLC. Brava Restaurant received approximately $4.3 million in fraudulent Federal Child Nutrition Program funds.
- **Ayan Jama**, 43, of Rochester, Minnesota, is charged with wire fraud, conspiracy to commit money laundering, and money laundering. Ayan Jama was a principal of Brava Restaurant and Café LLC. Ayan Jama also created shell companies to launder fraudulent proceeds.
- **Asha Jama**, 39, of Lakeville, Minnesota, is charged with conspiracy to commit money laundering and money laundering. Asha Jama worked for Brava Restaurant and created shell companies to launder fraudulent proceeds.
- **Fartun Jama**, 35, of Rosemount, Minnesota, is charged with conspiracy to commit money laundering and money laundering. Fartun Jama worked for Brava Restaurant and created shell companies to launder fraudulent proceeds.
- **Mustafa Jama**, 45, of Rochester, Minnesota, is charged with conspiracy to commit money laundering and money laundering. Mustafa Jama worked for Brava Restaurant and created shell companies to launder fraudulent proceeds.
- **Zamzam Jama**, 48, of Rochester, Minnesota, is charged with conspiracy to commit money laundering and money laundering. Zamzam Jama worked for Brava Restaurant and created shell companies to launder fraudulent proceeds.

Criminal informations:

- **Bekam Addissu Merdassa**, 39, of Inver Grove Heights, Minnesota, is charged with one count of conspiracy to commit wire fraud.
- **Hadith Yusuf Ahmed**, 34, of Eden Prairie, Minnesota, is charged with one count of conspiracy to commit wire fraud.
- **Hanna Marekegn**, 40, of Edina, Minnesota, is charged with one count of conspiracy to commit wire fraud.

United States Attorney Andrew Luger thanked the FBI, IRS Criminal Investigation, and the U.S. Postal Inspection Service for their collaboration and skilled investigative work in bringing these indictments.

Assistant U.S. Attorneys Joseph H. Thompson, Harry M. Jacobs, Chelsea A. Walcker, Matthew S. Ebert, and Joseph S. Teirab for the District of Minnesota are prosecuting the case. Assistant U.S. Attorney Craig Baune is handling the seizure and forfeiture of assets.

An indictment is merely an allegation. All defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

Topic(s):
Coronavirus
Financial Fraud

Component(s):
Criminal Division

Criminal - Criminal Fraud Section
Federal Bureau of Investigation (FBI)
Office of the Attorney General
Office of the Deputy Attorney General
USAO - Minnesota

Press Release Number:
22-993

Updated September 20, 2022

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, September 15, 2022

GOL Linhas Aéreas Inteligentes S.A. Will Pay Over $41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil

GOL Linhas Aéreas Inteligentes S.A. (GOL), an airline headquartered in São Paulo, Brazil, will pay more than $41 million to resolve parallel bribery investigations by criminal and civil authorities in the United States and Brazil. According to court documents, GOL entered into a three-year deferred prosecution agreement (DPA) with the Department of Justice in connection with a criminal information filed in the District of Maryland charging the company with conspiracy to violate the anti-bribery and books and records provisions of the Foreign Corrupt Practices Act (FCPA).

Pursuant to the DPA, GOL will pay a criminal penalty of $17 million. The department has agreed to credit up to $1.7 million of that criminal penalty against an approximately $3.4 million fine the company has agreed to pay to authorities in Brazil in connection with related proceedings to resolve an investigation by the Controladoria-Geral da União (CGU) and the Advocacia-Geral de União (Attorney General's Office). In addition, GOL will give up approximately $24.5 million over two years as part of the resolution of a parallel investigation by the U.S. Securities and Exchange Commission (SEC).

"GOL paid millions of dollars in bribes to foreign officials in Brazil in exchange for the passage of legislation that was beneficial to the airline," said Assistant Attorney General Kenneth A. Polite Jr. of the Justice Department's Criminal Division. "The company entered into fraudulent contracts with third-party vendors for the purpose of generating and concealing the funds necessary to perpetrate this criminal conduct, and then falsely recorded the sham payments in their own books. Today's resolution demonstrates the Department of Justice's commitment to holding accountable companies that corrupt the functions of government for their own financial gain."

"Our office's strong working relationship with the Department of Justice's Fraud Section demonstrates our commitment to weed out corruption by companies that operate throughout Maryland," said U.S. Attorney Erek Barron for the District of Maryland. "I am committed to ensuring that any company operating in this District does so lawfully and ethically without corrupt conduct."

"Companies bribing their way to profits will ultimately pay the price for their crimes," said Assistant Director Luis Quesada of the FBI's Criminal Investigative Division. "GOL paid off foreign officials to pass favorable legislation and then tried to conceal its bribes as legitimate transactions. Today's settlement is proof that the FBI and our law enforcement partners will work to eliminate corruption anywhere it occurs, whether at home or abroad."

According to the company's admissions and court documents, between 2012 and 2013, GOL conspired to offer and pay approximately $3.8 million in bribes to foreign officials in Brazil. Specifically, GOL caused multiple bribe payments to be made to various officials in Brazil to secure the passage of two pieces of legislation favorable to GOL. The legislation involved certain payroll tax and fuel tax reductions that financially benefitted GOL, along with other Brazilian airlines.

According to court documents, in order to effectuate the bribery scheme, a member of GOL's Board of Directors caused GOL to enter into sham contracts with, and make payments to, various entities connected to the relevant Brazilian

officials. GOL maintained books and records that falsely listed the corrupt payments as legitimate expenses, including as advertising expenses and other services.

As part of the DPA, GOL has agreed to continue to cooperate with the department in any ongoing or future criminal investigations relating to this conduct. In addition, under the agreement, GOL agreed to continue to enhance its compliance program and provide reports to the department regarding remediation and the implementation of compliance measures for the term of the DPA.

The government reached this resolution with GOL based on a number of factors, including, among others, the nature, seriousness, and pervasiveness of the offense. GOL received full credit for its cooperation with the department's investigation, which included, among other things, timely providing the facts obtained through the company's internal investigation – which included reviewing voluminous documents, interviewing witnesses, conducting background checks, and testing over two thousand transactions. The company promptly engaged in remedial measures by, among other things, redesigning its entire anti-corruption program. Accordingly, the criminal penalty calculated under the U.S. Sentencing Guidelines reflects a 25% reduction off the bottom of the applicable guidelines fine range. Due to GOL's financial condition and demonstrated inability to pay the penalty calculated under the U.S. Sentencing Guidelines, however, GOL and the department agreed, consistent with the department's inability to pay guidance, that the appropriate criminal penalty is $17 million.

The FBI's Los Angeles Field Office is investigating the case. Assistant Chief Derek J. Ettinger and Trial Attorney Joseph McFarlane of the Criminal Division's Fraud Section, as well as Assistant U.S. Attorney David I. Salem of the District of Maryland, are prosecuting the case. Authorities in Brazil provided assistance in this matter, as did the Criminal Division's Office of International Affairs.

The Fraud Section is responsible for investigating and prosecuting FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

Topic(s):
Foreign Corruption

Component(s):
Criminal Division
Criminal - Criminal Fraud Section
Criminal - Office of International Affairs
Federal Bureau of Investigation (FBI)
USAO - Maryland

Press Release Number:
22-978

Updated September 16, 2022

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, October 25, 2022

CEO and President of Hawaii Shipbuilding Company Charged with Securities Fraud

An indictment was unsealed yesterday charging a married couple for their roles in a decade-long scheme to defraud investors of millions of dollars in connection with Semisub Inc. (Semisub), a Hawaii-based company.

According to court documents, Curtiss E. Jackson, 69, of Honolulu, Hawaii, and Jamey Denise Jackson, 59, currently of Lake Worth, Florida, and formerly of Honolulu, allegedly engaged in a scheme to fraudulently obtain money by deceiving purchasers of Semisub securities about the company's business and operations, including its revenue and expenses. Specifically, the indictment alleges that Curtiss Jackson and Jamey Jackson, who were respectively Semisub's CEO and President, would use funds raised from the sale of securities to develop and build a fleet of semi-submersible vessels for tourism and other commercial purposes and raised over $28 million from more than 400 investors.

For over 10 years, the defendants allegedly falsely told investors that a purported prototype vessel, dubbed "Semisub One," was "weeks" or "months" away from beginning operations. They also allegedly falsely claimed that Semisub had entered into agreements or developed relationships with marquee government agencies and a well-known private equity firm to build and sell a fleet of additional vessels for $32 million each. The defendants allegedly misused a substantial amount of the money raised from the sale of Semisub securities to pay for luxury residences in California and Hawaii, a Mercedes-Benz automobile, luxury vacations, psychics, marijuana, personal credit card bills, and cash withdrawals for their personal use, among other things. Curtiss Jackson and Semisub were also allegedly barred from offering or selling securities by the Pennsylvania Securities Commission in 2008 and by the California Department of Corporations in 2009 in those states. The defendants nonetheless allegedly continued to sell securities to investors across the United States, including to those in Pennsylvania and California, in violation of both states' orders.

Curtiss Jackson and Jamey Jackson are charged with securities fraud, conspiracy, mail fraud, and wire fraud. Curtiss Jackson made his initial court appearance yesterday in the U.S. District Court for the District of Hawaii. Jamey Denise Jackson also made her initial court appearance yesterday in the U.S. District Court for the District of Connecticut. Each charged count carries a maximum penalty of 20 years in prison. A federal district court judge will determine any sentence after considering the U.S. Sentencing Guidelines and other statutory factors.

Assistant Attorney General Kenneth A. Polite, Jr. of the Justice Department's Criminal Division; Inspector in Charge Eric Shen of the U.S. Postal Inspection Service (USPIS), Criminal Investigations Group; and Special Agent in Charge Bret R. Kressin of the IRS Criminal Investigation (IRS-CI) Seattle Field Office made the announcement.

The USPIS and IRS-CI are investigating the case.

Trial Attorneys Christopher Fenton, Matthew Reilly, and Blake Goebel of the Criminal Division's Fraud Section are prosecuting the case.

If you believe you are a victim in this case, please contact the USPIS victim hotline at (202) 305-6736.

An indictment is merely an allegation. All defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

Topic(s):
Financial Fraud

Component(s):
Criminal Division
Criminal - Criminal Fraud Section

Press Release Number:
22-1147

Updated October 25, 2022

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 28, 2021

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, TAX DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Lisa Monaco

SUBJECT: Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies[1]

Fighting corporate crime is a top priority of the Department of Justice. By holding accountable individuals and companies responsible for criminal malfeasance, the Department protects the public, promotes the integrity of our markets, discourages unlawful business practices, fights transnational corruption, and upholds the rule of law. Additionally, we ensure public confidence in the fairness of our economic system and make clear that no one is above the law.

This Memorandum makes certain revisions to the Department's existing corporate criminal enforcement policies and practices. The changes announced today will aid Department attorneys immediately in our ongoing efforts to combat corporate crime and ensure consistency in our efforts to prevent corporate criminal conduct from occurring in the first instance; hold accountable individuals responsible for corporate crimes; and ensure that corporations take steps to prevent the recurrence of criminal conduct. I view these changes, which (1) instruct our attorneys to consider a corporation's entire criminal history, (2) clarify a corporation's obligation to provide all information concerning all persons involved in corporate misconduct in order to receive

[1] This Memorandum does not supersede or in any way alter the Antitrust Division's Corporate Leniency Policy.

cooperation credit, and (3) address the use of monitorships, as necessary and fundamental revisions warranting immediate adoption.

I am also announcing, through this Memorandum, the creation of a Corporate Crime Advisory Group within the Department that will consider and, where necessary, recommend additional guidance concerning the three revisions set forth herein. This group will also consider additional revisions and reforms that will strengthen our approach to corporate crime and equip our attorneys with the tools necessary to prosecute it when it occurs.

I am confident that Department attorneys will continue to thoughtfully evaluate the Principles of Federal Prosecution of Business Organizations, as amended by this Memorandum, and other operative guidance, in their determination of the appropriate and just resolution in corporate cases.

I. Creation of the Corporate Crime Advisory Group

I will convene a Corporate Crime Advisory Group within the Department of Justice tasked with reviewing our approach to prosecuting criminal conduct by corporations and their executives, management, and employees. The Corporate Crime Advisory Group will bring together relevant components in the Department and will have a broad mandate to consider various topics that are central to the goal of updating our approach to corporate criminal enforcement. These topics will include traditional considerations embodied in the Principles of Federal Prosecution of Business Organizations, such as cooperation credit, corporate recidivism, and the factors bearing on the determination of whether a corporate case should be resolved through a deferred prosecution agreement ("DPA"), non-prosecution agreement ("NPA"), or plea agreement.

The Corporate Crime Advisory Group will also look internally to see how the Department can best support the tireless work of our dedicated prosecutors and civil attorneys on the front line in combatting corporate crime. The group will consider how the Department can invest in new technologies, such as artificial intelligence, to assist in the often laborious task of processing vast amounts of data. It will also consider how best to employ our resources across the Department to investigate and prosecute corporate crime. Finally, because I firmly believe that the best process includes input from a variety of voices, the Corporate Crime Advisory Group will solicit input from the business community, academia, and the defense bar to make sure that any changes to Department policy take into account multiple perspectives.

I look forward to receiving recommendations from the Corporate Crime Advisory Group. More information about the creation of this group will soon be issued by my office. In the meantime, I am taking additional, immediate steps, described below, to revise and clarify certain aspects of the Department's corporate criminal enforcement policies.

II. Considering a Corporation's History of Misconduct

A corporation's record of past misconduct—including violations of criminal laws, civil laws, or regulatory rules—may be indicative of whether the company lacks the appropriate internal controls and corporate culture to disincentivize criminal activity, and whether any proposed remediation or compliance programs, if implemented, will succeed. Prosecutors must therefore take a holistic approach when considering a company's characteristics, including its history of corporate misconduct, without limiting their consideration to whether past misconduct is similar to the instant offense.

To that end, when making determinations about criminal charges and resolutions for a corporate target, prosecutors are directed to consider *all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family. Some prior instances of misconduct may ultimately prove less significant, but prosecutors must start from the position that all prior misconduct is potentially relevant.

Modifications to Justice Manual (JM) 9-28.600 will be forthcoming consistent with this guidance. All other factors listed in JM 9-28.600 remain in effect and should be considered in combination with this new guidance.

III. Information About Individuals Involved in Corporate Misconduct

This Memorandum reinstates the prior guidance issued by this Office that to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct. *See* Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015). To be clear, this means all nonprivileged information relevant to all individuals involved in the misconduct.

One of the most effective ways to combat corporate misconduct is to hold accountable the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system and economy.

To receive any consideration for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide to the Department all nonprivileged information relating to that misconduct. To receive such consideration, companies cannot limit disclosure to those individuals believed to be only substantially involved in the criminal conduct. This requirement includes individuals inside and outside of the company. Department attorneys are best situated to assess the relative culpability of, and involvement by, individuals involved in misconduct, to include those

individuals who, while deemed by a corporation to be less than substantially involved in misconduct, may nonetheless have important information to provide.

Modifications to JM 9-28.700 and 9-47.120 will be forthcoming consistent with this guidance. All prior statements from the Department inconsistent with the guidance set forth herein should be considered rescinded.

IV. Revisions to Monitorship Guidance

This Memorandum modifies standards, policies, and procedures for evaluating the necessity of monitors[2] in corporate criminal matters being handled by Department attorneys in order to (1) bring uniformity to our approach across Department components and United States Attorneys' Offices and (2) clarify the relevant factors for consideration.[3] The principles contained in this Memorandum shall apply to all determinations in criminal matters regarding whether a monitor is appropriate in specific cases, regardless of the form of the resolution.

Independent corporate monitors can be an effective resource in assessing a corporation's compliance with the terms of a corporate criminal resolution, whether a DPA, NPA, or plea agreement. Monitors can also be an effective means of reducing the risk of repeat misconduct and compliance lapses identified during a corporate criminal investigation.

The Department is committed to imposing monitors where appropriate in corporate criminal matters. Department attorneys should analyze and carefully assess the need for the imposition of a monitor on a case-by-case basis. As explained in prior guidance, two broad considerations should guide prosecutors when assessing the need for and propriety of a monitor: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation.

In general, the Department should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship. Where a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, Department attorneys should consider imposing a monitorship. This is particularly true if the investigation reveals that a compliance program is

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[2] This guidance is limited to monitors, and does not apply to third parties, whatever their titles, retained to act as receivers or trustees or to perform other functions.

[3] This Memorandum revises, supplements, and, in part, supersedes Part A of the guidance provided to the Department's Criminal Division through the October 11, 2018, memorandum entitled, "Selection of Monitors in Criminal Division Matters," issued by then-Assistant Attorney General Brian A. Benczkowski (hereinafter the Benczkowski Memorandum), and further supplements the March 7, 2008, memorandum addressed to all Department components and United States Attorneys entitled, "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," issued by then-Acting Deputy Attorney General Craig S. Morford. This Memorandum revises only Part A of the Benczkowski Memorandum, entitled "Principles for Determining Whether a Monitor is Needed in Individual Cases," and does not alter the remainder of the Benczkowski Memorandum (*i.e.*, Parts B through G), which remains in full force and effect as to the Criminal Division.

deficient or inadequate in numerous or significant respects. Conversely, where a corporation's compliance program and controls are demonstrated to be tested, effective, adequately resourced, and fully implemented at the time of a resolution, a monitor may not be necessary.

Finally, at a minimum, the scope of any monitorship should be appropriately tailored to address the specific issues and concerns that created the need for the monitor.

V. Conclusion

The guidance in this Memorandum will apply to all future investigations of corporate wrongdoing. It also applies to those matters pending as of the date of this Memorandum, to the extent practicable.

Revisions to the Justice Manual to reflect the changes described herein are forthcoming.

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Principal Associate Deputy Attorney General Marshall Miller Delivers Live Keynote Address at Global Investigations Review

New York, NY ~ Tuesday, September 20, 2022

Remarks as Prepared for Delivery

Thank you for that kind introduction. It's always a pleasant change to get outside the beltway, and I'm particularly pleased to be back in my hometown, where New Yorkers tell it like it is.

It's a timely moment for this conversation. On Thursday, the Deputy Attorney General announced significant advancements in the Justice Department's corporate crime policy. Today, I will focus on the ways those policy changes incentivize corporate responsibility and promote individual accountability – by clarifying, rethinking and standardizing policies on voluntary self-disclosure and corporate cooperation.

I'll also address how Department prosecutors are assessing some of the most challenging corporate compliance issues of the day, such as how incentive compensation systems can promote — rather than inhibit — compliance and how companies should be managing data given the proliferation of personal devices and messaging platforms that can take key communications off-system in the blink of an eye.

Then I'm looking forward to engaging in dialogue with this group of subject matter experts.

I. Background/Process

I first want to take a moment to discuss our process in crafting these changes. Last October, the Deputy Attorney General commissioned a top-to-bottom review of the Department's corporate crime enforcement program — to see what was working, what wasn't and where there were gaps.

As a leader who has advised executives from the Oval Office to the corporate boardroom, she knows first-hand that the most effective policies flow from the best ideas — whether they come from industry, academia, the public interest world or government. So, the Department engaged in an unprecedented effort to garner insight from practitioners and leaders outside of the Justice Department, as well as from within.

Gathering and pressure-testing these varied viewpoints has resulted in an approach to corporate crime enforcement that is more fit for purpose. The process helped us identify important changes to ensure individual accountability — the Department's top enforcement priority.

And it clarified the need for policy transparency and predictability to provide a clearer picture of how companies benefit from investing in and acting upon good corporate citizenship.

Today, more than ever, companies are competing in an environment that forces corporate leaders to make tough choices about where to direct resources and how to set priorities.

The policy changes announced by Deputy Attorney General Monaco are intended to assist General Counsels, Chief Compliance Officers and outside counsel in making the boardroom business case for investing in compliance and an ethical corporate culture.

II. Incentivizing Corporate Responsibility

Accountability and Responsibility

So let's dive in. I took the subway here from my home in Prospect Heights, and I'm going to be Brooklyn-blunt. The Department will not hesitate to seek criminal indictments or require guilty pleas where facts and circumstances require, including for serious and recalcitrant corporate criminal offenders.

Nor will the Department hesitate to breach companies that do not honor their obligations under Deferred Prosecution Agreements (DPAs) and Non Prosecution Agreements (NPAs), or the terms of corporate probation following guilty pleas.

Over the past year, the Department has obtained guilty pleas from some of the world's most powerful companies — NatWest, Allianz Global Investors, Fiat Chrysler Automobiles, Balfour Beatty Communities and a double guilty plea from two Glencore entities, to name just a few.

Criminal charges and guilty pleas are no longer a "special" for certain customers — they're now on the main, everyday menu.

But let me also be clear: while this Department will disfavor successive probationary agreements for the same company, we are not foreclosing their use.

To the contrary, there remain available pathways to obtain DPAs, NPAs, and even declinations. And we are working to clarify how to access those pathways, and to increase predictability as to the benefits of doing so.

Voluntary Self-Disclosure (VSD)

That brings me to voluntary self-disclosure. If you heard or read the Deputy Attorney General's speech last week, I trust one thing came through loud and clear: the Department is placing a new and enhanced premium on voluntary self-disclosure.

We want companies to step up and own up when misconduct occurs. When companies do, they should expect to fare better in a clear and predictable way. After all, a complete and timely voluntary self-disclosure is an indicator that a company has a working compliance program and responsible corporate leadership.

To date, a few Justice Department components have implemented effective VSD programs in specialized areas of enforcement: the Antitrust Division's leniency program, the Criminal Division's Corporate Enforcement Policy, and the National Security Division's policy on export control and sanctions, to name the most prominent examples.

Now, the Department is doubling down and scaling up. As the Deputy Attorney General directed, every Justice Department component that prosecutes corporate crime cases, including the U.S. Attorney community, will now have a voluntary self-disclosure policy that defines its terms and identifies its rewards.

Those policies will be clear. They will be public. And they will feature the same core tenets: any company that self-discloses promptly will not be required to enter a guilty plea — absent aggravating factors — and will not be assessed a monitor, if it has remediated, implemented and tested an effective compliance program.

You don't have to just take my word for it. Let me walk you through a few examples where this has already taken place:

- For many years, the Antitrust Division's voluntary self-disclosure policy has granted leniency to the first company to self-report, cooperate fully and meet the policy's requirements. In a prototypical investigation into criminal price-fixing involving the canned tuna market, one company voluntarily self-disclosed, received leniency, was not prosecuted, and paid no fine.

  Meanwhile, Bumble Bee Foods pleaded guilty and paid a $25 million fine, while StarKist pleaded guilty and paid the statutory maximum: $100 million.

- Last year, the National Security Division concluded its first resolution under its more recently adopted voluntary self-disclosure program. In that case, SAP voluntarily self-disclosed misconduct, cooperated substantially, and as a result, was required only to disgorge the relevant revenue, but it did not face criminal charges or a fine.

- And under its Corporate Enforcement Policy, the Criminal Division has approved declinations for 15 self-disclosing companies since 2016. Just this past March, the FCPA Unit announced a declination for Jardine Lloyd Thompson Group Holdings in a case that involved over $10 million in bribes and corrupt payments and the prosecution of five individuals.

After detecting and voluntarily disclosing the misconduct, the company fully cooperated, paid disgorgement, and made compliance enhancements to mitigate the risk of recurrence of the misconduct.

Contrast these resolutions with the series of guilty pleas I referenced earlier. The Allianz guilty plea involved criminal penalties of over $2.3 billion; the two Glencore guilty pleas carried collective criminal penalties of over $1 billion; and the FCA plea involved approximately $300 million in criminal fines and forfeiture.

The math is simple: voluntary self-disclosure, cooperation and remediation can save a company hundreds of millions of dollars, and it can make or break a company's chances to avoid indictment or a guilty plea.

Voluntary self-disclosure is often only possible when a company has a well-functioning compliance program that can serve as an early warning system and detect the misconduct early.

So, investment in a world-class compliance program should be a win-win proposition for every company — helping it deter and prevent criminal conduct in the first place, and positioning it to self-disclose if misconduct occurs nonetheless.

Of course, we understand that sometimes misconduct occurs, even at companies with well-resourced and fully tested compliance programs and strong ethical cultures. As the Principal Associate Deputy Attorney General, I can certainly relate to the difficulties of managing a far-flung multinational organization with staff in every corner of the world and a budget akin to a Fortune 100 company.

So when misconduct happens and the compliance program discovers it, we say: pick up the phone and call us. Do not wait for us to call you. Unless aggravating factors are present, even a company with a significant history of misconduct has a powerful incentive to make a timely self-disclosure: it is likely to make all the difference between a DPA and a guilty plea resolution.

Acquisitions

Another way we want to encourage corporate responsibility is by taking care not to deter companies with good compliance programs from acquiring companies with histories of misconduct.

Acquiring companies should be rewarded — rather than penalized — when they engage in careful pre-acquisition diligence and post-acquisition integration to detect and remediate misconduct at the acquired company's business.

As I'm sure this audience is well aware, the Criminal Division has declined to take enforcement action against companies that have promptly and voluntarily self-disclosed misconduct uncovered in the mergers and acquisitions context and then remediated and cooperated with the Justice Department in prosecuting culpable individuals. We will be looking to apply that same approach Department-wide.

And to further that approach, we will not treat as a recidivist any company with a proven track record of compliance that acquires a company with a history of compliance problems, so long as those problems are promptly and properly addressed in the context of the acquisition.

Corporate Cooperation

The DAG also provided important guidance on corporate cooperation. The key point I want to highlight relates to timeliness.

In building cases against culpable individuals, we have heard one consistent message from our line attorneys: delay is the prosecutor's enemy — it can lead to a lapse of statutes of limitation, dissipation of evidence, and fading of memories.

The Department will expect cooperating companies to produce hot documents or evidence in real time. And your clients can expect that their cooperation will be evaluated with timeliness as a principal factor. Undue or intentional delay in production of documents relating to individual culpability will result in reduction or denial of cooperation credit.

Where misconduct has occurred, everyone involved — from prosecutors to outside counsel to corporate leadership — should be "on the clock," operating with a true sense of urgency.

III. Clawbacks & Incentive Compensation

Now let me turn to something from the DAG's speech that received significant attention: clawbacks.

Companies are made up of individual executives and employees who should each feel personally invested in ensuring and promoting compliance. And nothing grabs attention and demands personal investment like having skin in the game, through a direct and tangible financial incentive.

So when Department prosecutors evaluate the strength of a compliance program, a key consideration will be whether a corporation's compensation system effectively incentivizes good behavior and deters wrongdoing.

- Has the company clawed back incentives paid out to employees and supervisors who engaged in or did not stop wrongdoing?
- Is the company targeting bonuses to employees and supervisors who set the right tone, make compliance a priority, and build an ethical culture?

Linking financial incentives to compliance is not a new idea, but it has yet to even approach its potential. Twenty years ago, the Sarbanes-Oxley Act provided for the clawback of executive compensation for top executives of public companies — but that provision's force and scope are limited to the context of financial restatements.

And the Dodd-Frank Act included broader clawback provisions for public companies, as to which the SEC remains engaged in rulemaking.

We've seen companies claw back pay from executives who were engaged in criminal conduct and from executive leadership in high-profile cases. So we know it can be done — and in the Department's view it should be done.

What we expect now, in 2022, is that companies will have robust and regularly deployed clawback programs. All too often we see companies scramble to dust off and implement dormant policies once they are in the crosshairs of an investigation.

Companies should take note: compensation clawback policies matter, and those policies should be deployed regularly. A paper policy not acted upon will not move the needle — it is really no better than having no policy at all.

To up the ante, the Deputy Attorney General has instructed the Criminal Division to examine how to provide incentives for companies to claw back compensation, with particular attention to shifting the burden of corporate financial penalties away from shareholders — who frequently play no role in misconduct — onto those who bear responsibility.

But using compensation systems to promote compliance isn't just about clawbacks. It's also about rewarding compliance-promoting behavior. For years, companies have designed and fine-tuned sophisticated incentive compensation systems that reward behavior that enhances profits.

We'll be evaluating whether corporations are making the same types of investments in adopting and calibrating compensation systems that reward employees who promote an ethical corporate culture and mitigate compliance risk.

As a former terrorism prosecutor, I'll put this in national security terms: our goal is not just to hold people accountable after crime has been committed, but to disrupt and deter the threat before crime takes place.

We expect companies to find innovative, effective, and targeted ways to use compensation to incentivize good corporate behavior and deter misconduct, using their own mix of carrots and sticks.

IV. Monitors

Next, let's discuss another issue that triggered robust conversation in the advisory group meetings. We heard loud and clear about the need for greater transparency and sharper guidance when it comes to monitors.

As this crowd well knows, monitors are less effective when they operate as blunt instruments. Last week's policy revisions are meant to replace the bludgeon with the scalpel. The scope of every monitorship should be carefully tailored to the particular misconduct and compliance program deficiencies identified.

There are, of course, different ways to structure monitorships. To give one example, where a company has instituted new management and embarked on a compliance program overhaul, but the controls are new and untested at the time of the resolution, a monitorship may be appropriate — but should be narrowly drawn.

The Foreign Corrupt Practices Act Unit's recent resolution with Stericycle is a good example of this situation, and it resulted in a carefully tailored monitorship of two years, with an opportunity for early termination if warranted.

On the other side of the spectrum, where a company has not demonstrated a reliable compliance culture or addressed compliance deficiencies, the Department will not shy away from imposing a broader monitorship to prevent the recurrence of misconduct — here, the Glencore case springs to mind, where the Department and the company agreed to separate monitors for each of the two corporate resolutions with the company.

Regardless of the length and scope of the monitorship, Department prosecutors will stay engaged throughout the lifespan of the monitorship.

As the DAG put it, our prosecutors will monitor the monitors, to keep them on task and on budget. Companies that invest in their compliance programs to get ahead of the curve will be rewarded with shorter monitorships, with the opportunity for early termination.

V. Meeting the Compliance Challenges of Communications Technology

Now let me turn to an area that we recognize is a big challenge for all organizations — employees' use of personal devices and third-party messaging platforms for work-related communications.

The ubiquity of personal smartphones, tablets, laptops and other devices and the rising use of third-party messaging platforms pose significant corporate compliance risks, particularly as to detecting their use for misconduct and recovering relevant data during a subsequent investigation.

Many companies require all work to be conducted on corporate devices; others permit the use of personal devices but limit their use for business purposes to authorized applications and platforms.

However a company chooses to address the use of personal devices or messaging platforms for business communications, the end result must be the same: companies need to prevent circumvention of compliance protocols through off-system activity, preserve all key data and communications and have the capability to promptly produce that information for government investigations.

Company policies and procedures addressing the use of personal devices and third-party messaging systems for business purposes will be reviewed as part of evaluating the effectiveness of a corporation's compliance program.

And a company's ability to produce relevant work-related communications — whether on-system or off — will be an important factor in assessing a corporation's cooperation during a criminal investigation.

VI. Concluding Points

In conclusion, let me emphasize that we do not view the recent policy announcements as the culmination of our work. Far from it.

We are reviewing and updating policies regarding voluntary self-disclosure and monitor selection, across the entire Department. The Criminal Division is assessing how to shift some of the burden of corporate financial penalties onto individual wrongdoers.

And we are looking at additional ways to improve corporate enforcement, including through analysis of the debarment process.

I can assure you that effective corporate criminal enforcement will remain a top priority for the Department — and the subject of continued and careful attention and analysis.

It has been a privilege to speak with you today, and I look forward to taking questions.

Topic(s):
Financial Fraud

Component(s):
Office of the Deputy Attorney General

Updated September 20, 2022

THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, April 20, 2022

Stericycle Agrees to Pay Over $84 Million in Coordinated Foreign Bribery Resolution

Stericycle Inc. (Stericycle), an international waste management company headquartered in Lake Forest, Illinois, has agreed to pay more than $84 million to resolve parallel investigations by authorities in the United States and Brazil into the bribery of foreign officials in Brazil, Mexico, and Argentina.

According to court documents, Stericycle entered into a three-year deferred prosecution agreement (DPA) with the Department of Justice in connection with the filing of a criminal information charging the company with two counts of conspiracy to violate (1) the anti-bribery provision of the Foreign Corrupt Practices Act (FCPA), and (2) the FCPA's books and records provision. Pursuant to the DPA, Stericycle's criminal penalty is $52.5 million. The department has agreed to credit up to one-third of the criminal penalty against fines the company pays to authorities in Brazil in related proceedings, including an amount of approximately $9.3 million to resolve investigations by the Controladoria-Geral da União (CGU) and the Advocacia-Geral de União (Attorney General's Office) in Brazil. In addition, Stericycle has agreed to pay approximately $28 million to resolve a parallel investigation by the U.S. Securities and Exchange Commission (SEC).

"Stericycle today accepted responsibility for its corrupt business practices in paying millions of dollars in bribes to foreign officials in multiple countries," said Assistant Attorney General Kenneth A. Polite, Jr. of the Justice Department's Criminal Division. "The company also maintained false books and records to conceal corrupt and improper payments made by its subsidiaries in Brazil, Mexico, and Argentina. Today's resolution demonstrates the Department of Justice's continuing commitment to combating corruption and protecting the international marketplace."

"Today's resolution with Stericycle shows that the FBI and our international law enforcement partners will not allow corruption to permeate domestic or international markets," said Assistant Director Luis Quesada of the FBI's Criminal Investigative Division. "The consequences of violating the FCPA are clear: Companies that bribe foreign officials for business advantage will be held accountable."

According to the company's admissions and court documents, Stericycle conspired to corruptly offer and pay approximately $10.5 million in bribes to foreign officials in Brazil, Mexico, and Argentina in order to obtain and retain business and other advantages for Stericycle. The company earned at least $21.5 million in profits from the corrupt scheme.

Specifically, between 2011 and 2016, Stericycle caused hundreds of bribe payments to be made to officials at government agencies and instrumentalities in Brazil, Mexico, and Argentina to obtain and retain business and to secure improper advantages in connection with providing waste management services. In perpetrating the scheme, an executive at Stericycle's Latin America division directed employees in the company's offices in Brazil, Mexico, and Argentina who paid bribes, typically in cash, that were calculated as a percentage of the underlying contract payments owed to Stericycle from government customers. In all three countries, the co-conspirators tracked the bribe payments through spreadsheets and described the bribes through code words and euphemisms, such as "CP" or "commission payment" in Brazil; "IP" or "incentive payment" in Mexico; and "alfajores" (a popular cookie) or "IP" in Argentina.

As part of the DPA, Stericycle has agreed to continue to cooperate with the department in any ongoing or future criminal investigations relating to this conduct. In addition, under the DPA, Stericycle agreed to continue to enhance its compliance program and to retain an independent compliance monitor for two years, followed by self-reporting to the department for the remainder of the term.

The government reached this resolution with Stericycle based on a number of factors, including, among others, the company's failure to voluntarily and timely disclose the conduct that triggered the investigation and the nature, seriousness, and pervasiveness of the offense. Stericycle received full credit for its cooperation with the department's investigation and engaged in extensive remedial measures. Although Stericycle has taken extensive remedial measures, it has not fully implemented or tested its enhanced compliance program, necessitating the imposition of an independent compliance monitor for a term of two years. Accordingly, the criminal penalty reflects a 25% reduction off the bottom of the applicable U.S. Sentencing Guidelines fine range.

In a related civil matter in the United States, Stericycle has agreed to pay disgorgement and prejudgment interest totaling approximately $28 million to resolve an investigation by the SEC. In related proceedings in Brazil, the company has agreed to resolve investigations by the CGU and the Attorney General's Office.

The FBI's New York Field Office is investigating the case. Trial Attorneys Paul A. Hayden and Jil Simon of the Criminal Division's Fraud Section are prosecuting the case. Authorities in Brazil and Mexico provided assistance in this matter, as did the Justice Department's Office of International Affairs.

The Fraud Section is responsible for investigating and prosecuting FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

Attachment(s):
Download Stericycle Information.pdf
Download Stericycle DPA.pdf

Topic(s):
Foreign Corruption

Component(s):
Criminal Division
Criminal - Criminal Fraud Section

Press Release Number:
22-401

Updated April 22, 2022

THE UNITED STATES DEPARTMENT of JUSTICE
JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, May 24, 2022

Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes

Swiss-Based Firm Agrees to Pay Over $1.1 Billion

Glencore International A.G. (Glencore) and Glencore Ltd., both part of a multi-national commodity trading and mining firm headquartered in Switzerland, each pleaded guilty today and agreed to pay over $1.1 billion to resolve the government's investigations into violations of the Foreign Corrupt Practices Act (FCPA) and a commodity price manipulation scheme.

These guilty pleas are part of coordinated resolutions with criminal and civil authorities in the United States, the United Kingdom, and Brazil.

"The rule of law requires that there not be one rule for the powerful and another for the powerless; one rule for the rich and another for the poor," said Attorney General Merrick B. Garland. "The Justice Department will continue to bring to bear its resources on these types of cases, no matter the company and no matter the individual."

The charges in the FCPA matter arise out of a decade-long scheme by Glencore and its subsidiaries to make and conceal corrupt payments and bribes through intermediaries for the benefit of foreign officials across multiple countries. Pursuant to a plea agreement, Glencore has agreed to a criminal fine of more than $428 million and to criminal forfeiture and disgorgement of more than $272 million. Glencore has also agreed to retain an independent compliance monitor for three years. The department has agreed to credit nearly $256 million in payments that Glencore makes to resolve related parallel investigations by other domestic and foreign authorities.

Separately, Glencore Ltd. admitted to engaging in a multi-year scheme to manipulate fuel oil prices at two of the busiest commercial shipping ports in the U.S. As part of the plea agreement, Glencore Ltd. agreed to pay a criminal fine of over $341 million, pay forfeiture of over $144 million, and retain an independent compliance monitor for three years. The department has agreed to credit up to one-half of the criminal fine and forfeiture against penalties Glencore Ltd. pays to the Commodity Futures Trading Commission (CFTC) in a related, parallel civil proceeding.

Sentencing has been scheduled in the market manipulation case for June 24, and a control date for sentencing in the FCPA case has been set for Oct. 3.

"Glencore's guilty pleas demonstrate the Department's commitment to holding accountable those who profit by manipulating our financial markets and engaging in corrupt schemes around the world," said Assistant Attorney General Kenneth A. Polite, Jr. of the Justice Department's Criminal Division. "In the foreign bribery case, Glencore International A.G. and its subsidiaries bribed corrupt intermediaries and foreign officials in seven countries for over a decade. In the commodity price manipulation scheme, Glencore Ltd. undermined public confidence by creating the false appearance of supply and demand to manipulate oil prices."

“The scope of this criminal bribery scheme is staggering,” said U.S. Attorney Damian Williams for the Southern District of New York. “Glencore paid bribes to secure oil contracts. Glencore paid bribes to avoid government audits. Glencore bribed judges to make lawsuits disappear. At bottom, Glencore paid bribes to make money – hundreds of millions of dollars. And it did so with the approval, and even encouragement, of its top executives. The criminal charges filed against Glencore in the Southern District of New York are another step in making clear that no one – not even multinational corporations – is above the law.”

“Glencore’s market price manipulation threatened not just financial harm, but undermined participants’ faith in the commodities markets’ fair and efficient function that we all rely on,” said U.S. Attorney Vanessa Roberts Avery of the District of Connecticut. “This guilty plea, and the substantial financial penalty incurred, is an appropriate consequence for Glencore’s criminal conduct, and we are pleased that Glencore has agreed to cooperate in any ongoing investigations and prosecutions relating to their misconduct, and to strengthen its compliance program company-wide. I thank both our partners at the U.S. Postal Inspection Service for their hard work and dedication in investigating this sophisticated set of facts and unraveling this scheme, and the Fraud Section, with whom we look forward to continuing our fruitful partnership of prosecuting complex financial and corporate criminal cases.”

“Today’s guilty pleas by Glencore entities show that there is no place for corruption and fraud in international markets,” said Assistant Director Luis Quesada of the FBI’s Criminal Investigative Division. “Glencore engaged in long-running bribery and price manipulation conspiracies, ultimately costing the company over a billion dollars in fines. The FBI and our law enforcement partners will continue to investigate criminal financial activities and work to restore the public’s trust in the marketplace.”

“The idea of fair and honest trade is at the bedrock of American commerce. It is insult to our shared traditions and values when individuals and corporations use their power, wealth, and influence to stack the deck unfairly in their own favor,” said Chief Postal Inspector Gary Barksdale of the U.S. Postal Inspection Service. “The resulting guilty plea by Glencore Limited demonstrates the tenacity of the U.S. Postal Inspection Service and its law enforcement partners in holding criminals accountable who try to enrich themselves by undermining the forces of supply and demand.”

The FCPA Case

According to admissions and court documents filed in the Southern District of New York, Glencore, acting through its employees and agents, engaged in a scheme for over a decade to pay more than $100 million to third-party intermediaries, while intending that a significant portion of these payments would be used to pay bribes to officials in Nigeria, Cameroon, Ivory Coast, Equatorial Guinea, Brazil, Venezuela, and the Democratic Republic of the Congo (DRC).

Between approximately 2007 and 2018, Glencore and its subsidiaries caused approximately $79.6 million in payments to be made to intermediary companies in order to secure improper advantages to obtain and retain business with state-owned and state-controlled entities in the West African countries of Nigeria, Cameroon, Ivory Coast, and Equatorial Guinea. Glencore concealed the bribe payments by entering into sham consulting agreements, paying inflated invoices, and using intermediary companies to make corrupt payments to foreign officials. For example, in Nigeria, Glencore and Glencore’s U.K. subsidiaries entered into multiple agreements to purchase crude oil and refined petroleum products from Nigeria’s state-owned and state-controlled oil company. Glencore and its subsidiaries engaged two intermediaries to pursue business opportunities and other improper business advantages, including the award of crude oil contracts, while knowing that the intermediaries would make bribe payments to Nigerian government officials to obtain such business. In Nigeria alone, Glencore and its subsidiaries paid more than $52 million to the intermediaries, intending that those funds be used, at least in part, to pay bribes to Nigerian officials.

In the DRC, Glencore admitted that it conspired to and did corruptly offer and pay approximately $27.5 million to third parties, while intending for a portion of the payments to be used as bribes to DRC officials, in order to secure improper business advantages. Glencore also admitted to the bribery of officials in Brazil and Venezuela. In Brazil, the company caused approximately $147,202 to be used, at least in part, as corrupt payments for Brazilian officials. In Venezuela, Glencore admitted to conspiring to secure and securing improper business advantages by paying over $1.2 million to an intermediary company that made corrupt payments for the benefit of a Venezuelan official.

In July 2021, a former senior trader in charge of Glencore's West Africa desk for the crude oil business pleaded guilty to one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering.

Under the terms of the plea agreement, which remains subject to court approval, Glencore pleaded guilty to one count of conspiracy to violate the FCPA, agreed to a criminal fine of $428,521,173, and agreed to criminal forfeiture and disgorgement in the amount of $272,185,792. Glencore also had charges brought against it by the U.K.'s Serious Fraud Office (SFO) and reached separate parallel resolutions with the Brazilian Ministério Público Federal (MPF) and the CFTC. Under the terms of the plea agreement, the department has agreed to credit nearly $256 million in payments that the company makes to the CFTC, to the court in the U.K., as well as to authorities in Switzerland, in the event that the company reaches a resolution with Swiss authorities within one year.

The department reached its agreement with Glencore based on a number of factors, including the nature, seriousness, and pervasiveness of the offense conduct, which spanned over a 10-year period, in numerous countries, and involved high-level employees and agents of the company; the company's failure to voluntarily and timely disclose the conduct to the department; the state of Glencore's compliance program and the progress of its remediation; the company's resolutions with other domestic and foreign authorities; and the company's continued cooperation with the department's ongoing investigation. Glencore did not receive full credit for cooperation and remediation, because it did not consistently demonstrate a commitment to full cooperation, it was delayed in producing relevant evidence, and it did not timely and appropriately remediate with respect to disciplining certain employees involved in the misconduct. Although Glencore has taken remedial measures, some of the compliance enhancements are new and have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, necessitating the imposition of an independent compliance monitor for a term of three years.

The Commodity Price Manipulation Case

According to admissions and court documents filed in the District of Connecticut, Glencore Ltd. operated a global commodity trading business, which included trading in fuel oil. Between approximately January 2011 and August 2019, Glencore Ltd. employees (including those who worked at Chemoil Corporation, which was majority-owned by Glencore Ltd.'s parent company and then fully-acquired in 2014) conspired to manipulate two benchmark price assessments published by S&P Global Platts (Platts) for fuel oil products, specifically, intermediate fuel oil 380 CST at the Port of Los Angeles (Los Angeles 380 CST Bunker Fuel) and RMG 380 fuel oil at the Port of Houston (U.S. Gulf Coast High-Sulfur Fuel Oil). The Port of Los Angeles is the busiest shipping port in the U.S. by container volume. The Port of Houston is the largest U.S. port on the Gulf Coast and the busiest port in the United States by foreign waterborne tonnage.

As part of the conspiracy, Glencore Ltd. employees sought to unlawfully enrich themselves and Glencore Ltd. itself, by increasing profits and reducing costs on contracts to buy and sell physical fuel oil, as well as certain derivative positions that Glencore Ltd. held. The price terms of the physical contracts and derivative positions were set by reference to daily benchmark price assessments published by Platts — either Los Angeles 380 CST Bunker Fuel or U.S. Gulf Coast High-Sulfur Fuel Oil — on a certain day or days plus or minus a fixed premium. On these pricing days, Glencore Ltd. employees submitted orders to buy and sell (bids and offers) to Platts during the daily trading "window" for the Platts price assessments with the intent to artificially push the price assessment up or down.

For example, if Glencore Ltd. had a contract to buy fuel oil, Glencore Ltd. employees submitted offers during the Platts "window" for the express purpose of pushing down the price assessment and hence the price of the fuel oil that Glencore Ltd. purchased. The bids and offers were not submitted to Platts for any legitimate economic reason by Glencore Ltd. employees, but rather for the purpose of artificially affecting the relevant Platts price assessment so that the benchmark price, and hence the price of fuel oil that Glencore Ltd. bought from, and sold to, another party, did not reflect legitimate forces of supply and demand.

Between approximately September 2012 and August 2016, Glencore Ltd. employees conspired to and did manipulate the price of fuel oil bought from, and sold to, a particular counterparty, Company A, through private, bilateral contracts, by manipulating the Platts price assessment for Los Angeles 380 CST Bunker Fuel. Between approximately January 2014 and February 2016, Glencore Ltd. employees also undertook a "joint venture" with Company A, which involved buying fuel oil from Company A at prices artificially depressed by Glencore Ltd.'s manipulation of the Platts Los Angeles 380 CST Bunker Fuel benchmark. Finally, between approximately January 2011 and August 2019, Glencore Ltd.

employees conspired to and did manipulate the price of fuel oil bought and sold through private, bilateral contracts, as well as derivative positions, by manipulating the Platts price assessment for U.S. Gulf Coast High-Sulfur Fuel Oil.

A former Glencore Ltd. senior fuel oil trader, Emilio Jose Heredia Collado, of Lafayette, California, pleaded guilty in March 2021 to one count of conspiracy to engage in commodities price manipulation in connection with his trading activity related to the Platts Los Angeles 380 CST Bunker Fuel price assessment. Heredia's sentencing is scheduled for June 17, 2022.

Glencore Ltd. pleaded guilty, pursuant to a plea agreement, to one count of conspiracy to engage in commodity price manipulation. Under the terms of Glencore Ltd.'s plea agreement regarding the commodity price manipulation conspiracy, which remains subject to court approval, Glencore Ltd. will pay a criminal fine of $341,221,682 and criminal forfeiture of $144,417,203. Under the terms of the plea agreement, the department will credit over $242 million in payments that the company makes to the CFTC. Glencore Ltd. also agreed to, among other things, continue to cooperate with the department in any ongoing investigations and prosecutions relating to the underlying misconduct, to modify its compliance program where necessary and appropriate, and to retain an independent compliance monitor for a period of three years.

A number of relevant considerations contributed to the department's plea agreement with Glencore Ltd., including the nature and seriousness of the offense, Glencore Ltd.'s failure to fully and voluntarily self-disclose the offense conduct to the department, Glencore Ltd.'s cooperation with the department's investigation, and the state of Glencore Ltd.'s compliance program and the progress of its remediation.

Additionally, the CFTC today announced a separate settlement with Glencore and its affiliated companies in connection with its investigation into FCPA and market manipulation conduct in a related, parallel proceeding. Under the terms of the CFTC resolution, Glencore agreed to pay over $1.1 billion, which includes a civil monetary penalty of over $865 million, as well as disgorgement totaling over $320 million.

The FCPA case is being prosecuted by Trial Attorneys Leila Babaeva and James Mandolfo of the Justice Department's Fraud Section, Trial Attorney Michael Khoo of the Justice Department's Money Laundering and Asset Recovery Section, and Assistant U.S. Attorneys Michael McGinnis and Juliana Murray of the Southern District of New York. The case is being investigated by the FBI.

The Criminal Division's Office of International Affairs provided significant assistance in this case. The department also expresses its appreciation for the assistance provided by law enforcement authorities in Switzerland, the United Kingdom, Brazil, Cyprus, and Luxembourg

The commodity price manipulation case is being prosecuted by Deputy Chief Avi Perry and Trial Attorneys Matthew F. Sullivan and John J. Liolos of the Justice Department's Fraud Section, and Assistant U.S. Attorney Jonathan Francis of the District of Connecticut. The case is being investigated by the U.S. Postal Inspection Service.

The Fraud Section is responsible for investigating and prosecuting FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

The Kleptocracy Asset Recovery Initiative is led by a team of dedicated prosecutors in the Criminal Division's Money Laundering and Asset Recovery Section, in partnership with federal law enforcement agencies, and often with U.S. Attorneys' Offices, to forfeit the proceeds of foreign official corruption and, where appropriate, to use those recovered assets to benefit the people harmed by these acts of corruption and abuse of office.

Topic(s):
Asset Forfeiture
Financial Fraud
Foreign Corruption

Component(s):
Criminal Division

Criminal - Criminal Fraud Section
Criminal - Money Laundering and Asset Recovery Section
Criminal - Office of International Affairs
Federal Bureau of Investigation (FBI)
USAO - Connecticut
USAO - New York, Southern

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FOR IMMEDIATE RELEASE Thursday, September 15, 2022

GOL Linhas Aéreas Inteligentes S.A. Will Pay Over $41 Million in Resolution of Foreign Bribery Investigations in the United States and Brazil

GOL Linhas Aéreas Inteligentes S.A. (GOL), an airline headquartered in São Paulo, Brazil, will pay more than $41 million to resolve parallel bribery investigations by criminal and civil authorities in the United States and Brazil. According to court documents, GOL entered into a three-year deferred prosecution agreement (DPA) with the Department of Justice in connection with a criminal information filed in the District of Maryland charging the company with conspiracy to violate the anti-bribery and books and records provisions of the Foreign Corrupt Practices Act (FCPA).

Pursuant to the DPA, GOL will pay a criminal penalty of $17 million. The department has agreed to credit up to $1.7 million of that criminal penalty against an approximately $3.4 million fine the company has agreed to pay to authorities in Brazil in connection with related proceedings to resolve an investigation by the Controladoria-Geral da União (CGU) and the Advocacia-Geral de União (Attorney General's Office). In addition, GOL will give up approximately $24.5 million over two years as part of the resolution of a parallel investigation by the U.S. Securities and Exchange Commission (SEC).

"GOL paid millions of dollars in bribes to foreign officials in Brazil in exchange for the passage of legislation that was beneficial to the airline," said Assistant Attorney General Kenneth A. Polite Jr. of the Justice Department's Criminal Division. "The company entered into fraudulent contracts with third-party vendors for the purpose of generating and concealing the funds necessary to perpetrate this criminal conduct, and then falsely recorded the sham payments in their own books. Today's resolution demonstrates the Department of Justice's commitment to holding accountable companies that corrupt the functions of government for their own financial gain."

"Our office's strong working relationship with the Department of Justice's Fraud Section demonstrates our commitment to weed out corruption by companies that operate throughout Maryland," said U.S. Attorney Erek Barron for the District of Maryland. "I am committed to ensuring that any company operating in this District does so lawfully and ethically without corrupt conduct."

"Companies bribing their way to profits will ultimately pay the price for their crimes," said Assistant Director Luis Quesada of the FBI's Criminal Investigative Division. "GOL paid off foreign officials to pass favorable legislation and then tried to conceal its bribes as legitimate transactions. Today's settlement is proof that the FBI and our law enforcement partners will work to eliminate corruption anywhere it occurs, whether at home or abroad."

According to the company's admissions and court documents, between 2012 and 2013, GOL conspired to offer and pay approximately $3.8 million in bribes to foreign officials in Brazil. Specifically, GOL caused multiple bribe payments to be made to various officials in Brazil to secure the passage of two pieces of legislation favorable to GOL. The legislation involved certain payroll tax and fuel tax reductions that financially benefitted GOL, along with other Brazilian airlines.

According to court documents, in order to effectuate the bribery scheme, a member of GOL's Board of Directors caused GOL to enter into sham contracts with, and make payments to, various entities connected to the relevant Brazilian

officials. GOL maintained books and records that falsely listed the corrupt payments as legitimate expenses, including as advertising expenses and other services.

As part of the DPA, GOL has agreed to continue to cooperate with the department in any ongoing or future criminal investigations relating to this conduct. In addition, under the agreement, GOL agreed to continue to enhance its compliance program and provide reports to the department regarding remediation and the implementation of compliance measures for the term of the DPA.

The government reached this resolution with GOL based on a number of factors, including, among others, the nature, seriousness, and pervasiveness of the offense. GOL received full credit for its cooperation with the department's investigation, which included, among other things, timely providing the facts obtained through the company's internal investigation – which included reviewing voluminous documents, interviewing witnesses, conducting background checks, and testing over two thousand transactions. The company promptly engaged in remedial measures by, among other things, redesigning its entire anti-corruption program. Accordingly, the criminal penalty calculated under the U.S. Sentencing Guidelines reflects a 25% reduction off the bottom of the applicable guidelines fine range. Due to GOL's financial condition and demonstrated inability to pay the penalty calculated under the U.S. Sentencing Guidelines, however, GOL and the department agreed, consistent with the department's inability to pay guidance, that the appropriate criminal penalty is $17 million.

The FBI's Los Angeles Field Office is investigating the case. Assistant Chief Derek J. Ettinger and Trial Attorney Joseph McFarlane of the Criminal Division's Fraud Section, as well as Assistant U.S. Attorney David I. Salem of the District of Maryland, are prosecuting the case. Authorities in Brazil provided assistance in this matter, as did the Criminal Division's Office of International Affairs.

The Fraud Section is responsible for investigating and prosecuting FCPA matters. Additional information about the Justice Department's FCPA enforcement efforts can be found at www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

Topic(s):
Foreign Corruption

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Criminal Division
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