

DOJ ENFORCEMENT: AN EVOLVING LANDSCAPE



AT A GLANCE

WHAT DOJ WANTS:

- Prompt voluntary self-disclosure of violations
- Full cooperation with DOJ investigations
- Swift, meaningful remediation
- Implementation and maintenance of effective compliance programs

WHAT DOJ MAY BE WILLING TO PROVIDE:

- Presumption of declination
- Significant reduction of penalties
- More rational resolutions to complex cases, to prevent “piling on”

WHAT COMPANIES MAY GAIN:

- An increasingly clear and certain roadmap for investigating, remediating and disclosing misconduct
- An opportunity to internalize and operationalize messages sent by DOJ
- Agency to control their fate in anticipation of future investigations through investment in, and continuous improvement of, compliance and ethics programs

A PATH TOWARD CLARITY

NOVEMBER 2017 — Deputy Attorney General Rod Rosenstein implemented a revised Foreign Corrupt Practices Act Corporate Enforcement Policy, stating that if 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.”

MARCH 1, 2018 — Acting Assistant Attorney General John Cronan announced that the principles of the FCPA Corporate Enforcement Policy will also be applied to all of the Criminal Division’s corporate criminal investigations as nonbinding guidance.

MARCH 2, 2018 — Rosenstein publicly stated that real compliance measures help the Department preserve its finite resources, and DOJ wants to “reward companies that invest in strong compliance measures.”

MAY 9, 2018 — Rosenstein encouraged “coordination” among law enforcement when “imposing multiple penalties for the same conduct” and sought to “enhance relationships with ... law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties.”

FOUR FEATURES OF THE “PILING ON” POLICY

1.

“Criminal enforcement authority” shouldn’t be used “for purposes unrelated to the investigation and prosecution of a possible crime” (i.e., DOJ shouldn’t threaten prosecution simply to induce a larger settlement).

2.

Coordination among law enforcers is encouraged to achieve an “overall equitable result.”

3.

DOJ attorneys are encouraged to “coordinate with other federal, state, local, and foreign enforcement authorities seeking to resolve a case with a company for the same misconduct.”

4.

DOJ will evaluate several factors when considering multiple penalties in a particular case (e.g., egregiousness, statutory mandates, risk of delay in finalizing a resolution, and quality of a company’s disclosures and cooperation).

KEY PRINCIPLES: THEN AND NOW

COMPLIANCE PROGRAMS

THEN

Just one of many important factors to qualify for credit

NOW

Becoming a threshold necessary to qualify for credit

WHAT COMPANIES SHOULD DO

- Ensure a culture of compliance
- Dedicate appropriate resources to compliance
- Staff the compliance function with personnel of adequate quality and experience
- Provide the compliance function adequate authority and independence
- Perform effective risk assessments
- Compensate and promote compliance personnel appropriately
- Audit to ensure effectiveness
- Implement an appropriate reporting structure

YATES MEMO

THEN

Individuals are in the crosshairs

NOW

Individuals remain in the crosshairs

WHAT COMPANIES SHOULD DO

On a proactive basis:

- Disclose all relevant facts and attribute them to specific sources where it would not violate attorney-client privilege (i.e., no general narratives)
- Disclose all facts related to involvement in the misconduct by the company's officers, employees or agents
- Disclose all facts regarding potential misconduct by third parties

COOPERATION AND REMEDIATION

THEN

Full cooperation and appropriate remediation

NOW

Same underlying concepts, but expect DOJ to hold companies to a high standard

WHAT COMPANIES SHOULD DO

- Be detailed, fulsome and proactive in cooperating with DOJ
- Promptly take extensive and demonstrable steps to remediate identified misconduct

ALLOCATION OF DOJ RESOURCES

THEN

Multiyear timelines tied up prosecutorial resources

NOW

Streamlining matters may allow reallocation to other enforcement priorities

WHAT COMPANIES SHOULD DO

- Prepare for shortened timelines for complex white collar matters