



# US PROSECUTION OF CORRUPT PRACTICES (TRENDS IN FCPA ENFORCEMENT)

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# TRENDS IN FCPA ENFORCEMENT

- Heightened disclosure required for companies seeking credit for cooperation with US Department of Justice (“DOJ”)
- Increased focus on corporate vs individual crime
- International focus on deterring the “demand side” of corruption
- Most recent DOJ incentives to companies for voluntary self-disclosure, cooperation, and remediation
- New certification requirements for CEOs and CCOs whose companies enter into FCPA settlement agreements
- DOJ focus on compliance

# INCREASED FOCUS ON CORPORATE CRIME

The Biden administration DOJ has repeatedly stressed its focus on prosecuting corporate crime.

For example, on October 28, 2021, Deputy Attorney General Lisa Monaco stated:

*“Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct—or else it’s going to cost them down the line.”*

# INCREASED FOCUS ON PROSECUTING BRIBE PAYORS AND PAYEES

- In 2021, the Organization for Economic Cooperation and Development (the “OECD”) issued a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions.
- The revised recommendations suggested policies to curb the “demand side” of public corruption, including:
  - Raising awareness of bribe solicitation risks;
  - Prohibiting or discouraging small facilitation payments, which have a “corrosive effect” on public integrity; and
  - Publicizing rules and regulations on the solicitation of improper payments, gifts, or expenses by public officials.
- The DOJ has shown an increased focus on prosecuting both individuals who pay bribes and bribe recipients (under money laundering and other criminal statutes).
- In a December 1, 2022 address at the 39<sup>th</sup> International Conference on the Foreign Corrupt Practices Act, Acting Principal Deputy Assistant Attorney General Nicole M. Argentieri said:
  - *“The Criminal Division has been bringing – and will continue to bring – impactful prosecutions against individuals to punish corrupt actors and deter others on all sides of the illegal scheme – bribe payors, intermediaries, and public officials.”*

# DOJ RETURNS TO A HIGHER STANDARD OF DISCLOSURE RELATED TO CULPABLE INDIVIDUALS

- DOJ has broadened its program to give credit to both corporations and individuals by way of reduced punishment, but the standards are high.
- DOJ policy requires corporations to identify all individuals involved in any aspect of alleged misconduct, regardless of their status or seniority, in order for a corporation to receive credit for its cooperation with the government.
- Under the current policy:
  - Companies must divulge information about all involved individuals, and it will be up to the DOJ “to determine the relevance and culpability of individuals involved in the misconduct.”
  - Organizations are required to provide information about “individuals inside and outside of the company,” and thus must divulge information about third parties to receive cooperation credit.
- On October 28, 2021, Deputy Attorney General Monaco issued a memo that stated:
  - *“..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.”*

# DOJ STANDARDS FOR DISCLOSURE RELATED TO CULPABLE INDIVIDUALS--AN INCREASED FOCUS ON TIMING

- The DOJ has also expressed more stringent expectations regarding the timing of disclosure.
- On September 15, 2022, Deputy Attorney General Monaco emphasized these points in a speech and related memo. In her speech she said:
  - *“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....”*

# MOST RECENT REVISIONS TO DOJ'S CORPORATE ENFORCEMENT POLICY

- On January 17, 2023, Assistant Attorney General Kenneth Polite Jr. announced revisions to the Corporate Enforcement Policy (“CEP”)
- These revisions provide specific, additional incentives for companies that self-disclose, cooperate, and remediate.
- Under the new policy:
  - Companies may get a discount of up to 75% off the minimum fine under U.S. sentencing guidelines (“Guidelines”) if they are not repeat offenders, voluntarily self-disclose, fully cooperate, and timely and appropriately remediate.

# NEW DOJ CERTIFICATION REQUIREMENT FOR CCOs

- In 2022, the DOJ began including in FCPA settlements provisions that require a company's CEO, and CCO, to sign certifications shortly before the expiration of the term of the settlement agreement.
- These certifications state that a company's compliance program has been "reasonably designed" to prevent future violations and that the company has "met its compliance obligations pursuant to [the settlement] agreement."
- The certifications specify that if the certifications are false, DOJ could prosecute signers for making false statements and obstructing justice.
- DOJ officials have stated that they believe this certification requirement will help empower CCOs by ensuring that they have "adequate visibility and access to information" in their organizations.
- Nevertheless, the new certification requirement creates personal exposure for CCOs of companies settling FCPA Matters. This may challenge companies under investigation to attract top compliance talent at a time when they need it most.



# DOJ GUIDANCE – THIRD PARTIES

- **Third Parties** – The new guidance shifts the focus regarding third parties from initial due diligence “primarily during the onboarding” to “risk management of third parties throughout the lifespan of the relationship.”
  - Historically, U.S. regulators have focused on the need for companies to conduct due diligence on third parties prior to onboarding.
  - This includes understanding the business rationale for engaging a third party; considering the third party’s qualifications, associations, and reputation; and ensuring compensation at a market rate commensurate with the services.
- Under the new guidance, companies can no longer rely solely on due diligence at the onboarding stage. Companies are advised to undertake risk management of third-party relationships throughout the relationship.
- These measures include compliance certifications, periodically refreshed due diligence, training, compliance audits, etc.

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