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Regulatory and Enforcement Alert

DOJ Criminal Division Unveils New Guidance on Self-Reporting and Enforcement Priorities for Corporate and White-Collar Crime

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On Monday, the Criminal Division of the U.S. Department of Justice (DOJ) issued three new documents relevant to the Division's guidelines on self-reporting misconduct, whistleblowers, corporate compliance monitors, and enforcement priorities for investigating and prosecuting corporate crimes in the Trump Administration.

First, the Criminal Division attempts to provide additional concrete incentives to companies that self-report, through an updated Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP). Building on the changes to the CEP in 2023, the updated CEP replaces what was previously a "presumption" for declination to a declination—full stop—assuming certain requirements are met. It also allows for full self-reporting credit in certain situations even if a whistleblower comes forward to DOJ first. In effect, this amounts to a 120-day grace period.

Second, in a new memorandum, the Criminal Division outlines its enforcement priorities and policies more generally, including where it intends to prioritize enforcement resources: generally focused on crimes against U.S. taxpayers (including health care fraud and federal program and procurement fraud), U.S. investors (including Ponzi schemes and elder abuse), U.S. customers (through trade and customs fraud), and crimes that harm U.S. national security interests (including violating sanctions, facilitating transactions by cartels or foreign terrorist organizations, complex money laundering, and bribery). The memorandum also incorporates changes to the Criminal Division's Corporate Whistleblower Awards Pilot Program designed to encourage whistleblowers to come forward with tips that lead to actions in these priority areas.

Finally, in another new memorandum, the Criminal Division details more tailored criteria for the selection of monitors and, when monitors have been imposed, evaluation of their costs to ensure they are proportionate to their mandate.

1. Enhanced Incentives for Self-Reporting

The Criminal Division's former policy provided for a *presumption* of a declination of prosecution on the condition that a company voluntarily self-disclosed wrongdoing, fully cooperated, and timely and appropriately remediated. A company was also required to pay all disgorgement, forfeiture, and restitution as required. It also permitted declination in limited situations even where there were aggravating factors, such as criminal recidivism or involvement by executive management in misconduct, assuming certain requirements were met. Finally, in situations where the Criminal Division concluded that a declination was not appropriate because of aggravating factors, but the company had nevertheless voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, it would not require a corporate guilty plea absent egregious circumstances, would recommend a minimum of 50% and 75% off the low end of the U.S. Sentencing Guidelines fine range, and would not require appointment of a monitor.

UPDATED CEP

In a speech announcing the new CEP, Matthew Galeotti, the new head of the Criminal Division, observed that the previous policy was "unwieldy and hard to navigate," and that the Criminal Division wanted to send a clear message that "self-disclosure is key to receiving the most generous benefits the Criminal Division can offer." To further that goal, the updated CEP provides that the Criminal Division will move beyond merely providing a presumption of declination, but rather commit to a declination in all circumstances so long as the company meets four conditions:

1. Voluntarily discloses misconduct to the Criminal Division. Notably, if a whistleblower makes an internal report *and* submits a report with the DOJ, the company may still be eligible for the presumption of declination provided it self-reports to the DOJ within 120 days and satisfies the other requirements.
2. Fully cooperates with the Criminal Division by disclosing relevant, non-privileged facts and taking other investigative steps.
3. Timely and appropriately remediates the misconduct. This includes analyses of the causes of the conduct, discipline of responsible employees as well as the implementation of compliance and ethics programs.
4. There are no aggravating circumstances related to the "nature and seriousness of the offense, egregiousness or pervasiveness of the misconduct within the company, severity of harm caused by the misconduct, or criminal adjudication or resolution within the last five years based on similar misconduct by the entity engaged in the current misconduct."

Should a company satisfy all four requirements, it is still required to pay all disgorgement/forfeiture as well as restitution/victim compensation payments resulting from the misconduct at issue.

For what it describes as "near miss" self-disclosures, *i.e.*, where a company is ineligible for declination under the above conditions because its self-report did not qualify as a voluntary self-disclosure (though made in good faith), or it had aggravating factors warranting a criminal resolution, the updated CEP provides additional incentive for self-reporting, offering the company:

1. A more lenient non-prosecution agreement (NPA) (absent particularly egregious or multiple aggravating circumstances);
2. A term length of fewer than three years;

3. No independent compliance monitor; and
4. A reduction of 75% off the low end of the Guidelines fine range.

2. Enforcement Priorities

In a new memorandum *Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime*, the Criminal Division sets out what it describes as its enforcement priorities and approach, guided by "three core tenets: (1) focus; (2) fairness; and (3) efficiency." Although the Trump Administration had already provided a generalized indication of enforcement priorities it intended to prioritize and deprioritize, the Criminal Division memorandum formalized this guidance and made clear that it will focus on crimes against U.S. taxpayers, U.S. investors, U.S. customers, and crimes that harm U.S. national security interests.

The memorandum lays out what it describes as 10 "high-impact areas" including:

- "Fraud that victimizes U.S. investors, individuals, and markets" such as Ponzi schemes and investment fraud;
- Trade fraud and tariff evasion;
- Money laundering; and
- "Conduct that threatens the country's national security, including threats to the U.S. financial system by gatekeepers, such as financial institutions and their insiders that commit sanctions violations or enable transactions by Cartels, TCOs, hostile nation-states, and/or foreign terrorist organizations."

Related to these priority areas, the Criminal Division has also updated its Whistleblower Program Corporate Whistleblower Awards Pilot Program (Criminal Division Whistleblower Program). Introduced in August 2024, the Criminal Division Whistleblower Program gives awards to those who "provide original, truthful information about criminal misconduct relating to one or more designated program areas that leads to forfeiture exceeding $1,000,000 in net proceeds." (There are other similar programs at other agencies, including at the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Financial Crimes Enforcement Network, and some U.S. Attorneys Offices.) Updates to the Criminal Division Whistleblower Program include the addition of new subject areas as eligible for whistleblowing incentives, including corporate violations of federal immigration law; trade, tariff, and customs fraud; and corporate procurement fraud.

3. More Tailored, Fewer Monitorships

In another new memorandum (*Memorandum on Selection of Monitors in Criminal Division Matters*), the Criminal Division also lays out its revised approach to corporate monitorships. Historically, prosecutors assessed the need for a monitor by considering "(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 early 2023, the Division provided prosecutors with 10 non-exhaustive factors to help make this determination, including the adequacy of existing corporate compliance policies and the nature of the company's response to misconduct. When monitors were imposed, prosecutors were instructed that "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."

UPDATED POLICY

Explaining these revisions to the existing policy in his speech on Monday, Galeotti emphasized that "unrestrained monitors can be a burden on businesses that are frequently making self-directed improvements and investing significant amounts in their own compliance programs to solve problems internally and proactively." Accordingly, as detailed in the memorandum, the new policy requires prosecutors to consider four factors in determining if a monitor is necessary: (1) the severity of the conduct at-issue and the potential for recidivism; (2) the "availability and efficacy of other independent government oversight," such as other regulator oversight; (3) the "efficacy of the compliance program and culture of compliance at the time of the resolution"; and (4) the "maturity of the company's controls and its ability to independently test and update its compliance program." Should monitors be imposed, the updated policy requires that costs be proportionate to the underlying criminal conduct, the company's profits, and the company's size and risk profile, and that there be mechanisms to ensure collaboration between the monitor and the monitored, including, at a minimum, biannual tri-partite meetings between the company, monitor, and government.

The Criminal Division is reviewing all pre-existing monitorships to, in the words of Galeotti, "narrow their scope or, where appropriate, terminate a monitorship altogether, based on a totality of the circumstances review."

Implications of the Updated Policies and Takeaways

The updated monitor guidance and the Criminal Division's granular discussion of its enforcement priorities is helpful transparency. But the headline of Monday's announcements is clearly the updated self-reporting guidance, which is the DOJ's latest effort to convince companies that self-reporting may reliably reduce criminal liability in the event of possible misconduct, at least with respect to the Criminal Division. It also helpfully allows for full self-reporting credit in certain situations even if a whistleblower comes forward to DOJ first. Such a "carrot" is, by the Criminal Division's own words, designed to improve a Company's calculus for self-reporting. It marks an apparent shift away from trying to incentivize self-reporting of wrongdoing as a way for DOJ to source new investigative matters to providing increased benefits to companies more generally—which is generally consistent with the administration's deprioritization of certain longstanding white-collar enforcement priorities. Even with this new carrot, however, the self-reporting calculus remains a difficult one. As the Criminal Division guidance makes clear, a company is only eligible for such a declination if it pays all disgorgement/forfeiture as well as restitution/victim compensation payments resulting from the misconduct at issue. All declinations will also be made public. And given that other enforcement components—including the U.S. Attorneys Offices, the U.S. Securities and Exchange Commission, and state programs—have their own self-reporting requirements and incentives, a company that self-reports to the Criminal Division is not guaranteed similar treatment elsewhere.

Companies will still face the risks of follow-on private lawsuits and adverse reputational consequences as well. Companies will still want to carefully weigh whether and when to self-report.

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