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Regulatory Update

Criminal Division White Collar Enforcement Plan: Turning the Page, Not Writing a New Book

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On May 12, the Head of the U.S. Department of Justice (DOJ) Criminal Division, Matthew Galeotti, delivered remarks at the Securities Industry and Financial Markets Association's Anti-Money Laundering and Financial Crimes Conference and announced the Criminal Division's White Collar Enforcement Plan (Enforcement Plan) entitled "Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime."

Galeotti highlighted revisions to three Criminal Division policies: (1) the Corporate Enforcement and Voluntary Disclosure Policy (CEP), (2) the Corporate Whistleblower Awards Pilot Program (Corporate Whistleblower Program) and (3) the Memorandum on Selection of Monitors.

Collectively, according to Galeotti, these changes are focused on identifying priority areas that protect U.S. interests, easing the burden on companies trying to do the right thing, and providing greater clarity on benefits available to companies that are ready to take responsibility and self-disclose. As Galeotti noted, "[I]f companies continue to assume that the Department will be quick and heavy-handed with the stick, and stingy with the carrot, the system will continue to generate lengthy drawn-out investigations that are ultimately detrimental to companies and the Department."

Notably, although Galeotti announced that the Criminal Division is "turning a new page" on white collar enforcement, these policy shifts are made within existing Criminal Division guidance that has evolved over the last decade. The new administration could have ditched the current framework wholesale but did not. Instead, the Criminal Division is pursuing its priorities within the contours of a pre-existing set of policies. This may make it easier for future administrations to adjust the dial if priorities shift.

The Enforcement Plan outlines the Criminal Division's priorities and policies for prosecuting corporate and white collar crimes and is organized under three core principles that will guide Criminal Division attorneys going forward: (1) focus, (2) fairness and (3) efficiency.

I. Focus: Criminal Division's Priority Areas

Top 10 Areas of Focus. The Criminal Division outlined its top 10 priority areas for enforcement. Some areas are being newly prioritized, while others, like healthcare fraud, remain in focus following literally decades of government scrutiny. The Enforcement Plan states that "the Criminal Division will prioritize investigating and prosecuting corporate crime in areas that will have the greatest impact in protecting American citizens and companies and promoting U.S. interests." These high-impact areas include:

1. Waste, fraud and abuse, including healthcare fraud and federal program and procurement fraud;
2. Trade and customs fraud (e.g., tariff evasion);
3. Fraud perpetrated through variable interest entities, which are "typically Chinese-affiliated companies listed on U.S. exchanges" that can pose significant risks to the investing public;
4. Fraud that victimizes U.S. investors, individuals and markets (e.g., Ponzi schemes, investment fraud and elder fraud);
5. Conduct that threatens the country's national security (e.g., financial institutions that facilitate sanctions violations or transactions by cartels, transnational criminal organizations, hostile nation-states and foreign terrorist organizations);
6. Material support by corporations to foreign terrorist organizations;
7. Complex money laundering;
8. Violations of the Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act;
9. Bribery and associated money laundering that impact U.S. national interests, undermine U.S. national security, harm the competitiveness of U.S. businesses and enrich foreign corrupt officials; and
10. Certain crimes involving digital assets that victimize investors and consumers.

Expanded Subject Areas in Revised Corporate Whistleblower Program Guidance. The Corporate Whistleblower Program also was amended to expand the subject areas where related tips can lead to forfeiture, including, among others, violations by corporations related to international cartels or transnational criminal organizations, corporate sanctions offenses, and corporate procurement fraud.

II. Fairness: Easing Burdens on Companies and Sweetening the Pot to Self-Disclose

Galeotti announced several changes to treat companies, particularly those that cooperate, more leniently. In most respects, these changes build upon existing policies and initiatives that the Department has implemented over the last decade, including efforts to focus on individual prosecutions, encourage voluntary self-disclosure and reward whistleblowers. However, the Department's goals have been adjusted, and there is an obvious and likely well-received effort to further clarify the benefits of disclosure.

This increased emphasis on voluntary self-disclosure is consistent with global trends. Last month, the U.K. Serious Fraud Office (SFO) issued new guidance stating that if a company self-reports promptly and cooperates fully, SFO will, absent exceptional circumstances, invite the company to negotiate a deferred prosecution agreement rather than prosecute. In 2023, France's Parquet National Financier's (PNF) published updated guidelines on the use of French-style deferred prosecution agreements (CJIPs or Conventions Judiciaire d'Intérêt Public) and offered companies up to a 50% discount in fines for voluntary self-disclosure.

Prosecution of Individuals Prioritized Over Companies. The Enforcement Plan emphasized that the Criminal Division's first priority is to prosecute individuals, and not all corporate misconduct warrants federal criminal prosecution.

Revised CEP Includes New 120-Day Grace Period Incentivizing Self-Disclosure. The CEP was revised to clarify that additional benefits are available to companies that self-disclose and cooperate. Specifically, in a turn from years of corporate frustration at U.S. Securities and Exchange Commission policy that did not require whistleblowers to go to companies first or otherwise allow companies to receive disclosure credit where such whistleblowers won the race to the government doors, the updated CEP now provides the following exception:

> *If a whistleblower makes both an internal report to a company and a whistleblower submission to the Department,* ***the company will still qualify for a presumption of a declination*** *under the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy —* ***even if the whistleblower submits to the Department before the company self-discloses*** *— provided that the company:*

> *(1)* ***self-reports the conduct to the Department within 120 days after receiving the whistleblower's internal report****, and*
>
> *(2)* ***meets the other requirements for voluntary self-disclosure and presumption of a declination under the policy****.*

Existing Criminal Division Resolutions Could Be Terminated Early. Further, the Criminal Division will review all existing agreements with companies to determine if early termination is warranted in any case. Factors that could justify early termination include, but are not limited to, duration of the post-resolution period, substantial reduction in the company's risk profile, extent of remediation and maturity of the compliance program, and whether the company self-reported the misconduct. Factors like a substantial reduction in risk profile will need to be better understood, but seem to provide additional, tangible avenues for companies to mitigate the time period of the impacts covered by criminal prosecution.

Going Forward, Almost All Criminal Division Resolutions Will Be Three Years or Fewer. In addition, the Enforcement Plan sets forth that terms of corporate resolutions should not exceed three years except in "exceedingly rare" cases, and prosecutors should assess these agreements regularly to determine if they should be terminated early.

III. **Efficiency: Streamlined Investigations and Targeted Use of Monitors**

More Efficient Investigations. Prosecutors must take all reasonable steps to minimize the length and impact of their investigations. Investigations will be tracked to ensure they do not linger and are swiftly concluded.

Revised Memorandum on Selection of Monitors — Narrowly Tailored Use of Monitors. Changes made to the Memorandum on Selection of Monitors (1) clarify the factors to be considered when determining whether a monitor is appropriate (including risk of criminal conduct that "significantly impacts U.S. interests") and how those factors should be applied, and (2) require that when a monitor is deemed necessary, the scope of the monitor's review and mandate is narrowly tailored to address the risk of recurrence of the misconduct and reduce unnecessary costs. As Galeotti remarked, "[U]nrestrained monitors can be a burden on businesses [and] the value monitors add is often outweighed by the costs they impose, so you can expect to see fewer of them going forward." Further, the Criminal Division has undertaken an individualized review of all existing monitorships to determine, on a case-by-case basis, if a monitor is still necessary.

IV. **Key Takeaways**

Companies Need to Evaluate Voluntary Self-Disclosures Under Updated DOJ Policies With Increased and More Concrete Incentives. DOJ is leaning into declinations for voluntary self-disclosures. Both in policy and messaging, DOJ wants to sweeten the pot for companies to make voluntary self-disclosures by providing a declination, not just the presumption of a declination, and enlarging the pathway to get to favorable terms via a non-prosecution agreement. The Enforcement Plan, Galeotti's remarks, and revised policies repeatedly note the challenges companies face and the need for prosecutors to provide more certainty to companies weighing the benefits of self-reporting and the potential high costs of an investigation. This suggests an opportunity for companies to make voluntary self-disclosures and mitigate risk on favorable terms. While how this will be implemented remains to be seen, this may be a good time for companies to disclose issues given the purported clear path to a declination, the interest in prosecuting individuals not corporations, and that resolutions appear far less likely to include a monitor.

Companies Need to Ensure Their Whistleblower Hotlines and Investigations Processes Are Robust to Take Advantage of New Grace Period. A company will still qualify for a presumption of a declination if it (1) self-reports within the new 120-day grace period after receiving the whistleblower's

internal report—even if that whistleblower reports to DOJ before reporting to the company — and (2) meets the other requirements under the CEP. This change reinforces the importance for companies to have strong internal procedures to timely receive, review and investigate whistleblower reports, and decide whether to self-report within that 120-day period. Indeed, even in the absence of any race with a whistleblower, the Department has strongly reinforced that companies should be incentivized to identify, investigate and remediate compliance issues to preserve the full menu of options for dealing with such issues.

Non-U.S. Companies May Face Greater Scrutiny. Consistent with the President's executive order regarding enforcement of the U.S. Foreign Corrupt Practices Act, a recurring theme in the Enforcement Plan is that prosecutors will focus on areas that will have the greatest impact in protecting the American public and companies and promoting U.S. interests. Accordingly, U.S. companies may receive a lighter touch, and foreign companies, particularly those based in countries not aligned with the U.S., such as China (which was called out specifically multiple times), are more likely to be in the crosshairs. This approach contrasts with recent comments made by the head of France's PNF, who said his office will "make no differences between companies" as it collaborates with U.K. and Swiss prosecutors on cross-border corruption investigations as part of the International Anti-Corruption Prosecutorial Taskforce announced in March.

Companies in Identified Key Sectors Should Take Stock of Risks Given Enforcement Focus. DOJ articulated its top 10 priorities ("areas of focus"). The list starts with (1) health care and federal program fraud; (2) trade and customs fraud (3) fraud perpetrated through variable interest entities, which are "typically Chinese-affiliated companies listed on U.S. exchanges" that can pose significant risks to the investing public; (4) fraud that victimizes U.S. investors, individuals, and markets; and the list goes on. Businesses in those sectors need to be sensitive to the heightened enforcement risks.

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