Volume 2, Number 5 September–October 2024

# THE JOURNAL OF FEDERAL AGENCY ACTION



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# The Journal of Federal Agency Action

Volume 2, No. 5 | September–October 2024

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Publishing Staff
Publisher: Leanne Battle
Production Editor: Sharon D. Ray
Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

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Cite this publication as:

The Journal of Federal Agency Action (Fastcase)

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Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005
https://www.fastcase.com/

POSTMASTER: Send address changes to THE JOURNAL OF FEDERAL AGENCY ACTION, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

## Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

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ISSN 2834-8796 (print)
ISSN 2834-8818 (online)

# The Department of Justice Wants You to Call. And It Wants You to Put Its Number on Speed Dial

Michael Culhane Harper, Christopher L. Nasson, David C. Rybicki, Neil T. Smith, and Hayley Trahan-Liptak*

*In this article, the authors examine all of the new programs recently unveiled by the U.S. Department of Justice designed to get employees or companies to call as soon as they learn of potential corporate misconduct. The authors then evaluate the impact these new policies and programs will have on corporate criminal prosecution. Finally, they explain what it all means for companies doing business today.*

Over the past year and a half, the U.S. Department of Justice (DOJ) has unveiled an unprecedented number of policy updates, pilot programs, and incentive structures all designed to do one thing—to get you or your company to give them a call as soon as you learn of potential corporate misconduct. With a downward trend in complex corporate cases brought by U.S. prosecutors, and the increasing difficulty in tracing communications and money across the globe, the reason why DOJ wants to incentivize whistleblowers is self-evident. DOJ knows corporate misconduct has not decreased, it is just getting easier to hide. This article looks at all the new programs and explains why DOJ has made such a significant pivot. It then evaluates what impact these new policies and programs will have on corporate criminal prosecution. Finally, it explains what it all means for companies doing business in this new and treacherous whistleblower landscape.

## Department of Justice Policies and Programs

### Corporate Self-Disclosure Policies

The first set of policies rolled out by DOJ endeavor to incentivize companies to proactively self-report corporate misconduct to

*The Journal of Federal Agency Action* / September–October 2024, Vol. 2, No. 5, pp. 353–372.
© 2024 Full Court Press. All rights reserved.
ISSN 2834-8796 (print) /ISSN ISSN 2834-8818 (online).

federal prosecutors. The first is an enhancement to the Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP), a pre-existing policy that provides incentives to companies that self-report corporate criminal misconduct. The second is a new policy, the Mergers and Acquisitions Safe Harbor Policy (M&A Safe Harbor Policy), designed to encourage companies to report misconduct discovered during the course of an acquisition.

### *The Revised Corporate Enforcement and Voluntary Self-Disclosure Policy*

On January 17, 2023, DOJ announced revisions to the CEP.[1] The announcement unveiled three significant modifications to the policy that governs the way in which DOJ prosecutes corporate crimes.

First, the revised CEP now extends beyond the Foreign Corrupt Practices Act (FCPA) and applies to all cases under the jurisdiction of DOJ's Criminal Division.

Second, the revised CEP expands the voluntary self-disclosure benefits companies can obtain, including providing for declinations even when aggravating circumstances are present.

Third, companies can now receive greater reductions in fines for self-disclosing and subsequent cooperation with a DOJ investigation.

#### Background and Expansion of Scope

In April 2016, DOJ launched its FCPA Pilot Program, a one-year, experimental initiative to incentivize companies to voluntarily disclose information related to potential FCPA violations, cooperate with DOJ investigations, and undertake remedial actions.[2] In November 2017, DOJ formally adopted the pilot program as the FCPA Corporate Enforcement Policy (FCPA CEP) and added it to the Justice Manual.[3] While the FCPA CEP had been nominally used in non-FCPA cases since 2018, the revised CEP expressly expands its application to all corporate criminal matters handled by DOJ's Criminal Division, including DOJ's Money Laundering and Asset Recovery Section and the Fraud Section.[4]

#### Voluntary Self-Disclosure

Under the revised CEP, companies that voluntarily self-disclose misconduct are eligible for a declination, regardless of aggravating circumstances, if the following three requirements are met:

1. The company voluntarily disclosed the misconduct "immediately" upon becoming aware of the allegation of misconduct;
2. The company had an effective compliance program and system of internal accounting controls in place that enabled the identification of the misconduct and led to the voluntary self-disclosure; and
3. The company engaged in "extraordinary cooperation" and remediation.[5]

The revised CEP requires voluntary self-disclosure immediately after the company learns of the alleged misconduct in order to benefit from the presumption of a declination under the program.[6] While the revised CEP does not define what qualifies as "immediate,"[7] DOJ's initial application of the revised CEP suggests DOJ sees the required term as closer to several weeks as opposed to months. In April 2024, for example, DOJ announced its declination of Proterial Cable America, Inc. (formerly Hitachi Cable America Inc.).[8] DOJ declined prosecution of Proterial for a fraud scheme committed by its employees.[9] The declination letter noted that Proterial "disclosed the issue to the Fraud Section *within weeks* of an employee raising the issue during an internal audit."[10]

Conversely, in September 2023, in applying the revised CEP, DOJ entered into a non-prosecution agreement (NPA) with Albemarle Corporation, which awarded Albemarle a 45 percent discount from the low end of the sentencing guideline range.[11] DOJ considered Albemarle's voluntary disclosure of its illegal conduct prior to DOJ's knowledge of the bribery scheme in its decision.[12] However, DOJ found the disclosure did not meet the voluntary disclosure standard under the CEP, noting the disclosure was not "reasonably prompt" as defined in the CEP and U.S. Sentencing Guidelines § 8C2.5(g)(1) because Albemarle first learned of allegations of bribery 16 months before its initial disclosure.[13]

Like the "immediate" requirement, the revised CEP does not clearly define the requirement for "extraordinary cooperation."[14] The FCPA CEP mandated "full cooperation" by companies in order to be eligible for a presumption of a declination and fine reduction.[15] The revised CEP retains this requirement for a presumption of declination and fine reduction, but now emphasizes the need for "extraordinary" actions, beyond merely "full cooperation," by companies facing aggravating factors.[16] DOJ leadership provided some guidance on DOJ's definition of "extraordinary," stating, "we

know 'extraordinary cooperation' when we see it, and the differences between 'full' and 'extraordinary' cooperation are perhaps more in degree than kind. To receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary."[17]

Additionally, the revised CEP now explicitly states that a company could receive a declination even with aggravating circumstances, provided that the company immediately self-discloses after learning of alleged misconduct, has effective compliance and internal accounting controls at the time of the misconduct and disclosure, and offers exceptional cooperation and remediation beyond the outlined factors.[18]

Where a criminal resolution is warranted for a company that voluntarily self-discloses, cooperates, and remediates, the revised CEP increases the cooperation credit ceiling to 75 percent, from 50 percent.[19] As for companies that fail to self-report, but fully cooperate and remediate, the revised CEP increases the maximum discount to 50 percent, from the previous max of 25 percent.[20] Importantly, DOJ emphasized the 50 percent discount will not become DOJ's standard practice.[21] Instead, it will be reserved for companies that truly distinguish themselves by showcasing exceptional cooperation and remediation.[22] Having a greater range of cooperation credit available will ensure that prosecutors consider distinctions among the nature of a company's cooperation and remediation and, for DOJ, hopefully incentivize those companies to go above and beyond in cooperating with the government.

### *The M&A Safe Harbor Policy*

DOJ's M&A Safe Harbor Policy was announced on October 4, 2023.[23] The purpose of this policy is to encourage acquiring companies to voluntarily disclose criminal misconduct uncovered during an M&A transaction.[24] Companies that disclose violations of U.S. law under this policy will receive a presumption of a declination by DOJ.[25] To be eligible, acquirors must:

1. Disclose wrongdoing discovered within six months of the acquisition's closing;[26]
2. Fully remediate the misconduct within one year of the closing date;[27] and

3. Pay any disgorgement, forfeiture, or restitution in accordance with voluntary self-disclosure policy.[28]

### Scope and Eligibility

The M&A Safe Harbor Policy applies to the acquiring company.[29] In announcing this new policy, DOJ emphasized that an acquiring company that fails to perform effective due diligence as part of the transaction or voluntarily self-disclose identified misconduct at its target will be subject to full successor liability.[30]

The time frame of the M&A Safe Harbor Policy is more precise than the CEP. To be eligible for the M&A Safe Harbor Policy, the acquiring company must voluntarily self-disclose misconduct to DOJ within six months of the close of the M&A transaction, regardless of whether the misconduct was discovered before or after the acquisition.[31] The acquiring company must then complete a full remediation of the misconduct within one year of closing.[32] The start of the six-month clock at closing incentivizes thorough pre-acquisition due diligence. Acquiring companies that discover conduct during diligence will have additional time to investigate and evaluate the conduct, an advantage over those that may only uncover misconduct after closing. Notably, the six-month disclosure period does not pertain to companies that uncovered misconduct concerning national security or ongoing or imminent harm; companies with this information are expected to come forward promptly.[33]

### Aggravating Circumstances

The presence of aggravating factors at the acquired company, such as the involvement of an executive, pervasive or egregious misconduct, or significant profits gained from the misconduct, will not affect the acquiring company's ability to receive a declination.[34] Additionally, any misconduct reported under the M&A Safe Harbor Policy will not be considered in future analyses of repeat offenses by the acquiring company.[35]

## Individual Whistleblower Programs

In addition to the increased incentives for corporate self-reporting, DOJ has also unveiled programs designed to incentivize individuals to disclose criminal conduct. Indeed, DOJ has rolled out

several whistleblower pilot programs during the first half of 2024, providing whistleblowers, who have criminal exposure, with NPAs in exchange for reporting new information about particular types of criminal conduct. However, the most successful new program provides significant financial rewards to individuals who call DOJ to flag corporate criminal misconduct—a potential game changer in the compliance and enforcement arena.

### *Southern District of New York Whistleblower Pilot Program*

The U.S. Attorney's Office for the Southern District of New York (SDNY) led the way with the first whistleblower program offering NPAs to culpable individuals who report certain criminal conduct (SDNY WB Pilot Program). The SDNY WB Pilot Program, announced January 10, 2024, and effectuated February 13, 2024, was launched to "encourage early and voluntary self-disclosure of criminal conduct by individual participants in certain non-violent offenses."[36] In particular, this program, which was designed to "proactively uncover criminal conduct," applies to "circumstances where an individual discloses to [SDNY] information regarding criminal conduct undertaken by or through public or private companies, exchanges, financial institutions, investment advisers, or investment funds involving fraud or corporate control failures or affecting market integrity, or criminal conduct involving state or local bribery or fraud relating to federal, state, or local funds."[37]

Under the SDNY WB Pilot Program, whistleblowers will be offered an NPA if the following six conditions are met:

1. The individual discloses new criminal information not previously known to authorities;
2. The individual discloses the information voluntarily and not in response to a government inquiry or preexisting duty to disclose;
3. The individual assists in prosecuting equally or more culpable individuals;
4. The individual "truthfully and completely" discloses all criminal conduct of which they are aware;
5. The individual is not a government official, law enforcement agent, or high-level company officer; and
6. The individual has no prior convictions or involvement in specific serious crimes.[38]

Even absent one or more of the stated requirements, prosecutors may, on a discretionary basis and with supervisory approval, offer an NPA in exchange for a whistleblower's information.[39] In determining whether to grant an individual a discretionary NPA, prosecutors consider factors such as the extent of public disclosure of the criminal conduct, voluntary disclosure by the individual, the individual's ability to provide assistance, completeness of disclosure, the individual's position of trust, adequacy of non-criminal sanctions, and the individual's criminal history.[40]

Regardless of whether an individual receives an NPA by meeting the enumerated criteria or through the prosecutor's discretion, any reporting individual who receives an NPA is required to forfeit any proceeds stemming from the individual's criminal misconduct.

### *Northern District of California Whistleblower Pilot Program*

Shortly after the SDNY announcement, the U.S. Attorney's Office for the Northern District of California (NDCA) launched its own whistleblower pilot program for culpable individuals, which took effect March 14, 2024 (NDCA WB Pilot Program).[41] Much like the SDNY WB Pilot Program, the NDCA WB Pilot Program "creates a strong incentive for wrongdoers to come forward, report crimes, and cooperate with [NDCA] in several critical areas—fraud, public corruption, and theft of trade secrets."[42]

The requirements for receiving an NPA under the NDCA WB Pilot Program largely echo those under the SDNY program, such as requiring the voluntary and truthful disclosure of new information and the ability and willingness to assist in the investigation of others. Moreover, like the SDNY WB Pilot Program, the NDCA WB Pilot Program disqualifies from NPAs particular government and corporate officials and those with a felony conviction or involvement in particular crimes.[43] Notably, and unique to the NDCA program, in requiring an individual's assistance in prosecuting others, the NDCA WB Pilot Program explicitly requires the individual to testify under oath where necessary or appropriate.[44]

Like SDNY prosecutors, NDCA prosecutors may similarly grant a discretionary NPA even absent the factors outlined in the NDCA Whistleblower Pilot Program.[45] Recipients of an NPA—whether pursuant to the above requirements or discretionary approval—must also forfeit proceeds involved in the individual's criminal misconduct.

### *DOJ Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals*

Not to be left out of the individual whistleblower party, in April 2024 DOJ's Criminal Division announced that it, too, was launching a pilot program on voluntary self-disclosures for culpable individuals with the hopes of obtaining information useful in "investigat[ing] and prosecut[ing] criminal conduct that might otherwise go undetected or be impossible to prove."[46] (DOJ WB Pilot Program). DOJ hopes that "in turn, [the DOJ WB Pilot Program] further encourage[s] companies to create compliance programs that help prevent, detect, and remediate misconduct and to report misconduct when it occurs."[47] The DOJ WB Pilot Program applies to the entirety of DOJ's Criminal Division and, aside from incentivizing and awarding individuals for coming forward, the program is also intended to "put pressure on everyone—including companies—to disclose misconduct as soon as they learn about it."[48]

DOJ WB Pilot Program is intended to complement existing DOJ policies and directives and will grant an NPA to individuals based on the following criteria:

1. Disclosure of original, non-public information on specific criminal activities to npa.pilot@usdoj.gov;
2. The information must relate to certain specified offenses involving:
    a. Financial institutions and fraud;
    b. Integrity of financial markets undertaken by certain financial institutions, by or through companies—either public or private—with 50 or more employees;
    c. Foreign corruption and bribery related to public or private companies;
    d. Health care fraud or illegal health care kickbacks by private or public companies with 50 or more employees;
    e. By or through companies with 50 or more employees related to fraud against the United States related to federally funded contracting; and
    f. Committed by or through companies related to bribe or kickback payments to domestic public officials.
3. Disclosure must be voluntary and made before any government inquiry and in the absence of any preexisting duty to disclose;

4. The disclosure must be truthful, complete, and include all relevant information;
5. The individual must agree to fully cooperate with DOJ investigations, including providing testimony and evidence;
6. The individual must agree to forfeit profits, pay restitution, and compensate victims;
7. The individual (a) has no prior involvement in violent or sexual offenses, no felony convictions, and no misconduct involving fraud or dishonesty and (b) is not a CEO, CFO, or publicly elected or appointed official.[49]

Separate and apart from the requirements above, prosecutors may also grant discretionary NPAs under certain circumstances, such as when an individual comes forward under the program but not all criteria are met. Such discretionary NPAs are granted in accordance with the Justice Manual and Criminal Division procedures.[50]

## Corporate Whistleblower Program

DOJ has also made clear it wants to incentivize reports from individuals who are aware of criminal misconduct but have had no role in the conduct. To that end, on March 7, 2024, DOJ announced its intention to launch a separate whistleblower pilot program to reward individuals who report significant corporate misconduct or financial wrongdoing (DOJ Corporate WB Pilot Program).[51] The program will follow in the footsteps of a similar Securities and Exchange Commission (SEC) whistleblower program (SEC WB Program) that was introduced in 2011, which has been responsible for a total of $1.9 billion in whistleblower awards since inception, with more than 18,000 tips in FY 2023 alone.[52]

The specific details of the program are still in development, however as part of the announcement of the program, DOJ previewed key criteria necessary to qualify for a reward. The criteria include:

1. The whistleblower must not have been involved in the disclosed criminal activity;
2. The whistleblower must be "the first in the door," bringing truthful information previously unknown to DOJ; and

3. There must not be other financial incentives for disclosure available to the whistleblower, such as under the qui tam provisions of the False Claims Act or another federal whistleblower program.[53]

DOJ previewed that any reward under the DOJ Corporate WB Pilot Program will be allotted only after all victims have been properly compensated. While the program is expected to apply to reports of any violations of federal law, DOJ has emphasized its use for reports on criminal abuses of the U.S. financial system. This may include corruption cases, including violations of the FCPA and the newly enacted Foreign Extortion Prevention Act, so long as these are matters not otherwise under the jurisdiction of the SEC WB Program. The stated intent of the DOJ Corporate WB Program is to fill gaps in the existing whistleblower program framework and promote good corporate citizenship.[54]

## Why Is DOJ Doing This?

This all-out whistleblower effort by DOJ is no coincidence. The rationale behind DOJ's unveiling of these programs is clear—prosecutors want help identifying and prosecuting corporate criminal misconduct which has become increasingly more difficult. This struggle to prosecute criminal cases is reflected in the fact that complex criminal corporate prosecutions are generally down across DOJ. And reasons for this downturn include the fact that the good evidence is harder for prosecutors to find.

### Corporate Prosecution Numbers Are Down

For the past several years, DOJ has been outspoken about the fact that it is laser focused on investigating and prosecuting corporate crime. In speech after speech, DOJ leadership has repeated the message that prosecuting corporate misconduct is a top priority for the nation's prosecutors.[55] Despite these words, the number of corporate criminal prosecutions over the past few years has seen a general decline.

The DOJ Criminal Division's Fraud Section is the global leader in investigating and prosecuting complex white-collar crimes.[56] The Fraud Section, comprised of about 160 prosecutors, has three

litigating units, each with a different mandate: the Health Care Fraud Unit (prosecuting health care fraud), the Market Integrity and Major Frauds Unit (prosecuting complex securities, commodities, cryptocurrency, and other financial fraud and market manipulation cases), and the Foreign Corrupt Practices Act Unit (prosecuting foreign bribery cases). Following a high water mark in 2019, the number of corporate criminal prosecutions brought by the Fraud Section has been consistently down year over year. The year 2019 saw a total of 15 corporate prosecutions that resulted in almost $3 billion in monetary penalties owed to U.S. authorities.[57] The year 2020 saw a decrease in the total number of corporate prosecutions, 13, but in an increase in the total monetary penalties owed in the United States, $4.4 billion.[58] The total number of corporate prosecutions in 2021 fell to 9, with total penalties around U.S. $3 billion.[59] As for the past two years, the numbers of corporate prosecutions remained low with 7 in 2022 and 8 in 2023.[60] And the total value of associated monetary penalties for those two years also fell to $1.64 billion and $641 million, respectively.

And it is not just DOJ's Fraud Section that has seen a dip in corporate prosecutorial action. According to statistics released by the U.S. Sentencing Commission—which tracks sentencing statistics from each judicial circuit, the districts within each judicial circuit, and the districts within each state—the number of "organizational offenders" sentenced nationwide in the federal system has been down from a high mark in 2019.[61]

Why are the numbers down? Three reasons: COVID-19, technological advancements, and data privacy laws.

### *COVID-19*

It is undeniable that the COVID-19 pandemic had a significant impact on all of us and the way in which we conduct our lives. The impact to federal prosecutors was no different. The way in which prosecutors best investigate cases is by pounding the pavement, meeting face to face with witnesses and targets, gathering evidence through interviews and reviewing evidence with federal law enforcement agents, and in the case of transnational crime, traveling overseas to coordinate with foreign law enforcement agencies on evidence sharing. The COVID-19 pandemic stopped all of this in its tracks—and did so for well over a year. It is unsurprising

that the dip in corporate prosecutions reflected the timeline of the pandemic, falling off a cliff after 2020.

### *Technological Advancements*

While the pandemic certainly had a significant impact, now that most of the associated restrictions are in the rearview mirror and prosecutors are again able to travel, there are other more systematic reasons cases are down. Technological innovation—including the proliferation of ephemeral messaging platforms and more sophisticated payment structures using off-shore bank accounts, digital banks, and cryptocurrencies—has certainly played a significant part in complicating the mission of U.S. prosecutors.

Long gone are the days where conspirators used emails as their main method of communication about a criminal scheme. These communications have moved to platforms like Signal, WhatsApp, and WeChat. In fact, in many parts of the world, ephemeral messaging platforms are the main ways in which people communicate. In Brazil, WhatsApp is the preferred communication application for a majority of the population.[62] In China, some statistics indicate that 80 percent of the population communicates by WeChat.[63]

The issue for prosecutors is that content from these platforms is either encrypted or disappears soon after being sent, or both. In the case of an email account, the entirety of its content may be preserved by the email provider (e.g., Google), and with a search warrant prosecutors can get their hands on those communications. However, the message content for ephemeral messaging platforms is not stored with the providers—a search warrant to WhatsApp won't work.[64]

In recognition of the value of the evidence contained in these platforms, and a desire to incentivize companies to help DOJ preserve this hard-to-get evidence, DOJ declared that companies should have data preservation policies in place that would capture their employees' use of these applications.[65] And in recent corporate resolutions, DOJ has provided additional cooperation credit for those companies who were able to provide employee cell phone data to prosecutors.[66]

As it relates to financial transactions, technological advancements have made it more difficult for prosecutors to follow the money. Off-shore banking has long been utilized by fraudsters to move money through financial havens and fiscal paradises with limited regulation and oversight. Yet despite global efforts

to combat money laundering, off-shore banking remains a preferred method for fraudsters to move illicit funds. While there are methods for prosecutors to get overseas financial records through requests pursuant to Mutual Legal Assistance Treaties or via correspondent banking records domestically, these methods often yield slow and incomplete results. And, if the records are held within a country that does not cooperate with U.S. authorities, they may be impossible to obtain. The proliferation of digital banks and cryptocurrencies have added additional layers of complexity to the equation. Customers of digital banks may be harder to track down or verify. As for cryptocurrencies, while investigators can utilize blockchain analysis to connect the digital dots, such an effort is far more resource intensive and time consuming than simply looking at a wire transaction record from a bank.

While DOJ is trying to figure out ways to get their hands on the key communications and financial records, there is no question that recent technological advancements have moved the needle and made prosecutors' jobs more difficult.

### *Data Privacy Laws*

Further complicating the process of gathering evidence, especially evidence overseas, are foreign data privacy laws and blocking statutes. The two most relevant, and most problematic from a U.S. prosecutor's perspective, are those in the European Union and the People's Republic of China (PRC). These laws make it difficult for DOJ to obtain evidence on crimes with an international nexus. And in certain instances, the laws criminalize companies who provide data from these jurisdictions to U.S. prosecutors.

For example, China's International Criminal Judicial Assistance Law directly affects DOJ investigations as it prohibits individuals and organizations in China from providing "criminal judicial assistance" to DOJ without approval from Chinese authorities.[67] Additionally, there are data and cybersecurity security laws in China with stringent requirements for data protection, network security, and data storage which further complicate things. In addition to these laws making cross-border enforcement more challenging for DOJ, they also introduce challenges for companies based in China, or with operations therein, that wish to cooperate or self-report misconduct. Even if companies wish to self-report to claim cooperation credit or a declination, they may risk penalties for violating PRC prohibitions.

In the European Union, data privacy laws broadly govern the processing and transfer of personal data. DOJ prosecutors and companies cooperating in DOJ investigations are not excused from complying with EU privacy laws. While these laws make it more difficult for DOJ, they also make it more difficult for companies when deciding to self-report. To avoid violating EU privacy laws during investigations, companies should hold open dialogues with DOJ to avoid non-cooperation penalties. In contrast to the PRC, DOJ prosecutors are generally aware of how EU privacy laws impact their investigations and are better able to work within these restrictions cooperatively with companies. However, in response to both EU and PRC laws, companies should encourage the regulators to discuss directly with each other so that companies receive DOJ whistleblower benefits and avoid EU and PRC penalties.

## What Does It All Mean for Companies?

Companies need to be thoughtful and proactive in responding to this new whistleblower landscape. For many companies, deciding whether to report misconduct has previously turned on how likely it was that DOJ would discover the misconduct on its own. With these new programs, the calculus in making this decision has changed dramatically. To get out in front of potential issues, it's essential that companies review their existing compliance programs, codes of conduct, and corporate training programs to promote compliance and prevent issues from arising in the first place. And when misconduct is identified, companies should be ready to engage counsel, understand the options, and make quick decisions. DOJ will be eagerly waiting whoever decides to call first.

### Robust Compliance Programs

The first line of defense against corporate wrongdoing is a robust and effective internal compliance program. Now, more than ever, companies should ensure they have updated policies and procedures in place, as well as effective training to reinforce those policies and procedures, to make every reasonable effort to stay on the right side of the law. The reality is that even the best programs do not guarantee compliance. Given the DOJ Corporate WB Pilot

Program, companies should start to think creatively about how they can encourage employees to use their internal reporting hotline in the first instance. Getting employees to report potential violations internally may allow the company to properly assess the best path forward, as opposed to being engulfed in an investigation with no opportunity to first independently assess the scope of the problem or to decide whether or not to self-report.

For those companies engaging in M&A transactions, they should design and maintain robust corporate compliance programs that enable them to:

1. Conduct thorough risk-based due diligence;
2. Ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and other applicable laws apply as quickly as is practicable;
3. Train the directors, officers, and employees;
4. Conduct a risk-based audit of all newly acquired entities as quickly as practicable; and
5. Expeditiously analyze the potential benefits of disclosing misconduct discovered as part of its due diligence.

## Enhanced Internal Reporting Mechanisms

Companies need to ensure that their internal reporting mechanisms are effective and utilized, and that allegations are tracked and investigated when appropriate. To do that, companies need to have a strong culture of ethics and compliance that is clearly communicated throughout their organization. As it relates to their internal reporting hotlines, companies need to broadly promote the existence of those hotlines, ensure employees' reports are anonymous and confidential, and make certain that a system is in place to track, assess, and where necessary, investigate reports.

However, in this new whistleblower landscape, even that may not be enough. Now that DOJ is dangling financial incentives and NPAs to encourage employees to call, companies will need to think creatively about how to counter-incentivize employees to use internal company whistleblower hotlines. The providing of rewards and incentive programs to employees who make good faith internal reports may motivate employees to call a company's internal hotline before calling DOJ.

### Companies Need to Engage Counsel and Make Self-Disclosure Decision Early

If a company decides to self-report, they should do so quickly. The decision to self-report is something that needs to happen early and quickly given the increased likelihood that DOJ will find out about misconduct from individuals. Under the revised CEP, a company can only qualify for the full benefits of the voluntary self-disclosure program if the conduct they report is entirely new to DOJ. But after the introduction of all of these new programs that incentivize individuals within companies to call DOJ, the probability that an employee has already tipped off DOJ is much higher. Accordingly, the earlier a company can make the determination whether or not to self-disclose, the better. The timeline of a company's decision to self-report is weighted considerably by prosecutors when assessing cooperation and determining benefits and declinations. Companies should understand, in consultation with experienced counsel, that when they make a decision not to self-disclose early on, they will likely be forfeiting many potential benefits should DOJ become aware of the conduct elsewhere.

## Notes

* The authors, attorneys with K&L Gates LLP, may be contacted at michael.harper@klgates.com, christoher.nasson@klgates.com, david.rybicki@klgates.com, neil.smith@klgates.com, and hayley.trahan-liptak@klgates.com, respectively. The authors wish to thank Sarah T. Hall and Sophia A. Khan (K&L Gates associates) and Madeline F. Mehra (K&L Gates summer associate) for their contributions to this article.

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2. Leslie R. Caldwell, Assistant Attorney General, U.S. Dep't of Just., Criminal Division Launches New FCPA Pilot Program, U.S. Dep't of Just. (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

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5. Justice Manual, supra note 4.

6. Id.

7. Id.

8. Letter of Declination from Glenn S. Leon, U.S. Dep't of Just. Crim. Div., to Proterial Cable America, Inc. (Apr. 12, 2024), https://www.justice.gov/criminal/media/1348111/dl?inline.

9. Id.

10. Id. (emphasis added).

11. Letter and Non-Prosecution Agreement from Glenn S. Leon, U.S. Dep't of Just. Crim. Div., to Albemarle Corporation (Sept. 28, 2023), https://www.justice.gov/opa/file/1316796/dl?inline.

12. Id.

13. Id.

14. Justice Manual, supra note 4.

15. John P. Cronan, Principal Deputy Assistant Attorney General, U.S. Dep't of Just., Speech at Practising Law Institute (Nov. 28, 2018), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-john-p-cronan-delivers-remarks-practising-law.

16. Justice Manual, supra note 4.

17. Polite, supra note 1.

18. Justice Manual, supra note 4.

19. Notably, the new 75% ceiling is *not* available to criminal recidivists. Id.

20. The 50% discount is not available for criminal recidivists. Id.

21. Polite, supra note 1.

22. Id.

23. Lisa O. Monaco, Deputy Attorney General, U.S. Dep't of Just., Speech at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute: Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions (Oct. 4, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self.

24. Id.

25. Id.

26. Deputy Attorney General Monaco (DAG Monaco) indicated that the six-month timeline is subject to a "reasonableness analysis" because deals differ in structure, size, and complexity. Id.

27. DAG Monaco also indicated that the one-year baseline is also subject to a similar "reasonableness analysis." Id.

28. Id.

29. Id.

30. Id.

31. Id.

32. Id.

33. Id. ("[C]ompanies that detect misconduct threatening national security or involving ongoing or imminent harm can't wait for a deadline to self-disclose.").

34. Id.

35. Id. ("[A]ny misconduct disclosed under the Safe Harbor Policy will not be factored into future recidivist analysis for the acquiring company.").

36. SDNY Whistleblower Pilot Program, U.S. Atty's Off. S. Dist. of New York (Feb. 13, 2024), https://www.justice.gov/d9/2024-05/sdny_wb_policy_effective_2-13-24.pdf (hereinafter SDNY WB Pilot Program).

37. The SDNY WB Pilot Program does not apply to FCPA violations, federal or state campaign financing law violations, federal patronage crimes, corruption of the electoral process, bribery of federal officials, federal tax offenses, and federal environmental crimes. Press Release, U.S. Atty's Off. S. Dist. of New York, U.S. Attorney Williams Announces Enforcement Priorities and SDNY Whistleblower Pilot Program (Jan. 10, 2024), https://www.justice.gov/usao-sdny/pr/us-attorney-williams-announces-enforcement-priorities-and-sdny-whistleblower-pilot; SDNY WB Pilot Program, supra note 36.

38. SDNY WB Pilot Program, supra note 36.

39. Id.

40. Id.

41. Press Release, U.S. Atty's Off. N. Dist. of California, U.S. Attorney Ismail Ramsey Announces Policies Underlying Whistleblower Pilot Program, (Mar. 18, 2024), https://www.justice.gov/usao-ndca/pr/us-attorney-ismail-ramsey-announces-policies-underlying-whistleblower-pilot-program (hereinafter NDCA WB Pilot Program).

42. Id.

43. Compare SDNY WB Pilot Program, supra note 36, at 1-2, with NDCA WB Pilot Program, U.S. Dep't of Just. 1-2 (Mar. 14, 2024), https://www.justice.gov/d9/2024-03/ndca_whistleblower_pilot_program.pdf.

44. Id.

45. NDCA WB Pilot Program, supra note 43, at 2; see SDNY Whistleblower Pilot Program, supra at 36.

46. The Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals, U.S. Dep't of Just. (updated Apr. 15, 2024), https://www.justice.gov/criminal/criminal-division-pilot-program-voluntary-self-disclosures-individuals.

47. Id.

48. Criminal Division's Voluntary Self-Disclosures Pilot Program for Individuals, U.S. Dep't of Just. (Apr. 22, 2024), https://www.justice.gov/opa/blog/criminal-divisions-voluntary-self-disclosures-pilot-program-individuals.

49. The Criminal Division's Pilot Program on Voluntary Self-Disclosures for Individuals, supra note 46.

50. Id.

51. Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime, U.S. Dep't of Just. (Mar. 7, 2024) (hereinafter DAG Monaco Keynote Remarks at the ABA), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

52. Securities and Exchange Commission Office of the Whistleblower Annual Report to Congress for Fiscal Year 2023, SEC (Nov. 14, 2023), https://www.sec.gov/files/fy23-annual-report.pdf.

53. DAG Monaco Keynote Remarks at the ABA, supra note 51.

54. Id.

55. See Lisa O. Monaco, Deputy Attorney General, U.S. Dep't of Just., Speech on Corporate Criminal Enforcement (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement ("our top priority for corporate criminal enforcement: going after individuals who commit and profit from corporate crime"); Lisa O. Monaco, Deputy Attorney General, U.S. Dep't of Just., Speech at ABA National Institute on White Collar Crime (Mar. 2, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national ("an enduring Department of Justice priority: advancing the fight against corporate crime"); Kenneth A. Polite Jr., Assistant Attorney General, U.S. Dep't of Just., Speech at ABA Institute on White Collar Crime (Mar. 3, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national ("department's first priority in corporate criminal cases is to prosecute the individuals who commit and profit from corporate malfeasance"); Merrick B. Garland, Attorney General, U.S. Dep't of Just., Speech at ABA Institute on White Collar Crime (Mar. 3, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime ("the prosecution of corporate crime is a Justice Department priority").

56. Fraud Section, U.S. Dep't of Just., https://www.justice.gov/criminal/criminal-fraud.

57. U.S. Dep't of Just., Fraud Section Year in Review 5 (2019), https://www.justice.gov/criminal/criminal-fraud/file/1245236/dl.

58. U.S. Dep't of Just., Fraud Section Year in Review 7 (2020), https://www.justice.gov/criminal/criminal-fraud/file/1370171/dl#:~:text=In%202020%2C%20the%20Fraud%20Section,Fraud%20and%20Prescription%20Opioid%20Takedowns (one reason the total global monetary amount sharply increased in 2020 was because of two massive corporate resolutions—Airbus and Goldman Sachs).

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62. Tiago Bianchi, WhatsApp in Brazil—Statistics & Facts, STATISTA (Jan. 10, 2024), https://www.statista.com/topics/7731/whatsapp-in-brazil/#topicOverview.

63. Lai Lin Thomala, WeChat—Statistics & Facts, Statista (May 15, 2024), https://www.statista.com/topics/9085/wechat/#editorsPicks.

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65. U.S. Dep't of Just., Evaluation of Corporate Compliance Programs (updated March 2023), https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl.

66. Letter and Non-Prosecution Agreement from Glenn S. Leon, U.S. Dep't of Just. Crim. Div., to Albemarle Corporation (Sept. 28, 2023), https://www.justice.gov/opa/media/1332661/dl?inline (one of the reasons cited for DOJ giving Albermarle a 40% discount for cooperation credit was "imaging the phones of relevant custodians at the beginning of the Company's internal investigation, thus preserving relevant and highly probative business communications sent on mobile messaging applications"); Plea Agreement, US v. Gunvor, No. 24-85 (ENV) (E.D.N.Y. Mar. 1, 2024), https://www.justice.gov/opa/media/1341011/dl?inline (DOJ cites Gunvor's "imaging the phones of relevant custodians at the beginning of the Defendant's internal investigation, thus preserving business communications sent on mobile messaging applications" as a reason for the 25% discount).

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