

ELİG GÜRKAYNAK

Attorneys at Law

Standards of Corporate Compliance Programs Based on Recent Trends of the DOJ

Authors: Gönenç Gürkaynak, Esq., Ceren Yıldız, Nazlı Gürün and Gamze Yalçın, ELIG Gürkaynak Attorneys-at-Law

Admittedly, all corporate compliance professionals, regardless of the country they practice in, might at one point find themselves having to monitor extra-territorial applicability of the United States laws and regulations, in the likely event that they are dealing with a multinational corporation. In this sense, it might be beneficial to adopt a holistic approach and look into the recent practices and publications of the U.S. enforcement authority, the Department of Justice (“**DOJ**”), rather than merely dwelling on the relevant legislation.

The DOJ is tasked with enforcement of U.S. laws (including those with extraterritorial applicability) and actively publishes press releases on enforcement actions, texts of the speeches given by officials in the DOJ, and publicly retains and revises advisory guidelines for prosecutors who are investigating corporate-level wrongdoings.

Below is a roadmap of standards of good corporate compliance programs as can be gleaned from DOJ’s recent practices and publications.

Further Revisions to Corporate Criminal Enforcement Policies (also known as the “Monaco Memo”) Following Discussions with Corporate Crime Advisory Group

Lisa Monaco, the DOJ’s Deputy Attorney, issued a memorandum on the DOJ’s Corporate Criminal Enforcement Policy (“Memorandum”) on September 15, 2022.¹

The Memorandum provides guidance on how prosecutors should ensure both individual and corporate accountability, and suggests that, going forward, the DOJ will take a more nuanced approach on (i) cooperation credit that can be gained by “voluntary and timely disclosure of all relevant, non-privileged facts” learned through internal investigations, (ii) factors to assess when determining whether to forego a prosecution in the U.S. if it has been already prosecuted in a foreign jurisdiction, (iii) strength of a corporation’s existing compliance program, (iv) appointment of independent monitors, including their selection and the appropriate scope of a monitor's work, (v) transparency in criminal enforcement actions.

¹<https://www.justice.gov/opa/speech/file/1535301/download> (Last accessed on January 26, 2023)

- Corporate Cooperation

Companies seeking credit for cooperation are expected to timely preserve, collect, and disclose relevant documents which may be located both within the United States and overseas. On this point, it is worthy to note that the Memorandum recognizes that data protection and privacy laws of foreign countries may restrict production of documents located overseas. In such a case, the cooperating corporation bears the burden of establishing the existence of any restriction on production and of identifying reasonable alternatives to provide the requested facts and evidence, and is expected to work diligently to identify all available legal bases to preserve, collect, and produce such documents, data, and other evidence expeditiously.

The Memorandum also stipulates that prosecutors should provide credit to corporations that find ways to navigate issues of foreign law and produce such records. However, it states that where it is evident that the corporation is using data protection laws of foreign countries as a way to shield misconduct and investigation, DOJ must adopt a contrary method and use it as an adverse inference as to the cooperation's cooperation.

- Company Policies on Use of Personal Devices and Third Party Applications

The Memorandum recognizes that information stored in personal electronic devices and third party applications may be critical for investigations. As part of evaluating a corporation's policies and mechanisms for identifying, reporting, investigating, and remediating potential violations of law, the DOJ advises that prosecutors should consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved.

- Foreign Prosecutions

Currently, existence of a foreign prosecution may provide grounds to forego federal prosecution. In this sense the Memorandum introduces a new ground by establishing criteria for determining whether such foreign prosecution can be recognized in the United States. The Memorandum sets out that the prosecutors should consider the following factors, among others: (i) the strength of the other jurisdiction's interest in the prosecution, (ii) the other jurisdiction's ability and willingness to prosecute effectively, and (iii) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction.

- Strength of Compliance Programs

The Memorandum provides that prosecutors should evaluate a corporation's compliance program as a factor in determining the appropriate terms for a corporate resolution, including whether an independent compliance monitor is warranted. It explains that prosecutors should

assess the adequacy and effectiveness of the corporation's compliance program at two points in time: (i) the time of the offense, and (ii) the time of a charging decision.

The Memorandum also sets forth an exhaustive list of factors to consider when determining whether prosecutors may require use of independent compliance monitors as part of a corporate criminal resolution.

- Transparency in Corporate Criminal Enforcement Actions

The Memorandum requires that DOJ's agreements with corporations be published on DOJ's website (absent exceptional circumstances) by including certain details such as (i) an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement, (ii) a statement of relevant considerations that explains the DOJ's reasons for entering into the agreement, (iii) cooperation credit received, if any, (iv) corporation's history of misconduct, (v) the state of the corporation's compliance program at the time of the underlying criminal conduct and the time of the resolution, and (vi) the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable.

Speech of Deputy Attorney General Lisa Monaco of September 15, 2022

On the same day the Memorandum was published, DOJ's Deputy Attorney General clarified their revised position through a speech.² Some of the most important points made, which expanded on the Memorandum, were as follows:

- Undue or intentional delay in producing information or documents, particularly those that show individual culpability will result in the reduction or denial of corporation credit.
- If a company has prior history of misconduct, criminal resolutions entered between the DOJ and such company that occurred more than ten years before the conduct currently under investigation, and civil or regulatory resolutions that took place more than five years before the current conduct will be accorded less weight.
- Every component within the DOJ that prosecutes corporate crime must have a program that incentivizes voluntary self-disclosure.
- Companies may employ the "carrots and sticks" approach within their discrete corporate policies, by introducing "clawback provisions", "escrowing of compensation", and "other ways to financially hold individuals accountable for criminal misconduct" of the company.

Four recent enforcement actions based on violation of corporate governance rules

- Lafarge SA

² <https://www.justice.gov/opa/speech/file/1535301/download> (Last accessed on January 26, 2023)

LaFarge SA, a France-based cement company pled guilty to conspiring to provide material resources and support to U.S. designated terrorist organizations and agreed to pay \$778 million via a resolution.

According to the DOJ's press release, LaFarge SA's senior executives participated in a scheme wherein they concealed payments to terrorist organizations, demonstrating a failure of its corporate culture. Additionally, LaFarge SA also lacked a robust anti-corruption compliance program, including an adequate anti-corruption policy and employee training. Further, LaFarge failed to monitor business communications on non-firm devices and communications platforms which employees used to discuss and execute the scheme.

- Stericycle Inc.

Stericycle Inc., an international waste management network, agreed to pay \$84 million to resolve parallel investigations by authorities in the U.S. and in Brazil into the bribery of foreign government officials in Brazil, Mexico, and Argentina. The resolution reached with Stericycle was based on a number of factors, including, among others, the company's failure to voluntarily and timely disclose the conduct that triggered the investigation and the nature, seriousness, and pervasiveness of the offense. Stericycle received full credit for its cooperation with the department's investigation and engaged in extensive remedial measures.

- Glencore International A.G.

Swiss based mining firm Glencore International A.G. and Glencore Ltd., agreed to pay over \$1.1 billion to resolve the government's investigations into violations of the Foreign Corrupt Practices Act ("FCPA"). According to DOJ's press release, Glencore and its subsidiaries caused approximately \$79.6 million in payments to be made to intermediary companies in order to secure improper advantages to obtain and retain business with state-owned and state-controlled entities in the West African countries.

Glencore did not receive full credit for cooperation and remediation, because it did not consistently demonstrate a commitment to full cooperation, it was delayed in producing relevant evidence, and it did not timely and appropriately remediate with respect to disciplining certain employees involved in the misconduct. Although Glencore has taken remedial measures, some of the compliance enhancements were new and had not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future. As a result, DOJ appointed an independent compliance monitor for a term of three years.

- SAP SE, a global software company

SAP SE, a software company based in Walldorf, Germany, agreed to pay more than \$8 million as part of a global resolution with the DOJ over voluntary disclosures the company

made wherein it acknowledged violations of the Export Administration Regulations and the Iranian Transactions and Sanctions Regulations of the U.S.

DOJ reached its resolution with the company based upon SAP's voluntary self-disclosure upon extensive internal investigation and cooperation of over a three-year period. During this time, SAP worked with prosecutors and investigators, producing thousands of translated documents, answering inquiries and making foreign-based employees available for interviews in a mutually agreed upon overseas location. SAP also timely remediated and implemented significant changes to its export compliance and sanctions program.

Article Contact: Gönenç Gürkaynak, Esq.

E-mail: gonenc.gurkaynak@elig.com

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