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KAREN WOODY

"The DOJ wants and needs the culture of compliance and the voluntary self-disclosure regime in order to have the resources to take on major complex corporate crimes. Yet the balance between government and cooperating companies is a precarious one; it may be a house of cards that needs to be intact for both sides to come out ahead."

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DOJ's Unrelenting Push for Corporate Cooperation

Rewards, sentencing reductions, and demanded loyalty reveal the government's expectation of voluntary corporate disclosure

KAREN WOODY

Introduction

Over the last three years, Deputy Attorney General Lisa Monaco has announced a number of new policies and procedures for DOJ prosecutors. These recent DOJ policies double down on the notion that companies must be swift in voluntarily disclosing violations, quick to point fingers at any executives involved in prohibited activity, and must produce to the government potentially damning documents as quickly as possible upon discovery. The increased pressure brought on by the newer DOJ policies, in addition to the most recent whistleblower program announced in March 2024, creates spillover effects on corporations debating whether to voluntarily disclose potential violations.

THE HISTORY OF CORPORATE COOPERATION IN CRIMINAL MATTERS

The assumption of corporate cooperation in federal prosecutions has existed for at least three decades. In the 1990s, the federal government gradually shifted its corporate criminal prosecutorial tactics to a practice that incorporated cooperation as federal policy. This policy shift was fueled primarily by the United States Sentencing Commission and the DOJ.

In 1991, the United States Sentencing Commission adopted the first Sentencing Guidelines for Organizations. Uniformity and predictability were the goals of the Guidelines, given that corporations often received varying sentences for similar conduct. Pragmatically, for corporations, the Sentencing Guidelines and standardized sentences represented a heightened risk of increased punishment because corporations often had previously benefited from sentencing disparities. The Guidelines incentivized companies to detect and deter criminal conduct of their employees because they afforded companies a reduction in corporate fines if the company could show it had established effective programs or systems to prevent criminal wrongdoing.

In the era of cooperation sparked by the Sentencing Guidelines, the DOJ began to issue memoranda establishing guidelines for prosecutors investigating and charging corporations for misconduct. The memoranda typically were promulgated by the then-current Deputy Attorney General. The criteria for cooperation and the level of aggressiveness taken by the DOJ have varied among the Deputy Attorneys General. However, there remains a common theme across all of the Memoranda: corporations that cooperate with the government can expect to receive favorable deals and can avoid prosecution.

RECENT DOJ POLICIES AND PROGRAMS

The current DOJ leadership has been prolific in establishing new, and often stricter, procedures for corporations being investigated by the U.S. government. The gist of these policies have been announced in a Memorandum from Deputy Attorney General Monaco in 2021 outlining more comprehensive procedures for cooperation credit; a subsequent Memorandum from Deputy Attorney General Monaco in 2022; a January 2023 speech by then-Assistant Attorney General Kenneth Polite updating the Corporate Enforcement Program; a March 2023 speech by Deputy Attorney General Monaco announcing new voluntary disclosure procedures and executive clawback measures; and a March 2024 speech by Deputy Attorney General Monaco rolling out a whistleblower bounty program at the DOJ.

Each of these new policies underscores the ultimate priority of the DOJ: timely voluntary disclosure by corporations. In addition to timeliness, DOJ policies also emphasize the importance of thoroughness in identifying culpable individuals. In fact, the 2022 Monaco Memo stated that holding individuals accountable is the paramount goal of the Department's investigation and prosecution of corporations.What exactly does "timeliness" mean in the context of corporate cooperation? As stated in the 2021 Monaco Memo, companies must provide all relevant, nonprivileged facts in order to receive cooperation credit. The 2022 Monaco Memo added that the disclosures must be "swift and without delay." Further, "prosecutors will consider, for example, whether a company promptly notified prosecutors of particularly relevant information *once it was discovered,* or if the company instead delayed disclosure in a manner that inhibited the government's

investigation." This statement was coupled with the threat that "[c]ompanies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit."

In a speech accompanying the release of the 2022 Monaco Memo, Deputy Attorney GEneral Monaco put the timeliness requirement more bluntly:

> If a cooperating company discovers hot documents or evidence, *its first reaction should be to notify the prosecutors*. This requirement is *in addition* to prior guidance that corporations must provide all relevant, non-privileged facts about individual misconduct to receive any cooperation credit.

(Emphasis added). A few months after the promulgation of the 2022 Monaco Memo, Assistant Attorney General Polite announced changes to the FCPA Corporate Enforcement Program (CEP), and sought to add clarity around the value proposition of voluntary self-disclosure.

Under the revised CEP, companies may be able to receive a declination even if aggravating factors are present. This is a change from the previous CEP which disqualified from a declination any company that had an aggravating factor, such as a recidivist company. Thus, under the revised CEP, although a company will not qualify for a *presumption* of a declination if aggravating circumstances are present, prosecutors may nonetheless determine that a declination is an appropriate outcome if the company "demonstrates to the Criminal Division that it has met all of the following factors:

- The voluntary self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct;
- At the time of the misconduct and disclosure, the company had an effective compliance program and system of internal accounting controls, which enabled the identification of the misconduct and led to the company's voluntary self-disclosure; and
- The company provided *extraordinary* cooperation with the Department's investigation and undertook *extraordinary* remediation that exceeds the respective factors listed herein.

(Emphasis added). If all three factors listed are present, the Criminal Division will recommend at least a 50% percent reduction from the Sentencing Guidelines, and up to a 75% reduction. The case for recidivist companies, however, is different. Polite's speech underscored that recidivist companies' reduction will "generally not be from the low end of the fine range" and that "prosecutors will have discretion to determine the starting point within the Guidelines range." That said, Polite reiterated that this overall revision is a "significant increase" from the previous *maximum* reduction of 50% off the Guidelines range.

What happens if a company does not voluntarily self-disclose, or is "scooped" before getting to the DOJ? The revised CEP states that such a company can avail itself of a 50% reduction in the low end of the Guidelines range, provided the company cooperates in a timely manner and appropriately remediates the issue. After laying out the carrot, Assistant Attorney General Polite reminded corporations of the stick, stating: "every company starts at zero cooperation credit and must earn it based on the parameters and factors outlined in the CEP. This is not a race to the bottom. A reduction of 50% will not be the new norm; it will be reserved for companies that truly distinguish themselves and demonstrate *extraordinary* cooperation and remediation." (Emphasis added).

Assistant Attorney General Polite must have known that most attorneys in the defense bar, as well as in-house counsel, would question what he meant by "extraordinary" cooperation, because he continued in his speech by stating that the differences between "full" and "extraordinary" cooperation are "perhaps more in degree than in kind." Further, "[t]o receive credit for extraordinary cooperation, companies must go above and beyond the criteria for full cooperation set [out? forth?] in our policies—not just run of the mill, or even gold-standard cooperation, but truly extraordinary.... And of course, the facts and circumstances of each case will be unique."

The themes from Assistant Attorney General Polite's speech echoed those of the other recent DOJ policies: timeliness/speed; *extraordinary* cooperation; and individual accountability.

Finally, in March 2024, Deputy Attorney General Monaco announced in a speech at the ABA White Collar Crime Annual Conference a new whistleblower bounty program. Under the whistleblower pilot program, individuals will be eligible to receive payment if they discover and report "significant corporate or financial misconduct" of which the DOJ was previously unaware. In such a case, "the individual could qualify to receive a portion of the resulting forfeiture" as a reward.

Deputy Attorney General Monaco's speech laid out some of the parameters for the program, including: (1) that whistleblowers will be paid only after all victims are properly compensated; (2) the whistleblower cannot have been involved in the criminal activity; (3) the bounty program applies only in cases where there is no existing financial disclosure incentive, such as in a False Claims Act *qui tam* action.

The DOJ continues to emphasize the importance of companies' implementing an effective corporate compliance program, including that companies create a mechanism for employees to confidentially report misconduct. However, as companies continue to invest in these internal channels and protect whistleblowers who use them, the DOJ's new program creates challenges for companies to encourage their employees to report concerns internally instead of to DOJ given the potential for monetary payouts under DOJ's new program.

IMPLICATIONS OF DOJ POLICIES AND PRESSURES

Attorney-Client Privilege. Importantly, DOJ does not force waiver of attorney-client privilege under current DOJ cooperation policy, in contrast to earlier eras of DOJ prosecution policies. However, the push for real-time disclosure and "extraordinary" cooperation (above and beyond "full cooperation") seems to be a wink by the DOJ that waivers of attorney-client privilege would be "seen favorably." If nothing else, the tone of the recent DOJ policies suggests that a "culture of waiver" is being established implicitly.

The message expressed in Deputy Attorney General Monaco's 2022 Memorandum and accompanying speech was clear – a corporation's "first call" upon discovering a hot document should be to the government.

Nevertheless, a culture in which a "first call" is not to a company attorney but instead to the government is arguably *beyond* a culture of waiver --- it is side-stepping legal advice entirely, thereby eviscerating the functional role of defense counsel, be it in-house or outside, and creating significant risk for both the company and the individuals who work for the company.

When will the demand for "extraordinary" cooperation become a soft requirement for waiver? It is possible that the issue will never get to the courts. Such an outcome would be likely only when an individual, who would be willing to take these matters to trial because of the real threat of incarceration, was implicated for the effective waiver, much like the defendants at KPMG in the *United States v. Stein* litigation. *See, e.g., United States v. Stein,* 541 F.3d 130 (2d Cir. 2008).

Of course, waiver of attorney-client privilege raises issues for the firm; even more, waiver has significant implications for individuals inside the firm if incriminating evidence is produced as a result. This is not incidental to DOJ policy but part of the design; the policy emphasizes that individuals must be held accountable for any illegal acts. But individuals in this context could be operating with one hand tied behind their backs because their employer could be turning over incriminating documents and interviews that help the government make a criminal case against them as individuals.

Ethical Concerns. While real-time disclosure may not be as obvious a danger as treading upon the sacrosanct attorney-client privilege, real-time disclosure of documents and other materials is effectively sidestepping any attempt or availability of providing both a privilege review and potentially creating a defense strategy. It is the effective deputization of in-house and outside defense counsel. According to the Monaco Speech, "strategization" by corporations will be deemed un-cooperative. Given this statement, what then is the role of defense counsel at all? This question raises concerns of the ethical duties of attorneys who may simply be pass-through agents to the government, risking consequences to both the corporate client and the individuals employed there. *See* Benjamin Gruenstein & Rebecca Schindel, "*The Risks of 'Too Much' Entanglement with the Government When Conducting Internal Investigations*," Bulletin of the International Academy of Financial Crime Litigators, Summer 2023.

Companies, like individuals, have a right to have counsel. Companies have a right to have a robust defense. This is not inapposite to a culture of cooperation. Companies, like individuals, should be able to have a defense strategy and plan without being punished for it, and losing out on the "carrot" of cooperation credit.

Moreover, individuals within the corporation also have a right to counsel. These rights might be at odds with a requirement that a corporation incriminate individuals in order to be deemed cooperative, thus creating a conflict of interest for many at the firm. This conflict of interest has very real consequences for individuals who *can* go to jail, unlike the corporation. The liberty interests at stake between individuals and the corporation are vastly different, and call for some significant protections for individuals who might operate under the assumption that corporate counsel represents them as individuals, or at least not be adverse to them as individuals.

Finally, what happens if the government pushes too far and companies do not think the "value proposition" of cooperation credit is worth the gamble? The calculus a company will do regarding voluntary self-disclosure and cooperation must take into account: (1) the new risk that whistleblowers have more incentive to report to the DOJ rather than internally; (2) the implications concerning what will be required of the firm, including the possible waiver of attorney-client privilege; (3) what the likely consequences will be for the individuals in the firm, including the individuals in the role of defense counsel, both in-house and outside; (4) the implications and requirements for the compliance personnel; and (5) the legal, political and business ramifications for any international work the company does if clawback and data privacy laws in foreign countries must be eschewed in order to meet the cooperation standard required by the DOJ.

The DOJ wants and needs the culture of compliance and the voluntary self-disclosure regime in order to have the resources to take on major complex corporate crimes. Yet the balance between government and cooperating companies is a precarious one; it may be a house of cards that needs to be intact for both sides to come out ahead.

AUTHORS

Karen Woody

Fellow Karen Woody is a professor at Washington & Lee University School of Law. Prior to teaching, she practiced law as a white collar defense litigator in Washington, D.C.