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Ambiguity persists for corporate recidivism under new DOJ guidance

DOJ's uncertain standards in applying heightened disclosure standards to corporate recidivists leave companies in limbo



Recidivist companies hoping to earn a declination after voluntarily self-disclosing corporate wrongdoing must measure up to uncertain standards that promise uncertain rewards.

Over the last year, the Department of Justice (DOJ) revised its corporate enforcement policies to encourage companies to voluntarily disclose wrongdoing in exchange for reduced penalties, namely non-guilty plea deals. Unfortunately for companies with a history of prior misconduct (recidivists), the new guidance imposes heightened standards of “immediate” self-disclosure and “extraordinary” cooperation and remediation to be eligible for reduced penalties, yet remains ambiguous as to how companies may achieve these heightened standards. This uncertainty has left recidivist companies in limbo.

This article analyses the DOJ's new policy changes regarding voluntary self-disclosure and how that may impact a recidivist company's decision to self-disclose. First, the article discusses new DOJ guidance that created heightened standards for recidivist companies to overcome in exchange for voluntary self-disclosure credit. Second, the article analyses the enforcement action against recidivist ABB, and recent guidance from the DOJ to understand how prosecutors may interpret these new heightened standards to achieve favourable non-criminal resolutions.

Heightened standards for recidivist companies

On September 15, 2022, deputy attorney general Lisa Monaco released a memorandum (Monaco Memo) changing how the DOJ evaluates companies' misconduct, disclosure, cooperation, compliance, and history of misconduct during investigations. The Monaco Memo highlighted the DOJ's "core principles regarding voluntary self-disclosure" where, absent "aggravating factors," if a company (1) voluntarily self-disclosed their misconduct, (2) fully cooperated, and (3) timely and appropriately remediated the criminal conduct, then there is a presumption that the company will receive a non-guilty plea deal. However, the Monaco Memo did not define "aggravating factors" and left disclosure standards unsettled for recidivists.

On January 17, 2023, the DOJ Criminal Division partially clarified these standards when it issued the Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP), which applies to all corporate criminal matters prosecuted by the Criminal Division. The CEP clarified that criminal recidivism constitutes an aggravating factor. Therefore, recidivist companies would not receive the automatic presumption of a declination of charges for satisfying the default standards (voluntary self-disclosure, full cooperation, and remediation).

Instead, the CEP explains that where aggravating circumstances - such as criminal recidivism - are present, prosecutors can only seek a declination if the following heightened standards are satisfied: (1) voluntarily self-disclosure immediately upon becoming aware of the misconduct; (2) an effective compliance program at the time of the misconduct, which identified the misconduct leading to self-disclosure; and (3) extraordinary cooperation and remediation efforts.

If all three standards are satisfied, prosecutors can decide whether a company is eligible for voluntary self-disclosure benefits under the CEP, such as a declination or a fine reduction (between 50% and 75% from the sentencing guideline range). It remains unclear whether these discretionary benefits will entice recidivists to self-disclose misconduct when they now face harsher and unsettled standards. Moreover, while the CEP set the standards for a recidivist company to receive more

favorable plea agreements, there are few examples of how these heightened standards are applied in practice and so ambiguity remains.

ABB and its implications

In a May 2023 speech announcing the uniformization of the self-disclosure policy across DOJ offices, Deputy AG Monaco explained that "the pathway to the best resolution will involve prompt voluntary self-disclosure". The speech cited a plea agreement entered into by Swiss-based technology company, ABB, as the exemplar for potential benefits. Despite the company's recidivism in a repeated violation of the Foreign Corrupt Practices Act (FCPA), ABB's parent company escaped criminal liability, entered into a three-year deferred prosecution agreement ("DPA"), and paid a reduced fine of \$315 million. However, because ABB was ultimately unsuccessful at receiving voluntary self-disclosure credit, ABB's resolution fails to provide a clear roadmap for how recidivists can meet the DOJ's heightened standards.

Immediate self-disclosure

The CEP requires that a recidivist company must voluntarily self-disclose immediately upon becoming aware of the alleged misconduct. The guidance encourages disclosure "at the earliest possible time, even when a company has not yet completed an internal investigation," and places the burden on the company to demonstrate timeliness. While the CEP does not define "immediately," the standard is necessarily beyond the default standard of "promptly" disclosing misconduct "prior to imminent threat of disclosure or government investigation."

Complicating Deputy AG Monaco's characterisation of the uniform benefits of voluntary self-disclosure, ABB's plea agreement specifies that the company did not receive voluntary disclosure credit because it failed to "voluntarily and timely disclose" the misconduct. While ABB requested a meeting with the DOJ "within a very short time of learning of the misconduct," according to the DPA, a media report outing ABB's misconduct was published prior to the scheduled DOJ meeting. ABB still disclosed the misconduct during the scheduled DOJ meeting and explained that it was unaware of any imminent reportage when requesting the

meeting. The DOJ still considered this evidence of ABB's best efforts to self-disclose in evaluating an appropriate disposition but found these efforts insufficient to grant voluntary disclosure credit under the heightened standards for criminal recidivists.

A recidivist company faces an increasingly difficult decision to self-disclose the longer it waits after discovering misconduct because any delay - or in the case of ABB getting behind the press even after reaching out to the DOJ - will be scrutinised by prosecutors when determining whether voluntary disclosure credit will be awarded. The line between "immediately" and "promptly" remains unclear, and will ultimately be decided by the DOJ. Indeed, "immediately" could require reporting misconduct before launching an internal investigation and understanding the scope of misconduct. The ABB plea agreement itself points to a practically literal conception of "immediate" disclosure.

Effective compliance at the time of misconduct

Second, a recidivist company, at the time of the misconduct and disclosure, must have an effective compliance program designed to identify the misconduct. The CEP instructs prosecutors to assess the compliance department's resources, personnel, independence, reporting structure, and internal testing, in the context of the company's size and industry, when determining a compliance program's effectiveness. Therefore, compliance programmes should aim to maintain industry best practices and tailor policies and procedures based on market context.

ABB's plea deal states that the company had already implemented a compliance program designed to prevent and detect violations of the FCPA, including at its foreign subsidiaries. Attachments to the plea agreement note that ABB satisfied the CEP's criteria for effective compliance. Relative to the CEP's standards for "immediacy" and "extraordinary," the guidance on compliance provides the most specificity on what is expected of recidivists.

While the CEP clarifies its expectations for compliance programs at the time of disclosure, it leaves questions open about what a well-functioning compliance

department should do when discovering a minor instance of misconduct. Voluntarily self-disclosing a small infraction could be seen as a positive sign of a reformed compliance culture. However, where a previous resolution led to the appointment of an independent compliance monitor or was based upon improved internal controls, continued wrongdoing may suggest compliance flaws that undermine satisfaction of this heightened standard, leaving the company with a difficult choice of whether to self-report with the aim of receiving self-reporting credit. Extraordinary cooperation & remediation

Third, a recidivist company must demonstrate extraordinary cooperation and remediation. While the government has yet to provide a bright-line rule for what constitutes “extraordinary,” this heightened standard is obviously more demanding than “full and effective” cooperation, which requires proactive disclosure of all non-privileged facts relevant to the wrongdoing, document preservation and collection, and facilitating DOJ interviews of relevant employees and officers.

The DOJ provided ABB full credit for “extraordinary” cooperation where ABB demonstrated “recognition and affirmative acceptance of responsibility”. ABB’s cooperation included promptly disclosing information from its internal investigations, scheduling regular factual presentations to prosecutors, facilitating overseas employee interviews, and producing, organising, and translating documents and evidence, including those located overseas. The DOJ also examined ABB’s extensive remedial measures including hiring experienced compliance personnel, conducting a root-cause analysis of the misconduct, and taking

disciplinary action against culpable employees.

Despite what we can understand from ABB, the standard for extraordinary cooperation remains undefined. Recidivist companies must be prepared to make full disclosure, fully cooperate and facilitate DOJ requests, and be willing and able to undertake substantial remediation efforts. What constitutes extraordinary cooperation is somewhat of a black box highly dependent on DOJ’s requests, and so it will not be clear to a recidivist company whether they can extraordinarily cooperate and remediate until after they self-disclose. Accordingly, the decision to self-report to receive credit will at least, in part, depend on a company’s willingness and ability to fully cooperate with the DOJ regardless of what direction the investigation may go.

Historical misconduct

The Monaco Memo provides the DOJ with wide discretion to evaluate companies’ historical misconduct when determining criminal resolutions. The guidance instructs that criminal resolutions over ten years old and civil or regulatory resolutions over five years old will hold less weight. Misconduct stemming from the same personnel, management, or “root cause” will receive greater scrutiny. Notably, the guidance instructs that successive non-guilty pleas will be disfavored by prosecutors and will need special approval from the deputy attorney general.

Though this was not ABB’s first DPA, the DOJ may have concluded that its historical misconduct - with criminal resolutions in 2004 and 2010 - to be sufficiently remote. Balancing ABB’s prior

criminal misconduct against not only the parent company’s efforts to self-disclose, cooperate, comply, and remediate, but also the concurrent resolution of separate investigations in South Africa, Switzerland, and Germany, the DOJ determined a DPA to be the appropriate resolution for the parent company. Of course, the outcome could be different where historical misconduct is more recent and/or more directly related to the conduct being self-reported. Companies will surely consider these factors when determining whether to self-report with the hope of better resolution.

Conclusion

The new guidance illustrates the DOJ’s central goal to encourage self-disclosure while retaining large amounts of prosecutorial discretion. As assistant AG Kenneth Polite Jr. recently stated, the DOJ “can never articulate in advance, what exactly will or will not satisfy” the standards for “extraordinary” cooperation and “immediate” voluntary self-disclosure, because “prosecutors need flexibility and discretion to apply their judgment in the myriad scenarios that may be presented”. Despite these heightened disclosure standards for recidivist companies, DOJ officials report an uptick in voluntary self-disclosures this year and expect the second half of 2023 to see “quite a bit of activity” due to several “fairly significant cases that have been in the pipeline.” As Polite explains: “The best way to understand these terms is to see how they are applied in future cases.”

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