Litigation Alert

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DOJ's Recent Enforcement Policy Changes Further Incentivize Effective Corporate Compliance Programs

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Key Points

- The DOJ recently highlighted the benefits of robust corporate compliance programs and its interest in incentivizing such programs as the common thread running throughout its recent enforcement policy changes, including the False Claims Act (FCA) credit policy announced on May 6, 2019, and the criminal enforcement reforms announced on April 30, 2019.
- Company compliance programs play a significant role in DOJ enforcement, not only in determining the nature and extent of the credits that companies can earn, but also in determining whether a civil or criminal enforcement action will proceed at all.
- In the FCA context, the DOJ considers the nature and effectiveness of a company's compliance program in evaluating whether the FCA applies.
- Similar changes in the Antitrust Division's enforcement policy may be coming.
- Companies should assess their existing programs against the DOJ's updated guidance for such programs and industry best practices to ensure that they are positioned to receive the maximum credits and benefits made available by the new policies.

On May 20, 2019, Principal Deputy Associate Attorney General Claire McCusker Murray addressed the annual Compliance Week Conference regarding the new enforcement policies previously announced by the DOJ, including the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy adopted in November 2017 and updated in March 2019, the FCA credit policy announced by Assistant Attorney General Joseph Hunt on May 6, 2019, and the updated guidelines on how prosecutors should evaluate a company's compliance program in the context of an investigation of potential criminal misconduct announced by Assistant Attorney General Brian Benczkowski on April 30, 2019. Murray discussed the benefits of effective compliance programs and the significant role that such programs play in understanding and implementing each new DOJ enforcement policy.

Why DOJ Incentivizes Corporate Compliance Programs

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In her remarks, Murray posed and answered the question of "why the Department is in the business of promoting compliance programs." She noted that compliance programs and officers are the first line of defense against corporate misconduct "because they work every day to prevent corporate misconduct from happening in the first place." Even when compliance personnel are not able to prevent wrongdoing from occurring, "you and your compliance programs make it possible to detect misconduct early, take prompt remedial action, determine whether a voluntary disclosure is appropriate and ultimately move forward with the benefit of lessons learned." Murray also characterized effective corporate compliance as a "major investment" that "pays important dividends." She noted that "[c]ompanies with smart compliance programs are more investible and less risky, they make better partners for commercial ventures and they last longer, creating more jobs along the way." Finally, by encouraging or reflecting a culture of compliance and fair dealing, they help create a level playing field, and "business is at its best when there is a level playing field."

How DOJ Incentivizes Corporate Compliance Programs

Murray discussed several recent DOJ enforcement credit policies and explained the role played by corporate compliance programs in those policies. Murray noted that implementation of an effective ethics and compliance program "is necessary to receive the maximum benefit" under the DOJ's FCPA Corporate Enforcement Policy. The maximum benefit is available only to FCPA defendants who voluntarily disclose misconduct, cooperate with the Department's investigation and take remedial measures, including implementing or improving an effective compliance program.

The same is true of the DOJ's recently announced FCA cooperation policy, which "takes a page from" the FCPA Corporate Enforcement Policy. Like that policy, the FCA cooperation policy provides credits for companies that voluntarily disclose misconduct, cooperate in ongoing investigations or undertake remedial measures such as implementing or improving compliance programs. Murray indicated that compliance programs and personnel "are at the forefront of all these things; [they] allow the company to detect misconduct early, to conduct the internal investigation, to take corrective action, to determine if a disclosure to the government is appropriate and, if so, to cooperate with the government's investigation." For this reason, "we want to provide the incentive for you to do this important work."

Murray identified two important incentives that bear upon a company's compliance program. The first is the reduction in damages and penalties that can result from self-disclosure, cooperation and remediation. Murray explained that depending on the facts and circumstances, when the company voluntarily (a) discloses FCA violations, "including all individuals substantially involved in or responsible for the misconduct," (b) takes appropriate remedial action and (c) provides maximum cooperation, the policy permits a substantial "discount" of damages and penalties "down to the government's single damages, plus lost interest, costs of investigation and, in a qui tam case, the share going to the whistleblower."

The second incentive is focused on the compliance program that exists at the time of the violation. Murray stated that the DOJ will take into account the nature and effectiveness of that program in evaluating whether the alleged violation was committed "knowingly" and "therefore whether the False Claims Act is an appropriate remedy in the first instance." In other words, an effective compliance program can potentially give a company two bites at the FCA credit apple: the first, in the form of

negating the scienter requirement for FCA liability and thereby eliminating the prospect of FCA damages and penalties altogether; and the second, in the form of reducing or eliminating penalties and the damages multiplier through enabling or facilitating voluntary disclosure, full cooperation and effective remediation, including root cause analysis and corrective action.

Murray's remarks suggest that effective compliance programs and personnel not only relate to these incentives, but are "central" to enabling companies to capitalize on both of them. For example, she noted that "even if the government has already initiated an investigation . . . a company may receive credit for making a voluntary self-disclosure of other misconduct outside the scope of the government's existing investigation that is unknown to the government." An effective compliance program substantially increases the odds that a company will be able to detect and disclose additional misconduct, increasing the likelihood that the company will receive credit for voluntary self-disclosure. An effective compliance program would also provide for root cause analysis, appropriate disciplinary measures and corrective action to prevent reoccurrences of the misconduct, thereby making it more likely that the company will receive credit for effective remediation. Finally, an effective compliance program evidences a lack of reckless disregard or deliberate ignorance, and thereby allows the company to assert that disclosure was not required by law and that the company is therefore entitled to the credit for voluntary disclosure.

How DOJ Decides Which Corporate Compliance Programs Are Worthy of Credit

Murray acknowledged that in order for the DOJ's incentives to work, the DOJ must be able to distinguish an effective compliance program from an ineffective one, and the industry must have confidence in the DOJ's ability and willingness to do so. "Having expertise in compliance on both sides of the table advances [DOJ's] mission of pursuing justice." Accordingly, the DOJ's Criminal Division has begun a hiring initiative to recruit prosecutors with in-house compliance experience and implemented a "robust" training program "that not only addresses compliance programs generally, but also industry-specific compliance issues, so that healthcare prosecutors can develop expertise in healthcare industry compliance, financial-crime prosecutors can develop expertise in banking industry compliance and so on." Murray stated that DOJ Civil Division attorneys would be participating in these training sessions and that the DOJ would also consider hiring lawyers with in-house compliance experience. In addition, the Criminal Division recently updated its guidance for assessing the effectiveness of corporate compliance programs, and DOJ civil attorneys will use that guidance in evaluating the effectiveness of such programs for purposes of implementing the FCA credit policy.

How Corporate Compliance Programs Can Be a Double-Edged Sword

Murray pointed out that an ineffective compliance program could potentially be as harmful for a company's enforcement posture as an effective program could be helpful. Not only will a "fig-leaf" program not garner the company any credit under the DOJ's policies, but the DOJ will look at evidence that a company disregarded or circumvented its compliance program as evidence that the company acted "knowingly" for FCA purposes. Murray cited the example of a company that ignored fraud complaints conveyed through its compliance program, fired its compliance officer and went after the individuals who had expressed their concerns about the company's potential fraud. "These are not best practices" and constituted "highly relevant

evidence" that the company "recklessly disregarded the law in violation of the [FCA]," i.e., acted knowingly. The same would be true of other compliance systems that a company circumvents or fails to adhere to. By contrast, "a robust compliance program that the company does follow and that identifies potential problems that are timely addressed by the company could demonstrate good faith and lack of scienter or otherwise be a strong mitigating factor in the government's assessment of liability."

How Compliance Programs Can Help Companies Deal with Subregulatory Guidance

Murray provided useful advice to company compliance personnel faced with agency guidance documents—"agency rules that come in the form of 'Dear Colleague' letters, 'Frequently Asked Questions,' bulletins and other informal guidance that exists on websites, manuals and everywhere in between." Because agencies "can be tempted to use [such] subregulatory guidance as a short-cut when they should be undertaking notice-and-comment rulemaking instead," the Brand Memo and subsequently the Justice Manual limit the ways in which such guidance can be used to establish violations of law in both civil and criminal enforcement proceedings. Murray explained that "when faced with new agency guidance, the best first step for compliance personnel is to determine the extent to which the guidance mirrors the requirements of the underlying statutes and/or regulations in light of binding judicial precedent." "[Y]ou'll want to ensure that your business practices are consistent with the portion of the guidance that mirrors binding law." She explained that the "key is to distinguish between . . . the part that mirrors what the law requires and everything else."

According to Murray, "everything else" could include language suggesting obligations that go beyond what the law requires, language that represents the agency's interpretation of an ambiguous statute or regulation or language recommending best practices. For agency language interpreting ambiguities or recommending best practices, "you make a good-faith risk calculation—really, a business decision, informed by a legal assessment—about whether to follow an agency's subregulatory guidance, which may be persuasive, or whether to take another lawful approach that differs from the guidance." Murray tempered this advice, however, by pointing to the Supreme Court's decision in Auer, which requires courts to defer to agency interpretations of their own ambiguous regulations, and the possibility that the Court will revisit Auer deference this term in Kisor v. Wilkie. "Unless and until the Supreme Court charts a new course with respect to Auer deference in Kisor v. Wilkie this term, an important part of [a company's] good-faith risk calculation will be informed by [its] legal team's analysis of whether the guidance at issue is likely to be accorded [Auer] deference."

Potential Enforcement Policy Changes for Antitrust Defendants

As a self-proclaimed "teaser" at the end of her remarks, Murray predicted that the DOJ's Antitrust Division would soon move away from "its previous refrain that leniency is the only potential reward for companies with an effective and robust compliance program." Instead, referring to recent statements by Assistant Attorney General for the Antitrust Division Makan Delrahim, Murray stated that the Antitrust Division would "do more to reward and incentivize good corporate citizenship" by formally recognizing that "even a good corporate citizen with a comprehensive compliance program may nevertheless find itself implicated in a cartel investigation." Accordingly, instead of just crediting extraordinary prospective commitment to corporate compliance, the Antitrust Division may soon be in a position to "credit robust compliance programs at the

charging stage, even when efforts to deter and detect misconduct were not fully successful in [a] particular instance."

Conclusion

As we stated in our alert regarding the DOJ's FCA credit policy, the enforcement credits provided by the DOJ are not guarantees, and its guidance for evaluating the effectiveness of corporate compliance programs are not free from subjectivity and ambiguity. If the purpose of the DOJ's credits is to incentivize companies to implement effective compliance programs and to disclose conduct that they are not legally compelled to disclose, then the DOJ must fully and liberally apply the credits and guidance that its new policies describe. Murray's remarks at the Compliance Week Conference suggest that the DOJ recognizes this, and that it intends to work with the industry to make its incentives and credits work in practice. Individual companies, therefore, appear to have much to gain by examining their compliance programs to ensure that they are in line with the DOJ's evaluation guidance and industry best practices.

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