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DOJ Emphasizes Transparency and Encourages Cooperation

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In 2019, the Criminal Division of the U.S. Department of Justice (DOJ) continued its efforts, begun a few years prior, to enhance transparency with respect to the DOJ's prosecutorial decision-making. In public statements, DOJ leadership has expressed the view that increased transparency ensures consistency and predictability in charging decisions and incentivizes good corporate conduct. The DOJ is plainly confident that institutions will make greater efforts to prevent misconduct in order to avoid investigations or increase the likelihood the DOJ will decline prosecution. Furthermore, because the department's policies favor companies that voluntarily self-report misconduct, internally investigate, cooperate with its investigation and remediate as necessary, the DOJ presumably expects that its transparency may increase the likelihood that institutions will self-report misconduct they identify.

Ironically, increased transparency — and the increased cooperation that the DOJ seeks as a result — can also create risk for the DOJ when it prosecutes individuals with information obtained by a cooperating institution. Arguments made by defendants in recent cases, with some success, indicate potential pitfalls when the DOJ relies too heavily on cooperating institutions. While the DOJ is expected to continue to encourage robust cooperation, it may be more cautious in future cases about the nature and extent of its collaboration with these institutions in order to avoid jeopardizing individual prosecutions.

DOJ's Guidance Concerning Prosecutorial Decision-Making

Assistant Attorney General Brian Benczkowski emphasized in an October 2019 speech that the "best way to deter white-collar crime is to provide proper incentives for law-abiding businesses to prevent misconduct before it occurs and foster the type of ethical corporate behavior that benefits all of us." Assistant AG Benczkowski further indicated that by publicly stating the standards that should guide prosecutorial decision-making, the DOJ "helps to ensure consistency and predictability in how those standards are applied within the Department." While the standards are not new, written public guidance provides a "window into the Department's thinking" that previously was unavailable publicly and eschews the "black box approach around the principles and policies that guide [DOJ] decisions," as Assistant AG Benczkowski stated in his December 2019 remarks at the ACI Conference on the Foreign Corrupt Practices Act (FCPA).

For example, in October 2019, the DOJ issued public guidance concerning the factors the DOJ will consider in evaluating a company's "inability to pay claims." These same factors have shaped prior evaluations, but the DOJ previously had not identified them publicly — or committed to applying them. Additionally, in April 2019, the DOJ released guidance concerning its assessment of corporate compliance programs. The existence and effectiveness of a corporate compliance program have long been key factors in the DOJ's corporate charging and penalty determinations, but the department had not explained previously, at this level of detail, how it evaluates effectiveness or what specific components the DOJ expects a robust compliance program to include.

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Also in 2019, the DOJ announced changes to the FCPA Corporate Enforcement Policy to further incentivize cooperation. Designed to encourage self-disclosure and/or full cooperation, the policy makes clear the credit available to companies for doing so, and the changes relax, to some extent, the requirements a company must meet in order to receive credit.

For example, in March, the DOJ no longer required a company to prohibit the use of ephemeral messaging apps (such as WhatsApp and WeChat) to receive full cooperation, requiring only appropriate guidance and controls to ensure the retention of business records created via use of these apps. In November, the DOJ modified disclosure language to clarify that companies can disclose misconduct before knowing all relevant facts if they share all facts known at the time and inform the DOJ that the investigation will continue. The DOJ also stated that disclosure should relate to any individual who played a substantial part in the "misconduct at issue," as opposed to a "violation of law," such that companies can divulge without having determined that a legal violation occurred.

In 2019, the DOJ continued, as in past years, to make publicly available its decisions not to prosecute companies that voluntarily self-disclosed and/or cooperated. Most recently, the DOJ highlighted its decision to decline to prosecute a publicly traded *Fortune 200* company and to charge the former chief legal officer and chief executive officer with FCPA violations. While the misconduct allegedly reached the company's senior levels, the DOJ declined to prosecute the company because it voluntarily self-disclosed within two weeks of the board's learning of the misconduct, permitting the DOJ to identify and prosecute culpable executives.

Corporate Cooperation Impacting Individual Prosecutions

As noted above, increased corporate cooperation can pose risks to individual prosecutions that are based substantially on the information provided by cooperating institutions. In 2015, with the publication of the Yates memorandum, the DOJ stated formally and publicly that individual prosecutions were a priority. Since then — as in prior years — the DOJ has worked closely with companies conducting internal investigations and simultaneously cooperating with the DOJ. Corporate cooperation typically involves responding to DOJ requests for documents and information and regularly updating the DOJ on the nature and status of the company's internal investigation. The DOJ may request that companies focus on specific issues and make factual and legal presentations of their investigative findings. These findings can be based on numerous sources, including key documents, employee interviews and expert analysis. Over the past few years, the DOJ has in some cases requested that company counsel inform the department of any anticipated interviews of employees or that it refrain from conducting such interviews so the DOJ may go first.

This regular contact may facilitate a DOJ determination that a company has fully cooperated and may aid the department in its efforts to prosecute culpable individuals, but if not carefully handled, it also can implicate the constitutional rights of employees who are future criminal defendants. This may potentially jeopardize the DOJ's prosecutions and convictions and subject the company to broad discovery of its internal investigative files. For example, in *United States v. Connolly*, former derivatives trader Gavin Black was convicted by a jury of wire fraud and conspiracy related to manipulating LIBOR, a global financial benchmark. In May 2019, Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York held that the DOJ and other agencies had effectively outsourced their investigation of Mr. Black to his former employer and its outside counsel, and that Mr. Black's interview by outside counsel — under threat of termination — was compelled within the meaning of the Fifth Amendment. But the court rejected the defense counsel's motion to dismiss the indictment, finding that prosecutors did not use Mr. Black's compelled statements in any meaningful way to obtain his indictment and conviction.

Connolly followed another criminal case in the U.S. District Court for the District of New Jersey, *United States v. Blumberg*, in which the defendant made a similar argument, claiming that his Fifth Amendment rights were violated when the government outsourced its investigative work to his former employer, but failed to search the employer's files for exculpatory materials. The case was resolved in 2018 with a plea following a hearing on the extent of "outsourcing" of the government's investigation to the company, but without a decision on that issue. Had the court found that the company acted on the government's behalf, effectively conducting a joint investigation in which the government had access to the company's files, those files could have been subject to discovery on the theory that the government had "constructive possession" of them.

In March 2019, following the *Blumberg* resolution and the *Connolly* motion to dismiss the indictment post-trial, the DOJ took steps to ensure its independence in future investigations, updating the FCPA corporate enforcement policy with respect to avoiding conflicts. The policy defines full cooperation to include, where "requested and appropriate," deconfliction

of witness interviews and other investigative steps that a company intends to take as part of its internal investigation — that is, making efforts to ensure that the company's investigation does not interfere with the DOJ's investigation. A footnote added in March 2019 clarifies that "although the Department may, where appropriate, request that a company refrain from taking a specific action for a limited period of time for de-confliction purposes, the Department will not take any steps to affirmatively direct a company's internal investigation efforts."

Courts have yet to elaborate how the DOJ and a corporation can facilitate appropriate cooperation while maintaining the independence of their respective investigations. But the DOJ and cooperating institutions are expected to be sensitive to this issue going forward, and both are expected to tailor their interactions accordingly.