

White Collar Enforcement Update

by Norman Harrison, Ed Westerman, Gary Kleinrichert, and David Moes

MARCH 11, 2024

At the American Bar Association White Collar Crime conference held in San Francisco from March 6 to 8, 2024, senior DOJ, SEC and CFTC officials provided important announcements and updates regarding their respective enforcement priorities and initiatives. Highlights include the following:

Whistleblowers. In her keynote address, Deputy Attorney General Lisa Monaco announced a new policy (to be codified in the DOJ Manual) to reward whistleblowers who report potential criminal conduct. One likely fact pattern will involve buyers who discover potential misconduct post-closing. The policy will apply only in bona fide, arm's-length transactions. The new policy is designed to provide assurance to acquirors who were not involved in the alleged wrongdoing, as it occurred prior to their purchase of the target company.

More generally, DAG Monaco announced that DOJ is commencing a "90-day sprint" to announce a pilot whistleblower program, which will closely resemble existing programs at the SEC and CFTC. The policy provides that for a whistleblower to be eligible to receive an award (as a percentage of a forfeiture), the disclosure must involve conduct previously unknown to DOJ (i.e., the whistleblower must be "first in the door"), and will be payable only if and after victims of the crime have been fully compensated. Unlike the SEC's whistleblower program, whistleblowers who were involved in the wrongdoing will not be eligible for a recovery. Moreover, whistleblowers under the DOJ program will only be available to obtain a recovery if they aren't eligible for recoveries under other federal programs (including, for example, DOJ's qui tam program under the False Claims Act, or the SEC or CFTC whistleblower programs).

DAG Monaco explained that the new policy is designed to incentivize companies to strengthen their internal compliance programs. She explained that companies are much better positioned to obtain a favorable outcome "if you knock on our door before we knock on yours."

She anticipates that primary categories of wrongdoing to which the new policy will apply include bribery & corruption, financial crimes, and domestic bribery.

DOJ publicized the new initiative the day after DAG Monaco's address.

Recidivism. A panel discussion involving senior DOJ, SEC and CFTC officials examined the issue of corporate recidivism. DOJ and the SEC have adopted new measures involving companies, not individuals, who repeatedly commit offenses. Under DOJ's new policy, the same factors will be applied as those in effect for individuals: namely, that successive or consecutive deferred prosecution agreements will be strongly disfavored, and that a company's entire criminal, civil and regulatory history will be considered in determining a resolution. Relevant factors will include the following:

- Prior misconduct involves criminal resolutions in the United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct.
- Dated misconduct (occurring 10 years or more prior to the current event) will generally be accorded less weight.
- The nature and circumstances of the prior misconduct, including whether it shared the same root causes as the present misconduct. Some facts might indicate broader weaknesses in a company's compliance culture or practices, such as wrongdoing that occurred under the same management team or executive leadership.

- For companies in highly regulated industries, whether the alleged wrongdoing is an outlier, or a more common occurrence among competitors.

SEC Enforcement Director Gurbir Grewal stated that the SEC is uniquely focused on the recidivism issue. He acknowledged that larger public companies, due to their size and geographic reach, will have a greater likelihood of repeat offenses, and that the SEC's consideration of recidivists will include an examination of different types of misconduct – i.e., those that are technical violations of federal securities laws versus those that are more substantive. He emphasized that transparency and trust are the hallmarks of the SEC's approach to recidivists – i.e., that there is no separate, more lenient set of rules for larger, more powerful companies.

On the issue of penalties, Director Grewal stated that the SEC has an array of tools to use in sanctioning recidivists. These include higher, more severe financial penalties; officer and director bars; and requiring corporate undertakings – including the appointment of compliance monitors or consultants. He stated also that the SEC will place increased emphasis on admissions of wrongdoing in matters involving recidivists.

Ian McGinley, the Director of Enforcement at the CFTC, summarized the Commission's September 2023 guidance on factors to be considered when determining penalties for repeat corporate offenders. These include: (i) the nature/ root causes of the misconduct; (ii) whether the repeat misconduct occurred under the same management team; (iii) the timeframe between offenses; and (iv) the extent and effectiveness of remedial action taken by the company after the initial offense. He stated that the CFTC's range of penalties for corporate recidivists are largely the same as the SEC's. He also noted that CFTC policy is to recommend the appointment of an independent monitor or consultant in recidivist cases.

Compensation / Clawbacks. DAG Monaco also emphasized DOJ's continuing focus on holding individual wrongdoers accountable, including by demanding clawbacks (of compensation or proceeds of wrongdoing) as part of a resolution. She emphasized that DOJ's policies regarding voluntary self-disclosure, by individuals and

companies, are designed "to make the math easy" – i.e., that a voluntary disclosure will always lead to a better outcome, including possibly no requirement for a guilty plea. She emphasized that all of DOJ's white-collar policies are designed to incentivize companies to invest in and actively manage their compliance programs – as, in her words, "the cost of compliance will be much less than the cost of a second violation."

In sum, there was a uniformity of messages from the nation's regulators of the capital markets and prosecutors of corporate / financial crimes: a greater emphasis on individual accountability, less tolerance of corporate recidivism, and more active encouragement of voluntary self-disclosure and whistleblowing. The underlying message is that investments by companies in risk assessments and compliance programs can reap significant benefits if wrongdoing occurs.

Secretariat Advisors is a leading provider of investigative, compliance, risk assessment, and testimonial services in matters involving white-collar crime and regulatory compliance. Please contact our experts if we may be of assistance.

For further information contact:

Norman Harrison

nharrison@secretariat-intl.com

+1 202.215.7593

Ed Westerman

ewesterman@secretariat-intl.com

+1 415.517.6853

Gary Kleinrichert

gkleinrichert@secretariat-intl.com

+1 317.652.3770

David Moes

dmoes@secretariat-intl.com

+1 312.371.6001