

DOJ leadership discusses FCPA enforcement trends and guidance

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In a recent speech, Acting Assistant Attorney General Nicole M. Argentieri laid out how the DOJ is increasing its use of data analytics to proactively identify FCPA cases, deepening its cooperation with international counterparties, actioning its 2023 revisions to the Corporate Enforcement Policy concerning cooperation credit, and beginning to require forfeiture or disgorgement as part of all corporate resolutions.

During a [speech](#) in connection with the 2023 International Conference on the Foreign Corrupt Practices Act (FCPA) on November 29, 2023, Acting Assistant Attorney General (AAG) Nicole M. Argentieri described the DOJ's ongoing and increasing use of data analytics and international partnerships to enhance its FCPA enforcement efforts. She also discussed the DOJ's application of the new discount levels available under the Criminal Division's Corporate Enforcement Policy (CEP) for companies that, despite not voluntarily self-disclosing misconduct, fully cooperated with the DOJ and timely and appropriately remediated. Acting AAG Argentieri highlighted cooperation in recent resolutions that merited the best cooperation credit, at the high end of the zero to 50% range, and medium credit of 25%. Additionally, she announced that the DOJ Criminal Division will begin requiring forfeiture or disgorgement as part of all corporate resolutions, in addition to criminal penalties and fines.

1. Identifying FCPA cases through data analytics

Acting AAG Argentieri continued the DOJ's recent trend of highlighting data analytics as a critical tool for the DOJ to proactively identify and prosecute fraud cases, and noted the application of this tool to FCPA investigations. She stated, "Let me be the first to tell you that we have proactively used data to generate FCPA cases, and we've only just gotten started." As part of these efforts, Acting AAG Argentieri noted that the DOJ intends to increase its investments in both personnel and tools that can interpret and synthesize data—both public and nonpublic—to enhance its ability to identify FCPA misconduct that may otherwise have gone undetected.

With respect to companies' use of data analytics as part of a compliance program, Acting AAG Argentieri noted that companies can be expected to be asked by prosecutors investigating potential FCPA violations what they have done to analyze or track their own data—both at the time of the misconduct and when the DOJ is considering a potential resolution. There does, however, seem to be a continued recognition by the DOJ that advanced data analytics may not be the right or best approach for many companies, and instead a focus on the compliance program's access to, use, and analysis of data, even if not using artificial intelligence or advanced analytics.

2. The International Corporate Anti-Bribery Initiative

Acting AAG Argentieri announced a new initiative to deepen international cooperation and combat white collar crime globally, the International Corporate Anti-Bribery Initiative (ICAB). This new initiative is intended to compliment the DOJ's existing bilateral and multilateral partnerships and foster new partnerships. It will be driven by three prosecutors who will focus on regions the DOJ believes can have the most impact in both coordination and case generation. Acting AAG

Argentieri noted that the ICAB will focus on threats to financial markets and the rule of law. She expects the members of the ICAB to work closely with other units across the Criminal Division, including the Fraud and Money Laundering and Asset Recovering sections, and their data experts to develop proactive leads and determine how the DOJ can assist foreign authorities in their parallel investigations. In some respects, this new program simply institutionalizes the Criminal Division's longstanding cooperation with international authorities, a theme we have highlighted repeatedly over the last decade or so.

3. Cooperation credit

In January 2023, as described in a [prior client update](#), the Criminal Division revised its CEP to, among other changes, add a new tier of cooperation credit—"extraordinary cooperation"—that would have the effect of increasing the discounts off the U.S. Sentencing Guideline fine ranges available to companies that voluntarily self-disclose, cooperate, and remediate.

Under the revised CEP, when a company voluntarily self-discloses, fully cooperates, and timely remediates, the company can obtain between a 50% and 75% discount off the low end of the guideline range if it is not a recidivist or, if it is a recidivist, off another point in the guideline range (for example, the midpoint of the fine range instead of the low end). Companies that do not voluntarily self-disclose but fully cooperate and timely remediate can obtain discounts of up to 50% off the guideline range, with the same caveat for recidivists.

When announcing the revised discounts, the DOJ cautioned that discounts at the high end of the range would not be the new normal but would rather be "reserved for companies that truly distinguish themselves and demonstrate extraordinary cooperation and remediation." The CEP, however, does not provide a clear distinction between "extraordinary" and "full" cooperation, and the DOJ has suggested this is a "know it when we see it" analysis.

In her remarks on November 29, 2023, Acting AAG Argentieri highlighted three resolutions that included cooperation credit within the zero to 50% discount range. She pointed to the September 2023 Albemarle Corporation resolution¹ as an example of cooperation and remediation warranting credit at the high end of the available range—a 45% discount off the bottom of the guideline range—and to the November 2023 resolutions with Tysers Insurance Brokers Limited (Tysers)² and H.W. Wood Limited (H.W. Wood)³ as illustrative of cooperation and remediation warranting medium discounts—each receiving a 25% discount off the bottom of the guideline range. AAG Argentieri noted that Albemarle's cooperation warranted a high discount because Albemarle cooperated with great urgency and speed, commenced remedial measures as well as continuous testing, monitoring, and improving of its compliance program even before the DOJ's investigation began, withheld bonuses from culpable individuals, made risk-reducing changes to its business model, and voluntarily (albeit belatedly) disclosed the misconduct. With respect to Tysers and H.W. Woods, she commented that, although they did cooperate with the investigation and engaged in timely remediation that included terminations of employees and business relationships, their cooperation was not as significant as others' and was more reactive than proactive, warranting only a medium discount.

4. Forfeiture and disgorgement

Acting AAG Argentieri also announced that, "as recent cases have shown," the DOJ Criminal Division will begin requiring forfeiture or disgorgement as part of all corporate resolutions, in addition to criminal penalties and fines. In the past, when a publicly traded company (i.e., an issuer) resolved with the DOJ and SEC in an FCPA case, in most instances the DOJ would impose a penalty or fine and the company would disgorge its profits to the SEC. However, when the company was not an issuer, the DOJ would impose a penalty and most often disgorgement or forfeiture of the profits was not required as part of the resolution. According to the Acting AAG, "to treat issuers and non-issuers alike, going forward, all companies should expect to both pay applicable fines and forego the proceeds of their criminal activity, subject of course to our anti-piling on policy and inability to pay guidance." Although perhaps a seemingly logical approach, this has not been the practice for many years in FCPA cases, and will have the effect of significantly increasing (oftentimes doubling) the amount that resolving non-issuers pay to the DOJ.

5. Key takeaways

Acting AAG Argentieri's remarks provide helpful insight into how the DOJ is evaluating cooperation and remediation efforts when assessing penalty discounts and the DOJ's efforts to continue to proactively identify and develop FCPA cases across the world. Notably, the announcements seem to be a recognition that in addition to the "carrot" side of the equation to encourage companies to voluntarily disclose, the DOJ needs to impact companies' and defense counsels' voluntary disclosure calculus by increasing the likelihood that DOJ will uncover misconduct on its own. The push to use

data analytics and the efforts to deepen and grow relationships with foreign authorities are geared at doing exactly that.

As a result, clients would do well to consider taking the following steps:

- Continue to periodically review compliance programs to determine whether there is appropriate access to and tracking of data, and whether there are appropriate and effective opportunities to employ data analytics.
- If there is discovery of misconduct, incorporate the DOJ's efforts of international coordination and data analytics into the voluntary disclosure analysis.
- In the event of a DOJ investigation, bear in mind the distinction between those companies that received cooperation and remediation credit at the higher end of the range and those that received credit at the lower end, and focus on prompt and proactive cooperation and remediation.
- For non-issuers facing resolution discussions with the DOJ, prepare for the reality that in addition to a penalty there will also likely be forfeiture or disgorgement demanded by the DOJ, and be prepared to evaluate and advance arguments to push back on the amount of any such forfeiture/d disgorgement.

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¹ Non-Prosecution Agreement, Albemarle Corporation (Sept. 29, 2023), <https://www.justice.gov/media/1316796/dl?inline>.

² Deferred Prosecution Agreement, United States v. Tysers Ins. Brokers Ltd., No. 1:23-cr-20414-DPG (S.D. Fla. Nov. 20, 2023), <https://www.justice.gov/media/1325796/dl?inline>.

³ Deferred Prosecution Agreement, United States v. H.W. Wood Ltd., No. 1:23-cr-20414-DPG (S.D. Fla. Nov. 20, 2023), <https://www.justice.gov/media/1325801/dl?inline>.