

## Biden DOJ announces summary of its changes to its Corporate Enforcement Policy

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DOJ issued a policy statement summarizing the Biden administration's corporate enforcement efforts and previously announced updates to its Corporate Enforcement Policy (CEP), as well as announcing additional rewards for companies that disclose to DOJ but do not meet the CEP's strict requirements necessary to achieve a declination, and the elimination of one of the "aggravating factors" that rebut a presumption of a declination for companies that do meet the voluntary disclosure requirements.

As has become part of the change of administration tradition, on November 22, 2024, the Department of Justice (DOJ) issued a policy statement by the head of DOJ's Criminal Division—Principal Deputy Assistant Attorney General (PDAAG) Nicole Argentieri—recounting the Biden administration's corporate enforcement efforts, an update on various pilot programs, and two changes to the Criminal Division CEP. The update was rooted in the premise that "most companies are made up of hundreds or thousands of people just doing their jobs, who want to operate within the law," and that transparency by DOJ will assist these companies in more effectively rooting out crime and taking appropriate action when it occurs. With the Trump administration preparing to take control of DOJ, however, it's not clear which of DOJ's current policies and pilot programs will remain intact. Companies should be careful on relying on these policies and programs too extensively during this interim period.

### Clawback Pilot Program update

With respect to DOJ's "Clawback Pilot Program," which offers rewards for companies under investigation that recoup compensation from wrongdoers, DOJ stated that "we've made clear that we will award fine reductions not only to companies that recoup compensation from qualifying employees, but also to those that withhold the money from ever being paid in the first place." This reflects a recognition that clawing back compensation may be difficult and potentially legally impossible in certain jurisdictions, and that withholding bonuses or other compensation can achieve the same end. We have noted the challenges to the Clawback Pilot program in this [prior client update](#). At a minimum, we have questioned the wisdom, or likelihood, of rewarding companies for litigating clawback issues during the pendency of an ongoing DOJ investigation.

### Recidivism update

PDAAG Argentieri also addressed how DOJ has been factoring in recidivism into its corporate resolutions. In particular, the DOJ official focused on companies that "have several ongoing investigations into different criminal offenses that are resolving concurrently," noting that although this does not constitute a "prior resolution," DOJ will consider this circumstance when resolving with the company. As with other policies, we have noted that their application can be subjective, and there is at least some evidence that this has been the case.

# CEP revisions

Perhaps most notably, DOJ's announcement addressed several revisions to the CEP. Although the CEP provides potential benefits for companies that voluntarily self-disclose (VSD), fully cooperate, and timely and appropriately remediate, there has not been clear guidance or benefits for companies that come close to meeting that standard but fall short for one reason or another. PDAAG Argentieri recognized that DOJ "must balance our desire to incentivize reasonably prompt disclosures of crimes we are not aware of with the reality that sometimes companies may come forward and fulfill many of our requirements but not qualify for a VSD under our policy."

As a result, she announced that, "where a company's self-disclosure does not meet the definition of 'voluntary self-disclosure' as articulated in the CEP, but the company has demonstrated that it acted in good faith to self-report the misconduct—and that it fully cooperated and timely and appropriately remediated—prosecutors will consider the company's self-disclosure in determining the appropriate resolution, including the appropriate form, the appropriate monetary penalty, and the length of the term of the agreement." This can result in "the possibility of a non-prosecution agreement, greater credit for cooperation and remediation, and a potentially shorter length of the term of agreement."

Although non-prosecution agreements and increased credit for cooperation and remediation have long been offered in these circumstances, a shorter term of resolution is a significant change. To date, since the implementation of the CEP, all corporate resolutions carry obligations that companies must meet for at least three years—a weighty requirement given that DOJ investigations themselves often last for several years prior to a resolution.

Finally, DOJ also announced that it was eliminating "one of the aggravating circumstances—significant profit—that could make a company ineligible for a presumption of declination." DOJ recognized that the amount of profits may not be known during the early stages of an investigation, and that they did not "want companies to hesitate in coming forward out of fear that, down the line, we may determine that the amount of profits was significant. After all, even with a CEP declination, companies are required to disgorge their illicit profits, whatever they may be."

## Key takeaways

PDAAG Argentieri's statement was helpful in summarizing the Biden administration's changes to DOJ's corporate enforcement policies, although their utility going forward remains in flux as the Trump administration's new leadership at DOJ takes control. And ultimately, their views will be what matters. We will continue to watch for and monitor whether they adopt the Biden administration's policies.

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