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Daniel S. Kahn (daniel.kahn@davispolk.com) is a Partner at Davis Polk & Wardwell LLP in Washington, DC, USA. Daniel previously served as Chief of DOJ's FCPA Unit, acting Chief of the Fraud Section, and acting Deputy Assistant Attorney General of the Criminal Division.

Takeaways for companies from DOJ's recent FCPA enforcement actions and guidance

By Daniel S. Kahn

Although the primary regulator for civil and administrative Foreign Corrupt Practices Act (FCPA) cases—the U.S. Securities and Exchange Commission (SEC)—has not updated its corporate enforcement guidance in more than two decades, the U.S. Department of Justice (DOJ) has been issuing new guidance with each new administration for the past 10 years. The Biden administration has been particularly prolific in the guidance it has released. This article addresses two recent guidance announcements and provides some key takeaways for companies in response. We will focus here on two notable announcements: the clawback pilot program and the mergers and acquisitions (M&A) disclosure policy. Recent enforcement actions have started to shed light on how these policies may be applied in practice.

Clawback pilot program

In March 2023, DOJ's Criminal Division—which enforces FCPA cases, financial fraud, money laundering, and sanctions, among other corporate crime violations—announced a three-year pilot program on compensation incentives and clawbacks.[1] The pilot program consists of two key components: (1) compliance requirements for criminal resolutions; and (2) a reduction in the penalty amount imposed in a DOJ resolution for companies that have clawed back compensation from wrongdoers.

First, according to the pilot program, every DOJ Criminal Division corporate resolution will now include a requirement that the company implement criteria related to compliance in its compensation structure and report annually to DOJ on implementing these new criteria. "These criteria may include, but are not limited to: (1) a prohibition on bonuses for employees who do not satisfy compliance performance requirements; (2) disciplinary measures for employees who violate applicable law and others who both (a) had supervisory authority over the employee(s) or business area engaged in the misconduct and (b) knew of, or were willfully blind to, the misconduct; and (3) incentives for employees who demonstrate full commitment to compliance processes."

Second, the pilot program also offers discounts off the penalty amount imposed by DOJ where the company has fully cooperated and remediated and demonstrated that it is seeking to "recoup compensation from employees who engaged in wrongdoing in connection with the conduct under investigation," or others who were supervisors and were willfully blind to the misconduct. In such circumstances, the Criminal Division will reduce the fine amount of any clawed-back compensation by 100%. Even where a company is unable to recoup compensation, so long as it demonstrates a "good faith attempt" to do so, prosecutors have the discretion to reduce the fine by up to 25% of the amount of compensation the company sought to claw back. Clawbacks will not have an impact on restitution, forfeiture, disgorgement, or other non-penalty amounts. A company seeking a

recoupment reduction will have until the end of the resolution term (usually three years) to actually recoup the money, or otherwise will be required to pay the full amount of the fine.

There is certainly a question as to why DOJ would create a stand-alone policy related to clawbacks and compensation when there are so many other components of a compliance program that are equally, if not more, important. That said, the first component of the pilot program—the compliance requirements as part of criminal resolutions—includes several common-sense proposals that should not be particularly onerous on companies.

The recoupment reduction component does not create any new obligations or requirements for companies. However, the benefits provided under the pilot program raise several questions and issues. First, many countries around the world restrict or preclude a company from clawing back compensation from employee wrongdoers; thus, the discounts accorded for clawbacks under the pilot program create incongruous and inequitable results for certain foreign companies based solely on geography. Second, even when it is possible to claw back compensation from employees, the process of doing so often entails protracted and expensive litigation; it could lead to the company being required to turn over to the employee information from its internal investigation (after all, it is likely the employee would challenge the findings of the internal investigation to avoid having the compensation clawed back). This disincentive—which may dissuade some companies more than others—has nothing to do with the quality of the company's compliance program, yet it will play a role in determining which companies are able to secure a discount from DOJ. Third, the design of the pilot program is, ironically, most likely to benefit companies with the most egregious misconduct. Often, it is the most senior executives who receive the *type* of compensation that can be clawed back—i.e., bonuses and equity compensation—and the *amount* of compensation that will reduce the penalty by the greatest number. As a result, companies with senior executives who engage in (or are willfully blind to) the misconduct will be best positioned to secure the biggest benefit from the pilot program.

Through a recent FCPA resolution, we have seen that DOJ's Fraud Section is likely to read the pilot program broadly in favor of companies attempting to do the right thing. In that case, the Fraud Section gave dollar-for-dollar crediting against compensation that was withheld (not clawed back) from the culpable employees, even though the pilot program's terms provide such a benefit only where the money is clawed back. This reflects a common sense and encouraging approach by a component of DOJ that is often responsible for most of the corporate criminal cases in the department.