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Recent Fraud Settlements: DOJ Values Voluntary Self-Disclosure and Corporate Cooperation

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The Department of Justice's (DOJ) conduct since announcing its February 22, 2023, Voluntary Self Disclosure (VSD) policy, demonstrates that the government continues to place a premium on corporate cooperation in both criminal prosecutions and negotiated resolutions of civil False Claims Act cases. As we reported last year, DOJ guidance has emphasized the need to determine "whether the [] conduct at issue came to light as a result of the company's timely, voluntary self-disclosure," and when that is the case, it will "credit such disclosure appropriately."

Cooperation Continues to Drive Favorable DOJ Resolutions for Corporate Defendants

With respect to DOJ criminal investigations, a non-prosecution agreement (NPA) is a company's most favorable outcome. However, deferred prosecution agreements (DPA) are a close second, and they are certainly preferable to entering corporate guilty pleas. Recent DOJ actions demonstrate that DPAs remain available, subsequent to the 2023 VSD policy. However, it is apparent that the level of corporate cooperation is the primary factor driving how favorable the overall resolution for companies will be. For example, in *United States v. SAP SE*, the company entered into a DPA on January 10, related to alleged violations of the Foreign Corrupt Practices Act. In its Information, the U.S. alleged that from 2013 to 2018, SAP conspired to pay foreign officials in South Africa and Indonesia to obtain business advantages.

In the DPA, however, DOJ credited the company's cooperation, highlighting SAP's "recognition and affirmative acceptance of responsibility for its criminal conduct." DOJ also noted the company "received credit for its substantial cooperation and timely remediation." Further suggesting that SAP benefitted from DOJ's VSD policy, the government stressed the specific and tangible contributions SAP made to the investigation, including its immediate cooperation, quick production of relevant documents across multiple foreign countries, "voluntarily making Company officers and employees available for interviews," and "imaging the phones of relevant custodians at the beginning of the Company's internal investigation," among other factors. SAP also received a 40% penalty discount and avoided an independent compliance monitor.

The government also appears to be continuing the trend, as we discussed last year, of using DPAs to resolve civil False Claims Act (FCA) cases, where the conduct at issue could otherwise give rise to criminal liability. For example, in *United States ex rel. DiGiacomo v. Genotox Laboratories, Ltd., et al.*, a *qui tam* relator brought claims in the Southern District of Georgia against Genotox, alleging it "paid volume-based commissions to third party marketers in violation of the Anti-Kickback Statute," which also violated the FCA. In a parallel case, the U.S.

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Attorney's Office for the Western District of Texas entered into an 18-month DPA with Genotox to resolve a criminal investigation involving the same conduct. In April 2023, Genotox agreed to a $5.9 million penalty to resolve both cases, and entered into a five-year corporate integrity agreement (CIA) with the Department of Health and Human Services Office of Inspector General. Unlike in *SAP*, where DOJ gave explicit credit to the company for its voluntary disclosures and cooperation, the government did not announce any similar conduct by Genotox. This is a possible (if not likely) explanation for why the DOJ implemented a CIA in the latter case, while allowing SAP to avoid this obligation.

Other recent civil settlements not only demonstrate the importance of cooperation in noncriminal cases, but also underscore the need for companies to fully understand their employees' underlying conduct and potential for criminal liability. For example, in a January 2024 settlement between the government and H. Lee Moffitt Cancer Center & Research Institute (Moffitt), the parties resolved Moffit's liability under the FCA for allegedly submitting improper claims that were not reimbursable by federal health care programs. In announcing the agreement, the government acknowledged Moffit's "significant steps entitling it to credit for cooperating."

The steps Moffitt took included proactively disclosing that its billing systems and practices billed items for which Moffitt should not have received payment, establishing a new unit within the finance department to ensure compliant billing, hiring new staff, and placing a blanket hold on all charges associated with clinical trials. Importantly, the civil resolution did *not* release Moffitt from any potential criminal liability from the conduct at issue, demonstrating that companies who enter into settlements with the government must be reasonably confident that the offending conduct has ended and will not give rise to a subsequent criminal prosecution for either previous or ongoing activities. Similarly, in a January 2024 settlement between the government and Hilcorp San Juan, L.P., for allegations that the company "knowingly underpaid royalties owed on oil and natural gas production," the government credited the company's "disclosure, cooperation and remediation," while explicitly reserving and not releasing Hilcorp from any potential criminal liability arising from the covered conduct.

Takeaway: Cooperation Must Be "Meaningful" to Lead to a Favorable Resolution, Whether Via a DPA or Civil Settlement

As the cases discussed above demonstrate, companies must be prepared to give meaningful concessions and cooperate fully in order to receive full credit from the government. Not only is this evident in cases that resulted in favorable resolutions, but the government's emphasis on corporate cooperation is also evident from cases where the government deemed the cooperation to be inadequate.

For example, last November, Binance Holdings Limited (Binance) agreed to pay more than $4 billion to resolve an investigation related to Bank Secrecy Act violations and the crypto exchange's failure to register as a money transmitting business. In announcing the penalties, DOJ specifically stated that "Binance did not make a timely and voluntary disclosure of wrongdoing." It also said the prosecution served as a "warning that companies that do not build sanctions compliance into their services" could "face serious criminal penalties."

DOJ also noted that Binance's internal communications showed its compliance program "did not have protocols to flag or report transactions for money laundering risks, which employees recognized would attract criminals to the exchange." DOJ further criticized Binance's "failure to implement an effective [Anti-Money Laundering] program," and although DOJ gave Binance "partial credit" for cooperating with its investigation, it said the

company “did not receive full credit for its cooperation because it delayed producing relevant evidence.” Accordingly, the company received only a “20% reduction off the bottom of the applicable U.S. sentencing guidelines fine range,” when more impactful cooperation might have resulted in a bigger discount.

The government also pointed to a company’s failure to cooperate in its December 2023 announcement of a DPA with Freepoint Commodities LLC (Freepoint). The company agreed to pay $98 million in criminal penalties to resolve a Foreign Corrupt Practices Act investigation related to alleged bribery of Brazilian government officials. While DOJ ultimately gave Freepoint partial cooperation credit, it also publicly criticized the company’s initial cooperation efforts as “limited in degree and impact, and largely reactive.” As a result, Freepoint was only afforded a “15% reduction off the bottom of the applicable guidelines fine range.” Freepoint was also unable to avoid individual prosecutions of some of the figures involved in the alleged scheme, two of whom were Freepoint representatives.

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As the above cases demonstrate, companies should continue to seriously consider the government’s voluntary self-disclosure policy, as timely and meaningful cooperation can help companies avoid stiff penalties and criminal prosecution. However, companies should also be aware of the sacrifices required in order to get full credit for that cooperation, and should be careful to assess the risks of civil-only resolutions where the underlying conduct could ultimately give rise to criminal charges.

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