FCPA Update

A Global Anti-Corruption Newsletter

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Ericsson Reaches FCPA-Related Settlement with DOJ

On March 21, 2023, Judge Laura Taylor Swain of the U.S. District Court for the Southern District of New York accepted from Swedish telecommunications company Ericsson a guilty plea and sentence that had been previously announced by the U.S. Department of Justice. The plea deal required Ericsson to plead guilty, extended its monitorship for a year, and imposed an additional financial penalty of $207 million for breaches of the company's 2019 DPA, removing the credit that the company previously had received for cooperation.[1] This move by DOJ demonstrates that it is focused not only on increasing the incentives it offers companies to cooperate fully, but also on imposing penalties on companies that it believes withhold or slow-walk disclosures.

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1. Press Release, "Ericsson to Plead Guilty and Pay Over $206M Following Breach of 2019 FCPA Deferred Prosecution Agreement," (Mar. 2, 2023), https://www.justice.gov/opa/pr/ericsson-plead-guilty-and-pay-over-206m-following-breach-2019-fcpa-deferred-prosecution.

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Ericsson's Road to the Resolution

In December 2019, Ericsson and DOJ entered into a deferred prosecution agreement with respect to alleged schemes to make bribe payments to government officials and to manage off-the-books slush funds in Djibouti, China, Vietnam, Indonesia, and Kuwait. As part of the settlement, Ericsson agreed to retain an independent compliance monitor for three years and paid more than $1 billion in disgorgement and penalties to DOJ and the SEC. Under the DPA, one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of conspiracy to violate the internal controls and books and record provisions were deferred. An Ericsson subsidiary, Ericsson Egypt Ltd, also pleaded guilty to conspiracy to violate the anti-bribery provisions.[2]

Ericsson did not receive full cooperation credit at the time because, according to the DPA, it failed to disclose allegations of corruption in two relevant matters, did not produce certain relevant materials sufficiently quickly, and failed to take appropriate disciplinary measures with respect to certain employees and executives.[3] Ericsson did receive cooperation credit for conducting a thorough investigation, making factual presentations, and making foreign witnesses available for interviews.[4]

Approximately two years later, in October 2021, DOJ reportedly notified Ericsson that it was in breach of its DPA for failing to provide documents and factual information about the alleged bribe schemes.[5] In March 2022, DOJ again notified Ericsson that it was in breach – for providing insufficient information about potential misconduct in Iraq, which Ericsson was obligated to disclose even though it was not one of the alleged bribe schemes that formed a part of the DPA.[6]

Initially, these breaches resulted in the extension of Ericsson's monitor for a year, until June 2024.[7] However, on March 2, 2023, DOJ announced that Ericsson would be pleading guilty for the conduct described in the DPA due to its breaches of the DPA. In addition to pleading guilty to the two original counts of conspiracy to violate the anti-bribery and accounting provisions of the FCPA, DOJ reported

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2. Deferred Prosecution Agreement, *United States v. Telefonaktiebolaget LM Ericsson* (Nov. 26, 2019) (hereinafter "DPA"), https://www.justice.gov/usao-sdny/press-release/file/1224261/download; Press Release, "Ericsson Agrees To Pay More Than $1 Billion To Resolve Foreign Corrupt Practices Act Case," (Dec. 6, 2019), https://www.justice.gov/usao-sdny/pr/ericsson-agrees-pay-more-1-billion-resolve-foreign-corrupt-practices-act-case.
3. DPA at ¶4.c.
4. DPA at ¶4.b.
5. Press Release, "Update on Deferred Prosecution Agreement," (Oct. 21, 2021), https://www.ericsson.com/en/pressreleases/2021/10/update-on-deferred-prosecution-agreement.
6. Press Release, "Update on Deferred Prosecution Agreement," (Mar. 2, 2022), https://www.ericsson.com/en/press-releases/2022/3/update-on-deferred-prosecution-agreement.
7. Press Release, "Ericsson Announces Extension of Compliance Monitorship" (Dec. 14, 2022), https://www.ericsson.com/en/pressreleases/2022/12/ericsson-announces-extension-of-compliance-monitorship.

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that Ericsson would also pay a penalty amount of $206,728,848. This amount was calculated by eliminating the cooperation credit DOJ had granted as part of the 2019 settlement, which had constituted a 15% reduction off the bottom of the applicable Sentencing Guidelines penalty range. The additional fine brings Ericsson's total penalty to the midpoint between the low end and the high end of the Sentencing Guidelines range.

Alleged Breaches of the DPA

DOJ's actions in this matter serve as a warning sign for companies assessing their cooperation with U.S. inquiries and the risk they are prepared to assume when deciding what to share with the U.S. government.

"This move by DOJ demonstrates that it is focused not only on increasing the incentives it offers companies to cooperate fully, but also on imposing penalties on companies that it believes withhold or slow-walk disclosures."

Ericsson's plea agreement details four breaches:

- First, the plea agreement states that, for more than a year after it signed the DPA, Ericsson failed to disclose a significant email in Italian between two of its executives who "orchestrated the Djibouti bribery scheme" even though Ericsson had produced other documents from these executives, had produced other portions of this email chain, had produced other documents in Italian, and had agreed to search terms that, when run in Italian, hit on this document.[8]
- Second, the plea agreement states that Ericsson failed to disclose a significant email that a manager had sent to a senior officer, raising allegations against former senior executives who "played central roles in the China criminal scheme." DOJ noted that Ericsson's senior leadership, upon receipt of this email, had asked the company's prior counsel to investigate the allegations, yet Ericsson failed to produce the email until April 2021 and failed to disclose all the facts gathered during its investigation into the allegations made in the email.[9]

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8. Plea Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, Case No. 1:19-cr-00884-LTS (S.D.N.Y Mar. 2, 2023) (hereinafter "Plea Agreement"), A-1 at 3 – 4.
9. Plea Agreement, A-1 at 5 – 6.

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- Third, the plea agreement states that Ericsson failed to produce hard copy records kept in safes and locked filing cabinets in Ericsson's headquarters, as well as two USB drives maintained by Ericsson personnel, that also contained records relating to third-party payments and agreements. According to DOJ, Ericsson employees knew about the existence of these records as early as 2015, but they were not produced until April 2021.[10]
- Fourth, the plea agreement states that, two weeks before the DPA was signed, Ericsson's outside counsel disclosed to DOJ "generalized information" relating to a new investigation it was conducting in connection to Iraq, but DOJ asserted that disclosure omitted key details known to Ericsson's outside counsel at the time and that Ericsson did not provide an update to DOJ until February 2022, after receiving a query from a journalist, even though Ericsson had finalized its investigation five days after signing the DPA.[11]

DOJ noted that the above harmed its ability to carry out its investigation and in some instances precluded it from pursuing charges against certain individuals.

For a company under investigation or under a monitorship, the calculus is simple: swift disclosure is likely in its best interest, particularly if DOJ is likely to eventually uncover the misconduct anyway. Otherwise, any cooperation credit that the company may have already earned could be swept away.

Takeaways

Ericsson's guilty plea highlights two implications of the current FCPA enforcement regime:

- Companies need to empower their legal and compliance functions not only to identify misconduct, but also to make recommendations with respect to disclosure to authorities. Knowledge is only half the battle, and companies need to ensure appropriate follow-through when they learn of potential wrongdoing.
- The scope of cooperation that merits "partial credit" may be growing narrower, and missteps with respect to one aspect of cooperation may reduce or eliminate credit earned elsewhere.

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10. Plea Agreement, A-1 at 6 – 7.
11. Plea Agreement, A-1 at 7 – 8.

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DOJ Issues Trio of Updates That Further Heighten Compliance Expectations

On March 2 and 3, 2023, the U.S. Department of Justice announced several updates to its corporate enforcement policies, in significant part formalizing recent pronouncements about corporate compliance programs.[1] Deputy Attorney General Lisa Monaco and Assistant Attorney General Kenneth A. Polite, Jr. announced these updates in remarks at the ABA's National Institute on White Collar Crime. In particular, DOJ:

- revised its guidance to federal prosecutors relating to the Evaluation of Corporate Compliance Programs, most notably regarding how companies approach (i) the use of personal devices and different communications platforms and (ii) corporate compensation systems;[2]
- launched a Compensation Incentives and Clawbacks Pilot Program that requires settling companies to include compensation-related criteria in their compliance programs and offers criminal fine reductions for companies that claw back compensation from individual wrongdoers;[3] and
- revised its Memorandum on Selection of Monitors in Criminal Division Matters to, among other things, include the 10 factors introduced in the September 2022 Monaco memo to clarify how DOJ selects monitors.[4]

Consistent with corporate enforcement memos released in October 2021 and September 2022, these changes reflect DOJ's continued prioritization of incentivizing companies to help deter criminal conduct in the first place. This includes developing and implementing effective programs that foster a compliance-promoting culture and holding individual wrongdoers accountable. The changes are intended in part to assist in-house legal and compliance personnel and other executives in making the case for investing in compliance rather than treating it principally as a cost center.

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1. U.S. Department of Justice, "Assistant Attorney General Kenneth A. Polite, Jr. Delivers Keynote at the ABA's 38th Annual National Institute on White Collar Crime" (Mar. 3, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national.
2. U.S. Department of Justice, "Evaluation of Corporate Compliance Programs" (updated March 2023), https://www.justice.gov/opa/speech/file/1571911/download.
3. U.S. Department of Justice, "The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks" (Mar. 3, 2023), https://www.justice.gov/opa/speech/file/1571906/download.
4. U.S. Department of Justice, "Revised Memorandum on Selection of Monitors in Criminal Division Matters" (Mar. 1, 2023), https://www.justice.gov/opa/speech/file/1571916/download.

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The Revised Evaluation of Corporate Compliance Programs ("ECCP")

The ECCP features a lengthy list of questions that DOJ uses to evaluate companies' compliance programs when making charging decisions, including whether to impose a monitor or other compliance obligations. The Fraud Section of DOJ's Criminal Division issued its first ECCP in February 2017, which it then revised in April 2019 and June 2020. Since 2019, DOJ has structured the ECCP around three core questions, namely whether a compliance program is: (1) well designed; (2) applied earnestly and in good faith; and (3) working in practice.

The revised ECCP adds additional requirements to the guidance on two increasingly important aspects: monitoring off-system communications and implementing compliance-promoting compensation structures.

Off-System Communications

The proliferation of personal devices and third-party messaging apps can present significant compliance challenges for companies. In today's business world, much communication happens via text and messaging apps rather than email or other corporate systems more easily monitored. First and foremost, this is an issue for broker-dealers and other regulated entities subject to stringent recordkeeping requirements under the federal securities laws. As noted in our 2022 Year in Review, several Wall Street banks and brokerages recently agreed to pay a combined $1.8 billion to resolve investigations brought by the SEC and CFTC relating to off-system communications.

However, DOJ in particular has broadened the focus to all companies, even those without such specific recordkeeping obligations. The 2022 Monaco Memo provided a "general rule" that all companies' compliance programs should contain effective and enforced policies governing the use of personal devices and messaging platforms, as well as clear employee training and enforcement of such policies. In our recent article in Reuters on this topic, we offered 10 practical compliance steps for companies to consider.

DOJ's revised ECCP now includes a detailed section on the Criminal Division's expectations regarding how companies approach the use of personal devices and messaging applications. Prosecutors are now explicitly instructed to consider the relevant communications channels, policies and risk mitigation, including:

- the types of electronic communication channels used by a company and its employees and their preservation and deletion settings (particularly important with ephemeral messaging platforms where messages disappear instantly);

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- whether the company employs a "bring your own device" (BYOD) policy and associated preservation and similar policies;
- how policies and procedures governing the use of messaging applications are tailored to the company's risk profile and how they ensure that business-related electronic data and communications can be preserved and collected, if needed (*e.g.*, in the FCPA context where companies operate in foreign jurisdictions where text messaging on personal devices or the use of apps like WeChat, WhatsApp or Signal may be more common for business communications); and
- how policies and procedures have been communicated to employees, and whether they are enforced on a regular and consistent basis.

Importantly, AAG Polite noted in announcing the revisions that a "company's answers – or lack of answers may very well affect the offer it receives to resolve criminal liability."

The bottom line is companies need to understand common messaging platforms and how they are used by their employees.

"[T]hese changes reflect DOJ's continued prioritization of incentivizing companies to help deter criminal conduct in the first place. This includes developing and implementing effective programs that foster a compliance-promoting culture and holding individual wrongdoers accountable."

Compliance-Promoting Compensation Structures

Following a similar move by the SEC last October, the revised ECCP emphasizes that the design and implementation of compensation systems play important roles in fostering a culture of compliance. In the revised "Compensation Structures and Consequence Management" section (previously called the "Incentives and Disciplinary Measures"), DOJ added a number of questions that help determine how a company's compensation system contributes to or undermines an effective compliance program. Prosecutors are instructed to consider how a company's HR process, disciplinary measures and financial incentives foster a compensation structure that promotes and prioritizes compliance, and how effective that structure is in practice.

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More specifically, prosecutors now should consider (among other things) whether a company:

- maintains and enforces policies and procedures that allow compliance performance to proactively and retroactively influence compensation packages, for example, through compensation systems that (i) recoup or reduce compensation in the wake of compliance violations via deferred or escrowed payments, particularly for compensation that would have not been earned but for the violations and also (ii) reward exemplary compliance behaviors with bonuses, establishing opportunities for employees to serve as compliance "champions" and making compliance performance a key metric for career advancement;
- tracks metrics and other data relating to disciplinary actions to measure effectiveness of the investigation and consequence management functions (*e.g.*, effectiveness and consistency of disciplinary measures across seniority levels, business units and regions) and adapts as needed its practices based on the analysis of those findings; and
- maintains a nimble compliance function that gathers insights from its hotline and other indicia of compliance performance (*e.g.*, the number of allegations substantiated and the average investigation duration) and is therefore able to evolve and adapt.

Compensation structures that effectively impose financial penalties for misconduct can deter employees' risky or "gray area" behavior by pinning the expenses of wrongdoing on culpable persons' wallets. Companies should involve Compliance department personnel in designing, approving and awarding financial incentives, including for personnel in senior levels of the organization.

Hotline Data Analytics

The revised "Compensation Structures and Consequence Management" section also includes new metrics for companies' hotline data. These include how hotline substantiation rates compare for similar types of wrongdoing across a company, such as across states, countries, or departments, or in comparison to similar companies.

Additionally, based on that analysis, companies are expected to conduct root cause analysis for areas where conduct is relatively underreported or overreported.

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Compensation Incentives and Clawbacks Pilot Program

Relatedly, DOJ also launched its first-ever Pilot Program on Compensation Incentives and Clawbacks, allowing prosecutors to acknowledge clawbacks and thereby reduce corporate fines. The program, which will run for three years before being extended or modified:

- requires that companies entering a corporate resolution involving the Criminal Division develop compliance-promoting criteria within their compensation and bonus systems and report to DOJ annually about their implementation during the resolution term; and
- for companies that fully cooperate, timely and appropriately remediate, and have implemented programs to recoup compensation, reduces the applicable criminal fines by the amount of compensation the company attempts to claw back from culpable employees and those who "(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." This clawed-back portion stays with the company and does not go to DOJ, effectively doubling the value of any clawback by reducing its penalty obligations in addition to receipt of the clawback itself.

Acknowledging the expenses around pursuing clawbacks, such as potential litigation costs, the program will ensure that companies that pursue clawbacks in good faith but without success are still eligible to receive a fine reduction of up to 25% of the targeted recoupment amount.

DAG Monaco explained that DOJ's "goal is simple: to shift the burden of corporate wrongdoing away from shareholders, who frequently play no role in misconduct, onto those directly responsible."

Revised Memorandum on Selection of Monitors in Criminal Division Matters

DOJ also issued a revised memo on the Selection of Monitors in Criminal Division Matters, which builds off the 2018 Benczkowski Memo and incorporates updates previewed in the October 2021 Monaco Memo and the September 2022 Monaco Memo (discussed in our September 2022 FCPA Update) to clarify how DOJ selects monitors. The slightly revised memo provides clarity on four fronts:

- Prosecutors should neither apply a presumption for nor against monitors, but instead should consider the provided 10 (non-exhaustive) factors when assessing the appropriateness of a monitor;
- Many of the requirements for monitors also apply to monitor teams;

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- Monitor selections are made according to DOJ's commitment to diversity, equity and inclusion; and
- The cooling off period has been increased from no less than two years to no less than three years from the date of the monitorship's termination.

These changes clarify the process around implementing monitorships, particularly with respect to when monitorships may be required and which candidates are available to perform the monitorship.

Cooling Off Period

Although these revisions are aimed squarely at ensuring the independence of monitors, the breadth of the requirements may leave a shallower pool of candidates available to take on particular monitorships. The cooling off period, *i.e.* the period within which the company may not conduct other business with the monitoring firm/individual after the monitorship's end, was increased from two years to three years. This provision also included language outlining the various prohibited relationships, including "any employment, consultant, agency, attorney-client, auditing, or other professional relationship" with the company or any of its personnel, subsidiaries, affiliates, successors, or agents.

Further, monitor candidates must certify that they, their firms, and their team members have no current or former interest in or relationship with the company or affiliated entities or personnel. As many companies seek legal advice and other professional services from multiple firms, this requirement may significantly reduce the number of candidates available to perform a monitorship.

Future Implications

In many ways, revisions to the ECCP and monitorship memo involve DOJ formalizing guidance it has offered over the past few years rather than any sort of sea change to the enforcement environment. That said, the formality, and indeed the repetition of the guidance, amplifies DOJ's priorities and further guides what companies can expect from the enforcement process.

Notably, it remains to be seen how companies implement this guidance (especially DOJ's increasingly complex and high expectations) and how DOJ will react to those efforts. These policy guideposts should help companies better direct their compliance resources and draft their internal policies. However, DOJ's actual enforcement resolutions undoubtedly will provide the best measure of corporate efforts against DOJ's expectations and the benefits that DOJ is correspondingly willing to extend. While there have been some positive signs on this front, such as

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the ABB Ltd. DPA, DOJ has shown its teeth recently too, including recently extending Ericsson's monitorship and imposing an additional $206 million fine for breach of its DPA. We will be watching closely upcoming resolutions for indications of precisely how DOJ applies its escalating expectations in assessing cooperation and compliance programs on the ground.

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