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Penalty Reductions for Clawbacks and Late Self-Disclosure: Albemarle FCPA Settlement Highlights Recent DOJ Policies

In September 2023, U.S. authorities announced a parallel DOJ and SEC resolution of FCPA investigations into Albemarle Corporation, a Charlotte-based chemicals company that operates in more than 70 countries. As part of the resolution, Albemarle agreed to pay approximately $218 million to DOJ and the SEC to settle charges that it violated the FCPA's anti-bribery, books and records, and internal accounting controls provisions.[1] The company admitted to paying third-party sales agents to bribe government officials in Vietnam, India, and Indonesia to secure chemical catalyst sales business with state-owned oil refineries.

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1. Non-Prosecution Agreement, *In re Albemarle Corp.* (Sept. 28, 2023), https://www.justice.gov/media/1316796/dl?inline ["Albemarle NPA"]; Order, *In re Albemarle Corp.*, Securities Exchange Act Release No. 98622 (Sept. 29, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98622.pdf ["Albemarle Order"].

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The settlement is only the second parallel resolution involving DOJ and the SEC in 2023 – after the resolution in August with Corficolombiana[2] – and only the fourth corporate FCPA resolution with DOJ in 2023. Notably, the Albemarle resolution highlights how DOJ treats voluntary – even if not necessarily *timely* – self-disclosure, and it is the first FCPA case lowering a DOJ penalty by the amount of compensation withheld pursuant to the Compensation Incentives and Clawbacks Pilot Program ("Clawback Pilot Program") that DOJ unveiled earlier this year.[3]

The Alleged Facts

Albemarle's shares are traded on the New York Stock Exchange, and it is an issuer for purposes of the FCPA. To facilitate its sales of chemical catalysts to oil refineries worldwide, Albemarle, at the time of the conduct under investigation, employed third-party sales agents who were paid commissions based on a percentage of sales. According to the company's NPA with DOJ, from at least 2009 through 2017 Albemarle's agents paid bribes to government officials to promote its chemical catalyst business with state-owned oil refineries in Vietnam, Indonesia, and India. The scheme resulted in approximately $98.5 million in profits.[4]

In Vietnam, Albemarle allegedly obtained contracts at two oil refineries of the state-owned Vietnam Oil and Gas Group ("PetroVietnam") through an intermediary sales agent who requested increased commissions in exchange for providing nonpublic information from government officials about tender processes to help secure business for Albemarle.[5] According to the NPA, Albemarle initially agreed to pay the agent a 4.25% commission, which an Albemarle sales representative understood to be high, and later acquiesced to demands to increase the commission to 6.5% in exchange for access and to fund contributions to the sales agent's "friend" (a key decisionmaker) at PetroVietnam.[6] Albemarle allegedly later used the same sales agent to obtain business at an oil refinery owned by a joint venture that included PetroVietnam.[7] The agent won the support of a government official in exchange for an above-market commission of 6%, 2% of which was offered to the official.[8]

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2. *See* Bruce E. Yannett, Andreas A. Glimenakis, and Courtney Barger, "Shopping Trips, Chats, and Joint Ventures: Two Recent FCPA Cases Highlight Classic FCPA Risks," FCPA Update, Vol. 15, No. 2 (Sept. 2023), https://www.debevoise.com/insights/publications/2023/09/fcpa-update-september-2023.
3. *See* Nicole M. Argentieri, Acting Assistant Attorney General, "Remarks at the American Bar Association 10th Annual London White Collar Crime Institute" (Oct. 10, 2023), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-nicole-m-argentieri-delivers-remarks-american-bar.
4. Albemarle NPA, Attachment A ¶¶ 2, 20.
5. *Id.* ¶ 21.
6. *Id.* ¶¶ 24–33; Albemarle Order ¶¶ 10–13.
7. Albemarle NPA, Attachment A ¶¶ 36–37.
8. *Id.* ¶ 41.

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According to the NPA, in total, Albemarle paid the sales agent approximately $3.5 million in commissions related to the PetroVietnam refineries between 2013 and 2017 and reaped approximately $69.25 million in profits from that business.[9]

A similar story allegedly occurred in Indonesia, where Albemarle used a third-party sales agent to obtain business with Indonesia's state-owned and state-controlled oil company, PT Pertamina ("Pertamina"). According to the NPA, Albemarle hired the sales agent in 2012 with a 4% commission on sales to Pertamina at the request of a Pertamina official, whose close friend was the president of the sales agent's company; the official's son also served on the sales agent company's board. The sales agent paid bribes to Pertamina officials to obtain samples of a competitor's product for Albemarle to use to improve its product and make its bids. In 2013, the sales agent allegedly asked Albemarle to increase its commission from 4% to 10% to enable it to pay bribes to Pertamina officials, a request that Albemarle employees refused but did not report to supervisors or to legal or compliance personnel. According to the NPA, Albemarle terminated the agent only after the "close friend" government official retired in 2015. Overall, Albemarle paid the agent approximately $1.28 million in commissions and fees, a portion of which was paid to a close relative of a Pertamina official, and obtained approximately $18.1 million in profits from two purchase orders with Pertamina.[10]

"Notably, the Albemarle resolution highlights how DOJ treats voluntary – even if not necessarily *timely* – self-disclosure, and it is the first FCPA case lowering a DOJ penalty by the amount of compensation withheld pursuant to the Compensation Incentives and Clawbacks Pilot Program…."

In India, Albemarle is alleged to have engaged in a similar bribery scheme, using a third-party sales agent to retain catalyst business with the state-owned and controlled Indian Oil Corporation Limited ("IOCL"). According to the NPA, in 2009, a sales agent with no prior relationship to Albemarle sent emails to its personnel stating that it would help Albemarle to avoid being placed on a "holiday list," a blacklist that would have prevented it from obtaining business with IOCL. According to the NPA, after internal discussions raising several red flags, including a regional director alerting an Albemarle sales executive that engaging

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9. *Id.* ¶ 43.

10. *Id.* ¶¶ 13, 45–48, 52–55; Albemarle Order ¶¶ 21–26.

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the agent, which claimed to have two former IOCL officials on its board, would cause Albemarle to violate the FCPA, the executive approved a consulting contract with the sales agent. Albemarle allegedly paid approximately $1.14 million in commissions to the sales agent, thereby avoiding placement on the holiday list and obtaining approximately $11.1 million in profits between 2009 and 2011.[11]

In addition to the allegations of payment of bribes through sales agents to state-owned oil refineries in India, Indonesia, and Vietnam, the SEC's Order found that Albemarle failed to implement a sufficient system of internal accounting controls concerning the retention, payment, and oversight of third parties in the same three countries, as well as China and the United Arab Emirates. According to the SEC's Order, Albemarle paid increased commission rates to agents in China and the United Arab Emirates to obtain business with state-owned refineries, despite red flags indicating high risks of bribery, including ties to government officials, and a lack of assurances that the intermediaries provided legitimate services.[12]

According to the SEC's Order, Albemarle internal audit reports over several years identified gaps in internal accounting controls related to the use of sales agents, including that they were paid without completed due diligence, executed contracts, or contractually required reports describing services provided; were paid at rates higher than contracted; or were reimbursed for vague or unsupported expenses. Albemarle's subsidiaries also entered backdated contracts or instructed third parties to submit or tailor their invoices to avoid longer approval processes.[13]

The Resolution

To reach a resolution with DOJ, Albemarle entered into a three-year NPA and agreed to pay a penalty of approximately $98.2 million and an administrative forfeiture of approximately $98.5 million, the latter of which was satisfied in large part by the company's disgorgement of $81.9 million paid to the SEC.[14] To reach a resolution with the SEC, Albemarle consented to a cease-and-desist order, and agreed to pay disgorgement and prejudgment interest of approximately $103.6 million ($81.9 million of which DOJ credited against its forfeiture order).[15] In total, Albemarle agreed to pay approximately $218.5 million to settle the DOJ and SEC investigations.

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11. Albemarle NPA, Attachment A ¶¶ 16, 57–59, 63–65; Albemarle Order ¶¶ 14–20.
12. Albemarle Order ¶¶ 27–32.
13. *Id.* ¶¶ 7–9.
14. Albemarle NPA ¶ 3.
15. Albemarle Order ¶¶ 1, 12.

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Albemarle reported its misconduct to the government in January 2018, approximately 16 months after it first learned of the allegations in Vietnam and nine months after it uncovered evidence of the misconduct in the course of an internal investigation.[16] DOJ determined that due to the delay, the company's self-disclosure was not "reasonably prompt" according to the Corporate Enforcement and Voluntary Self-Disclosure Policy ("CEP") criteria. Nonetheless, the government gave "significant weight" to Albermarle's voluntary self-disclosure "in evaluating the appropriate form of the resolution" and determining the appropriate credit for cooperation and remediation. As a result, the $98.2 million criminal penalty reflects a 45% discount off the bottom of the otherwise-applicable U.S. Sentencing Guidelines fine range. That discount is near the top of the potential 50% discount under the new CEP, which itself represents a doubling of the prior discount possible for companies that exhibit full cooperation and effective remediation without self-disclosure credit.[17] DOJ also noted that Albemarle's self-disclosure influenced DOJ's decision to agree to an NPA rather than a guilty plea or a DPA.[18]

Although Albemarle did not receive credit for *timely* self-disclosure, DOJ considered the company's voluntary self-disclosure in awarding it cooperation credit. Albermale's cooperation included disclosing information obtained through its internal investigation and making foreign documents and witnesses available.[19] Albemarle additionally received credit for remediation, which both DOJ and the SEC noted began upon identifying issues and before the commencement of government investigations. Albemarle's remedial measures included disciplining culpable individuals, exercising third-party audit rights, strengthening its anti-corruption compliance program, and using data analytics to monitor and measure its effectiveness. The company further reduced its bribery risks by shifting to a direct sales business model, eliminating the use of sales agents, and removing compensation incentives tied to sales amounts.[20]

As part of its disciplinary actions, Albemarle terminated 11 employees and withheld bonuses from 16 employees involved in the misconduct. DOJ thus reduced Albemarle's penalty by $763,453, the amount of the withheld bonuses, in accordance with its new Clawback Pilot Program.[21] The three-year initiative, unveiled in March 2023, authorizes fine reductions for companies that recoup compensation

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16. Albemarle NPA ¶ 2(b).
17. *See* Debevoise Update, "DOJ Offers New Incentives in Revised Corporate Enforcement Policy" (Jan. 24, 2023), https://www.debevoise.com/insights/publications/2023/01/doj-offers-new-incentives-in-revised.
18. Albemarle NPA ¶ 2(b).
19. *Id.* ¶ 2(c); Albemarle Order ¶ 42.
20. Albemarle NPA ¶ 2(e); Albemarle Order ¶ 43.
21. Albemarle NPA ¶¶ 2(e), 3.

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from employees who commit misconduct or had supervisory authority over culpable employees and knew of or were willfully blind to the misconduct. The program also provides that DOJ resolutions must require companies to implement compliance criteria in their compensation and bonus systems.[22]

Takeaways

In a year with relatively few DOJ corporate enforcement actions, the Albemarle resolution features DOJ's recent enforcement policies in action. Here are a few takeaways from this case:

- **Even late voluntary self-disclosure can yield benefits.** While falling short of securing the voluntary self-disclosure credit that can unlock a CEP declination, Albemarle received significant benefits for self-reporting misconduct, including a 45% reduction in its criminal penalty, a resolution in the form of an NPA (rather than a DPA or guilty plea), and no imposed monitorship. The penalty reduction is the highest thus far awarded under the revised CEP and, along with last year's ABB resolution, demonstrates DOJ offering more lenient resolution terms where a company has attempted self-disclosure and has a compliance program that detects potential wrongdoing.[23] This case demonstrates that it is worthwhile to invest resources in regularly monitoring potential risks and promptly investigating reports of possible misconduct. If those efforts uncover evidence that is likely to capture the government's interest, the company is then well-positioned to have as informed a discussion as possible with its counsel to determine appropriate next steps, including whether to self-disclose.
- **Government attention to compensation clawbacks is increasing, and the Clawback Pilot Program marks its first action.** Albemarle earned a $763,453 penalty reduction under the Clawback Pilot Program for withholding bonuses from culpable employees. DOJ's policy is to reduce the applicable fine by the full amount of any compensation to culpable employees that is recouped during the period of the resolution. If a company makes a good faith but unsuccessful effort to claw back compensation, DOJ may also in its discretion reduce the fine by up to 25% of the amount of compensation the company attempted to recoup. This development is part of a DOJ effort to shift the burdens of

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22. *See* Kara Brockmeyer, et al., "DOJ Issues Trio of Updates that Further Heighten Compliance Expectations, Particularly Involving Off-System Communications and Compensation Systems," Debevoise In Depth (Mar. 6, 2023), https://www.debevoise.com/insights/publications/2023/03/doj-issues-trio-of-updates-that-further-heighten ["March 2023 Debevoise In Depth"].

23. ABB, a recidivist, settled its third FCPA action in 2022 with a DPA and guilty pleas by two subsidiaries, managing to avoid a parent-level guilty plea and a monitorship due in part to early detection of misconduct and evidence of intent to self-disclose. ABB had scheduled a meeting with DOJ to disclose the misconduct without knowledge of forthcoming media reports that broke the news before the meeting took place. *See* Kara Brockmeyer, Andrew M. Levine, Andreas A. Glimenakis, and Joseph Ptomey, "Cooperation Mitigates Recidivism: ABB Settles with DOJ and the SEC," FCPA Update, Vol. 14, No. 5 (Dec. 2022), https://www.debevoise.com/insights/publications/2022/12/fcpa-update-december-2022.

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corporate wrongdoing from shareholders to individual wrongdoers. While that shift here represents less than 1% of the settlement amount and marks another battlefront for companies to address during the complexities already attendant in government investigations, companies need to consider proactively including compliance criteria in their compensation and bonus systems. DOJ revised its Evaluation of Corporate Compliance Programs guidance earlier this year to emphasize the role of compensation systems in fostering a culture of compliance and to instruct prosecutors to consider how a company's HR processes, disciplinary measures, and financial incentives foster a compensation structure that promotes and prioritizes compliance, and how effective that structure is in practice.[24] Similarly, the SEC in October 2022 released its Rule 10D-1, which requires public companies to adopt a clawback policy that meets certain standards.[25] The SEC has already successfully required clawbacks in a number of recent actions pursuant to the narrower Section 304 of the Sarbanes-Oxley Act.[26]

"Strong compliance and risk management programs are essential to ensure that relationships with third parties are structured to safeguard against the risks of misconduct and that employees are incentivized and empowered to report red flags and evidence of possible misconduct."

- **Focus on controls around the retention, payment, and oversight of third parties.** Using third parties without sufficient business justification and unsupported by sufficient documentation is the most significant bribery risk that does not implicate actual knowledge, and virtually all FCPA cases resolved over the past few years have involved the use of third parties. Albemarle allegedly used a business structure reliant on third-party sales agents who received compensation incentives tied to sales amounts. According to the NPA, employees ignored significant red flags that the intermediaries had improper ties to government officials (e.g., close friends and relatives) and

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24. *See* March 2023 Debevoise In Depth.
25. Debevoise Debrief, "Dodd-Frank Clawbacks: NYSE and Nasdaq Extend Effective Date to October 2" (June 12, 2023), https://www.debevoise.com/insights/publications/2023/06/dodd-frank-clawbacks-nyse-and-nasdaq-extend#:~:text=Capabilities-,Dodd%2DFrank%20Clawbacks%3A%20NYSE%20and%20Nasdaq%20Extend,Effective%20Date%20to%20October%202&text=Both%20the%20New%20York%20Stock,2%2C%202023%20for%20the%20rules.
26. SEC Press Release No. 2022-150, "SEC Charges Infrastructure Company Granite Construction and Former Executive with Financial Reporting Fraud" (Aug. 25, 2022), https://www.sec.gov/news/press-release/2022-150.

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were recommended by government officials, and intended to use increased commissions to pay bribes. Albemarle employees also allegedly failed to keep proper records and report obvious offers to pay bribes. Strong compliance and risk management programs are essential to ensure that relationships with third parties are structured to safeguard against the risks of misconduct and that employees are incentivized and empowered to report red flags and evidence of possible misconduct. It is not necessary to eliminate the use of sales agents and shift entirely to direct sales models, as Albemarle did as part of its remediation, but companies should screen and oversee any third parties like distributors and resellers they engage; require and review documentation evidencing the services they are providing; and test and monitor the effectiveness of their compliance programs.

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DOJ Announces Six-Month "Safe Harbor" Policy for Acquisition-Related Disclosures

On October 4, 2023, Deputy Attorney General Lisa Monaco of the U.S. Department of Justice announced a new "safe harbor" policy for voluntary self-disclosures in connection with mergers and acquisitions (the "Policy").[1] The Policy modifies DOJ's prior guidance on successor liability and further applies it across the Criminal Division.

Although the new Policy largely tracks former guidance (both formal and informal), it does provide some useful bright lines. More specifically, the Policy now explicitly creates a "safe harbor" from prosecution for acquiring companies that:

- Conduct thorough pre-acquisition or immediate post-acquisition due diligence in a bona fide M&A transaction;
- Promptly and voluntarily disclose criminal misconduct at an acquired entity to DOJ ***within six months of closing***;
- Cooperate with any ensuing investigation;
- Fully remediate the misconduct ***within one year of closing***; and
- Engage in timely and appropriate restitution and disgorgement.

The Policy also establishes that aggravating circumstances at the acquired company will not prevent the acquiring company from accessing the safe harbor. Additionally, consistent with DOJ's Corporate Enforcement Policy, acquired companies may be eligible for a declination if there are no aggravating circumstances.

The Policy differs from prior guidance regarding successor liability in several other respects:

- Most significantly, the Policy explicitly expands potential eligibility for the safe harbor to additional entities. Under prior DOJ guidance, an acquiring company would receive the presumption of a declination if it met the requirements of the Corporate Enforcement Policy, including self-reporting, cooperation, and remediation. The Policy now provides expressly that this presumption also will apply to the acquired company.

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1. U.S. Dep't of Justice, "Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions" (Oct. 4, 2023), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self. In addition, DAG Monaco addressed DOJ's growing focus on national security enforcement and reiterated DOJ's expectations regarding compliance-promoting compensation systems, including experience to date under the related pilot program.

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- Under the Policy, such a declination will cover both pre- and post-closing misconduct within the six-month safe harbor period. That includes both successor liability for pre-closing misconduct and the acquirer's primary liability for post-closing misconduct, giving the successor company six months to remediate any lingering issues. This will be particularly helpful where the acquiring company was unable to conduct full anti-corruption due diligence pre-closing, whether due to the structure of the deal or for another reason.
- Conduct disclosed under the Policy will not be included in any future assessment of whether a company is a recidivist.
- The Policy adds specific timeframes for reporting and remediation, subject to a reasonableness analysis, replacing the "as quickly as practicable" timeframe provided by prior DOJ guidance.

Further Analysis

DOJ's new Policy is explicitly designed to encourage companies to give the compliance function "a prominent seat at the table" in M&A transactions. As with DAG Monaco's 2022 speech and memorandum,[2] it emphasizes both voluntary self-disclosure and timeliness, and it now provides some welcome clarity regarding how long is presumed "reasonable."

Although the potential of a safe harbor for an acquired entity reduces the threat of criminal monetary penalties effectively being levied on the successor, both entities remain obligated to disgorge profits if obtaining a declination under the Corporate Enforcement Policy. Given that DOJ's disgorgement calculations often can be onerous, this can serve as a significant deterrent.[3]

As we pointed out in 2018, when the then-Deputy Assistant Attorney General proposed offering self-disclosing acquirers declinations with disgorgement, "that form of resolution is far less attractive to a successor company than a true declination (*i.e.*, not charging a company or seeking any settlement), along the lines suggested by DOJ and the SEC in their 2012 *Resource Guide to the U.S. Foreign Corrupt Practices Act*."[4] Accordingly, this Policy may increase the number of acquiring companies that seek to build clawback provisions into their acquisition agreements,

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2. U.S. Dep't of Justice, "Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement" (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.
3. *See, e.g.*, U.S. Dep't of Justice, "Albemarle to Pay Over $218M to Resolve Foreign Corrupt Practices Act Investigation" (Sept. 29, 2023) (noting $218 million in penalties paid in DOJ and SEC FCPA resolutions, including $103 million in disgorgement and pre-judgment interest).
4. Andrew M. Levine, Philip Rohlik, and Kamya B. Mehta, "Mitigating Anti-Corruption Risk in M&A Transactions: Successor Liability and Beyond," FCPA Update, Vol. 10, No. 5 at 2 (Dec. 2018), https://www.debevoise.com/insights/publications/2018/12/fcpa-update-december-2018.

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retroactively reducing the purchase price to account for any previously-earned profit disgorged to the government.

Finally, the Policy leaves unanswered whether successor liability will become the norm for acquirers that do not voluntarily self-disclose, as opposed to a theory deployed in "limited circumstances, generally in cases involving egregious and sustained violations."[5] The suggestion in DAG Monaco's speech that non-self-disclosing companies "will be subject to full successor liability for misconduct under the law" is a significant threat and certainly an incentive for voluntary self-disclosure. However, as has always been the case, voluntary self-disclosure is not the only factor to be weighed under the Principles of Federal Prosecution of Business Organizations. While companies that do not self-disclose will not receive a safe harbor, they likely still would receive some benefit from cooperation, remediation, the potential for civil or regulatory remedies, and the other factors listed in the Principles.

"Given the short (six-month) timeframe of the safe harbor, companies that are unable to perform rigorous diligence before the deal closes will need to be prepared to move expeditiously to identify any misconduct post-closing."

Conclusion

Rigorous compliance due diligence in M&A transactions has many benefits, such as enabling an acquiring company to properly value an acquisition and to cease pursuing a transaction that exhibits too much risk. Given the short (six-month) timeframe of the safe harbor, companies that are unable to perform rigorous diligence before the deal closes will need to be prepared to move expeditiously to identify any misconduct post-closing.

The Policy may provide a clearer path forward for acquiring companies that have identified an issue and want the benefit of self-disclosure. However, the practical reality is that the costs of an investigation and potential disgorgement must be weighed against the value of the assets to be acquired and the likelihood that DOJ otherwise would discover the past misconduct. Although companies undertaking this analysis will be aided by the clarity of the Policy, it remains to be seen how

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5. A Resource Guide to the U.S. Foreign Corrupt Practices Act [First Edition] at 28 (2012); *see also* A Resource Guide to the U.S. Foreign Corrupt Practice Act [Second Edition] at 30 (2020).

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DOJ will apply the Policy in enforcement actions and whether this new guidance will materially alter the voluntary self-disclosure calculus.

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