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APRIL 26, 2023

Non-U.S. Companies Beware: U.S. Corporate Leniency Programs May Not Achieve Best Outcome

Top U.S. Department of Justice (DOJ) officials have recently been promoting the organization's leniency programs for cooperative companies. However, non-U.S. companies should be wary – the DOJ has continued to stretch the bounds of its jurisdiction to prosecute companies outside the U.S. We explain what companies can do to counter DOJ overreach.

Recent signals from top U.S. Department of Justice (DOJ) officials appear to demonstrate that U.S. federal prosecutors are redoubling efforts to promote leniency programs for cooperating with the DOJ on corruption and bribery investigations.

Non-U.S. companies, however, should not let their guard down – these moves come as the DOJ is using leniency programs to help it stretch the bounds of its jurisdiction and aggressively expanding its prosecution of individuals and companies outside American borders.

What are the Changes?

A DOJ official said companies should divulge potential corruption within weeks of discovering it to meet the DOJ's threshold for "immediate" voluntary self-disclosure. The DOJ also explained the various measures companies can take to avoid an independent monitorship, as well as what "extraordinary cooperation" looks like for repeat offenders to qualify for a declination.

These clarifications come at the heels of updated guidelines last year that have serious implications for non-U.S. companies. The updates allowed U.S. prosecutors to pursue investigations against non-U.S. companies despite pre-existing investigations from other governments, and increased pressure on companies to disclose documents and previous civil, regulatory or criminal investigations, even if the materials are located outside the United States.

What Does this Mean?

Even as the DOJ dangles more potential benefits in exchange for "cooperation," U.S. regulators are redoubling efforts to undertake additional enforcement actions against companies located outside the United States. Even if a company qualifies for the various U.S. leniency programs, there is no guarantee that the program will automatically drive better outcomes, especially where the company believes the allegations being investigated are unfounded.

For example, under the DOJ's definition of cooperation, companies must comply with rounds of invasive information demands and interviews of key personnel in exchange for "cooperation credit." This can result in enforcement proceedings, significant financial penalties and collateral exposure, including potential civil liability and further investigations and enforcement activity by regulators outside the United States.

In some circumstances, a more aggressive approach may yield better results. Such an approach could potentially include:

1. **Testing the Regulator's Reach:** It may be possible to challenge the legal basis of an enforcement action. This is especially pertinent for non-U.S. targets, where the DOJ's reach is more tenuous: for example, prosecutors must follow certain procedures to obtain overseas evidence. Even if a company intends to be fully cooperative, noting a jurisdictional issue can be a good negotiating tool to narrow the scope of a subpoena, for example.
2. **Seizing Control of the Narrative:** While conventional wisdom may favor playing one's cards close to the vest, it can sometimes be advantageous to shape the DOJ's views of a situation early in the process. This might consist of proactively setting the facts supporting a counter-narrative to regulators from the early stages.
3. **Going On the Offensive:** Companies can also look for opportunities to take regulators head-on by challenging the enforcement process by using techniques involving strategic cross-border filings, information demands and cost-shifting applications.

U.S. regulators have become increasingly emboldened to extend their jurisdictional reach to companies based outside the United States. Despite recent policy announcements, submitting to the DOJ does not guarantee the best outcome for at-risk companies, especially if the company believes that the allegations are unfounded. By deploying counteroffensive measures with a team of globally-based former U.S. government lawyers, companies can more effectively coordinate a united response and drive more successful outcomes.

About Kobre & Kim

Kobre & Kim is a conflict-free global law firm focused on disputes and investigations, often involving fraud and misconduct.

Our team of independent advocates in cross-border government enforcement investigations and actions:

- includes over a dozen former U.S. government lawyers based globally;
- has served as lead counsel in prominent enforcement actions including those involving market manipulation, bribery and corruption, antitrust and competition, economic sanctions, asset forfeiture, money laundering, extradition, fraud and other misconduct; and
- are able to either advocate directly or to work cooperatively with local counsel, in jurisdictions in the U.S., UK, EMEA, Asia, Latin America and key offshore financial centers.