

Investigations and enforcement trends: Top takeaways for 2023

DOJ corporate criminal enforcement policy



Ensure that your **compliance program** is appropriately tailored to your organization's risk profile. Given the current regulatory scrutiny, consider engaging outside counsel to direct an **enterprise risk assessment** to address any deficiencies in your compliance program.



Develop a compensation structure that incentivizes **compliance-promoting behavior**, and consider implementation of "clawback provisions" in executive employment agreements.



Develop or bolster your policy surrounding **the use of personal devices and third-party messaging platforms for business purposes**. Where appropriate, be certain that your document preservation policy adequately ensures that such data is preserved and could easily be collected in response to a government inquiry.

Antitrust trends



Ensure that agreements and **compliance materials** are in line with updated key EU antitrust regulations relating to **supply and distribution agreements** (Vertical Block Exemption Regulations) and **cooperation between competitors** (for example, research and development and other commercial cooperation).



Be aware of dramatic changes in both level and scope of antitrust **enforcement by the DOJ and FTC** with respect to both **mergers and conduct**.



Be aware of continued **scrutiny of large digital platforms**.

Environment and sustainability



Follow the SEC's plan to adopt **climate disclosure regulations**, which was initially planned for October 2022. The plan, however, has been pushed back, and now the rules will unlikely be final before April 2023. Once they are final, expect an immediate challenge to the rules under the precedent of *West Virginia v. EPA*. This will likely delay implementation of the climate disclosure regulations even further – and will call into question the final scope.



Be aware that **sustainability issues will continue to be challenged in courts in 2023** – from issues related to the social cost of carbon to reconsideration of the Pennsylvania-New Jersey-Maryland price floors.



Also know that the **Mountain Valley Pipeline** faces another challenge to permitting in 2023, which will lead to yet another delay, and which will increase the risk of project failure.

Sanctions, export controls, and EU customs



More than ever before, we will see **sanctions becoming more multilateral** with broad cooperation between the major regimes (United States/EU/UK). We should expect that many of the sanctions programs in the future will continue to include collaboration between jurisdictions, which would also include **cooperation on enforcement matters**.



Expect **increased enforcement of export controls** related to (1) diversion from lawful end use, particularly for diversion to China, Iran, and Russia; (2) services provided by U.S. persons abroad, including defense services and activities in support of advanced computing and semiconductor manufacturing in China; and (3) non-U.S. company sales of items subject to U.S. foreign direct product rules. **Proactive due diligence of sales distribution channels** is recommended to minimize diversion risks, particularly if there was past business in Russia or involvement in now-sanctioned activities.



Prepare for **mandatory supply chain due diligence**: know how the goods that you buy, make, or import are manufactured, and document it. The U.S., the EU, and a growing list of jurisdictions have adopted – or are adopting – a rapidly growing list of regulatory schemes that make it necessary to know that products are manufactured in compliance with minimum labor standards and without harming the environment, and requiring to know the carbon footprint of products. Not having this information will mean that the products cannot be imported, may have to be recalled, or will be subject to new punitive carbon border taxes. **Prepare now**.

Foreign Corrupt Practices Act



Where wrongdoing is discovered, the **DOJ wants prompt self-disclosure by the responsible individuals to the prosecutors** to maximize the company's opportunity for non-prosecution.



To obtain **cooperation credit**, engage in early discussion with U.S. authorities about potential legal channels to be employed to enable the disclosure of personal data from the UK and/or Europe.



Track UK Serious Fraud Office enforcement relating to **green investment fraud and crypto**.

False Claims Act



Evaluate business proposals and monitor existing business implicating **federal funds, grants, payers, and beneficiaries**.



Track key areas of enforcement (e.g., **potential kick-backs, use of COVID-19 funds, procurement, cybersecurity**).



Consider **strategies to reduce risk** (e.g., seeking guidance if laws are ambiguous and notifying payers of practices).

DoD OIG investigations



Employees of a defense contract may file a **whistle-blower retaliation claim** with the Department of Defense, Office of Inspector General (DoD OIG) if they believe they were subject to an adverse personnel action in retaliation for making a protected disclosure.



The employee must **demonstrate causation** – i.e., that the employee's protected disclosures (and not some other cause), and contributed to the adverse personnel action.



Employers may opt to participate in confidential **optional mediation** – at no cost – with DoD OIG mediators. If no settlement is reached, the case will be transferred to the OIG investigators for a full investigation.

Digital assets



Increased focus on **digital asset investigations and prosecutions** by regulators and the DOJ.



Criticism of regulators, particularly the SEC, that there has been **"regulation by enforcement."**



Expectation that the extended crypto winter will hasten **additional regulations in this space**.