

DOJ Revisions to Corporate Criminal Enforcement Policies Are a Potential Sea Change for Internal Investigations

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Two weeks ago, the U.S. Department of Justice (“DOJ”) announced broad changes to its policies on corporate criminal enforcement. The changes were outlined in a memorandum entitled Further Revisions to Corporate Criminal Enforcement Policies Following Discussions With Corporate Crime Advisory Group (“Revised Policies”)¹ and were accompanied by a public statement by Deputy Attorney General Lisa Monaco.² Last week, Principal Associate Deputy Attorney General Marshall Miller gave a Keynote Address (“Keynote”) at Global Investigations Review in New York City, which augmented Monaco’s remarks.³ The Revised Policies and these public statements merit serious consideration by in-house and outside counsel who conduct internal investigations.

Among other things, the Revised Policies admonish companies to expedite disclosures of potential criminal conduct to the DOJ and provide evidence of such misconduct in real time. The Revised Policies also call on all divisions of the DOJ to have documented programs to give credit for voluntary disclosures. The Revised Policies follow the DOJ’s announcement in the Fall of 2021 requiring corporations to disclose all information regarding individual wrongdoing to receive cooperation credit. The Revised Policies may affect the way corporations investigate potential misconduct by their employees, and will likely usher in an era of increased enforcement long been anticipated since the Biden Administration began more than a year and a half ago.

Summary of the Revised Policies

The Revised Policies include the following five components: (1) individual accountability, (2) addressing companies that are repeat offenders, (3) incentivizing companies to voluntarily self-disclose misconduct, (4) improving the compliance monitor process, and (5) promoting a link between compensation and compliance.

First, the Revised Policies clarify that individual accountability remains the DOJ’s “first priority.”⁴ To ensure internal investigations are expedited, however, the DOJ will now require cooperating companies

¹ Further Revisions to Corporate Criminal Enforcement Policies (September 15, 2022), available at <https://www.justice.gov/opa/speech/file/1535301/download>.

² Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (September 15, 2022) (“Monaco Remarks”), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

³ Principal Associate Deputy Attorney General Marshall Miller Delivers Live Keynote Address at Global Investigations Review (September 20, 2022), available at <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-live-keynote-address>.

⁴ Revised Policies at 2.

to come forward with evidence they uncover more quickly. Evidence of misconduct must be provided “swiftly and without delay.”⁵ As Miller emphasized in the Keynote, “cooperating companies [must] produce hot documents or evidence in real time.”⁶ The Revised Policies’ carrot and stick approach has the following stick: “Where prosecutors identify undue or intentional delay in the production of information or documents—particularly with respect to documents that impact the government’s ability to assess individual culpability—cooperation credit will be reduced or eliminated.”⁷

Miller’s Keynote highlighted this issue, making clear that the DOJ “will not hesitate to seek criminal indictments or require guilty pleas [of corporations] where facts and circumstances require.”⁸ Citing recent pleas from companies such as NatWest and Balfour Beatty Communities, Miller noted that criminal charges and pleas are “now on the main, everyday menu,” and not limited to special circumstances.⁹

Regarding the sequencing of corporate and individual charges, the DOJ will work to complete investigations and seek criminal charges against individuals “prior to or at the same time as” entering a resolution against a corporation.¹⁰ If prosecutors seek to resolve a corporate case prior to completing an investigation into responsible individuals, they must “obtain the approval of the supervising United States Attorney or Assistant Attorney General of both the corporate resolution and the memorandum addressing responsible individuals.”¹¹

Second, for companies with a history of misconduct, the Revised Policies contain guidance for evaluating this prior misconduct. The Revised Policies clarify that the DOJ does not view all instances of prior misconduct as equal; the most egregious are prior criminal resolutions in the U.S. and prior wrongdoing involving the same personnel or management. In a nod to criticism over prior policy in this regard, however, the Revised Policies make clear that misconduct that occurred more than five or ten years prior to the conduct under investigation will be given less weight.

Additionally, the Revised Policies state that the DOJ disfavors repeated non-prosecution or deferred prosecution agreements with the same company. Before a prosecution team extends an offer for a successive NPA or DPA, prosecutors must obtain the written approval of the responsible U.S. Attorney or Assistant Attorney General and provide notice to the Office of the Deputy Attorney General.¹²

Third, the Revised Policies announce additional incentives for companies to voluntarily self-disclose misconduct to the government.¹³ The DOJ will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct, “absent...aggravating factors,” such as “misconduct that poses a grave threat to national security or is deeply pervasive throughout the company.”¹⁴ Nor will the DOJ require an independent compliance monitor for such a company if, at the time of resolution, it has implemented and tested an effective compliance program.

⁵ *Id.* at 3.

⁶ Keynote at II.

⁷ Revised Policies at 3.

⁸ Keynote at II.

⁹ *Id.*

¹⁰ Monaco Remarks, Individual Accountability.

¹¹ Revised Policies at 4.

¹² *Id.* at 4-6.

¹³ *Id.* at 6-8.

¹⁴ *Id.* at 7.

Of particular note, the Revised Policies will also require every component of the DOJ that prosecutes corporate crime to have a formal, documented program that incentivizes voluntary self-disclosure.¹⁵ This change recognizes the DOJ Antitrust Division's success over many years in implementing its voluntary disclosure policy.¹⁶ As Miller said in his Keynote, the DOJ is "doubling down and scaling up," and every component of the DOJ including U.S. Attorney's Offices "will now have a voluntary self-disclosure policy that defines its terms and identifies its rewards."¹⁷ Companies that disclose will not be required to enter a guilty plea, absent aggravating factors, nor will they be required to have a corporate monitor, assuming they have remediated and have "implemented and tested an effective compliance program."¹⁸

Fourth, the Revised Policies include changes to how prosecutors identify the need for a compliance monitor, select a monitor, and oversee the monitor's work.¹⁹ Going forward, all monitor selections are to be made pursuant to a documented selection process that is to operate transparently and consistently.²⁰ Additionally, prosecutors must ensure that the scope of every monitorship is tailored to the misconduct, and when a monitor is imposed, the DOJ is to "remain apprised of the ongoing work conducted by the monitor" and engage in a "[c]ontinued review of the monitorship."²¹

Finally, the Revised Policies encourage companies to tie employee and executive compensation to the promotion of compliance and the avoidance of improperly risky behavior. When prosecutors evaluate the strength of a company's compliance program, they will consider "how the corporation has incentivized or sanctioned employee, executive, and director behavior, including through compensation plans, as part of its efforts to create a culture of compliance."²² They will evaluate whether, after learning of misconduct, a company actually claws back compensation or otherwise imposes financial penalties.²³ As Miller said in his Keynote, "We've seen companies [clawback] pay from executives who were engaged in criminal conduct and from executive leadership in high-profile cases. So we know it can be done — and in the Department's view it should be done."²⁴ The DOJ's Criminal Division will also develop guidance on how to reward corporations that employ claw back or similar arrangements.²⁵

Potential Implications for Internal Investigations

The Revised Policies could result in significant shifts in how companies investigate potential misconduct by their employees. In the first instance, companies may feel greater incentives to disclose such misconduct very early in an investigation. This is because a failure to disclose in a timely manner could result in a significant penalty down the road, in the form of a guilty plea or even an indictment, which are on the "menu" as Miller stated.

Furthermore, companies may feel increased pressure to disclose documents even before they have fully understood their import in the context of the overall investigation. Experienced white-collar practitioners

¹⁵ *Id.*

¹⁶ 7-3.300 - Antitrust Division Leniency Policy and Procedures, available at <https://www.justice.gov/atr/page/file/1490246/download>.

¹⁷ Keynote at II.

¹⁸ Revised Policies at 7.

¹⁹ *Id.* at 11-14.

²⁰ *Id.* at 13-14.

²¹ *Id.* at 14.

²² *Id.* at 9.

²³ *Id.* at 10.

²⁴ Keynote at III.

²⁵ Revised Policies at 10.

know that the significance of a “hot document” can only be fully appreciated with the benefit of interviews of people involved in creating the document. Now, however, companies will have to evaluate whether to turn the documents over to the DOJ before such interviews are conducted.

Additionally, as they investigate potential wrongdoing by employees, companies will need to pay attention to compensation and clawing back salaries and/or bonuses where appropriate. Companies will feel increased pressure to claw back to receive full credit from the DOJ for their compliance program.

These are just a few of the potential strategic implications raised by the Revised Policies. There is no doubt that the changes represent a significant update to the DOJ’s corporate enforcement policies. Time will tell whether the Revised Policies are a shift in the existing landscape or a sea change.

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