

DOJ Announces Major Changes to Its Corporate Enforcement Policies

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The Department of Justice (DOJ) has once again raised the bar for corporations seeking cooperation credit in government investigations. Last Thursday, DOJ issued a [department memorandum](#) and [announced](#) three significant revisions to its corporate enforcement policies, including:

- Restoring prior DOJ guidance requiring companies to provide all nonprivileged information about individuals involved in the misconduct to be eligible for cooperation credit;
- Considering a corporation's prior corporate misconduct — both related and unrelated, domestic and abroad — in charging decisions; and
- Imposing a corporate monitor whenever DOJ deems it necessary and appropriate.

In announcing these revisions, Deputy Attorney General Lisa Monaco emphasized that these changes seek to hold more individuals accountable for corporate misconduct and incentivize companies to implement measures to prevent and detect corporate crime in the first place.

Cooperation Credit

DOJ's guidance on cooperation credit is — in many ways — a reinstatement of the “Yates Memo.” To receive any cooperation credit whatsoever, a company must once again identify and provide all nonprivileged information about individuals involved in, or responsible for, the misconduct under investigation — regardless of the individuals' role or position within the company. This revision is a major departure from DOJ's more recent policies, which only required companies to identify individuals “substantially” involved in, or responsible for, the wrongdoing.

DOJ's position is that even individuals on the periphery can possess information that is valuable to an investigation, and DOJ is better situated than the company to assess an individual's relative culpability and involvement in misconduct. The prior administration scaled back the Yates Memo's requirements out of concerns of inefficiency and practicality — including the scarcity of investigative resources and the time it took to complete corporate criminal investigations. It is too soon to tell if the same concerns persist today; however, the current

administration has been clear that white collar criminal enforcement is a top priority for DOJ, dedicating additional resources to carry out those enforcement goals.

Historical Corporate Misconduct

Now, DOJ also will take into account all of a company's prior corporate misdeeds when considering a corporate resolution or criminal sanction. Prosecutors now are instructed to evaluate a company's *full and complete* criminal, civil, and regulatory record when deciding the appropriate resolution. For example, a prior civil settlement in a health care fraud case could be considered in resolving an antitrust investigation. Further, this review is not limited to domestic corporate misconduct; DOJ made clear that it will also assess a company's prior conduct abroad.

How this will be applied in practice and its impact in resolving enforcement actions remain to be seen. Historically, prosecutors have considered prior corporate misconduct. However, prior misconduct unrelated to the investigation at issue, previously stood a stronger chance of being discounted or weighted less by DOJ when considering potential resolutions.

Independent Monitors

DOJ's announcement also included changes to its stance on the use of independent compliance monitors. Prosecutors now can require the imposition of independent monitors whenever necessary to ensure a company's compliance with its corporate resolution obligations. This is another significant deviation from the prior administration's guidance that suggested corporate monitors would be disfavored, and their imposition would be the exception rather than the rule. Under the revised policy, a company with an untested or ineffective compliance program, or one not fully implemented at the time of DOJ resolution, would more likely face the prospect of a monitor than a company whose compliance program and controls are tested, adequately staffed, and fully implemented.

Corporate Crime Advisory Group

Finally, DOJ has created a new Corporate Crime Advisory Group as an additional tool in its fight against white collar crime. The advisory group will bring together representatives from all parts of DOJ involved in corporate criminal enforcement to continually review DOJ's approach to criminal enforcement of business entities and their employees.

Implications

DOJ's announcement aligns with the administration's efforts to make white collar crime a key enforcement priority. In light of this trend, companies must be prepared for increased scrutiny and enforcement activity in this area. Given the new policies:

- Companies should review compliance programs/internal controls to ensure they adequately monitor, deter, and prevent misconduct. Corporate culture is important to DOJ. How seriously a company treats compliance can be the decisive factor for DOJ when considering potential resolutions, which now could very well include the imposition of a costly monitor.

- Companies should expect an increased push by DOJ for information concerning a broader range of individuals potentially involved in misconduct. Lower-level employees or individuals on the periphery of the misconduct who would not have previously been identified are now fair game and should be included in any internal review. Omitting these individuals from disclosure could impact whether DOJ awards cooperation credit.
- Companies already under investigation must assess what, if any, additional steps must be taken under the revised cooperation credit guidance.
- Companies should assess any unrelated prior criminal, civil, and regulatory enforcement actions; consider their potential impact on future DOJ corporate resolutions; and be prepared to advocate for why prior enforcement actions should not impede the successful resolution of a matter.

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