

March 7, 2023

Justice Department Announces New Policies Impacting Corporate Criminal Enforcement

Introduction

On March 2 and 3, 2023, at the American Bar Association's National Institute on White Collar Crime, Deputy Attorney General Lisa O. Monaco and Assistant Attorney General Kenneth A. Polite addressed recent developments in the landscape of corporate criminal enforcement, concurrent with an official announcement of two new policies.

In her remarks, Monaco stated the DOJ intends to “zealously pursue corporate crime” and noted that an “ounce of prevention is worth a pound of cure.” She encouraged companies to get ahead of the curve by (1) voluntarily self-disclosing misconduct to the appropriate Department component and (2) making compliance a factor in corporate compensation structures, including through the use of clawbacks for individuals involved in wrongdoing.¹ Monaco also emphasized the Department's position that corporate crime is increasingly a matter of national security. Noting that “sanctions are the new FCPA,” Monaco stressed the government's commitment to investing additional resources to confront emerging national security risks caused by corporate misconduct and shared specific ways in which the Department is combatting the “troubling trend” in corporate crime's intersection with national security.

In Polite's address, he emphasized the importance to the DOJ of understanding why misconduct occurs and how to prevent it, a trait that “distinguishes a community problem-solver from someone who simply files criminal charges.” Polite stated that this dynamic is driving the DOJ's increasing focus on corporate compliance. Polite discussed changes to the DOJ's Evaluation of Corporate Compliance Programs (ECCP), focusing on revisions to the mobile device and messaging portions of the policy.² Under these changes, the DOJ will evaluate a company's policies on devices, and preservation of and access to messages according to the company's “risk profile and specific business needs.” Polite specifically called out “bring your own device” (BYOD) policies and policies on ephemeral messaging platforms as areas of emphasis for DOJ. The DOJ will also evaluate how companies are communicating these policies to their employees and whether they are enforced consistently.³

Polite stressed that, during an investigation, prosecutors will not take “at face value” a company's lack of production from third-party messaging applications, including ephemeral messaging applications. Polite stated that a company's answers or lack thereof on mobile device policies and message preservation, including for personal devices, “may very well affect the offer it receives to resolve criminal liability.” Polite advised executives to keep these issues “top of mind.”

Goals

Monaco and Polite identified several Department-wide priorities. First, the DOJ aims to promote proactive investment in compliance cultures and good corporate citizenship by providing consistent, clear, and transparent guidance across all DOJ components nationwide on its expectations specifically with regard to self-reporting. Second, the DOJ identified a particular need for clear guidance on mobile device policy and messaging preservation. While Polite acknowledged that companies have unique business needs and risks that will drive their policies, the Department wants companies to understand the criteria and process that the DOJ will bring to these issues. Third, the agency wants to encourage individual executives to take ownership of corporate compliance and, where wrongdoing has occurred, shift the consequences of misconduct from shareholders to the individual wrongdoers and their direct supervisors.

Two New Policies

Monaco and Polite discussed two new policies that the DOJ is implementing to incentivize companies to promote corporate compliance.

Voluntary Self-Disclosure Program. The voluntary self-disclosure program was first announced by the DOJ on February 22, 2023,⁴ and Monaco explained it has now been implemented nationwide to eliminate geographic disparities

and ensure a “predictable,” consistent and “transparent” approach to enforcement. Specifically, consistent with recent policy announcements from DOJ, absent any aggravating factors, DOJ will not seek a guilty plea where a company has promptly (i) self-disclosed, (ii) cooperated, and (iii) remediated the misconduct.⁵ To qualify as a voluntary disclosure, (1) the disclosure must be made voluntarily and not due to any preexisting legal obligation, (2) the conduct must be reported in a “reasonably prompt” timeframe and must not already be publicly disclosed or known, and (3) the disclosure must reveal all relevant facts of the misconduct.⁶ When asked in the follow-up Q&A session what qualifies as “prompt” reporting, Monaco explained that it depends on the facts and circumstances of the matter, but noted the DOJ understands that self-reporting requires investigating and navigating complex issues, such as privilege concerns. Monaco also explained during the follow-up Q&A that if a whistleblower complaint has been submitted directly to the DOJ and the company is not aware of the misconduct, the DOJ will not count that against the “prompt” reporting requirement, but may inquire what controls the company has in place that would or should have led it to discover the misconduct. Monaco encouraged the companies to err on the side of earlier disclosure.

Compensation Incentives and Clawbacks Pilot Program. On March 3, DOJ launched its first-ever pilot program linking compliance to compensation and clawbacks. According to Monaco, “Nothing grabs attention or demands personal investment like having skin in the game, through direct and tangible financial incentives.” The focus of the clawback policy is to ensure a company’s remediation efforts address those actual wrongdoers and their supervisors who had knowledge of misconduct or were willfully blind. Monaco stated that if a company recoups compensation from a wrongdoing employee, any resolution between the DOJ and the company will exclude those sums. The program, which is a three-year initiative, has two components: (1) every corporate resolution with the DOJ will have a requirement that there is a compliance-promoting component in the company’s compensation and bonus program, and (2) fine reductions will be offered for companies that claw back compensation paid to executives responsible for misconduct.⁷ If the clawback is successful, the fine will be reduced by the amount of the clawback; if a company’s good faith effort to claw back compensation is unsuccessful, prosecutors will have discretion to reduce fines up to 25% of the amount of compensation that it attempted to claw back.⁸ The DOJ will not punish companies who cannot pursue clawbacks due to their home countries’ restrictions.⁹

National Security Enhancements

Monaco also announced a surge in resources to address the intersection between corporate crime and national security, including hiring 25 new prosecutors to investigate sanctions evasions, export compliance, and other economic crimes. According to Monaco, “sanctions are the new FCPA.” To address the increasing intersection of corporate crime and national security, the DOJ is undertaking significant restructuring and resource commitments within the National Security Division overseen by Assistant Attorney General for National Security, Matt Olsen. The DOJ is also investing in its Bank Integrity Unit and Money Laundering Section, as well as hiring Chief Corporate Enforcement Counsel. Monaco said that “significant announcements in some significant cases” would be made “in the coming weeks.”

Key Takeaways

- Prompt self-disclosure remains a priority: companies who discover misconduct should consult legal counsel to carefully consider whether and when to self-disclose, cooperate and mitigate.
- The DOJ encourages self-reporting by companies that discover misconduct during normal-course internal investigations or data analytics findings as well as those that discover misconduct through whistleblower reports.
- If a company is unaware of misconduct because a whistleblower complaint has been filed without notice to the company, the DOJ will not count that against the “prompt” reporting requirement, but it may inquire what controls the company has in place that would or should have led it to discover the misconduct. Companies will have to weigh these significant risks when considering whether to self-report.

- The Department has a continued focus on individual responsibility and linking compliance to compensation structure. Specifically, the DOJ offers fine reductions for clawbacks of wrongdoers' compensation and encourages including compliance as an element in employees' compensation structure.
- DOJ encourages companies to solidify their policies on mobile devices (including “bring your own device” policies), and retention and preservation of ephemeral messages. Failure to address these areas or produce messages from these devices will likely impact the offer the company receives in order to resolve its liability.
- The DOJ is devoting additional resources to combatting the intersection between corporate misconduct and national security risk, a priority of expected future enforcement.

If you have any questions on this topic or need additional information, please contact Ropes & Gray's [anti-corruption / international risk](#) and [government enforcement / white collar criminal defense](#) attorneys.

1. *Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime*, DOJ (March 2, 2023) <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>
2. Alert, Ropes & Gray LLP, *DOJ Unveils Changes to the Criminal Division's Corporate Enforcement Policy to Incentivize Voluntary Self-Disclosure and Cooperation* (January 20, 2023) <https://www.ropesgray.com/en/newsroom/alerts/2023/01/doj-unveils-changes-to-the-criminal-divisions-corporate-enforcement-policy-to-incentivize-voluntary>
3. *Assistant Attorney General Kenneth A. Polite, Jr. Delivers Keynote at the ABA's 38th Annual National Institute on White Collar Crime*, DOJ (March 3, 2023) <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national>
4. Alert, Ropes & Gray LLP, *DOJ Launches Formal Voluntary Self-Disclosure Policy for All U.S. Attorney Offices* (February 27, 2023) <https://www.ropesgray.com/en/newsroom/alerts/2023/02/doj-launches-formal-voluntary-self-disclosure-policy-for-all-us-attorney-offices>
5. Department of Justice, *Evaluation of Corporate Compliance Programs* (updated March 3, 2023).
6. *Id.*
7. Chris Strom, *DOJ Pushes Companies to Punish Misconduct with Bonus Cuts*, Bloomberg News (March 2, 2023) <https://www.bloomberg.com/news/articles/2023-03-02/doj-pushes-companies-to-punish-misconduct-through-compensation-cuts#xj4y7vzkg>
8. Department of Justice, *The Criminal Division's Pilot Program Regarding Compensation Incentives and Clawbacks* (March 3, 2023).
9. *Id.*