DOJ Issues New Memorandum on Corporate Criminal Enforcement

Yesterday the Deputy Attorney General of the U.S. Department of Justice (DOJ) issued a memorandum that establishes new policies on corporate criminal enforcement. The memorandum builds on a shorter October 2021 memorandum that sought to enhance DOJ's efforts to combat corporate crime, including through the prosecutions of executives and other personnel involved in illegal activities. The new memorandum addresses, among other issues, how companies can earn cooperation credit from federal prosecutors; how DOJ will account for parallel foreign prosecutions; how DOJ will assess corporate compliance programs; when an independent compliance monitor is appropriate; and the efforts that companies must undertake to produce documents potentially shielded from disclosure by foreign data-privacy laws. Understanding the implications of the memorandum is critical for any company operating in the United States.

Here is what business leaders need to know today about the new policies:

I. Timely Disclosure of Wrongdoing to DOJ

Under existing policies, companies under federal investigation can receive credit for cooperating with DOJ, resulting in lesser penalties or in deferred-prosecution or non-prosecution agreements. The new memorandum, however, makes clear that such credit will be reduced or eliminated if the cooperation is not timely. For that reason, "to receive full cooperation credit, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct." And companies must prioritize disclosure of evidence that is "most relevant for assessing individual culpability."

II. Foreign Prosecutions

Consistent with DOJ's longstanding approach to prosecutions in other jurisdictions—for example, prosecution by state authorities—the memorandum authorizes federal prosecutors to forgo prosecutions of individuals who are subject to prosecutions in foreign countries for the same conduct. In deciding whether to forgo a prosecution, prosecutors must consider a number of factors, chief among them the strength of the foreign country's interest in the case, the foreign country's ability and willingness to prosecute, and the probable sentence that will be imposed by the foreign tribunal.

III. Company's History of Misconduct

The October 2021 memorandum instructed prosecutors to examine a company's history of misconduct in deciding whether to seek criminal charges. The new memorandum provides more granular guidance as to how prosecutors should assess past misconduct:

- Prior criminal resolutions that are more than ten years old, and civil or regulatory resolutions that are more than five years old, should be given less weight.

- The greatest weight should be given to recent misconduct involving the same personnel or management, including whether such overlap indicates weaknesses in the company's compliance program.
- When a company operates in a highly regulated industry, its history of compliance should be evaluated against similarly situated companies.
- Prior misconduct by an acquired company should be discounted if the acquiring company has an effective compliance program and addressed the root cause of the prior misconduct before the new misconduct occurred.
- Prosecutors are discouraged from offering deferred-prosecution or non-prosecution agreements for a second time.

IV. Voluntary Self-Disclosure

The memorandum directs every DOJ component to adopt a formal written policy ensuring that a company benefits from voluntary self-disclosure of misconduct—*i.e.*, disclosure without any preexisting obligation to do so and without the imminent threat of a disclosure or a government investigation. Those written policies must reflect two "core principles": (i) DOJ generally will not seek a guilty plea where a company has self-reported, cooperated, and remediated the wrongdoing; and (ii) DOJ will not seek to impose an independent compliance monitor where a company self-reported and has put in place an effective compliance program by the time that the matter is resolved.

V. Evaluation of Cooperation in Light of Foreign Data-Privacy Laws

Companies under investigation sometimes claim that foreign data-privacy laws prevent them from producing documents. The memorandum instructs prosecutors to evaluate whether a company is working diligently to navigate foreign laws to permit production where possible, or instead "actively seeks to capitalize on data privacy laws and similar statutes to shield misconduct inappropriately from detection and investigation by U.S. law enforcement."

VI. Assessing Corporate Compliance Programs

In deciding an appropriate resolution of an investigation into corporate misconduct, prosecutors must consider the effectiveness of a company's compliance program, both at the time of the offense and at the time of the charging decision. Supplementing existing DOJ policies, the new memorandum enumerates two "additional metrics" to evaluate compliance programs.

First, prosecutors must consider whether a company has put in place a compensation system that "clearly and effectively impose[s] financial penalties for misconduct." The memorandum places particular emphasis on "compensation clawback provisions" to hold "personally accountable" individuals "who engage in or contribute to criminal misconduct." It instructs DOJ's Criminal Division to develop further guidance on rewarding companies that develop clawback policies, including policies that shift the burden of corporate penalties from shareholders to culpable individuals. The memorandum also directs prosecutors to consider whether a company provides

"affirmative incentives for compliance-promoting behavior" and whether the company's actions in practice align with its written policies.

Second, prosecutors must consider a company's policies on the use of personal phones and other devices, as well as the use of third-party messaging apps. In particular, in deciding whether to grant cooperation credit, prosecutors will examine whether a company has the ability to collect all non-privileged responsive documents related to an investigation. The memorandum directs the Criminal Division to study "best corporate practices" on those issues and incorporate them into the next edition of its compliance-program guidance document.

VII. Independent Compliance Monitorships

The October 2021 memorandum instructed prosecutors not to apply any presumption either in favor of or against imposing an independent compliance monitorship as part of a corporate criminal resolution. The new memorandum sets out specific factors that prosecutors must consider in deciding whether to seek a monitorship. Among a number of other factors, prosecutors must consider:

- Whether the company voluntarily self-disclosed the misconduct;
- Whether the company has implemented and adequately tested an effective compliance program;
- Whether the misconduct was long-lasting or pervasive across the organization;
- Whether the company has taken adequate remedial steps to address the misconduct, such as terminating business relationships or culpable personnel;
- Whether the company faces unique risks or compliance challenges; and
- Whether the company is already subject to regulatory oversight or another monitorship.

In addition, the memorandum requires monitors to be selected through "consistent and transparent procedures." To that end, it instructs all relevant DOJ components to adopt a public monitor selection process by the end of the year and it provides that the Office of the Deputy Attorney General must approve a component's selection of a monitor.

Finally, prosecutors must continually review a monitor's work during the full term of the monitorship, including by considering whether to reduce or extend the term of the monitorship. To facilitate that review, "the monitor's responsibilities and scope of authority" must be "well-defined and recorded in writing" and a "clear workplan" must be established.

VIII. Transparency in Criminal Enforcement

The memorandum directs that, to the extent possible, prosecutors who enter into agreements with companies to resolve criminal liability must include (i) an agreed-upon statement of facts that outlines the criminal activity, and (ii) a discussion of the considerations that led DOJ to enter into the agreement. Absent exceptional circumstances, such agreements will be published on DOJ's website.

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A number of Quinn Emanuel partners are veterans of the Department of Justice, including former United States Attorneys and high-level DOJ officials. The implications of the new memorandum will vary considerably across companies and industries. To consult a Quinn Emanuel attorney on how the memorandum may impact your company and compliance program, please contact one of the following partners:

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