

Regulatory Alert

Regulatory Insights

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DOJ further shifts policies, encouraging compliance “incentives and deterrence”

KPMG Insights: Building off of policy issuances in 2020 and 2021 (see KPMG Regulatory Alerts [here](#) and [here](#)), the DOJ has outlined additional key elements of an effective ethics and compliance program. Based on recommendations from DOJ’s Corporate Crime Advisory Group (established in 2021), DOJ has updated portions of its corporate enforcement policies and practices, including in areas such as compensation clawbacks for employees/executives/directors, consideration of probationary arrangements or monitoring status under prior resolutions, and leniency for companies that voluntarily and timely self-report misconduct. DOJ suggests the changes will give “general counsels and chief compliance officers the tools they need to make a business case for responsible corporate behavior.” Companies should ensure appropriate investment (people, process, and technology) to prevent, detect, and respond to ethics and compliance matters as well as demonstrable reporting of issues identification, notification, escalation, and resolution (inclusive of monetary action).

The Department of Justice has issued a [memorandum](#) detailing revisions to its approach for addressing corporate ethics and compliance matters. The memorandum, which was announced in a [speech](#) by the deputy attorney general, provides “a mix of incentives and deterrence” to enhance corporate compliance in areas of:

1. Individual accountability
2. History of Misconduct
3. Voluntary self-disclosure
4. Independent compliance monitors
5. Corporate culture

1. Individual Accountability. The DOJ states that its top priority in corporate ethics and compliance matters is to hold accountable individuals who commit and profit from corporate misconduct. In particular, the DOJ identified the need for prosecutors to expedite the investigations of individuals as they stated a delay in disclosures of evidence “undermines efforts to hold individuals accountable” and “limits the Department’s ability to proactively pursue leads

and preserve evidence before it disappears.” To address this concern, the DOJ issued the following guidelines:

- To receive full cooperation credit, companies that discover “hot documents” or evidence must prioritize notifying prosecutors; undue or intentional delay in producing evidence will result in a “reduction or denial of cooperation credit.”
- DOJ prosecutors will complete investigations and seek warranted charges against individuals prior to or at the same time as entering a resolution against a corporation.
- In cases where it makes sense to resolve a corporate case first, DOJ prosecutors must issue a full investigative plan outlining outstanding work on the individual cases and a timeline to bring the matter to resolution prior to the end of any statute of limitations period.

2. History of Misconduct. Addressing repeat offenders of corporate misconduct, the DOJ issued additional guidelines pertaining to how a history of misconduct will be evaluated. Key aspects of this review entail:

- An emphasis on prior misconduct involving criminal resolutions in the United States and prior wrongdoing

- involving the same personnel or management as the current misconduct.
- More recent findings of misconduct; dated conduct, including criminal resolutions that are more than 10 years old and civil or regulatory resolutions that are more than five years old, will be accorded less weight.
- The nature and circumstances of the prior misconduct and whether it shares the same root causes as the present misconduct.
- A company's proven track record of compliance; companies that acquire other companies with compliance issues will not be treated as repeat offenders by the DOJ as long as the acquired company has been integrated into an effective well-designed compliance program and the root cause of the prior misconduct had been addressed before the conduct under current investigation.
- A company's other non-prosecution agreements (NPA) or deferred prosecution agreements (DPA); multiple NPAs or DPAs will be disfavored though voluntary self-disclosure would be given favorable credit.

3. Voluntary self-disclosure. Companies seeking to avoid guilty pleas or indictments are instructed by the DOJ to voluntarily self-disclose misconduct. Core principles for voluntary self-disclosure include:

- In the absence of "aggravating factors," the DOJ will not seek a guilty plea from a company that has self-disclosed, fully cooperated, and timely and appropriated remediated the misconduct.
- For companies that demonstrate at the time of resolution that they have implemented and tested an effective compliance program, the DOJ will not require the imposition of an independent compliance monitor.

4. Independent Compliance Monitors. To promote greater transparency and reduce confusion about independent compliance monitors, the DOJ announced:

- New guidance for prosecutors to identify the need for a monitor, the monitor selection process, and oversight of the monitor's effectiveness.

- A requirement that all monitor selections are made pursuant to a documented selection process that operates transparently and consistently.
- Ongoing review by DOJ prosecutors through regulatory updates, including communication with the monitor and the corporation, about the status of the monitorship and any issues presented.

5. Corporate Culture. Prosecutors will consider a company's compensation system in evaluating the strength of its compliance program. Companies will be evaluated on whether they reward compliant behavior and penalize misconduct, including employing clawbacks on compensation and financial sanctions after becoming aware of misconduct.

The DOJ's Criminal Division expects to issue further guidance by the end of 2022 on how to reward companies that implement compensation systems that financially hold accountable individuals that contribute to misconduct, including guidance that helps shift the corporate financial liability away from shareholders who do not play any role in misconduct.

DOJ will also consider whether a corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved. Prosecutors are instructed to consider whether corporations seeking cooperation credit in connection with an investigation have instituted such policies to ensure that it will be able to collect and provide all non-privileged responsive documents relevant to the investigation.

Relevant KPMG Thought Leadership:

- KPMG Regulatory Alert | [DOJ shifts policies, encourages companies to focus on compliance investment](#)
- KPMG Regulatory Alert | [Effective Compliance Programs: Updated DOJ Guidance](#)

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