

How to Navigate DOJ's Update on Corporate Criminal Enforcement

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The Justice Department's changes to its corporate enforcement policies have significant implications for companies seeking cooperation credit in connection with an investigation.

The new policies maintain pre-existing requirements that companies provide the DOJ with all non-privileged documents and other evidence, make witnesses available for interviews, and assist in interpreting complex business records.

However, the changes announced by Deputy Attorney General Lisa Monaco in her Sept. 15 remarks and formal memorandum require companies to disclose "important evidence more quickly," especially information showing individual culpability.

Monaco warned that "undue or intentional delay" in producing such evidence "will result in the reduction or denial of cooperation credit." Thus, the "first reaction" of companies discovering "hot documents or evidence" should be alerting prosecutors.

The message of these revised policies is clear—companies are expected to conduct a thorough investigation and turn over information to the DOJ as quickly as possible, or risk losing cooperation credit. But the implications for companies trying to meet these requirements are less clear. They are fraught with risk and must be navigated with great care.

Interpreting the New Requirements

The updated disclosure requirements include two key factors—prioritization of evidence related to individual culpability and timeliness.

Monaco explained that the DOJ's "first priority" is prosecuting individual wrongdoers, and her memo focuses on evidence that is "most relevant for assessing individual culpability." Companies must also prioritize "timely" disclosure of "important evidence" that gives the DOJ the "ability to assess individual culpability."

Significantly, however, there is no clear guidance regarding what the DOJ will view as “timely” disclosure made without “undue or intentional delay.”

Companies must decide whether to disclose information immediately upon discovery to meet government expectations regarding timeliness, or delay disclosure until the facts and implications for the organization and individuals are better understood. With that in mind, they should consider whether delay would run afoul of DOJ expectations, which are open to interpretation.

On the one hand, it appears that minimal good-faith delay may be acceptable since the goal of the new disclosure requirements is to ensure important evidence is available to prosecutors in time for a successful individual prosecution.

Specifically, this would be before statutes of limitations expire, evidence disappears, and memories fade. The DOJ memo specifies that prosecutors will consider whether a company “delayed disclosure in a manner that inhibited the government’s investigation.”

Further, the DOJ appears primarily concerned with delays that are “undue or intentional,” and preventing “[g]amesmanship,” suggesting that if a company has a reasonable and good-faith basis for delaying disclosure, and if the delay did not hinder the government’s investigation, the company is less likely to risk a loss of cooperation credit.

On the other hand, Monaco’s comments that important evidence must be produced “swiftly” and “without delay” suggests that any delay will present risk to the company. Monaco specified that companies cannot delay disclosure to “mitigate damage or investigate on their own” and that a company’s “first reaction” to discovering significant evidence should be notifying prosecutors.

Striking a Balance

Navigating these new requirements is difficult. A company must balance the risks and benefits of a speedy disclosure versus taking the time to conduct a thorough investigation. Moving too slowly could cost valuable cooperation credit. Moving too fast could result in disclosures that are made without a full understanding of the facts and their legal implications, raising additional risks for the company under investigation.

Premature disclosure can also jeopardize a company’s internal investigation and ongoing remediation efforts. This can divert resources away from quick implementation of remediation to appropriately engage with the government on matters related to the disclosure.

Investigations can involve complicated facts requiring interviews with numerous people at multiple levels of an organization. Analysis of volumes of documents is needed to understand and assess the implications of discovered information.

In those circumstances, there may be a reasonable and good-faith basis for delaying disclosure. But the DOJ is clear that it will critically assess disclosure delays.

Thus, companies are wise to conduct investigations and make disclosure decisions as quickly as possible, while being thorough and accurate before making disclosures. The reasons for delaying disclosure should be carefully considered and well-documented to allow for a fair assessment of timeliness when the issue of cooperation credit is decided.

In short, the DOJ’s new guidance has a clear message: companies seeking cooperation credit must act quickly in disclosing critical evidence, particularly evidence regarding individual culpability.

However, the lack of clarity about how the DOJ will assess timeliness, and the significant risks of premature disclosures, place companies in a difficult position when deciding what and when to disclose.

Companies are more likely to be successful in navigating the new requirements if they identify the unique aspects and objectives of the internal investigation and consider the government’s goals in imposing these new

requirements.

This should be balanced with the need to protect the interests of the company. Clear and trusted lines of communication and agreements with prosecutors should also be forged regarding disclosure expectations.

Doing so will likely go a long way in ensuring that the company can meet the new requirements for securing full cooperation credit from the DOJ, while also taking appropriate steps to protect its interests.

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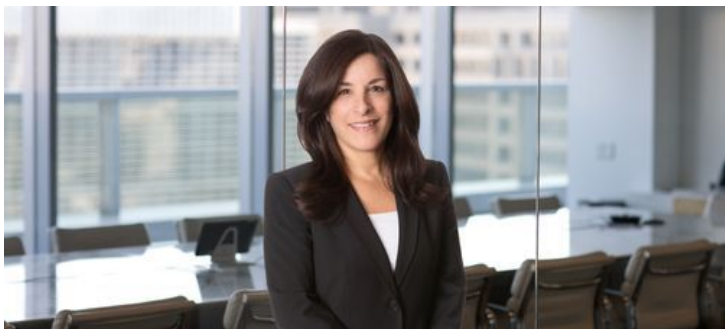
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