

Justice Manual Updates Bring Needed Clarity On Policy Shifts

By **Rod Rosenstein and Amelia Medina** (April 27, 2023, 1:14 PM EDT)

In March, the U.S. Department of Justice quietly made significant revisions to its corporate enforcement policies, codifying them in the Justice Manual at Title 9, Section 28, "Principles of Federal Prosecution of Business Organizations."^[1]

The amendments are intended to incorporate many policy changes announced by department officials in speeches and memoranda over the past two years.

The result is a lengthier chapter — approximately 50% longer than the previous version — that largely accomplishes the goal of codifying policy changes in a reference manual readily available to department employees and external stakeholders.

While the amendments reflect many of the policy changes announced by the department over the past two years, there are some notable revisions that have yet to be publicly addressed by department officials or analyzed by commentators.

The DOJ should be commended for incorporating its policy changes into the Justice Manual.

Often in the past, department officials announced new policies in lengthy memoranda and speeches, without considering how current and future department employees would keep track of them.

Management-by-memoranda was not an effective way to make lasting changes to the operations of a large federal agency whose mandate is independent of its temporary leaders. It left many department employees uncertain where to find definitive statements of department policy.

The former title of the policy compilation — U.S. Attorney's Manual — was an additional source of confusion, creating ambiguity about whether it applied to the 90% of department employees who do not work for a U.S. attorney's office.

The department sought to end management-by-memo in 2018, when it completed a yearlong process of revising the manual and reissued it with a new title, Justice Manual. The goals, according to a DOJ press release, "were to identify redundancies, clarify ambiguities, eliminate surplus language, and update the manual to reflect current law and practice."^[2]



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The changes included establishing a formal process for incorporating future policy changes.[3] A key objective was to encourage department officials, who often speak and write at length about their policy changes, to update the manual with concise policy statements that department attorneys can readily locate and implement.

The corporate enforcement revisions clarify how the recent policy announcements alter prior practices.

The most significant new changes are to the sections that address how the department considers a corporation's history of misconduct,[4] weighs cooperation,[5] evaluates corporate compliance programs,[6] consults with people indirectly harmed by criminal conduct,[7] and imposes compliance monitors.[8]

These are key factors prosecutors should consider in deciding whether to pursue a criminal prosecution, whether to offer a more lenient disposition, and what terms to mandate in a negotiated resolution.

The section concerning a corporation's history of misconduct is expanded substantially. The former policy merely said to consider similar misconduct.[9] The new policy spells out a variety of factors for prosecutors to consider.[10]

It continues to state that prosecutors should consider similar misconduct, which seems to vary from Deputy Attorney General Lisa Monaco's proclamation in October 2021 that prosecutors would consider all types of prior misconduct.[11]

The "nonexhaustive list" of relevant factors in evaluating prior domestic or foreign criminal, civil or regulatory misconduct include:

- The time elapsed since the violation;
- The seriousness or pervasiveness of the misconduct;
- Factual admissions made in the prior resolution;
- Whether the corporation was still on probation or under other supervision;
- Whether the misconduct reflects broader weaknesses in the corporate compliance culture;
- Whether the corporation's history is comparable to similarly situated companies; and
- Whether the corporation self-disclosed the conduct.[12]

A new provision in the comment advises prosecutors to give the greatest significance to recent criminal resolutions, which is a slightly different formulation from Monaco's suggestion in September 2022 that conduct covered by criminal resolutions more than 10 years ago "should generally be accorded less weight." [13]

Another codified policy change, albeit again relegated to the commentary, is to require notice to the deputy attorney general before prosecutors agree to "a successive non-prosecution or deferred prosecution agreement." [14] This new review process provides an opportunity for Monaco to overrule career prosecutors and enforce her view that successive grants of leniency are "generally disfavored." [15]

Encouraging corporate cooperation in criminal investigations has been a persistent theme of DOJ enforcement for more than two decades, and the department highlights this by making extensive changes to the provision concerning cooperation. [16]

The guidance reflects Monaco's policy that corporate cooperation generally should be an all-or-nothing undertaking in which companies that fail to disclose fully "all relevant facts" about misconduct by individuals will receive zero credit.[17]

But the Justice Manual recognizes that there are varying degrees of cooperation and explains, "The greatest amount of cooperation credit will generally be provided when companies cooperate through the [specified] actions." [18]

The nonexhaustive list of considerations to be weighed in assessing cooperation credit includes timely disclosing all relevant facts, cooperating proactively and producing relevant documents.

Of particular note, the new policy requires prosecutors to consider the extent to which the corporation had policies in place

to preserve, collect, and disclose documents, data, and other evidence relevant to the government's investigation (including as to third-party messaging data, regardless of whether the data is kept on corporate or personal devices that are used for work purposes).[19]

The department's goal is to incentivize corporations to adopt expansive data preservation policies before they come under DOJ scrutiny.

Corporate compliance programs are another topic that has received considerable attention from department leaders in recent speeches and memoranda.

In March, the DOJ's Criminal Division revised its detailed written policy concerning how to evaluate corporate compliance programs.[20]

Similarly, the Justice Manual was revised — although once again, only in the commentary — to address two current DOJ priorities: preservation of business-related data from "personal devices and communication platforms," and compensation policies

that enable financial recoveries and penalties to be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct.[21]

The former provision is a source of consternation for many companies struggling to oversee the ever-growing array of technological tools constituents use to communicate. The latter challenges companies to navigate legal and practical constraints that may impede the DOJ from accomplishing its goal of promoting "the use of compliance metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior." [22]

Section 9-28.1400, which was formerly limited to consulting victims, now includes a novel requirement in the commentary: to consider the interests of "individuals or entities who may fall outside of the statutory definition of a victim, but were significantly, even if indirectly, harmed by the criminal conduct." [23]

The comment suggests that prosecutors should consult that amorphous group along with the traditional victims whom prosecutors are required to support under federal law.

It is unclear what types of stakeholders the department has in mind, and what effect this new requirement will have on future corporate criminal cases.

Finally, the department added four new sections codifying its policies concerning corporate compliance monitors.[24]

Department officials have recently suggested that prosecutors should not hesitate to appoint corporate monitors when they deem it appropriate.[25] However, the formal guidance retains the long-standing limitations that prosecutors should not impose a monitor for punitive reasons, and should weigh the benefits of a monitor against the costs and adverse impact on corporate operations — although it moderates the latter factor by suggesting that the costs can be "calibrated by tailoring the scope and duration of a monitorship." [26]

The new policy specifies factors prosecutors should consider in deciding whether to require a monitor as part of a corporate criminal resolution, including whether the criminal conduct was long-lasting or pervasive; whether the compliance program was inadequate; whether the corporation faces unique risks or compliance challenges; and whether an industry regulator is providing oversight.[27]

The manual also now includes guidance about selecting and supervising monitors.[28]

In conclusion, the revisions to the Justice Manual's corporate enforcement provisions reflect a welcome commitment by the department to incorporate its policy changes into the central repository of federal prosecutorial policies and to clarify which previous guidance the amendments modify or supersede.

Variances between the revisions and previous memoranda and public statements may reflect evolution in the department's thinking about these important issues.

We anticipate that the DOJ will continue to review and modify its corporate enforcement policies as it seeks to promote compliance and enhance enforcement while taking account of practical impediments to accomplishing its objectives.

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Disclosure: In the course of his role as deputy attorney general, Rosenstein oversaw the 2018 reissuing of the Justice Manual.

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[1] "Principles of Prosecution of Business Organizations," Justice Manual § 9-28.000 et seq., U.S. Dept. of Justice, available at <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

[2] "Department of Justice Announces the Rollout of an Updated United States Attorneys' Manual," Sep. 25, 2018, available at <https://www.justice.gov/opa/pr/departments-justice-announces-rollout-updated-united-states-attorneys-manual>.

[3] JM §1-1.300.

[4] JM § 9-28.600.

[5] JM § 9-28.700.

[6] JM § 9-28.800.

[7] JM § 9-28.1400.

[8] JM §§ 9-28.1700 — 28.1740.

[9] "Principles of Federal Prosecution of Business Organizations, U.S. Dept. of Justice, version effective Feb. 2, 2023, available at <http://web.archive.org/web/20230202152045/https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>.

[10] JM § 9-28.600.

[11] Deputy Attorney General Lisa Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," at 3, Oct. 28, 2021 ("Prosecutors must therefore take a holistic approach when considering a company's characteristics, including its history of corporate misconduct, without limiting their consideration to whether past misconduct is similar to the instant offense."), available at https://www.justice.gov/d9/pages/attachments/2021/10/28/2021.10.28_dag_memo_re_corporate_enforcement.pdf (hereinafter "October 2021 DAG Memo").

[12] JM § 9-28.600.

[13] Deputy Attorney General Lisa Monaco, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussion with Corporate Crime Advisory Group," at 5, Sep. 15, 2022 ("Dated conduct addressed by prior criminal resolutions entered into more than ten years before the conduct currently under investigation, and civil or regulatory resolutions that were finalized more than five years before the conduct currently under investigation, should generally be accorded less weight as such conduct may be generally less reflective of the corporation's current compliance culture, program, and risk tolerance."), available at <https://www.justice.gov/opa/speech/file/1535301/download> (hereinafter "September 2022 DAG Memo").

[14] JM § 9-28.600 (comment).

[15] September 2022 DAG Memo, at 6 ("Multiple non-prosecution or deferred prosecution agreements are generally disfavored, especially where the matters at issue involve similar types of misconduct; the same personnel, officers, or executives; or the same entities.").

[16] JM § 9-28.700.

[17] Id. See also September 2022 DAG Memo, at 3 ("To be eligible for any cooperation credit, corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct."); October 2021 DAG Memo at 3 ("This Memorandum reinstates the prior guidance issued by this Office that to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct.").

[18] Id.

[19] Id.

[20] Criminal Division, U.S. Dept. of Justice, "Evaluation of Corporate Compliance Programs," Mar. 2023, available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

[21] JM § 9-28.800 (comment).

[22] Id.

[23] Id.

[24] JM §§ 9-28.1700 — 28.1740.

[25] Lisa O. Monaco, "Keynote Address at ABA's 36th National Institute on White Collar Crime," Oct. 28, 2021 ("To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance."), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>; Kenneth A. Polite, Jr., Remarks at NYU's Law Program on Corporate Compliance and Enforcement," Mar. 25, 2022 ("Monitors can be allies to compliance officers in making recommendations that create lasting, sustainable change in corporate culture."), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate>.

[26] § 9-28.1700.

[27] Id.

[28] JM §9-28.1730 — 28.1740.