

## The DOJ's Current White Collar Priorities

By **Melissa Jampol, Chelsea Ott and Clay Lee** (October 3, 2018, 4:12 PM EDT)

On Sept. 27, 2018, Deputy Assistant Attorney General Matthew S. Miner of the U.S. Department of Justice's Criminal Division addressed attendees of the 5th Annual Global Investigations Review Live event in New York City.[1] Miner, who is responsible for oversight of DOJ's Fraud Section in conjunction with Acting Chief Sandra Moser, noted that there have been "numerous changes in our approach to corporate white collar enforcement" over the past year, and clearly set forth DOJ's current white collar prosecutorial initiatives. Miner emphasized continued prompt self-disclosure of corporate wrongdoing, as well as continued focus on individual accountability and health care fraud offenses.



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### **Continued Emphasis on Self-Disclosure, Mergers and Acquisitions, Cooperation, and Remediation**

Specifically, Miner highlighted the corporate self-disclosure found in the Foreign Corrupt Practices Act enforcement policy,[2] which is approximately a year old and has, since March of this year, been "nonbinding guidance" for all DOJ white collar investigations. Continuing a theme set forth in a speech this past summer, Miner emphasized that DOJ also "will seek to apply the [FCPA policy] to mergers and acquisitions that uncover potential FCPA violations" as well as "other types of potential wrongdoing." Miner's messaging is clear — by promulgating defined guidelines describing the substance and character of how corporate self-disclosure should be handled, the DOJ seeks to "foster and encourage — a culture of openness and cooperation where good decisions are encouraged and rewarded, appropriately."



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Of course, corporations are concerned with the criteria for obtaining declinations for the corporate entity when they have discovered that they engaged in wrongdoing. Miner acknowledged this throughout his speech and emphasized that simply self-disclosing misconduct alone is not enough for the DOJ to decline to prosecute a corporate entity. He noted that companies must also:



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1. Promptly and voluntarily self-disclose the misconduct;
2. Conduct a comprehensive internal investigation;
3. Fully cooperate in the criminal investigation, including by providing all known relevant facts about individuals involved in the misconduct;

4. Implement remediation measures to enhance compliance program effectiveness, particularly with design to stamp out recurrent behavior; and
5. “[Agree] to full remediation, including paying full restitution ... and disgorgement of ill-gotten gains.”

### **Individual Accountability**

Miner reaffirmed the department’s “clear commitment to holding individuals accountable for transnational corruption.” This builds off of the September 2015 “Yates memo,” which emphasized that holding individuals accountable has an important deterrent effect, incentivizes appropriate change in the way businesses behave, ensures that the individuals who have acted wrongly are appropriately held responsible for their actions, and increases confidence in the justice system overall.[3]

Echoing sentiments from a similar address in July 2018,[4] Miner remarked, “It is still possible for one or a few bad actors to engage in misconduct,” even in the face of an active, robust compliance program. With this fact in mind, the FCPA “policy encourages companies to promptly report misconduct, fully cooperate, and enact prompt and effective remedial measures.”

Furthermore, Miner highlighted repeatedly that the new, more concrete FCPA guidance provides companies with greater certainty. By clarifying the department’s expectations for what constitutes behavior worthy of declination, companies can more easily decide to self-disclose wrongdoing knowing that they will receive credit for being forthcoming, taking responsibility and rectifying misconduct.

Miner underscored that the department believes that there are numerous benefits to the acquisition of problem-ridden companies by good corporate citizens. Miner acknowledged the DOJ’s sensitivity to the rapid pace at which corporate deals move and the limited set of information that is available during that time. Therefore, Miner offered that if misconduct is realized after a deal has been consummated, companies should not grapple with whether or not to self-disclose the information; rather, he encouraged companies to be forthcoming with wrongdoing uncovered even post-acquisition. Miner commented that he hopes companies can see the DOJ “as partners, not as adversaries” because “when businesses and industry work with the Department, rather than against it, our public institutions and our country are stronger for it.”

### **Continued Emphasis on Health Care Fraud Investigations and Prosecution**

Miner also singled out the accomplishments of the Fraud Section’s Health Care Fraud (HCF) Unit, and the recent announcement of the 12th Medicare Fraud Strike Force in the Newark, New Jersey/Philadelphia region, emphasizing that “we have already broken records, announcing charges involving 320 individuals, and 193 convictions. This is a significant increase from the prior year, when HCF Unit attorneys brought public charges against 220 individuals, with 178 announced convictions.”

As Moser noted during last month’s announcement of the Newark/Philadelphia region Medicaid Strike Force, data analytics teams at the DOJ have the ability to rapidly identify instances of potential fraud committed by medical providers who are outliers in billing and reimbursement rates, stating, “The fraudsters know to go after and identify what the highest reimbursable rates are, and they generally are not great at stopping themselves and showing moderation. So we look for those patterns, those outliers.”[5] Looking forward, we can likely expect increased enforcement against individual providers in the Eastern District of Pennsylvania and the District of New Jersey due to the new strike force.

## **“If You See Something, Say Something”**

The primary theme from Miner’s speech is that the DOJ believes that companies should take affirmative steps to discover, and actually do something about any misconduct uncovered, in order to receive the benefits of voluntary self-disclosure. As such, legal and compliance departments must:

- Immediately put a stop to any misconduct once it is revealed;
- Fully investigate any alleged wrongdoing;
- Fully cooperate with the government and share all known information about individuals implicated in the improper behavior;
- Make appropriate enhancements to compliance programs to mitigate opportunities for similar misconduct in the future; and
- Pay restitution.

The advantages of voluntary self-disclosure are significant, but Miner’s comments must also be appreciated for the difficult work that quality cooperation entails. That is to say, cooperation must be complete, the investigation thorough, proper controls must be instituted (including proper audits and a strong commitment by a board of directors to compliance). Moreover, the DOJ has emphasized that the corrective actions taken after a problem is identified must be proportional and reasoned to prevent wrongdoing from reoccurring.

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[1] Deputy Assistant Attorney General Matthew S. Miner of the Justice Department’s Criminal Division Delivers Remarks at the 5th Annual GIR New York Live Event (Sept. 27, 2018) (available at <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division>).

[2] U.S. Dep’t of Justice, Justice Manual 9-47.120 (2018), available at <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>.

[3] Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Dep’t of Justice, Individual Accountability and Corporate Wrongdoing (Sept. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>. Miner observed that the heightened focus on individual accountability is leading to a greater number of FCPA cases going to trial, as opposed to settling.

[4] Deputy Assistant Attorney General Matthew S. Miner Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (July 25, 2018) (available at <https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th>).

[5] New Strike Force To Combat Healthcare Fraud, available at <http://www.wbgo.org/post/new-strike-force-combat-health-care-fraud#stream/0>; DOJ Announces 11th Medicare Fraud Strike Force: the Newark/Philadelphia Regional Medicare Strike Force, available at <https://www.healthlawadvisor.com/2018/08/24/doj-announces-11th-medicare-fraud-strike-force-the-newark-philadelphia-regional-medicare-strike-force/>.