

October 29, 2021

## Justice Department Announces Changes Impacting Corporate Criminal Enforcement

### Introduction

On October 28, 2021, at the American Bar Association’s National Institute on White Collar Crime, Deputy Attorney General Lisa O. Monaco [discussed](#) the current landscape of corporate criminal enforcement, presented three “new actions” that the DOJ is taking to strengthen its enforcement activities, and outlined key areas of review that will be the focus of ongoing study by a Corporate Crime Advisory Group.<sup>1</sup> A common theme across Monaco’s speech was the DOJ’s efforts to incentivize and monitor responsible corporate citizenship. Monaco’s remarks signal that the DOJ will adopt a more aggressive prosecutorial stance against corporate wrongdoing, particularly toward companies that have engaged in prior misconduct.

### Attorneys

[James P. Dowden](#)

[Brian R. Blais](#)

[Ezra D. Geggel](#)

[Cambrey C. Dent](#)

### Corporate Criminal Enforcement Landscape

Monaco began her remarks by reiterating the DOJ’s focus on prosecuting “the individuals who commit and profit from corporate malfeasance.” Monaco explained that “the fear of losing” at trial “should not deter” the Department’s prosecutors from bringing difficult cases against corporate executives who engaged in criminal misconduct. Monaco also announced that the DOJ would “surge resources” to assist in the investigation of potential white collar criminal conduct. Monaco closed her review of the current landscape by emphasizing to corporations the importance of developing a responsible corporate culture, noting that the DOJ’s “responsibility is to incentivize responsible corporate citizenship, a culture of compliance and a sense of accountability.”

### Three New Actions

Monaco highlighted three new actions that the DOJ plans to take to aid in its efforts to combat corporate misconduct. First, the DOJ is restoring the guidance outlined in the “Yates Memo,” which requires companies to disclose all non-privileged information about all individuals involved in the relevant misconduct, regardless of their position, in order to receive cooperation credit from the DOJ. By announcing this position, the DOJ is rescinding its prior guidance that companies need only disclose information about employees who were “substantially involved” in the misconduct. Monaco criticized that policy for providing companies with too much discretion, and she emphasized that prosecutors – rather than company counsel – were better positioned to assess individual involvement and culpability. Anticipating criticism that the DOJ would unfairly prosecute those with minimal involvement, Monaco reaffirmed the centrality of the Principles of Federal Prosecution in guiding prosecutors toward fair and just charging decisions.

Second, the DOJ is issuing new guidance regarding the type of historical misconduct that a prosecutor must evaluate when considering corporate resolutions such as Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs). This amendment to the DOJ’s Principles of Federal Prosecution of Business Organizations will require prosecutors to “consider the full criminal, civil and regulatory record of any company when deciding what resolution is appropriate for a company that is the subject or target of a criminal investigation.” This new guidance not only will direct prosecutors investigating an FCPA case to evaluate, for example, a company’s prior federal prosecution for a tax-related offense, but also will direct prosecutors to examine whether the company has been prosecuted at the state level, by a different country, or has a “history of running afoul of regulators.” Monaco recognized that “[s]ome prior

<sup>1</sup> Press Release, Department of Justice, Remarks of Deputy Attorney General Lisa O. Monaco at the American Bar Association’s National Institute on White Crime (October 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>

instances of misconduct may ultimately prove to have less significance,” but she emphasized that “prosecutors need to start by assuming all prior misconduct is potentially relevant.” Monaco explained that this holistic approach will not only “harmonize” the approach to evaluating corporate and individual criminal histories, but also will provide prosecutors with valuable visibility into a company’s commitment to its compliance programs.

Third, the DOJ is rescinding any guidance suggesting that corporate monitorships are disfavored or are an exceptional remedy. Instead, the DOJ will look to independent monitorships as an important tool for encouraging and verifying compliance with DPAs and NPAs. In connection with this announcement, Monaco explained that the DOJ would study the selection process for corporate monitors and may standardize the selection process across divisions and offices.

### Ongoing Review

Monaco also announced topics that the DOJ is currently studying and previewed future policy updates. These topics address many of the same themes outlined above.

First, Monaco announced that the DOJ would study corporate recidivism, noting that 10%–20% of all significant corporate resolutions involve companies that have previously entered into a pretrial resolution. Monaco questioned whether DPAs and NPAs are a sufficient deterrent to such recidivist companies or whether certain companies consider these resolutions and the attendant fines as “just the cost of doing business.”

Relatedly, the DOJ will explore whether companies are complying with the terms of the applicable DPAs and NPAs. Monaco announced a zero tolerance policy for companies that continue to commit crimes after entering into such an agreement, and she emphasized that “there will be serious consequences for violating their terms.” Monaco then referenced two recent breach notifications that the DOJ has sent to multinational corporations.

Monaco concluded by announcing the formation of the Corporate Crime Advisory Group, which will have representatives from every part of the DOJ involved in corporate criminal enforcement. Monaco explained that the group has a broad mandate and will evaluate not only the topics addressed in her speech, but also other issues, such as benchmarks to use to measure successful company cooperation and which resources can assist more rigorous enforcement.

### Key Takeaways

Monaco provided the following five points to emphasize the key takeaways from her speech:

- Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct – or else it’s going to cost them down the line.
- For companies facing investigations, as of today, the Department will review their whole criminal, civil and regulatory record – not just a sliver of that record.
- For companies cooperating with the government, they need to identify all individuals involved in the misconduct – not just those substantially involved – and produce all non-privileged information about those individuals’ involvement.
- For companies negotiating resolutions, there is no default presumption against corporate monitors. That decision about a monitor will be made on the facts and circumstances of each case.
- The issues discussed in Monaco’s speech are the start – and not the end – of this administration’s actions to more aggressively investigate, prosecute, and punish corporate crime.