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DOJ Unveils New Policies to Incentivize Responsible Corporate Citizenship and Deter Wrongdoing

On September 15, 2022, before an audience at NYU School of Law that included the Director of the SEC’s Enforcement Division Gurbir Grewal, U.S. Attorneys for the Southern District of New York and District of New Jersey, and several line prosecutors, Deputy Attorney General Lisa O. Monaco [announced important changes](#) to corporate criminal enforcement. These changes are the result of ongoing study by the DOJ’s Corporate Crime Advisory Group, a group of DOJ experts tasked with a review of corporate enforcement efforts, which Monaco first publicized [last October](#). During her most recent remarks, Monaco emphasized that the DOJ will implement a combination of incentives and deterrents to “make the business case for responsible corporate behavior” and shift the burden of corporate financial penalties away from shareholders. The Department also released an [accompanying memorandum](#) further describing the changes. Monaco’s remarks make clear that the DOJ is taking concrete steps to accompany the more aggressive prosecutorial stance against corporate crime that it adopted last October.

Attorneys
[James P. Dowden](#)
[Ryan Rohlfen](#)
[Jessica L. Soto](#)
[Haley Eagon](#)
[Megan Zwiebel](#)

1. Holding Individuals Accountable, Faster

Monaco began by emphasizing that the DOJ continues to consider individual accountability—the pursuit of individuals who commit or profit from corporate crime—its top priority. To that end, Monaco announced a new requirement with respect to DOJ cooperation credit. Specifically, a cooperating company must quickly alert the DOJ to “important evidence.”

Companies that delay turning over evidence of individual malfeasance do so at their peril: “undue or intentional delay in producing information or documents—particularly those that show individual culpability—will result in reduction or denial of cooperation credit,” she warned.

However, the burden of moving individual cases will not fall solely on companies. Monaco explained that DOJ prosecutors “will work to complete investigations and seek warranted criminal charges against individuals prior to or at the same time as entering a resolution against a corporation.” In instances where the corporate case is resolved first, prosecutors now must create an investigative plan with an outline and timeline for resolving any remaining individual cases.

2. Revised Approach to Historical Misconduct

Last year, Monaco announced that the DOJ now considers a company’s full criminal, civil, and regulatory record when determining an appropriate resolution—a controversial move at the time. In her recent speech she provided further guidance on how the DOJ will contextualize this historical record.

The DOJ will consider what type of misconduct occurred, as well as where the misconduct took place. Specifically, Monaco identified the following factors as indications of significant prior misconduct: (a) U.S. criminal resolutions; (b) prior misconduct that involved the same personnel, management, or executive leadership as the current misconduct; and (c) prior misconduct that “shared the same root causes as the present misconduct.” The DOJ will also consider how long ago the prior misconduct occurred. Criminal resolutions from more than ten years ago, and civil or regulatory resolutions from more than five years ago, will be accorded less weight by the Department.

Monaco also highlighted certain mitigation factors that the DOJ will consider in its evaluation of past misconduct. First, she noted that the actions of a corporation in a highly regulated industry should be measured against others in that industry to gauge the severity of misconduct. Second, she assured that acquiror companies with good compliance histories will not be penalized for historical compliance problems at acquired companies, if the problems are quickly addressed post-acquisition.

Lastly, Monaco warned that DOJ leadership will closely scrutinize all non-prosecution agreement (NPA) and deferred prosecution agreement (DPA) proposals for companies with at least one prior NPA or DPA.

3. Incentivizing Voluntary Self-Disclosure

Monaco also made clear that the DOJ remains keen on voluntary self-disclosure. Every DOJ component will now be required to have a formal, written policy incentivizing voluntary self-disclosure, including identifying specific benefits a company will receive from self-disclosure.

Monaco discussed two new global policies that companies may benefit from if they self-disclose. First, a voluntary self-disclosure (in addition to cooperation and remediation measures) will prevent the Department from seeking a guilty plea. Second, if a company has voluntarily self-disclosed, and has implemented and tested an effective compliance program at the time of the matter's resolution, the DOJ will not require an independent compliance monitor.

4. Additional Requirements for Compliance Monitors

Monaco addressed monitorships as well. She announced that (a) the DOJ will be releasing new prosecutorial guidance on how to identify the need for, select, and oversee compliance monitors; (b) monitor selections now must conform with a documented selection process; and (c) prosecutors will confirm that the monitor is performing its role adequately and on-budget. She noted that the DOJ is not a regulatory body, but “where we impose a monitor, we recognize our obligations to stay involved and monitor the monitor,” she said.

5. Evaluating Financial Compensation Programs to Promote Compliance

Lastly, Monaco announced that DOJ prosecutors will now consider a company's compensation system in [evaluating the strength of the company's overall compliance program](#). Specifically, the DOJ will consider whether company policies use (a) “affirmative metrics and benchmarks to reward compliance-promoting behavior,” and/or (b) methods of penalizing individuals who have contributed to criminal misconduct, such as clawback provisions or the escrowing of compensation. Additionally, the DOJ will consider the extent to which the company enforced these policies when misconduct arose. Monaco indicated that the DOJ Criminal Division will release additional guidance before 2023 on these policy changes.

Key Takeaways

As Monaco herself highlighted at the top of her remarks yesterday, the past decade has seen a decline in corporate criminal prosecutions, which has underscored the Department's need to “do more and move faster.” Monaco's statement highlighted that the DOJ remains focused on encouraging companies to prevent, detect, and report wrongdoing through both “carrots and sticks.” To win carrots, companies should evaluate ways they can encourage good behavior, particularly through compensation; to avoid sticks, they should consider ways to make their internal investigations more streamlined and nimble in order to meet the DOJ's expectation of speedy disclosures. In sum, the new DOJ policies further empower prosecutors to aggressively pursue perceived misconduct while seeking to tangibly reward responsible corporate citizenship.