

DOJ Announces Major Changes in Corporate Enforcement Policies

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This blog was originally written as a client alert on October 29, 2021.

Deputy Attorney General Lisa Monaco announced on October 28, 2021, that the Department of Justice (DOJ) has adopted major changes to its policies regarding corporate criminal investigations and resolutions. Monaco named three new actions the DOJ is taking to respond to corporate crime:

1. **Individual Accountability** – The restoration of prior DOJ guidance that companies seeking cooperation credit from the DOJ must provide information on *all* individuals involved in the misconduct at issue rather than just those “substantially involved.”
2. **All Prior Misconduct Considered** – When evaluating whether to bring charges against a company, the DOJ will take a much broader view of historical misconduct, including all prior civil, criminal, and regulatory matters.
3. **Corporate Monitors** – The rescission of prior DOJ guidance disfavoring corporate monitors.

Monaco announced these changes during her keynote address at the American Bar Association’s National Institute on White Collar Crime.

TRENDS IN CORPORATE CRIME AND THE DOJ’S ENFORCEMENT PRIORITIES

Before describing the DOJ’s shift in corporate enforcement policies, Monaco discussed what she sees as recent trends in the corporate enforcement landscape. Monaco said corporate crime has burgeoning national security implications, including “cyber vulnerabilities that open companies up to foreign attacks.” She also pointed to the growing role of data analytics in corporate criminal investigations and new criminal schemes that exploit emerging financial and technological industries.

As to the DOJ’s corporate enforcement priorities, Monaco was clear: “Accountability starts with the individuals responsible for criminal conduct.” Still, she emphasized that the DOJ “will not hesitate to hold companies accountable.” To that end, Monaco stressed the importance of companies’ compliance programs: “[W]e will ensure

the absence of such programs inevitably proves a costly omission for companies who end up the focus of Department investigations.”

THREE MAJOR CHANGES TO DOJ CORPORATE ENFORCEMENT POLICIES

Monaco announced three “new actions” the DOJ will take immediately to “strengthen the way [it] respond[s] to corporate crime.”

First, Monaco directed the DOJ to “restore prior guidance making clear that to be eligible for any cooperation credit, companies must provide the government with all non-privileged information about individuals involved in or responsible for the misconduct at issue.” By “prior guidance,” Monaco was referring to former Deputy Attorney General Sally Yates’s September 9, 2015 memorandum, which set forth what some believe was an all-or-nothing approach to corporate cooperation credit. Under the Yates Memo, corporations had to identify “*all* individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority” to receive any cooperation credit from the DOJ. This directive is reflected—almost verbatim—in the policy shift announced by Monaco. By reviving the Yates Memo’s policy on corporate cooperation credit, Monaco rolled back former Deputy Attorney General Rod Rosenstein’s November 2018 guidance permitting corporations to receive credit for identifying individuals “*substantially* involved in or responsible for the misconduct at issue.” On this point, Monaco was unequivocal: “It will no longer be sufficient for companies to limit disclosures to those they assess to be ‘substantially involved’ in the misconduct.”

Second, Monaco established new guidance directing prosecutors to take a “broader view” of corporations’ historical misconduct. The DOJ’s guidelines for determining whether a corporation should be prosecuted, known as the Principles of Federal Prosecution of Business Organizations,^[1] will be amended to instruct 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.”

Third, Monaco “rescind[ed]” prior DOJ guidance disfavoring corporate monitorships.^[2] Prosecutors are now “free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy [themselves] that a company is living up to its compliance and disclosure obligations under the DPA or NPA.”

To ensure the success of the DOJ’s enhanced corporate enforcement policies, Monaco said the DOJ would “urge prosecutors to be bold in holding accountable those who commit criminal conduct” and would “find ways to surge resources to the Department’s prosecutors.” In particular, Monaco said the DOJ would embed a new squad of FBI agents in Main Justice’s Criminal Fraud Section, a model often used in high-profile corporate enforcement cases. Monaco also announced the formation of a Corporate Crime Advisory Group within the DOJ, which will consider, among other things, whether deferred prosecution agreements and non-prosecution agreements are appropriate for “recidivist companies.”

ADVICE FOR COMPANIES

For companies with questions on the DOJ’s new policies, Monaco gave specific answers. First, companies should take strides to ensure their compliance programs adequately monitor for and address misconduct, “or else it’s going to cost them down the line.” Second, the DOJ will review a company’s entire criminal, civil, and regulatory record during investigations. Third, companies seeking cooperation credit must identify *all* individuals involved in the misconduct and produce all non-privileged information about those individuals’ involvement. And fourth, there will no longer be a default presumption against corporate monitors.

Monaco was careful to note that the policies laid out in her keynote address were “only the first steps,” and she made it clear the DOJ has embarked on a more aggressive approach to the investigation and prosecution of companies and the individuals who work for those companies.

If you have any questions or need assistance, please contact **Jack Knight** (Partner, White Collar, Regulatory Defense, and Investigations) or your Winston & Strawn relationship attorney. You can also contact **Abbe Lowell** or **Suzanne Jaffe Bloom**, Co-Chairs of our White Collar, Regulatory Defense, and Government Investigations practice group, or visit our practice group webpage [here](#), for more information on this and related subjects.

Patrick Doerr (Associate, White Collar, Regulatory Defense, and Investigations) contributed to this article.

¹ U.S. Dep't of Justice, Justice Manual § 9-28.000, Principles of Fed. Prosecution of Bus. Orgs., <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> (last visited Oct. 28, 2021).

² A reference to an October 11, 2018 memorandum from then Assistant Attorney General Brian Benczkowski, which set new principles for determining whether a monitor was needed in individual cases and limited the circumstances in which a monitor should be required.

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