

DOJ Paving a More Structured Path for Corporate Criminal Enforcement

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by RJ Zayed

On September 15, 2022, Deputy Attorney General Lisa Monaco laid out the DOJ's first substantive changes to white-collar criminal investigations and enforcement under the Biden administration. This comes on the heels of Deputy AG Monaco's announcement last October to crackdown on corporate wrongdoing. In a [speech at NYU law](#) and in a [memo](#) distributed across the DOJ, Deputy AG Monaco reemphasized that DOJ's corporate enforcement policy focuses on individual accountability, corporate responsibility, predictability and transparency, and ways corporate enforcement policies must square with the realities of the modern economy. In [an exclusive interview with the New York Times](#) previewing her speech, Deputy AG Monaco stated that, "I wanted very much to arm and empower chief compliance officers and general counsel to be able to go into the boardrooms and say to the C.E.O., to the chair of the board, 'We need to make these investments in compliance. When I was out of government, I sat on some corporate boards and I saw that those are hard decisions and you have hard trade-off discussions.'"

In announcing these reforms, Deputy AG Monaco targeted five specific policy areas to further strengthen corporate enforcement and prioritize and prosecute corporate crime.

1. **Individual Accountability:** The DOJ announced it will require cooperating companies to come forward with important evidence more quickly than before, even while the companies are still considering how to mitigate the damage and or investigate on their own. Deputy AG Monaco emphasized that "speed is of the essence" in individual prosecutions. Companies who unduly or intentionally delay producing information or documents to the DOJ risk the DOJ reducing or denying cooperation credit. The DOJ will look unfavorably upon those corporate actions that limit the DOJ's efforts to hold individuals accountable or proactively pursue leads. Deputy AG Monaco succinctly summarized this point in noting that, "Gamesmanship with disclosures and productions will not be tolerated." This policy update enhances the DOJ's existing requirement that corporations are required to provide all relevant non-privileged facts about individual misconduct to receive any cooperation credit.
 - a. **Practice Point:** If a cooperating corporation discovers highly relevant information or a "hot" document, the DOJ wants the company to come forward immediately.

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Experienced counsel can work with a client to negotiate cooperation credit, a proffer agreement, or additional protections while at the same time conducting a fulsome investigation into the misconduct. Although corporate prosecutions are near an all-time low, it would be a dangerous gambit not to disclose critical information in a timely manner.

2. **History of Misconduct:** Deputy AG Monaco noted that companies with a history of misconduct (criminal, civil or regulatory) will get more scrutiny in determining an appropriate resolution. Misconduct, however, will be viewed by the DOJ on a sliding scale as “not all instances of prior misconduct are created equal.” The DOJ will consider the most significant types of prior misconduct to be prior criminal resolutions in the US or prior wrongdoing involving the same personnel or management. The DOJ will also consider and individually weigh a number of other factors, including the date of the prior misconduct, the nature and circumstances of the prior misconduct, any overlap in personnel, management, or leadership with the prior misconduct, and compliance history of the target corporation, including compliance of acquired companies. In particular, the DOJ will disfavor multiple succession non-prosecution or deferred prosecution agreements with the same company. Before the DOJ will extend a successive agreement, it will be thoroughly scrutinized by DOJ leadership.
 - a. **Practice Point:** Under this new policy, the DOJ will treat companies similar to how individuals are treated in the justice system – when prosecutors are required to consider an individual’s criminal history and past behavior in determining settlements and sentencing. Repeat offenders will face more serious consequences, particularly for their failures to reform. Government agencies are increasingly examining a company’s compliance practices, and evaluating whether ineffective compliance programs and policies contributed to the resulting misconduct. If your corporation has a history of misconduct, do not delay in setting the correct tone at the top and implementing effective compliance measures (including organized program administration, screening and evaluation of employees, vendors and other agents, and internal compliance training), as well as monitoring, auditing, and internal reporting systems. It is just as important to remedy the problem that led to the misconduct, as it is to prevent the misconduct from occurring in the future.
3. **Voluntary Self-Disclosure:** Deputy AG Monaco emphasized the department’s commitment to “providing incentives to companies that voluntarily self-disclose misconduct to the government.” From the DOJ’s perspective, “voluntary self-disclosure is a sign that the company has developed a compliance program and has fostered a culture to detect misconduct and bring it forward.” To effectuate this policy, the DOJ is establishing programs within each DOJ department that prosecutes corporate crime to incentivize voluntary self-disclosure. This aligns with similar programs in effect at other DOJ divisions (e.g., the Antitrust Division’s leniency program, the Criminal Division’s Program for FCPA Violations, and the National Security Division’s Program for Export Control and Sanctions Violations). For those DOJ departments that lack a formal documented policy, the DOJ is now requiring the departments to draft one. Absent any aggravating factors, these voluntary self-disclosure policies will apply common principles, including that the DOJ will not seek a guilty plea from a company that has voluntarily self-disclosed, cooperated and remediated, and that the DOJ will not require an independent compliance monitor if at the time of resolution the company has implemented and tested an effective compliance program.
 - a. **Practice Point:** Ripping the bandaid off and owning up to misconduct can be a very overwhelming, intimidating, and stressful decision. The DOJ, however, has

made it clear that “step[ping] up and own[ing] up” to the misconduct will be appropriately rewarded and viewed from a much more favorable lens than attempts to cover up or downplay the potential misconduct. To get credit for cooperation, the companies must make proactive and genuine efforts to cooperate and remediate the situation— this includes being willing to name specific individuals suspected of wrongdoing, linking compensation to compliance, and implementing policies to claw back compensation or perks provided to bad actors. In particular, the DOJ’s willingness to *not* require an independent compliance monitor if a company is able to show that it has implemented and tested an effective compliance program can result in tremendous cost savings (of time, money, and human capital) to a corporation.

4. **Independent Compliance Monitors:** Court appointed compliance monitors bring diligence, expertise, much needed focus on remedying wrongdoing, and systems, policies, and procedures for improving a corporate bad actor’s compliance systems and implementing reforms required by settlement. However, independent compliance monitors are costly and have, on occasion, run into conflicts of interest. To address these concerns, Deputy AG Monaco announced new guidance for prosecutors on how to identify the need for a monitor, to select a monitor, and to oversee the monitor’s work to increase likelihood of success.
 - a. **Practice Point:** With the increasing use of monitors in recent years, it is reassuring to see the DOJ taking a more proactive approach in reforming the process and ensuring that the ultimate monitorship goals – remedying past wrongdoing and preventing future wrongdoing – are achieved. As part of this reform, all monitor selections will be made pursuant to a documented selection process that operates transparently and consistently. The intent of these reforms is to ensure that the scope of the monitor’s work is tailored to the misconduct and the related compliance deficiencies. Importantly, the reforms require the monitor to stay “on task and on budget”. For many companies facing a “monitor” line item in its budget, this last point is critical and provides some reassurances that costs will be appropriately monitored.
5. **Corporate Culture:** Lastly, Deputy AG Monaco emphasized the importance of the “tone at the top”. As part of this, Deputy AG Monaco focused on fundamental system, policy, and incentive mechanisms that a company can change to promote a more compliant culture. Deputy AG Monaco noted, “it all comes back to corporate culture. Having served as both outside counsel and a board member in the past, I know the difficult decisions and trade-offs companies face about how to invest corporate resources, structure compliance programs, and foster the right corporate culture.” As part of these reforms, the DOJ will encourage corporations to shape financial compensation systems to avoid risky behavior. These reforms include clawing-back compensation when misconduct happens, including compensation for management or the C-Suite who have ignored or disregarded red flags. On the flip side, the DOJ will look favorable upon those compliance programs that promote “good actor” behavior by using affirmative metrics and benchmarks.
 - a. **Practice Point:** As noted above, the importance of strong and effective compliance programs cannot be overemphasized. Bad actors and acts do not develop overnight. In our experience, corporate wrongdoing tends to be the result of a steady buildup of small acts that, overtime, can result in egregious, potentially illegal behavior. Setting a tone at the top that does not tolerate this type of risky or questionable behavior helps discourage it throughout. However, tone at the top is not sufficient if the compliance systems in place are ineffective. The DOJ indicated it will be looking to the strength of a company’s compliance program in its

evaluation of a company's culture and what, if anything, contributed to the wrongdoing and how, if at all, a company could have prevented it through its internal policies and procedures, including its compensation system and financial sanctions. If your company has not prioritized updating its compliance systems, now is the time.