

## DEPUTY ATTORNEY GENERAL'S REMARKS ON NEW DOJ CORPORATE CRIMINAL ENFORCEMENT POLICIES

September 20, 2022

On September 15, 2022, Deputy Attorney General Lisa O. Monaco ("Monaco") delivered [remarks](#) on significant updates on Department of Justice's ("DOJ") corporate criminal enforcement policies. Monaco's remarks were made in connection with the release of revised DOJ policies that reflect a tough-on-corporate-crime approach that Monaco first previewed in October 2021. The updates stem in large part from the Corporate Crime Advisory Group ("Advisory Group") headed by Monaco and consisted of DOJ experts, public interest groups, ethicists, academics, audit committee members, in-house attorneys, former corporate monitors, and members of the business community. The policy updates are separated into five categories discussed below.

### *Individual Accountability*

Monaco stressed that the "top priority" for DOJ's corporate criminal enforcement is to pursue individuals who commit and profit from corporate crime. Monaco called on prosecutors "to do more and move faster," which notably includes expediting DOJ investigations. As a result, DOJ will require cooperating companies to disclose important evidence more quickly. Any undue delays or intentional delay in producing information will result in a reduction or denial of cooperation credit. The reduction or denial is more likely if the undisclosed information shows individual culpability. Monaco emphasized the need for disclosure stating, "gamesmanship with disclosures and productions will not be tolerated."

Monaco further explained that a company's initial reaction to discovering "hot" documents should be to notify prosecutors and provide all relevant, non-privileged facts about individual misconduct to receive cooperation credit. Prosecutors will strive to complete investigations and seek criminal charges against individuals prior to or at the same time as entering into a resolution with the company. If it makes more sense to resolve a case with the company first, however, prosecutors must produce a full investigative plan that outlines the remaining time needed and work to be done on the individual's case.

While this guidance was not a complete shift in DOJ's attitude toward individual culpability, it did introduce a quicker and more aggressive timetable for individual prosecutions. These new policies encourage companies to address potential issues faster to ensure the company is protected.

### *History of Misconduct*

Monaco built on the feedback she received from the Advisory Group to reiterate that repeat offenders will be closely scrutinized and she offered further guidance on the holistic review policies that DOJ takes in assessing prior misconduct.

Most importantly, prior misconduct given the heaviest weight will be criminal resolutions in the United States and prior wrongdoings involving the same personnel and management as the current misconduct. Inversely, DOJ will give less weight to “dated conduct,” which includes criminal resolutions that occurred more than 10 years before the conduct under investigation and civil or regulatory misconduct that occurred more than 5 years prior to the current misconduct.

Monaco also announced that DOJ will consider the nature and circumstances of the prior misconduct. Some of the factors include whether the prior misconduct shares the same root cause of the current misconduct and whether the current misconduct is similar to past misconduct by other similarly situated companies that are part of a highly regulated industry.

Significantly, Monaco reassured that DOJ would not treat an acquiring company with a proven compliance record as a recidivist if it acquired a company with compliance problems. That said, the acquiring company will need to ensure that the problems are properly addressed after acquisition. DOJ will also disfavor multiple successive non-prosecution or deferred prosecution agreements to the same company.

### *Voluntary Self-Disclosure*

Citing the Antitrust Division’s Leniency Program and the National Security Division’s program for expert control and sanctions violations, Monaco expressed the need to incentivize voluntary self-disclosure. She noted that in many cases, voluntary self-disclosure is a sign that the company has developed a good compliance program. As a result, DOJ’s goal is to reward companies that have compliance programs that enable voluntary self-disclosure.

Going forward, Monaco introduced a new policy where every DOJ component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure. Furthermore, if a component lacks a formal, written policy, it must draft one. Monaco announced that the common principles of the policies should include that, absent aggravating factors, DOJ will not seek guilty pleas when a company voluntarily self-disclosed, cooperated, and remediated the misconduct, and DOJ will not require an independent compliance monitor if the company implemented and tested an effective compliance program.

### *Independent Compliance Monitors*

Monaco also previewed the release of new guidance for prosecutors on how to identify the need for an independent compliance monitor, how to select a monitor, and how to oversee that monitor’s success. For monitor selection, prosecutors must adhere to a documented selection process that should operate “transparently and consistently.”

Monaco also ensured that prosecutors would make certain that the monitorship is tailored to a company’s misconduct and compliance deficiencies through receiving regular updates to verify that the monitor stays on task and budget.

### *Corporate Culture*

Finally, Monaco stressed the necessity of a strong corporate culture and outlined potential incentives and deterrents that companies can use to gain a good corporate culture. Some of those deterrents included employing clawback provisions and escrowing compensation, whereas some of the incentives included building compensation systems that use affirmative metrics and benchmarks to reward compliant behavior.

From DOJ's perspective, Monaco stated that prosecutors will evaluate the strength of a company's compliance program based on whether the compensation system rewards compliance and imposes financial sanctions on noncompliant employees, directors, or executives. Monaco also asked DOJ's Criminal Division to develop further guidance by the end of the year on how to reward companies that employ clawback or similar arrangements.

## IMPLICATIONS

With these announcements, DOJ has made it clear that a good compliance program is essential to avoiding DOJ enforcement. The program must address an improved culture, a self-disclosure mechanism, and an ability to quickly provide information that shows individual culpability.

If you have any questions or need further guidance regarding the updated DOJ policies on corporate criminal responsibility, please contact a member of Hancock Daniel's [Compliance](#) or [Fraud & Abuse](#) teams.

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