

DOJ Issues New Guidance on the Investigation and Prosecution of Corporations and Corporate Officers

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On September 15, 2022, Deputy Attorney General Lisa Monaco announced significant revisions to the Department of Justice's corporate criminal enforcement policies. Monaco's remarks, delivered in a [speech](#) at New York University, coincided with the publication of the department's key memorandum regarding "[further revisions to corporate criminal enforcement policies following discussions with corporate crime advisory group](#)."

The long-awaited memo and Monaco's speech not only made clear that enforcement of criminal laws against corporations and individual corporate officers is a department priority but also added important details explaining how the department will carry out that mission. Key details include the importance of timely, voluntary disclosure of corporate and individual wrongdoing; the demand for comprehensive and timely cooperation by corporate entities to earn cooperation credit; the evaluation of a corporation's history of misconduct in deciding upon an appropriate resolution of the case; the need to tie officers' compensation to compliance; and guidance on the use of independent compliance monitors. Each of these items will be addressed in turn.

Accountability

Monaco made it clear that individual accountability remains the department's "number one priority" and that the department will be taking steps to "expedite" its investigations of individuals. For company executives, it is important to understand that the department will likely be dissatisfied with a corporate prosecution or resolution alone; the department intends to go after individual corporate officers. Consistent with this approach, the department's memo directs that "prosecutors must strive to complete investigations into individuals — and seek any warranted individual criminal

charges — prior to or simultaneously with the entry of a resolution against the corporation.” Essentially, the department is looking to hold the sword of Damocles over the corporation’s head while it investigates suspected wrongdoing by corporate officers.

Cooperation

Cooperation remains a key consideration in how the department chooses to resolve a corporate matter, and the department is placing new emphasis on timing. It’s been long-standing department policy that “corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct.” The department’s memo does not change that policy, but the emphasis placed on the timing of cooperation is noticeable. Throughout the department’s memo, it repeated its demand for “timely” cooperation. The department stresses that the “mere disclosure of records, however, is not enough.” Disclosure must be “prompt,” “without delay,” and in “a timely fashion.” As Monaco stated in her speech, “[i]f a cooperating company discovers hot documents or evidence, its first reaction should be to notify the prosecutors.” Consequently, a delay in disclosure will place in jeopardy the company’s eligibility for cooperation credit.

History of Misconduct

Monaco reiterated a key point that the department has made over the past year: federal prosecutors are paying particular attention to companies with a history of misconduct, even if such prior acts are different, or separate, from the current acts under investigation. In other words, the department expects lessons to be learned and reinforced with proper corporate governance. A corporation’s history of misconduct will be a relevant consideration in how it’s treated by the department. But there are limits. The department acknowledges that “prior criminal resolutions entered into more than ten years before the conduct currently under investigation, and civil or regulatory resolutions that were finalized more than five years before the conduct [at issue]” will be given less weight.

Compensation

Federal prosecutors evaluating a company’s compliance program will now look at how the company compensates employees in determining case resolution. This means the department is going to pay particular attention to whether companies have created financial incentives for compliance and sanctions for misconduct. In the department’s view, “[c]orporations can help to deter criminal activity if they reward compliant behavior and penalize individuals who engage in misconduct.” Clawbacks or partial escrowing of compensation may have to be considered. Prosecutors will look at how these compliance policies operate in practice, not just how they are written on paper.

Voluntary Self-Disclosure

Fifth, and of great interest, is the department's focus on voluntary self-disclosure. As with prior portions of the memo, the department notes that "voluntary self-disclosure only occurs when companies disclose misconduct promptly and voluntarily (i.e., where they have no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior Department resolution) and when they do so prior to an imminent threat of disclosure or government investigation." To those corporations that fit this bill, the reward could be substantial. According to Monaco and the department's memo, "absent the presence of aggravating factors, the Department will *not* seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct." Every component of the department that prosecutes corporate crime must have a program that incentivizes voluntary self-disclosure. "If a component currently lacks a formal, documented policy, it must draft one." The key question here is if, and when, a company learns of potential misconduct, how and when does the company report such acts? There is no scientific formula to answer those case-by-case determinations. Ultimately, such decisions require a careful balancing of multiple factors guided by the hand of experienced counsel.

Independent Compliance Monitors

Finally, Monaco included the welcome announcement that to address the private sector's "suspicion and confusion" about independent compliance monitors, new guidance would be issued on the department's use, selection, and oversight of such monitorships. As of September 15, department policy is that prosecutors will not apply any general presumption against or in favor of imposing independent compliance monitors on corporations. The department's memo outlines 10 non-exhaustive considerations in evaluating the necessity and potential benefits of a monitor. Every component involved in corporate criminal compliance resolutions must develop a public monitor selection process, if one does not already exist for the particular department component.

Although many of these messages and priorities are not new to the department, the tone of Monaco's message, and the department's memo, has made one thing clear: the department is looking to confront alleged corporate misconduct head-on. To support that mission, the department is seeking \$250 million from Congress to fund its renewed corporate criminal enforcement efforts. The department has the will — and soon it may have the funding — to devote substantial resources to corporate crime enforcement.

Our team of experienced white collar attorneys is here to help navigate our clients through any federal or state investigation into our clients' business practices. Whether the client's decision is voluntary self-disclosure or stand and fight, we have the know-how and resources to achieve optimum results.

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