

It's Not "Business as Usual" for DOJ's Corporate Criminal Enforcement Efforts

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On the heels of a speech delivered by Deputy Attorney General (DAG) Lisa Monaco to NYU Law School on September 15, the Department of Justice (DOJ) issued a memorandum and [announced](#) further revisions to its existing corporate criminal enforcement policies and practices. The revised policies will be incorporated into the DOJ's *Justice Manual*. The recent revisions follow DAG Monaco's [October 2021](#) announcement to create the Corporate Crime Advisory Group to review corporate enforcement efforts, and which recommended the additional revisions. As DAG Monaco explained during her speech, these changes are meant to "further strength[en] how [the DOJ] prioritize[s] and prosecute[s] corporate crime."

Key Takeaways

The changes follow the trends announced in October 2021 of a renewed focus on individual accountability, consideration of prior misconduct, and the availability of corporate monitorships in appropriate cases. Highlights detailed in the 15-page memorandum include:

- **Individual Accountability and Cooperation Credit:** To qualify for cooperation credit from the DOJ, corporations must *timely* disclose all relevant, nonprivileged facts about individual misconduct. DOJ could withhold cooperation credit if a prosecutor identifies undue or intentional delay in the production of information or documents, particularly those impacting the government's ability to assess individual culpability;
- **Historical Misconduct:** DOJ clarified how far back prosecutors would look when considering historical corporate misconduct. While prosecutors should consider a corporation's record of past misconduct, the memorandum makes clear that not all instances of past misconduct are of equal relevance or probative value. Criminal conduct older than 10 years and civil or regulatory resolutions finalized more than five years before the conduct currently under investigation should generally be accorded less weight and considered less reflective of the company's current culture.
- **Voluntary Self-Disclosure:** Each DOJ component that prosecutes corporate crime must review its policies on corporate voluntary self-disclosure, and if the component has no formal written policy, it must draft one and publicly share it. The memorandum sets out core principles that each self-disclosure policy must contain, including, among others, that absent aggravating factors, the DOJ will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct.
- **Compensation Clawbacks:** In assessing a compliance program, prosecutors also will consider whether a

corporation's compensation system incorporates compensation clawback provisions or other elements that enable penalties to be levied against current or former employees, executives, or directors whose direct or supervisory conduct or omissions contributed to the criminal activity. Prosecutors should look to whether these written provisions are followed in practice and whether or not the corporation has taken affirmative steps to execute on these policies. Further guidance on how to reward corporations that develop and apply compensation clawback policies is expected.

- **Corporate Monitorships:** In what is expected to lead to the use of more monitors, the DOJ stated that the need for a corporate monitor and the scope of any monitorship will depend on the facts and circumstances of a particular case.
- **Transparency:** Corporate criminal resolutions will be published on the DOJ's public website, absent exceptional circumstances.

Implications

These updates align with the Biden administration's ongoing efforts to make white collar crime a key enforcement priority. Companies must remain vigilant regarding increased scrutiny and enforcement activity:

- Companies should review compliance programs and internal controls to ensure they adequately deter, detect, and prevent misconduct. Corporate culture is important to the DOJ. How seriously a company treats compliance can be the decisive factor for the DOJ when considering potential resolutions, which could well include the imposition of a costly monitor.
- Individual accountability remains a top priority for the DOJ, and companies must timely produce relevant information. Failure to do so could impact whether the DOJ recognizes cooperation credit.
- Companies should review their compensation policies and incorporate forthcoming guidance on compensation clawback policies.
- Companies should assess any prior criminal, civil, and regulatory enforcement actions; consider their potential impact on future DOJ corporate resolutions; and be prepared to advocate for why prior enforcement actions should not impede the successful resolution of a matter.

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