

Department of Justice Announces Significant Changes to Corporate Criminal Enforcement

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Overview

Last week, the #2 official at the Department of Justice [announced significant new measures](#) intended to strengthen the DOJ's response to criminal corporate misconduct. In an address to the ABA's National Institute on White Collar Crime in Miami, Deputy Attorney General Lisa Monaco announced three policy changes and identified future focus areas for corporate criminal enforcement, while stressing the importance of corporate compliance programs designed to prevent misconduct.

Three key policy changes

First, Monaco announced that the DOJ will restore [2015 guidance](#) that required companies seeking cooperation credit in an investigation to provide the government with "all non-privileged information about individuals involved in or responsible for" potential misconduct "regardless of their position, status, or seniority." To be eligible for such credit, companies will now be required to provide information about all relevant individuals, and not just those who are "substantially involved" in potential misconduct.

Second, the DOJ plans to evaluate the full universe of a company's prior misconduct when making enforcement decisions, regardless of "whether or not that misconduct is similar to the conduct at issue in a particular investigation." The DOJ's amended "Principles of Federal Prosecution of Business Organizations" will direct prosecutors to "consider the full criminal, civil and regulatory record" of a company to reach an appropriate resolution.

Finally, Monaco reversed prior DOJ guidance disfavoring corporate monitors. Instead, she indicated that the DOJ may "require the imposition of independent monitors whenever it is appropriate to do so" in order to ensure "that a company is living up to its compliance and disclosure obligations" under deferred prosecution or non-prosecution agreements with the DOJ. Monaco also said that monitorships would no longer be considered an exception to the rule.

Monaco characterized these three shifts as "first steps," but discussed additional areas where the DOJ is considering further action. For example, its newly formed Corporate Crime Advisory Group is considering whether deferred prosecution or non-prosecution agreements are appropriate for recidivist companies after a recent review found that between 10% and 20% of all significant corporate criminal resolutions involve companies that have previously entered into a resolution with the DOJ. Monaco cautioned that the DOJ has "no tolerance for companies that take advantage of pre-trial diversion by going on to continue to commit crimes."

Monaco summarized the DOJ's new approach as follows:

- Companies should actively review their compliance programs to ensure they are adequately monitoring for and remediating misconduct.
- For companies facing investigations, effective immediately, the DOJ will review their entire criminal, civil and regulatory record.
- Companies cooperating with the government will now need to identify all individuals potentially involved in the misconduct – not just those substantially involved – and produce all non-privileged information about those individuals' involvement.
- For companies negotiating resolutions, there is no longer a default presumption against corporate monitors.
- These policy shifts represent the beginning, and not the end, of this administration's actions to toughen its approach to corporate crime.

Key takeaways

As [we previewed last year](#), the new DOJ policies continue to emphasize the crucial role that an effective compliance program will play in resolving corporate investigations. Each of these policy announcements makes clear the DOJ's expectation that companies will make robust efforts to identify and prevent misconduct at the corporate and individual

levels, and that expectation will be taken into account when determining the potential outcome of any enforcement action against the company being investigated.

To that end, companies should ensure their compliance programs reflect sincere efforts to identify and address the principal risks they face, and they should engage in a regular process of assessment and improvement of their compliance programs. Companies also should be prepared for more extensive proactive cooperation with the DOJ in criminal investigations, including measures to identify and provide information on all individuals involved in the conduct under investigation. Such updated policies and proactive remediation may also help prevent the perceived need for corporate monitors, which promise to make a comeback.

Monaco's comments make clear that the DOJ will take a more holistic and aggressive approach to determining the appropriate outcome of its corporate criminal investigations, particularly for companies with a repeated history of misconduct. Such companies should expect their full record of past conduct to be a factor in any enforcement determination by the DOJ and should expect the DOJ to be less willing in repeat-offender situations to offer DPA and NPA resolutions.

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