

Deputy Attorney General Announces Important Changes to DOJ's Corporate Criminal Enforcement Policies

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On October 28, 2021, Deputy Attorney General Lisa Monaco spoke to the ABA's 36th National Institute on White Collar Crime and announced, among other things, three actions the U.S. Department of Justice ("DOJ") is taking with respect to its policies on corporate criminal enforcement. These relate to:

- Restoring prior DOJ guidance about the need for corporations to provide all non-privileged information about *all* individuals involved in the misconduct to be eligible for cooperation credit;
- Taking account of a corporation's full criminal, civil, and regulatory record in making charging decisions, even if dissimilar from the conduct at issue; and
- Making it clear that prosecutors are free to require the imposition of a corporate monitor when they determine it is appropriate to do so.

In summary, as a result of these actions:

- In government investigations, companies will need to identify *all* individuals involved in the misconduct and provide all non-privileged information about their involvement;
- In charging decisions, DOJ will review companies' entire criminal, civil, and regulatory record; and
- In corporate resolutions, there is no presumption against the imposition of a corporate compliance monitor, which may be imposed whenever DOJ prosecutors deem it appropriate to do so.

This announcement is notable both for what it does and what it does not purport to do. This Client Alert provides some initial thoughts on the issues outlined by Deputy Attorney General Monaco.

Notably, thus far, the Biden DOJ has not indicated that it plans to rescind or otherwise revisit what possibly was the most significant corporate criminal enforcement announcement of the Trump DOJ: the so-called anti-"piling on" policy announced by then-Deputy Attorney General Rod Rosenstein in 2018, which directs DOJ to coordinate internally and with other authorities to avoid duplicative fines or penalties for the same underlying conduct. Additionally, although Deputy Attorney General Monaco signaled a reversion to Obama-era requirements for corporate cooperation, she did not suggest revisiting DOJ's firm guidance to its prosecutors that waiver of the attorney-client privilege shall not be required for an organization to receive full cooperation credit. Nevertheless, this announcement, which reflects the first major announcement of the Biden DOJ about corporate criminal enforcement, will undoubtedly have a meaningful impact on investigations and prosecutions.

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Corporate Cooperation Credit

Deputy Attorney General Monaco signaled that the DOJ is reverting to the cooperation requirements as outlined in the Yates Memo—a change to corporate cooperation requirements announced by then-Deputy Attorney General Sally Yates in 2015. As discussed in this [Client Alert](#), the Yates Memo augmented the Justice Manual, which provides a comprehensive collection of standards that guide prosecutors from the start of an investigation through prosecution, to require, among other things, that prosecutors premise cooperation credit on organizations providing “all relevant facts relating to the individuals responsible for the misconduct.” This guidance amended Section 9-28 of the Justice Manual, entitled “Principles of Federal Prosecution of Business Organizations,” which sets forth the factors that prosecutors must consider when determining whether to bring criminal charges against a company. The Trump DOJ subsequently modified the Yates Memo in 2018, in response to concerns that this requirement was inefficiently slowing down corporate investigations. This revision premised cooperation on providing information about individuals who were “substantially” involved in or responsible for the misconduct, rather than requiring information about *all* individuals involved in the misconduct.

Deputy Attorney General Monaco explained that this is no longer DOJ policy and that the prior guidance on the Yates Memo will control going forward. Specifically, she stated that to receive cooperation credit, organizations must provide to DOJ “all non-privileged information about individuals involved in or responsible for the misconduct at issue.” She underscored that this requirement is irrespective of an individual’s position in the company and observed that the prior standard of “substantially” involved individuals proved unworkable, because the standard was not clear and left too much to the judgment of cooperating companies. Importantly, however, Deputy Attorney General Monaco repeatedly used the phrase “non-privileged information,” strongly signaling no intent to revisit the prohibition on premising cooperation credit on an organization waiving any valid assertion of the attorney-client privilege.

Prior Misconduct

The Justice Manual also advises federal prosecutors to consider a “corporation’s history of similar misconduct” when making a charging decision with regard to an organization. Here too, Deputy Attorney General Monaco announced a shift in DOJ policy. Specifically, no longer will DOJ focus merely on prior misconduct similar to the conduct under investigation. Rather, DOJ will consider other historical misconduct by the corporation. Going forward, “all prior misconduct needs to be evaluated . . . , whether or not that misconduct is similar to the conduct at issue in a particular investigation.”

Deputy Attorney General Monaco explained that, by focusing narrowly only on similar misconduct, the prior guidance failed to consider fully a “company’s overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity.” This approach will sweep broadly to include past regulatory violations and prosecutions by state and local authorities. The speech suggested that prosecutors should exhibit flexibility in recognizing that not all past misconduct is indeed relevant, but provided a baseline at which “prosecutors need to start by assuming all prior misconduct is potentially relevant.” Although Deputy Attorney General Monaco did not indicate how recent past misconduct must be to retain relevance, she gave an example that suggested a focus on more recent violations: “For example, a company might have an antitrust investigation one year, a tax investigation the next, and a sanctions investigation two years after that.”

Monitorships

The final portion of Deputy Attorney General Monaco’s speech focused on corporate compliance monitors, which has been a recurring topic of great interest in corporate enforcement. Corporations that enter into a negotiated resolution with DOJ generally will

be required to pay a fine and penalties, admit to wrongdoing, and fulfill a number of obligations, such as regular reports to the government. On occasion, DOJ also imposes an independent, third-party corporate monitor as part of a negotiated resolution. These monitors observe and assess a company's compliance with the terms of the resolution and make regular reports to DOJ. They are intended to help companies reduce the risk of recurrence of misconduct.

As the imposition of a monitorship can be quite costly and time-consuming for companies, DOJ has established guidelines to create greater transparency concerning the imposition, selection, and use of monitors. In March 2008, then-Acting Deputy Attorney General Craig Morford issued the first policy memorandum (the "Morford Memo") establishing basic standards surrounding corporate monitorships. In determining the appropriateness of imposing a monitor, the Morford Memo advised prosecutors to consider both the potential benefits of a monitor and "the cost of a monitor and its impact on the operations of a corporation." The Morford Memo further cautioned that monitors should never be used "to further punitive goals."

More recently, in October 2018, then-Assistant Attorney General Brian Benczkowski issued a memorandum (the "Benczkowski Memo"), which significantly expanded on the Morford Memo. The Benczkowski Memo further stressed the Morford Memo's pronouncement that prosecutors should assess both the benefits and the cost of imposing a monitor, stating that monitors should only be favored "where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burden." Moreover, the Benczkowski Memo explained that if a company has demonstrated that it has a demonstrably effective compliance program and controls, "a monitor will likely not be necessary."

Deputy Attorney General Monaco's remarks suggest that DOJ is poised to loosen prior guardrails around the impositions of monitors. Deputy Attorney General Monaco explained that, where trust in a corporation's commitment to improvement and self-policing is called into question, monitors are a longstanding tool in DOJ's arsenal to motivate and verify compliance. To that end, Deputy Attorney General Monaco emphasized that DOJ "is free to require the imposition of independent monitors whenever it is appropriate to do so" and made clear that she is "rescinding" any prior DOJ guidance suggesting that monitorships are an exception or disfavored.

Deputy Attorney General Monaco made clear that the decision to impose a monitor must still consider the monitorship's administration and the standards by which monitors will accomplish their work. With respect to the selection of monitors, Deputy Attorney General Monaco announced that DOJ will study how corporate monitors are chosen and whether that process should be standardized across all DOJ components and offices.

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Deputy Attorney General Monaco framed all three of these changes to DOJ policy as part of a broader Biden DOJ initiative to revisit the standards and practices that DOJ has applied to corporate criminal enforcement. Notably, she announced the formation of a Corporate Crime Advisory Group within DOJ, featuring representatives from each portion of DOJ that brings enforcement actions against corporations, to make recommendations on enhancing departmental policy in this area. Among the areas the Advisory Group will consider are the efficacy of the current approach to pretrial diversion (non-prosecution and deferred prosecution agreements), especially in cases of arguably recidivist organizations, and DOJ's standards and practices for the selection of corporate monitors.

Over the coming weeks and months, we will carefully monitor DOJ implementation of these new measures.

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