

DOJ Announces Policy Changes to “Invigorate” Efforts to Combat Corporate Crime

The changes include more focus on individual accountability, more holistic evaluation of prior corporate misconduct, and stricter corporate resolutions.

On October 28, 2021, US Deputy Attorney General Lisa Monaco gave the keynote address at the American Bar Association’s 36th National Institute on White Collar Crime.¹ In her speech, Monaco highlighted the following:

- The Department of Justice (DOJ) will review companies’ entire criminal, civil, and regulatory record — not just similar misconduct — when evaluating appropriate resolutions.
- Companies will need to identify all individuals involved in misconduct — not just individuals who are substantially involved in misconduct — to obtain cooperation credit.
- There will be “serious consequences” for companies that violate the terms of their Deferred Prosecution Agreements (DPAs) or Non-Prosecution Agreements (NPAs) with DOJ.
- There will be no default presumption against corporate monitors. The decision about whether to impose a monitor will be made according to the facts of each case.
- Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct.
- DOJ plans to study, evaluate, and take additional actions to better combat corporate crime.

DOJ Signals a Tougher Stance on Corporate Crime

Corporate leaders should be mindful of the new priorities outlined by Deputy Attorney General Monaco, both from a corporate compliance standpoint and an individual liability perspective. The speech underscores a continuing shift away from the more cooperation-focused tone of DOJ under the Trump Administration. It also signals an increased focus on individual liability, the importance of establishing a corporate culture of compliance, and accountability for repeat offenders. Deputy Attorney General Monaco began the speech by discussing the following trends and DOJ enforcement priorities:

Evolving Landscape of Corporate Crime. Echoing President Biden’s “Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest” from earlier this year,² Deputy Attorney General Monaco noted that corporate crime has “an increasing national security dimension — from the new role of sanctions and export control cases to cyber vulnerabilities that open companies up to foreign attacks.” She noted that criminals are taking advantage of emerging technologies and financial innovations to develop new ways to exploit the public, specifically referencing healthcare fraud, cryptocurrency schemes, insider trading, and market manipulation.

At the same time, she noted that these developments are “changes of degree and not of kind,” stressing that DOJ has long been involved in cases involving national security implications, data analytics, and evolutions in corporate fraud.

Prioritization of Individual Accountability. Consistent with indications from Attorney General Merrick Garland, Deputy Attorney General Monaco said that DOJ’s “first priority in corporate criminal matters [is] to prosecute the individuals who commit and profit from corporate malfeasance.” Acknowledging the difficulty of prosecuting such cases, she said that she would continue to make clear to DOJ prosecutors that, so long as DOJ acts in accordance with the Principles of Federal Prosecution, “the fear of losing should not deter them.” She indicated that, consistent with the Justice Manual, DOJ would “urge prosecutors to be bold in holding accountable those who commit criminal conduct.”

Although Deputy Attorney General Monaco indicated that DOJ would prioritize individual accountability, she also indicated that, when appropriate, DOJ “will not hesitate to hold companies accountable.” Here, she noted that, while DOJ understands the costs enforcement actions can place on shareholders and others, DOJ’s responsibility is to “incentivize responsible corporate citizenship, a culture of compliance and a sense of accountability.” Thus, DOJ “will not hesitate to take action when necessary to combat corporate wrongdoing.”

Consistent with her comments about the challenges associated with prosecuting difficult cases, Deputy Attorney General Monaco stressed that DOJ will bring the full resources of the government to bear when fighting corporate crime, noting that “when given the right resources and support,” prosecutors can uncover and prosecute even the most sophisticated corporate criminals. She said that DOJ would find ways to “surge resources” to prosecutors, including by adding a new squad of FBI agents embedded in the Fraud Section.

The Importance of Corporate Culture. The speech signals a continued emphasis on corporate culture, and DOJ’s expectation that companies will adopt and implement compliance programs that are appropriately resourced and designed to promote and achieve compliance with applicable laws. While acknowledging that managing a large organization and establishing the right culture requires resources and effort, Deputy Attorney General Monaco indicated that “corporate culture matters” and that a corporate culture that “fails to hold individuals accountable, or fails to invest in compliance — or worse, thumbs its nose at compliance — leads to bad results.” She noted that companies serve their shareholders by proactively implementing compliance functions and spending resources to anticipate problems. She also assured companies that they will receive credit from the government if such proactive procedures are put in place. Conversely, DOJ will “ensure the absence of such programs inevitably proves a costly omission for companies who end up the focus of [DOJ] investigations.”

Notable Policy Changes

Deputy Attorney General Monaco announced three major policy changes that aim to help DOJ better combat corporate crime:

- 1) Companies Will Be Required to Provide DOJ With All Information About Individual Wrongdoing to Obtain Cooperation Credit.** Deputy Attorney General Monaco stressed that prosecutors need to know the full cast of characters involved in corporate misconduct, so they can appropriately hold individual actors accountable. To that end, Deputy Attorney General Monaco announced that she was directing DOJ to restore prior guidance which clarified that, to be eligible for any cooperation credit, companies must provide DOJ with “all non-privileged information about individuals involved in or responsible for the misconduct at issue,” regardless of their position, status, or seniority. She added that it will “no longer be sufficient for companies to limit disclosures to those they assess to be ‘substantially involved’ in the misconduct,” noting that such distinctions are confusing in practice and ignore the fact that individuals with peripheral involvement may nonetheless have important information. Putting a finer point on this, Deputy Attorney General Monaco said that “cooperating companies will now be required to provide the government with all non-privileged information about individual wrongdoing.” Attempting to hedge against criticism that this requirement will lead to DOJ prosecuting minimal participants, Deputy Attorney General Monaco said that this policy change will “not alter the principles that govern fair and just charging decisions.”
- 2) DOJ Will Consider All Prior Criminal, Civil, and Regulatory Misconduct When Evaluating Corporate Resolutions.** Deputy Attorney General Monaco announced that, moving forward, “all prior misconduct needs to be evaluated” when determining a proper resolution with a company — irrespective of whether the prior misconduct is similar to the conduct at issue. In support of this position, Deputy Attorney General Monaco said that the record of misconduct “speaks directly to a company’s overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity.” She indicated that DOJ would amend the Principles of Federal Prosecution of Business Organizations to direct prosecutors to consider “the full criminal, civil and regulatory record of any company” when deciding what resolution is appropriate. Some prior instances of misconduct may ultimately prove to have less relevance, but prosecutors “need to start by assuming all prior misconduct is potentially relevant.” In Deputy Attorney General Monaco’s view, this approach will help DOJ “harmonize the way [DOJ treats] corporate and individual criminal histories, as well as ensure that [DOJ does] not unnecessarily look past important history in evaluating the proper form of resolution.”
- 3) DOJ Is Rescinding Any Guidance Suggesting Monitors Are Disfavored or an Exception to the Rule.** To the extent that prior DOJ guidance suggested that monitors were disfavored or an exception, Deputy Attorney General Monaco said that she was “rescinding that guidance” and making clear that DOJ “is free to require the imposition of independent monitors wherever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA.” In conjunction with this change, Monaco said that DOJ will study how it selects corporate monitors, including evaluating whether to standardize its selection process across the divisions and offices to eliminate even the perception of favoritism.

Future Areas of Change

Deputy Attorney General Monaco noted that the announced policy changes “are only the first steps to reinforce our commitment to combatting corporate crime.” She previewed two other areas in which DOJ expects to make changes:

- 1) **Assessing Repeated Corporate Wrongdoing.** In certain cases, DOJ sees the same company become the subject of multiple investigations. Deputy Attorney General Monaco noted that “somewhere between 10% and 20% of all significant corporate criminal resolutions involve companies who have previously entered into a resolution with the department.” Going forward, DOJ will consider:
 - Whether and how to differently account for companies that become the focus of repeated DOJ investigations
 - Whether pre-trial diversion — NPAs and DPAs — is appropriate for certain recidivist companies
 - Whether companies subject to NPAs and DPAs take those obligations seriously enough
- 2) **Holding Companies That Violate NPAs and DPAs Accountable.** Deputy Attorney General Monaco said that DOJ will have “no tolerance” for companies that take advantage of pre-trial diversion by going on to continue to commit crimes — particularly if they compound their wrongdoing by knowingly hiding it from the government — and that there will be “serious consequences” for violating their terms. In support of this position, Deputy Attorney General Monaco noted that two multinational corporations recently announced that they had received a breach notification from DOJ.

To facilitate the analysis of these and other, potential changes, Deputy Attorney General Monaco announced the creation of the Corporate Crime Advisory Group (CCAG), which will include representatives from every part of DOJ involved in corporate criminal enforcement. CCAG will have a broad mandate and will consult on a variety of issues, including monitorship selection, recidivism, and pre-trial diversion compliance. It will also make recommendations on what resources can assist more rigorous enforcement, and how DOJ can ensure that individual accountability is prioritized. CCAG will develop recommendations and propose revisions to DOJ’s policies on corporate criminal enforcement.

Highlighting her time as a board member, Deputy Attorney General Monaco acknowledged the difficult conversations that arise surrounding compliance and measures designed to proactively stop misconduct, and the tradeoffs that may need to be considered when making investment decisions. She said that “clear department guidance strengthens the case for these measures because it makes clear why taking steps to root out misconduct, and avoid the ‘edge case,’ often can be the most valuable guidance legal advisors can provide” to businesses. She said she will focus on ensuring clarity with respect to DOJ’s objectives and priorities so that attorneys can provide “well-informed advice” to their clients.

Analysis

The speech signals a tougher stance by DOJ on individuals and corporations that DOJ concludes have committed criminal violations. DOJ will particularly focus on corporations that have a prior history of misconduct or have failed to develop and maintain a corporate culture focused on compliance. As such, business leaders should take into account the following four considerations moving forward include:

- 1) **DOJ has signaled it is likely to commit significant resources to white collar enforcement, which will likely lead to concurrent pressure to show results.** The speech's focus on resources echoes a similar statement made recently by Associate Deputy Attorney General John Carlin during a Global Investigation Review panel, when he noted that "... in the days and months to come... [DOJ is] building up to surge resources for corporate enforcement."³ According to Associate Deputy Attorney General Carlin, these resources will come in the form of both additional FBI personnel to assist the Fraud Section and an increased investment in data analytics to discover illicit conduct, like healthcare fraud, money laundering, and insider trading. As with any entity investing resources, DOJ will want to see results, and so corporations should expect additional scrutiny from DOJ to bring more enforcement actions in the coming years. Companies should also expect increased cooperation between DOJ and civil enforcement agencies, including the SEC. Accordingly, companies need to be prepared by reviewing and strengthening compliance programs, pre-emptively identifying and rectifying problematic conduct, and responding effectively in the event DOJ comes knocking. Companies should work to follow suit and invest in building out their compliance programs and using data analytics to root out illicit behavior and monitor the effectiveness of internal controls.
- 2) **Individual accountability is a priority.** The Yates Memo still looms large at DOJ. Deputy Attorney General Monaco pronounced that in order to obtain cooperation credit, companies will be required to provide significant detail about all employees and executives involved in misconduct, and not just those that the company deems as the key bad actors. This requirement may necessitate providing separate counsel to additional employees whose individual liability may create a conflict with the company in an investigation by DOJ. Furthermore, companies will need to provide even more detail about employee involvement, and DOJ may launch additional probes into individual liability while simultaneously investigating corporate wrongdoing. This could strain relationships between employees and employers, which means keeping an open dialogue with individual counsel — to the extent possible — will be key.
- 3) **Resolutions may become more challenging for companies to navigate.** This is particularly true for companies that were the subject of prior enforcement actions. The speech signals that DOJ will increasingly push for monitors as part of corporate resolutions. In addition, in order to ensure that NPAs and DPAs are effective, DOJ may push for longer monitor terms and require stricter reporting requirements and cooperation provisions in agreements. These changes may slow the corporate resolution process. Further, companies may face more difficulty agreeing to DOJ's demands, which could result in an increased likelihood of litigation for companies that may not gain as much from the settlement process. Companies should approach all white collar engagements with an eye toward preparing for potential litigation in the event a resolution is not possible.
- 4) **DOJ is likely to continue to focus on corporate culture.** Investing in building a positive, supportive corporate environment will pay dividends, not only in bettering employee morale and corporate results, but also in giving companies a leg up in negotiations with DOJ. Deputy Attorney General Monaco was clear that "corporate culture matters" and a "culture of compliance and a sense of accountability" is crucial. This means creating an open environment in which employees can ask questions and discuss appropriate behavior when sensitive issues and circumstances arise. Corporations need a tone from the top that encourages dialogue and accountability so that compliance is embedded in the company's DNA. Creating a strong culture focused on compliance is likely to both stave off problematic conduct in the first place and also demonstrate to the government that the company has processes in place for preventing and addressing compliance issues.

To help clients build a positive culture of compliance and accountability, Latham & Watkins recently published the third edition of [Culture — A Practical Framework for Sustainable Change](#), a first-of-its-kind framework that draws on the firm's experience over the past decade advising institutions on their culture change and conduct initiatives, as well as other culturally rooted issues. The framework seeks to bridge the theory-practice divide by outlining an array of practical measures and techniques that companies can adopt in their quest to institute a meaningful, objectively monitorable, and operationally workable culture change program.

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Endnotes

¹ Lisa O. Monaco, Deputy Attorney General, DOJ, Remarks prepared for the ABA's 36th National Institute on White Collar Crime in Washington, DC (October 28, 2021), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

² The White House, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (June 03, 2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

³ John Carlin, Associate Deputy Attorney General, DOJ, Keynote on stepping up DOJ corporate enforcement at GIR Connect: New York, Global Investigations Review (October 11, 2021), *available at* <https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/john-carlin-stepping-doj-corporate-enforcement>.