

US Deputy Attorney General Monaco Announces Revised Policies on Corporate Crime

Updated DOJ policies will continue to focus on individual accountability and corporate recidivism, while aiming to provide additional incentives for voluntary self-reporting, foster greater transparency on use of monitors, and take further steps to promote corporate compliance.

In a speech at NYU School of Law on September 15, 2022,¹ and in an accompanying memo released the same day (the Monaco Memo),² US Deputy Attorney General Lisa Monaco announced revised Department of Justice (DOJ) policies on criminal enforcement for corporate misconduct:

- DOJ's top priority will continue to be individual accountability; prosecutors will be encouraged to complete investigations and seek any appropriate criminal charges against individuals prior to or at the same time as entering a resolution against a company.
- DOJ will consider a company's history of prior misconduct when entering into a resolution with a company, but will place greatest weight on criminal resolutions in the US as well as prior misconduct that involved the same personnel. DOJ will disfavor successive non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) with the same company.
- DOJ units will adopt policies to incentivize voluntary self-disclosure of corporate wrongdoing, similar to such policies already in place with respect to the Foreign Corrupt Practices Act (FCPA) and antitrust enforcement. DOJ notably intends not to seek a guilty plea if a corporation voluntarily self-discloses, cooperates with DOJ's investigation, and remediates the underlying misconduct.
- DOJ will issue new guidance to prosecutors on how they should identify the need for a monitor and how monitors should be selected and supervised to ensure they stay "on task and on budget."
- DOJ will continue to emphasize corporate compliance culture, with a new emphasis on compensation systems that incentivize compliant behavior, such as executive compensation clawback provisions. DOJ will also focus on how companies govern employee use of personal devices and ephemeral communication technologies.
- DOJ will seek \$250 million from Congress in 2023 to fund these initiatives.

This Client Alert explains and assesses these latest measures in DOJ's approach to corporate criminal enforcement.

Background

On September 15, 2022, Deputy Attorney General Lisa Monaco delivered a speech at NYU School of Law's Program on Corporate Compliance and Enforcement. DOJ released the Monaco Memo the same day. In both her speech and the Monaco Memo, Deputy Attorney General Monaco outlined several updates and revisions to the corporate criminal enforcement policies that she first previewed in a speech on October 28, 2021.

Taken together, these announcements hearken back to DOJ's 2015 memorandum on Individual Accountability for Corporate Wrongdoing, better known as the "Yates Memo."³ The Yates Memo announced an increased focus on prosecution of individuals and adopted a strict stance on voluntary disclosures of misconduct. After considerable discussion among members of the bar, DOJ under the Trump Administration indicated that it moved away from the Yates Memo's rigid "all or nothing" approach to disclosures and returned to a policy of giving discretion to prosecutors, while retaining a focus on individual accountability.⁴ Deputy Attorney General Monaco's remarks in October 2021 and September 2022, and the Monaco Memo, revisited some of the same themes that animated the Yates Memo.

Previous Guidance

On October 28, 2021, Deputy Attorney General Monaco gave a speech to the American Bar Association's annual White Collar Conference, in which she announced a series of new policies meant to "invigorate" DOJ's efforts to combat corporate crime.⁵ These new policies included the following:

1. DOJ would review companies' entire criminal, civil, and regulatory record — not just similar misconduct — when considering appropriate resolutions.
2. DOJ would require companies to identify all individuals involved in misconduct, not just individuals substantially involved in misconduct, to obtain cooperation credit.
3. DOJ would impose "serious consequences" for companies that violate the terms of their NPAs or DPAs.
4. No default presumption would apply against corporate monitors, and decisions about whether to impose a monitor would be made based on the facts of each case.
5. Companies must actively review their compliance programs to ensure they adequately identify and remediate misconduct.

Following Deputy Attorney General Monaco's October 2021 speech, DOJ began a year-long review of its corporate enforcement efforts in consultation with the Corporate Crime Advisory Group (CCAG), a body of experts tasked by DOJ with proposing revised enforcement policies. The CCAG included public interest groups, consumer advocacy organizations, experts in corporate ethics and compliance, academics, audit committee members, in-house attorneys, former independent monitors, and members of the business community and defense bar.⁶

Updated Guidance

In her recent speech, Deputy Attorney General Monaco shared the findings from CCAG's year-long review and provided revised guidance on DOJ's corporate crime policies. She stated that DOJ will continue to focus on individual accountability and corporate culture and that DOJ plans to take further steps to incentivize voluntary disclosures. She also said DOJ is further refining its approach to the imposition of compliance monitors and its evaluation of companies' prior misconduct when resolving investigations. In the accompanying Monaco Memo, DOJ provided additional detail on these revised policies, which are summarized below.

Summary and Analysis of New Policy Measures

Continued Focus on Individual Accountability

Deputy Attorney General Monaco's speech and the Monaco Memo emphasize that DOJ's top priority remains individual accountability, seeking to hold accountable those who break the law, regardless of their position, status, or seniority.⁷ Referencing the October 2021 announcement, Deputy Attorney General Monaco reaffirmed that "corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct" in order to "be eligible for any cooperation credit."

Timely Disclosure of Evidence Relevant to Individual Misconduct

Building on this earlier guidance, Deputy Attorney General Monaco elaborated on the importance of *timely* disclosure of information relevant to individual prosecutions, stating that it is "imperative that Department prosecutors gain access to all relevant, non-privileged facts and evidence about individual misconduct swiftly and without delay." Noting that investigatory delays may result in "the expiration of statutes of limitations" and the "dissipation of corroborating evidence," Deputy Attorney General Monaco announced that DOJ will implement guidance to expedite investigations of corporate individuals and stressed that DOJ needs to "do more and move faster."

To facilitate these ends, DOJ's policy will be that "undue or intentional delay" in producing information or documents — especially evidence that demonstrates individual culpability — will result in the reduction or denial of cooperation credit. If a cooperating company discovers hot documents or evidence, "its first reaction should be to notify the prosecutors." Nevertheless, Deputy Attorney General Monaco's remarks suggest that individual determinations about whether a company promptly and adequately produced key documents or evidence will likely remain, at least in part, within the discretion of individual prosecutors.

Prioritization of Individual Investigations

Additionally, Deputy Attorney General Monaco indicated that DOJ will re-prioritize the sequencing of investigations. Going forward, prosecutors will be directed to complete investigations and, if appropriate, seek criminal charges against individuals prior to, or simultaneously with, entering into a resolution with the corporation. If investigations of individuals will continue after a corporate resolution, DOJ's new policy will require prosecutors to submit a memorandum specifying their plan for completing those investigations expeditiously. As the Monaco Memo explains, this prosecutorial memorandum must include "a discussion of all potentially culpable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period." Additionally, prosecutors must obtain approval from the supervising US Attorney or Assistant Attorney General for both the corporate resolution and the memorandum addressing responsible individuals. But aside from the obligations discussed above, Deputy Attorney General Monaco's address did not shed light on whether or how DOJ will engage with corporations about such plans for pursuing any individuals associated with the company, even

though the prospect of ongoing investigations and prosecutions of company personnel may bear on a company's own considerations.

Foreign Prosecutions of Individuals Responsible for Corporate Crime

Deputy Attorney General Monaco also discussed the importance of foreign prosecutions of individuals responsible for corporate crime. The Monaco Memo notes that cooperation with DOJ's foreign counterparts plays an increasing role in holding individuals accountable and stresses that DOJ must "continue to pursue forcefully its own individual prosecutions." The Monaco Memo also acknowledges that the Principles of Federal Prosecution of Business Organizations (often referred to as the Filip Factors) recognize that effective prosecution in another jurisdiction may be grounds to forgo DOJ prosecution, but notes that prosecutors must make case-specific determinations to decide whether there is a significant likelihood the individual will be subject to "effective prosecution" in another jurisdiction.

In making this determination, the Monaco Memo instructs prosecutors to consider (1) the strength of the other jurisdiction's interests in the prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction.⁸ The Monaco Memo suggests that prosecutors may wait to initiate federal prosecution in the US in order to understand better the effectiveness of a prosecution in another jurisdiction first. But the Monaco Memo notes that DOJ should not let such delay prevent the government from pursuing charges, if appropriate.

DOJ's Evaluation of a Company's Prior Misconduct

In her October 2021 speech, Deputy Attorney General Monaco indicated that prosecutors would be required to consider the full range of a company's historical misconduct when evaluating corporate criminal resolutions. In her most recent announcement, Deputy Attorney General Monaco provided further detail regarding DOJ's evaluation of corporate recidivism, announcing that DOJ will release additional guidance on this issue. First, she noted that "not all instances of prior misconduct are created equal" and that DOJ will place the greatest weight on past criminal resolutions in the US, as well as prior misconduct involving the same management or personnel. Additionally, DOJ will disfavor successive NPAs or DPAs with the same companies, and companies should not assume that they are entitled to an NPA or DPA, particularly when they are "frequent flyers." To those ends, prosecutors will be required to secure written approval from supervisors, and provide notice to the Office of the Deputy Attorney General, before entering into a corporate resolution that would result in successive NPAs or DPAs.⁹

Next, Deputy Attorney General Monaco explained that "dated conduct" (i.e., criminal resolutions more than ten years old or civil resolutions more than five years old) will "generally be accorded less weight." This arguably revises Deputy Attorney General Monaco's announcement in October 2021 that "all prior misconduct needs to be evaluated" when determining a proper resolution with a company. Nevertheless, the Monaco Memo clarifies that even in cases in which the prior misconduct falls outside the proscribed time periods, "depending on the facts of the particular case, repeated misconduct may be indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards." This qualification may, in practice, diminish the effects of this policy revision.

The Monaco Memo also encourages prosecutors to "consider the facts and circumstances underlying a corporation's prior resolution," including the following factors: "any factual admissions by the corporation," "the seriousness and pervasiveness of the misconduct underlying each prior resolution," "whether that conduct was similar in nature to the instant misconduct under investigation, even if it was prosecuted under different statutes," and "whether at the time of the misconduct under review, the corporation was

serving a term of probation or was subject to supervision, monitorship, or other obligation imposed by the prior resolution.”

The Monaco Memo also indicates that overlap in company personnel — at any level — could indicate a lack of commitment to compliance or insufficient oversight of compliance risk at the management or board level, and that prosecutors should consider what remediation was undertaken to address the “root causes” of prior misconduct (specifically referencing employee discipline, compensation clawbacks, restitution, management restructuring, and compliance program upgrades).

On the other hand, the Monaco Memo states that prosecutors should give “less weight” to prior misconduct when the corporate entities did “not have common management or share compliance resources with the entity under investigation” or when the prior resolution “involved conduct that is not chargeable as a criminal violation under US federal law.” For corporations that operate in highly regulated industries, those corporations’ histories should “be compared to th[ose] of similarly situated companies in the industry.”

Mergers and Acquisitions in Which Target Has a History of Misconduct

Addressing a concern that members of the defense bar have raised, Deputy Attorney General Monaco noted that DOJ does not want to discourage acquisitions that result in improved compliance structures. As a result, DOJ will not treat companies as recidivists if they acquire companies with a history of compliance problems, so long as those problems are promptly and properly addressed post-acquisition.

Broader Incentivization of Voluntary Self-Disclosure

Deputy Attorney General Monaco also announced that DOJ is taking additional steps to incentivize voluntary self-disclosure, beyond the FCPA and antitrust contexts in which DOJ already has such policies.¹⁰ To this end, every DOJ component that prosecutes corporate crime must now develop and publish a policy to incentivize voluntary self-disclosure. According to the Monaco Memo, every policy must document “the component’s expectations of what constitutes a voluntary self-disclosure, including with regard to the timing of the disclosure, the need for the disclosure to be accompanied by timely preservation, collection, and production of relevant documents and/or information, and a description of the types of information and facts that should be provided as part of the disclosure process.”

Deputy Attorney General Monaco also outlined “common principles” that will apply uniformly across DOJ with respect to voluntary self-disclosures. Most importantly, she stated that DOJ will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct. The aim of these new directives is to promote predictability and provide clearer expectations for what voluntary self-disclosures will entail and how they will be rewarded. DOJ’s goal is that these policies will promote self-reporting and empower chief compliance officers and general counsel to make the internal case for more robust compliance programs.

Nevertheless, the extent to which the new policies will provide actionable guidance and predictability regarding the steps individual prosecutors or DOJ will deem to be adequate self-reporting, cooperation, and remediation remains to be seen. In practice, considerable discretion will likely remain with individual prosecutors to decide whether a corporation has voluntarily and sufficiently satisfied these requirements for a more favorable resolution. This kind of uncertainty and variability in practice may continue to undermine the predictability DOJ seeks to promote through this policy.

Further Guidance on Cooperation in International Investigations

In addressing potential complications caused by the existence of evidence outside of the US, the Monaco Memo indicates that cooperating corporations bear the burden of establishing any restriction on production, as well as the burden of identifying reasonable alternatives to providing requested facts and evidence. Similarly, cooperating companies are expected to work diligently to “identify all legal bases to preserve, collect, and produce” such evidence expeditiously. The Monaco Memo states that companies will receive credit for finding ways to navigate foreign legal issues and producing such records. At the same time, companies that actively seek to capitalize on data privacy laws to shield misconduct from detection and investigation may be subject to an adverse inference if they fail to produce such evidence.

Emphasis on Executive Compensation and Clawbacks

Echoing her October 2021 comments, Deputy Attorney General Monaco emphasized that “it all comes back to corporate culture.” In doing so, she reiterated that “resourcing a compliance department is not enough;” every compliance department must also be backed by, and integrated into, a corporate culture that rejects wrongdoing for the sake of profit. Deputy Attorney General Monaco took note of the number of companies choosing to reflect corporate values in their compensation systems and using affirmative metrics to reward compliance-promoting behavior. Going forward, part of DOJ’s evaluation of a company’s compliance program will include whether the company’s compensation systems reward compliance and impose financial sanctions on those whose actions contribute to criminal conduct. By the end of the year, Deputy Attorney General Monaco expects the Criminal Division to develop further guidance on how to reward companies that employ compensation clawbacks or other similar arrangements. This emphasis on compensation aligns with DOJ’s recent focus on other mechanisms of accountability, such as compliance officer certifications in connection with DOJ resolutions.¹¹

Use of Personal Devices and Third-Party Communication Applications

In her September 2022 speech, Deputy Attorney General Monaco highlighted the challenges to voluntary compliance and investigatory efforts posed by “ephemeral and encrypted messaging applications.” The Monaco Memo provides guidance on the use of personal devices and third-party messaging platforms, which pose “significant corporate compliance risks, particularly as to the ability of companies to monitor the use of such devices for misconduct and to recover relevant data from them during a subsequent investigation.” As “a general rule,” DOJ will expect “all corporations with robust compliance programs” to “have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, [] provide clear training to employees about such policies, and [] enforce such policies when violations are identified,” in order to “ensure that business-related electronic data and communications are preserved.”

DOJ’s new guidance will encourage prosecutors deciding whether to extend cooperation credit to take into account a corporation’s policies in this area. The guidance follows recent high-profile instances in which regulators have scrutinized and in some cases penalized companies for failing to keep records of business-related communications sent using employees’ personal devices. These government efforts express little sympathy for the difficulties companies can face in trying to adopt policies and compliance measures that account for the diverse and ever-evolving set of communication tools people commonly use in their everyday lives.

Transparency in the Imposition and Supervision of Compliance Monitors

To increase transparency with respect to independent compliance monitors, DOJ will release new guidance for prosecutors on how to identify the need for a compliance monitor and how to select and supervise such a monitor “stays on task and on budget.”

Although the use of corporate monitors increased substantially during the Obama Administration, the Trump Administration issued guidance discouraging their use in 2019.¹² In her October 2021 address, Deputy Attorney General Monaco turned the page on the prior administration’s policy toward corporate monitorships. She announced that DOJ would no longer disfavor the use of monitors and would allow prosecutors to impose 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.” This new guidance, however, revises the open-ended guidance from her October 2021 address and provides greater clarity on prosecutors’ authority to appoint and supervise monitors in the performance of their duties.

In the Monaco Memo, DOJ provides a non-exhaustive list of factors prosecutors should consider when evaluating the need for a monitor, while stressing that this determination must still be made on a “case-by-case basis.” The factors include whether the corporation voluntarily self-disclosed the misconduct, whether the corporation implemented an adequate compliance program to prevent future misconduct, whether the underlying criminal conduct was long-lasting or pervasive, and whether the corporation took adequate investigative and remedial measures to address the misconduct. The Monaco Memo also directs prosecutors to “ensure that the monitor’s responsibilities and scope of authority are well-defined and recorded in writing, and that a clear workplan is agreed upon between the monitor and the corporation.” DOJ will not require an independent compliance monitor for such a corporation if, in DOJ’s view, it has implemented an effective compliance program.

Additional Funding

Finally, Deputy Attorney General Monaco announced that DOJ will request an additional \$250 million from Congress to fund these corporate crime initiatives in 2023. By way of comparison, DOJ’s entire budget request for FY 2022 for the Criminal Division was \$215.2 million.¹³ If Congress agrees to fund these corporate crime initiatives, DOJ will have significantly more resources at its disposal.

Key Takeaways

As in each prior iteration of DOJ policy on corporate misconduct, observing the application of these principles in practice over time will be critical in assessing their effectiveness in fostering corporate compliance. Notwithstanding the open questions discussed above, however, several key themes emerge:

- Corporate compliance programs remain as important as ever in deterring misconduct and ensuring the best chance at a favorable outcome if misconduct occurs. Deputy Attorney General Monaco’s remarks underscore that DOJ wants corporations to prioritize and invest in robust compliance programs, and that it aims to reward companies that show a demonstrated commitment to compliance.¹⁴
- Corporations should consider mechanisms to incentivize compliance, with compensation systems viewed as an important means of deterring misconduct. Companies should consider employing discipline guideposts, installing employment remediation processes, and utilizing clawbacks for employee non-compliance. Indeed, prosecutors are expected to credit corporations that utilize executive compensation clawbacks.

- Compliance programs must continually be adapted to take account of new technology and forms of communication. Corporations should stay informed about new applications and messaging platforms their employees use, especially in light of the prevalence of remote working arrangements and as a younger generation enters the workforce. Corporations should consider policies, procedures, and training to address employees' use of personal devices and third-party messaging platforms for corporate communication.
- Corporations should place renewed emphasis on healthy M&A practices (including pre- and post-acquisition diligence and auditing) in light of the acquisition-related guidance in Deputy Attorney General Monaco's address and the Monaco Memo.
- Corporations should have robust procedures to investigate potential wrongdoing and make informed decisions about voluntary disclosure and cooperative measures with DOJ. In light of the emphasis DOJ places on prompt disclosures, corporations should determine in advance which stakeholders should be involved in voluntary self-disclosure decisions and take prompt steps to preserve information and investigate potential wrongdoing that may arise.

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Endnotes

- ¹ Lisa O. Monaco, Deputy Attorney General of the US Department of Justice, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.
- ² Lisa O. Monaco, Deputy Attorney General of the US Department of Justice, Memorandum on Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), *available at* <https://www.justice.gov/opa/speech/file/1535301/download>.
- ³ Department of Justice Memo, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), *available at* <http://www.justice.gov/dag/file/769036/download>.
- ⁴ Rod J. Rosenstein, US Deputy Att'y Gen., Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (hereinafter Rosenstein Remarks) (Nov. 29, 2018), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.
- ⁵ Lisa O. Monaco, Deputy Attorney General of the US Department of Justice, Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>. See Latham & Watkins LLP, Client Alert: DOJ Announces Policy Changes to "Invigorate" Efforts to Combat Corporate Crime (Oct. 29, 2021), *available at* <https://www.lw.com/admin/upload/SiteAttachments/Alert%202905%20final.pdf>.
- ⁶ *Id.*
- ⁷ The Monaco Memo expressly cites the Yates Memo when discussing the central importance of individual accountability.
- ⁸ See JM § 9-27.240.
- ⁹ See JM § 1-14.000.
- ¹⁰ See Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division).
- ¹¹ See Latham & Watkins LLP, Client Alert: US Regulators Increase Focus on Corporate Compliance and ITs Gatekeepers (Aug. 1, 2022), *available at* <https://www.lw.com/admin/upload/SiteAttachments/Alert%202986.pdf>.
- ¹² Brian A. Benczkowski, Assistant Attorney General, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty (Oct. 8, 2019), *available at* <https://www.justice.gov/opa/speech/file/1207576/download>.
- ¹³ U.S. Department of Justice, Summary of Budget Authority by Appropriation, *available at* <https://www.justice.gov/jmd/page/file/1398951/download>.
- ¹⁴ See Latham & Watkins LLP, Client Alert: Empowering Corporate Compliance Functions in a Post-Pandemic Environment (Aug. 15, 2022), *available at* <https://www.lw.com/admin/upload/SiteAttachments/Alert%202995.pdf>.