

Alert | White Collar Defense & Special Investigations



September 2022

DOJ Announces New Policies for Tackling Corporate Crime: Get Ready for Monitorships

Go-To Guide:

- Individual accountability remains DOJ's number one priority
- Prosecutors directed to evaluate a company's recidivism against industry peers
- Companies who "step up and own" responsibility by self-reporting misconduct will benefit
- New guidance on the appointment of compliance monitors
- Company financial compensation should promote compliance and avoid risky behavior

Since the Department of Justice (DOJ) **announced** new, heightened policies for addressing corporate crime at the end of 2021, companies have been waiting to see how the DOJ will implement those policies. Recent **remarks** by Deputy Attorney General Lisa Monaco, and an accompanying **Memorandum** issued Sept. 15, 2022, announced additional new policies that will govern DOJ's approach to prosecuting corporate crime. DAG Monaco also offered additional insights into the previously announced policies.

The DOJ's New Policies Impacting Corporate Resolutions

The new policies at issue focus on the following key areas:

- **Voluntary Self-Disclosure.** The DOJ has long encouraged corporations to use compliance programs to voluntarily self-disclose misconduct before an investigation commences, occasionally with criticism from private industry that the benefits of such voluntary cooperation were less than clear in prior announcements. In her Memorandum, DAG Monaco now directs that all DOJ units “*must ensure that a corporation benefits from its decision to come forward to the Department and voluntarily self-disclose misconduct*, through resolution under more favorable terms than if the government had learned of the misconduct through other means” (emphasis added). Absent aggravating factors, the DOJ will not seek criminal prosecution when a company has voluntarily self-disclosed, cooperated, and remediated misconduct. Moreover, the DOJ will not require an independent compliance monitor for such a corporation if, at the time of resolution, it has implemented and tested an effective compliance program.
- **Individual Accountability.** In October 2021, the DOJ announced that corporate cooperation credit will only be available to a company that identifies all individuals involved in misconduct, without regard to their position, status, or seniority. As an extension of this pronouncement, DAG Monaco’s remarks emphasized that the DOJ’s newest policies are designed to expedite investigations into individual accountability. Among other changes, going forward, corporations must disclose “hot documents or evidence” without delay, and any undue or intentional delay in producing such information or records will result in the reduction or denial of cooperation credit. Moreover, prosecutors must work to complete investigations and seek any criminal charges against individuals prior to or at the same time as entering a resolution against a corporation.
- **History of Misconduct.** As announced in October 2021, the DOJ will take into consideration a company’s complete history of prior misconduct – including criminal, civil, and regulatory resolutions of any nature – in evaluating a potential resolution. The new policies make clear that the DOJ disfavors multiple, successive non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) with the same company, and DOJ leadership is charged with scrutinizing proposed successive NPAs or DPAs before they are offered. So-called serial recidivist companies should not assume entitlement to an NPA or DPA.
- **Independent Compliance Monitors.** In delivering her remarks, DAG Monaco doubled down on her October 2021 pronouncement that explicitly rescinded any earlier DOJ guidance suggesting that corporate monitorships were disfavored by the DOJ. In fact, the DOJ is expected to release new guidance for prosecutors to assist with identifying the need for a monitor, the selection of a monitor, and the oversight of a monitor’s work. The new policy will not take a one-size-fits-all approach but will aim to tailor a monitorship to the misconduct and specific compliance deficiencies of the company. Based on the new policies, monitors will be selected pursuant to a documented selection process, and the DOJ will stay involved in the monitorship process to monitor the monitors.
- **Corporate Culture.** The new DOJ policies also emphasize that corporate cooperation must be backed by a strong company culture that rejects wrongdoing for the sake of profit. Based on the new policies, in evaluating the strength of a company’s compliance program, a prosecutor will consider whether the company’s compensation systems reward compliance and impose financial sanctions on employees whose actions or omissions contributed to the criminal conduct.

Takeaways for Companies

Although only time will tell whether this most recent round of policy pronouncements will result in meaningful change in the corporate prosecution landscape, the DOJ seems increasingly focused on corporate enforcement. Decisions about self-disclosure and cooperation will remain and ought not be made without the advice of defense counsel with experience dealing with federal law enforcement agencies. However, DAG Monaco's Memorandum should encourage corporate officers to take a proactive approach toward compliance and internal investigations before a matter emerges, as the benefits of cooperation and self-disclosure shrink after an investigation begins or a whistleblower goes public.

Despite numerous announcements over the past year about increased enforcement actions against corporations, the DOJ's actual track record during that time period has yet to show any material shift in approach by the DOJ to investigations of potential corporate wrongdoing.

The use of corporate monitors in the near future could signal that the DOJ is finally implementing its new policies.

Companies with a history of violations for misconduct may see greater scrutiny, especially those in highly regulated industries where a corporation's compliance history compares poorly to its peers. If a company has engaged in any recent wrongdoing (criminal resolutions less than 10 years old and civil/regulatory resolutions less than five years old), the company may see the DOJ's close consideration of this past misconduct in fashioning a potential corporate resolution. And recidivists who do not offer early and full cooperation may be faced with intrusive and lengthy monitorships.

Finally, companies should review and consider whether their compensation system imposes financial penalties for misconduct and rewards compliance-promoting behavior as an effective tool in deterring misconduct and fostering a culture of compliance. Compensation systems will continue to be scrutinized by the DOJ as a reflection of a company's level of commitment to corporate compliance.

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