

THE JOURNAL OF FEDERAL AGENCY ACTION

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Publisher: Morgan Morrissette Wright

Production Editor: Sharon D. Ray

Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

This journal's cover includes a photo of Washington D.C.'s Metro Center underground station. The Metro's distinctive coffered and vaulted ceilings were designed by Harry Weese in 1969. They are one of the United States' most iconic examples of the brutalist design style often associated with federal administrative buildings. The photographer is by XH_S on Unsplash, used with permission.

Cite this publication as:

The Journal of Federal Agency Action (Fastcase)

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A Full Court Press, Fastcase, Inc., Publication

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711 D St. NW, Suite 200, Washington, D.C. 20004

<https://www.fastcase.com/>

POSTMASTER: Send address changes to THE JOURNAL OF FEDERAL AGENCY ACTION, 711 D St. NW, Suite 200, Washington, D.C. 20004.

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ISSN 2834-8796 (print)
ISSN 2834-8818 (online)

U.S. Justice Department Announces Substantial Revisions to Corporate Enforcement Policy

Andrew S. Boutros, David N. Kelley, Andrew J. Levander, Vincent H. Cohen Jr., and D. Brett Kohlhofer*

In this article, the authors review new guidelines announced recently by the U.S. Department of Justice for prosecutors to use when determining how to assess and treat corporate offenders.

Deputy Attorney General Lisa Monaco of the U.S. Department of Justice (the “Department”) recently announced several new guidelines for prosecutors to use when determining how to assess and treat corporate offenders.

First, the guidelines emphasize individual accountability. The Department is laser-focused on bringing criminal cases against individuals who participate in alleged criminal conduct in the scope of their employment—and doing so quickly. To achieve this result, the Department will require cooperating companies to prioritize prompt and comprehensive disclosures regarding executives and other individual actors.

Second, reiterating its continued focus on corporate recidivism, the Department has clarified and standardized how prosecutors should evaluate past corporate misconduct.

Third, the Department has emphasized the importance and concrete benefits of making a voluntary self-disclosure of potential criminal wrongdoing.

Fourth, the just-announced guidelines lay out revisions to the use and selection of compliance monitors.

Fifth, new Department policies encourage companies to leverage compensation arrangements to promote compliance and deter improperly risky conduct.

Background

In September 2022, Deputy Attorney General Lisa Monaco announced a series of revisions to Department policy addressing

how federal prosecutors will evaluate and treat corporate defendants. Shortly thereafter, the Department published a memorandum setting out the new policies in further detail (the “Monaco Memorandum”).

Incorporating feedback from the Corporate Crime Advisory Group, which Deputy Attorney General Monaco formed last year, the new policies re-emphasize this Justice Department’s focus on corporate crime enforcement. The announcement also underscores a particular focus on individual accountability and represents the Department’s clear and unmistakable attempt to incentivize greater corporate participation in its now-expanded voluntary self-disclosure program.

Selected Highlights of the Policy Revisions for In-House Legal and Compliance Professionals

Expanded, Department-Wide Voluntary Self-Disclosure Program

Citing success with its existing voluntary self-disclosure programs in certain components of the Department, the Department will be expanding its voluntary self-disclosure programs Department-wide. Department components without formal self-disclosure policies have been directed to adopt them.

As Deputy Attorney General Monaco previewed, the forthcoming policies must adhere to two core principles, which aim to incentivize corporate participation.

First, absent aggravating factors, the Department will not seek a guilty plea if a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct.

Second, the Department will not require an independent compliance monitor for cooperating self-disclosers that, at the time of the resolution, can demonstrate that an effective compliance program has been implemented.

New Timing Constraints for Corporate Disclosures and Prosecutor Charging Decisions Concerning Potentially Culpable Individuals

To receive full credit for cooperation, the Department will now insist on corporate disclosure of certain evidence more quickly than

in the past. Cooperating companies will be required to prioritize disclosures of information and communications to the extent they may be relevant to assessing individual culpability. Should prosecutors identify any “undue or intentional delay” in a cooperator’s production of information or documents, particularly where the information impacts the assessment of individual culpability, the company’s cooperation credit will be reduced or eliminated.

In addition, prosecutors must complete investigations and seek any criminal charges against individuals prior to or simultaneously with the corporate resolution. In cases where it makes sense to resolve the corporate action prior to an individual action, the prosecutor must first prepare a full investigative plan and timeline and secure the approval of the supervising United States Attorney or Assistant Attorney General.

New Standards for Assessing Prior Misconduct

Consistent with guidance issued late last year, Deputy Attorney General Monaco reiterated that when determining corporate charging and resolution decisions, Department prosecutors should “consider the corporation’s record of past misconduct, including prior criminal, civil, and regulatory resolutions, both domestically and internationally.” The recent policy revisions expand on this prior directive, identifying several relevant considerations for making the assessment and also clarifying that not all prior misconduct should carry the same weight:

- Prosecutors will assign the most significance to “recent” U.S. criminal resolutions and prior misconduct involving the same personnel or management. By contrast, “dated conduct,” meaning criminal resolutions reached at least 10 years before the conduct at issue, and civil or regulatory resolutions reached at least five years before the conduct at issue, will “generally be accorded less weight.”
- The policy instructs prosecutors to consider the nature and circumstances of the prior misconduct, identifying several considerations related to the facts of the previous misconduct and similarities to the more recent issue under investigation. Notably, “[o]verlap in involved personnel—at any level—could indicate a lack of commitment to compliance or insufficient oversight of compliance risk at the management or board level.”

- For companies that operate in highly regulated sectors, the new guidance reminds prosecutors that comparisons to the compliance track records of other companies should focus on similarly situated companies from the same industry.
- Importantly, previous misconduct by an acquired entity may carry less weight if the acquirer has implemented an effective compliance program and the prior conduct's root cause was addressed before the new misconduct began.
- The policy disfavors prosecutors extending multiple non-prosecution or deferred prosecution agreements to the same company. Going forward, before such a repeat offer may even be made, the policy requires the prosecutor to secure special approval and notify the Office of the Deputy Attorney General. But the policy makes an exception in the case of a company making a voluntary and timely self-disclosure.

New Factors for the Department Assessment of Corporate Compliance Programs: Compensation and Personal Devices

Consistent with the announcement's theme of individual accountability, the Monaco Memorandum supplements existing Department guidance for the assessment of corporate compliance programs. As Deputy Attorney General Monaco highlighted when announcing the revised policies, prosecutors assessing corporate compliance programs should now consider whether a company's compensation program has been structured to reward compliance and impose financial sanctions on personnel who contributed to criminal misconduct. That assessment will include "what companies say and what they do," meaning whether, in practice, a company has actually sought to claw back compensation—not merely whether its agreements would allow for it.

Notably, prosecutors will also consider whether the company uses or has used nondisclosure agreements or other contractual language that would "inhibit the public disclosure of criminal misconduct by the corporation or its employees."

Separately, while not featured in the Deputy Attorney General Monaco's remarks, the Monaco Memorandum directs Department prosecutors to consider whether the corporation has implemented

effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure the preservation of business-related data and communications.

Enhanced Transparency Regarding Compliance Monitors

Deputy Attorney General Monaco also announced several changes to Department policy concerning the selection and use of independent compliance monitors.

First, the Monaco Memorandum sets out 10 nonexhaustive factors to guide prosecutors in the assessment of whether a monitor is necessary.

Second, going forward, monitor selections must be made pursuant to documented selection processes.

Department components that do not already have formalized policies have been instructed to adopt them by year-end. The Monaco Memorandum also includes more granular directions regarding the monitor selection process.

Finally, the Department is directing prosecutors to ensure that monitorships are tailored in scope to the misconduct and compliance deficiencies of the company at issue. The monitor's responsibilities and scope of work must be memorialized in a written work plan. Prosecutors are also now required to remain involved throughout the term of the monitorship—essentially to monitor the monitor. The policy contemplates that this may result in the shortening or lengthening of the monitor's term, depending on the pace of improvements at the company and whether there is a continuing need for the monitor.

Considerations for the Business Community Moving Forward

It is clear from both Deputy Attorney General Monaco's speech and the Monaco Memorandum that the Department understands that when evaluating whether to self-disclose and whether and how to cooperate, companies do best when the Department has articulated the "rules of the road" with clarity and precision. As such, with greater transparency and standardization of the self-disclosure process, this announcement represents the Department's "carrot" for companies facing potential enforcement exposure. But

Deputy Attorney General Monaco's announcement was also not shy about previewing the "stick," warning: "resolutions over the next few months will reaffirm how much better companies fare when they come forward and self-disclose."

Whether the latest revisions to the Department corporate enforcement policies will result in more self-disclosures remains to be seen. Clearly, though, that is one of the main goals of the just-announced policy changes. Regardless, with a Justice Department so focused on pursuing corporate misconduct and seeking to hold individuals accountable, companies that operate in an environment with any meaningful enforcement risk should carefully consider the Monaco Memorandum sooner rather than later. Should reportable issues come to light, the latest guidance may affect whether and when self-disclosure should occur.

If nothing else, the Monaco Memorandum also contains important guidance that companies can and should use now (not later) when assessing existing policies, compensation agreements, and compliance programs to put themselves in the best position possible should they learn about potentially reportable issues in the future. Now more than ever, an ounce of prevention may be worth a pound of cure.

Note

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