



DAG Lisa Monaco Announces Additional Corporate Enforcement Priorities

In October 2021, Deputy Attorney General (DAG) Lisa Monaco [announced new policies](#) that addressed the Department of Justice's (DOJ) corporate criminal enforcement efforts. The revised policies presented a tougher DOJ approach to white collar and corporate crime, placing more weight on a corporation's criminal history and its disclosure of persons involved in criminal conduct, and announcing the use of monitorships to ensure corporate compliance. This guidance from Main Justice encouraged FBI investigators and U.S. Attorneys to step up prosecution efforts on individual corporate actors, including those in the c-suite.

On September 15, 2022, speaking at NYU Law School, Monaco further detailed the DOJ's "carrot and stick" approach that companies who find themselves in the department's enforcement crosshairs can expect. [In a memorandum released the same day](#), Monaco provided additional details concerning what specific corporate actions will receive favorable treatment from the DOJ. In her speech, Monaco also announced that the DOJ will seek \$250 million from Congress specifically for corporate criminal enforcement efforts.

The DOJ's efforts seek to speed up indictments against executives include assuring companies that they will not face a guilty plea or imposition of a costly corporate monitor if they quickly — and proactively — investigate misconduct and turn over details of corporate malfeasance, including evidence of individual misconduct. Monaco emphasized new incentives to encourage self-reporting, and to punish the failure to do so, and she highlighted a new emphasis on the robustness of company-side compliance programs.

Monaco stated that if a cooperating company drags its feet in turning over key documents and information to the government during an investigation, it will risk losing some or all cooperation credit. “This new guidance should push prosecutors and corporate counsel alike to feel they are on the clock to expedite investigations, particularly as to culpable individuals,” Monaco said.

Self-Reporting Requirement

Monaco announced that going forward, every part of the DOJ that prosecutes corporate crime must have an individualized program to incentivize voluntary self-disclosure (VSD) by companies who become aware of wrongdoing. She also announced two core principles for VSD programs:

- Absent aggravating factors, guilty pleas will be off the table when a corporation makes a VSD, cooperates, and remediates wrongdoing.
- Where a company has made a VSD and can show it implemented an effective compliance program before a resolution is reached, monitorships will be unnecessary.

Compensation Clawbacks

Monaco further stated that the DOJ will look favorably on companies who discourage bad behavior including through “clawing back” compensation from employees who engage in criminal conduct. “Compensation systems that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance,” Monaco said.

Previous Corporate Conduct

Monaco stated that recent unrelated prior misconduct would be taken into account during the resolution of corporate criminal cases. She clarified that criminal conduct less than 10 years old would be relevant to the analysis, as would civil or regulatory settlements in the last five years. Monaco warned that the DOJ will not be inclined to enter into repeat deferred or non-prosecution agreements with the same company.

In her speech last fall, Monaco made clear that corporate monitorships will no longer be disfavored, and prosecutors will have authority to pursue them whenever appropriate. Monaco announced a list of 10 factors that prosecutors are urged to

consider in evaluating the efficacy of a monitorship. Although the list is non-exclusive, it includes excellent benchmarks for companies: whether the company timely and effectively self-disclosed, whether effective remediation and internal investigatory steps were taken, and the robustness of compliance programs, to name a few.

Monaco's new memorandum emphasizes:

- To be eligible for any cooperation credit, corporations must disclose all relevant, non-privileged information about individual misconduct in a *timely* fashion to the DOJ.
- DOJ policies 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 otherwise learned of the misconduct.
- Absent aggravating factors (national security implications, pervasive, company-wide misconduct), the DOJ will not require a company to plead guilty where a corporation has voluntarily self-disclosed, fully cooperated, and remediated the criminal conduct in a timely and appropriate way.
- The DOJ will not require the imposition of an independent compliance monitor for a cooperating corporation that voluntarily self-discloses the relevant conduct if, at the time of resolution, it also demonstrates that it has implemented and tested an effective compliance program.
- Foreign corporate counterparts will receive increased prosecution scrutiny in cross-border corporate crimes. Companies seeking credit for cooperation must timely preserve, collect, and disclose relevant documents located both within the United States and overseas.
- Only a company's recent, relevant misconduct will be considered in determining corporate charging resolutions.
- A company's compliance culture and practices, including the efficacy of any compliance programs, should be considered. Specifically, prosecutors should consider whether the corporation's compliance program is well designed, adequately resourced, empowered to function effectively, and working in practice. Prosecutors should also consider whether compensation programs encourage compliant conduct, and discourage malfeasance including by

holding actors personally accountable, and “clawing back” any ill-gotten gains.

- As part of their evaluation of a corporation’s compliance program, prosecutors should review a corporation’s policies regarding compensation and determine whether they are actually followed in practice.
- Multiple deferred or non-prosecution agreements are disfavored.

Things To Do

The DOJ continues to raise the bar for companies in the context of corporate criminal enforcement. Between the new (yet still incomplete) guidance for voluntary self-disclosures, to the increased emphasis on robust disclosure to the government, to the criteria behind the decision to impose a monitor, the new policies announced by Monaco put a premium on engagement of counsel familiar with the rules and priorities by which the DOJ investigates and prosecutes organizations. In light of the DAG’s announcements, companies should

- Revisit their internal priorities and culture around compliance, detection, investigation, remediation, and sanctioning of wrongdoing;
- Appreciate the premium being placed on voluntary self-disclosure, understanding that all DOJ elements are developing their own protocols; and
- Closely follow the DOJ’s fine tuning of policies regarding compliance, self-disclosure, and enforcement priorities.

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