

# PUBLICATION

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## Announcements on New DOJ Corporate Enforcement Policies and Changes to Come

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On September 15, 2022, Deputy Attorney General Lisa Monaco of the U.S. Department of Justice (DOJ) issued a Memorandum supplementing prior DOJ guidance on corporate criminal enforcement policies, titled *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (the Memorandum).<sup>1</sup> The Memorandum came the same day Deputy AG Monaco delivered remarks on the subject<sup>2</sup> and three days after Glenn Leon, the former chief compliance executive at Hewlett Packard Enterprise, started as the new chief of the DOJ Criminal Division's Fraud Section, which investigates and prosecutes health care fraud, financial fraud, and violations of the Foreign Corrupt Practices Act (FCPA), among other corporate crimes. Chief Leon has been lauded as well-situated to balance DOJ's enforcement practices with his understanding of the practicalities of running a business. With this new guidance in place and new leadership at the helm, we appear to be entering a new era of corporate crime enforcement.

We now review key updates from the announcements, including the DOJ's stated priorities to (a) encourage corporate cooperation and self-disclosure, (b) penalize the specific individuals accountable for any violations, and (c) ensure that resolutions mirror these and other DOJ priorities. The Memorandum further requires that relevant branches within the DOJ develop various policies necessary to prioritize these initiatives, which remain to be seen. In the meantime, companies should consider the Memorandum carefully to evaluate how they can strengthen their corporate policies to reflect best practices, because the Deputy AG did not mince her words: "If any corporation still thinks criminal resolutions can be priced in as the cost of doing business, we have a message: Times have changed."

### 1. Key Memorandum Takeaways

#### A. Limited corporate accountability with cooperation

The Memorandum notably announces that DOJ will generally not seek a guilty plea from a company that has voluntarily disclosed and remediated misconduct, as long as certain requirements are met. This incentive to self-disclose is consistent with guidance updated in 2020 concerning the Fraud Section's enforcement of the FCPA,<sup>3</sup> but the Memorandum provides greater detail on how the entire DOJ footprint will now consider particular facts and circumstances of a company's cooperation. Specifically, to maximize cooperation credit, a company's policies and practices should reward compliant behavior and penalize misconduct, including through financial incentives, and closely monitor and regulate any use of personal devices and third-party messaging platforms, among other best practices. In addition, the Memorandum reiterates the need for robust compliance programs and ethical corporate culture from the top down to secure a non-prosecution or deferred-prosecution agreement.

Companies wishing to preserve their ability to take advantage of this DOJ initiative should therefore not only ensure that robust policies and practices are in place but regularly audit and test their programs so they can provide evidence that the requirement to receive cooperation credit has been met. In addition, any complaints — whether formal or informal, and regardless of their source — should be investigated promptly and thoroughly, and the investigation and any resulting analyses and recommendations should be well-

documented, with any suggested remediation promptly put in place and verified. Companies should also develop and maintain established protocols for consideration of whether and when self-disclosure may be warranted.

## **B. Individual accountability before corporate liability**

Deputy AG Monaco's October 2021 Keynote Address on White Collar Crime stressed that the DOJ's "first priority in corporate criminal matters [is] to prosecute the individuals who commit and profit from corporate malfeasance."<sup>4</sup> The Memorandum emphasizes that companies can maximize cooperation credit by self-disclosing individual misconduct, although companies will only be given cooperation credit if the self-disclosure is timely, thorough, and transparent. The cooperation should also prioritize evidence bearing on individual culpability, as prosecutors will now generally be prevented from closing an investigation against a company until they have completed related investigations into potentially culpable individuals.

In addition, DOJ prosecutors will no longer simply decline to commence a prosecution in the United States where there may be parallel investigations by foreign regulators. Rather, the Memorandum instructs prosecutors to carefully consider (i) the foreign jurisdiction's interest in the prosecution, and ability and willingness to prosecute the crimes at issues and (ii) the probable sentence and/or other consequences the individual will face if convicted in the foreign jurisdiction before making a decision on declination. Companies should therefore ensure that future investigations — whether internal or in cooperation with a DOJ investigation — consider not only the risk to the company but the risk to any potentially culpable individuals involved, both domestically and abroad.

## **C. Guidance on avoiding compliance monitorships**

The DOJ will now consider several factors when determining whether to require an independent compliance monitorship, which is notoriously costly and cumbersome, as part of a corporate criminal resolution. Specifically, the DOJ is less likely to declare a need for a compliance monitorship when (i) the company voluntarily disclosed, has a tested compliance program and internal controls, took adequate investigative or remedial measures to address the underlying conduct, and is subject to oversight from industry regulators or a monitor; and/or (ii) the underlying conduct was isolated and not long-lasting or pervasive throughout the business; was not approved, facilitated, or ignored by senior management; did not involve active participation by compliance personnel; and did not exploit an inadequate compliance program or system of internal controls. Going forward, companies should keep these factors in mind when updating and auditing their compliance programs.

## **D. Public resolution of corporate liability**

In an effort to promote transparency in the DOJ's criminal enforcement priorities and processes, the Memorandum mandates that agreements resolving corporate criminal liability be published on DOJ's website, absent exceptional circumstances. The published agreements should further include: a statement of facts and of relevant considerations, including the company's voluntary self-disclosure, cooperation, and remedial efforts, and corresponding cooperation credit, if any; the seriousness and pervasiveness of the criminal conduct; the company's history of misconduct and status with respect to a compliance program at the time of the underlying conduct and resolution; and the reasons for imposing a compliance monitor, if applicable. It appears the DOJ will have no appetite to sweep misconduct under the proverbial rug going forward.

## **2. The Path Forward**

Less than a year ago, Deputy AG Monaco gave the keynote address that was the DOJ's first signal that white collar crime was a top priority. Since then, the DOJ has announced several high-stakes corporate resolutions

involving felony guilty fees, large fines, compliance monitorships, and prosecutions of individuals. The Memorandum and related public remarks from Deputy AG Monaco are the latest showing of the DOJ's commitment to its tough-on-crime approach to corporate fraud, and companies should carefully consider the guidance.

In a clear effort to motivate company cooperation in the reduction of corporate crime, the DOJ is turning to companies now more than ever to come forward by promoting transparency and predictability in how decisions regarding cooperation will be made and the factors that will be considered. Given this "combination of carrots and sticks" being promoted by the DOJ, companies faced with an enforcement action should consult with experienced counsel as early as possible to navigate the DOJ's evolving guidance.

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With extensive Government Enforcement & Investigations and Corporate Governance experience, Baker Donelson has the tools to help clients navigate potential challenges posed by the DOJ's recent revisions to its Corporate Criminal Enforcement Policies.

<sup>1</sup> Available at <https://www.justice.gov/opa/speech/file/1535301/download>. The prior guidance was issued in October 2021. See *Corporate Crime Advisory Group and Initial Revisions to Corporate Enforcement Policies*, available at <https://www.justice.gov/dag/page/file/1445106/download>.

<sup>2</sup> *Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement* (September 15, 2022), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

<sup>3</sup> In July 2020, the DOJ issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, including the FCPA Corporate Enforcement Policy, available at <https://www.justice.gov/criminal-fraud/file/1292051/download>.

<sup>4</sup> *Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime* (October 28, 2021), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.