



## White Collar, Government & Internal Investigations ADVISORY ■

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### Thin Gruel: Prosecutorial Discretion as Reassurance on New DOJ Policy

In recent days, Assistant Attorney General Kenneth Polite and other key officials in the Department of Justice's (DOJ) Criminal Division amplified [Deputy Attorney General Lisa Monaco's October 28, 2021 announcement](#) of a more muscular DOJ approach to corporate criminal enforcement. While the speakers sought to reassure the business community about the potentially significant impact of that new approach, their remarks boil down to a reiteration of the fact that prosecutors do—and will continue to—exercise discretion when making enforcement decisions.

#### **Comments from the Enforcers**

##### ***Assistant Attorney General Polite at ACI's 38th International Conference on the FCPA***

On December 1, 2021, Assistant Attorney General Polite reiterated that corporate criminal enforcement is among the DOJ's key priorities. He acknowledged the "concern" among those in the business community about the DOJ's intention to consider the entire criminal, civil, and regulatory record of a company facing enforcement scrutiny and explained that while the DOJ would want "the full picture" of the company, the extent to which that full picture would drive the DOJ's decision will be a "discretionary" matter for prosecutors. Polite sounded a similar note regarding reporting by companies subject to deferred- and non-prosecution agreements, encouraging them to err on the side of disclosing new misconduct to the DOJ, and noting that not every matter a company discloses will trigger DOJ attention.

##### ***Other DOJ officials signal alignment***

Other key corporate criminal enforcement players echoed the same theme in their remarks last week. On December 3, 2021, at the Atlanta Bar Association's 28th Annual Securities Litigation & Regulatory Practice Seminar, Deputy Assistant Attorney General Lisa Miller noted the DOJ's intention to consider the full picture of a company's prior misconduct when making charging decisions. This point was further echoed in remarks at the ACI FCPA conference by DOJ Fraud Section FCPA Unit Chief David Last. Both also touted prosecutorial discretion as a meaningful brake upon the DOJ's activities.

##### ***A more receptive UK Serious Fraud Office***

The director of the UK Serious Fraud Office (SFO), by contrast, has voiced a more nuanced approach to corporate criminal enforcement. Also speaking at the ACI FCPA conference, SFO Director Lisa Osofsky highlighted several recent

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corporate prosecutions by the SFO and noted that the SFO is “an agency that’s wired to work with the corporate world.” Companies will not be foreclosed from receiving the full benefit of a deferred prosecution agreement, she explained, even if they have not self-reported to the SFO or have a record of prior misconduct.

### **Prosecutorial Discretion as Reassurance?**

Prosecutorial discretion is not new to, and indeed is a cornerstone of, the U.S. criminal justice system. But its record as a bulwark against prosecutorial excesses is mixed at best. In the face of cascading announcements by senior DOJ officials of a renewed commitment to toughness, a promise to exercise “discretion” offers cold comfort. It is therefore more important than ever for companies to design, implement, and regularly test and improve compliance programs and controls that will promptly identify and address misconduct. In addition, companies must calibrate their engagement with the DOJ in a way that highlights these programs and controls and thereby maximizes the amount of favorable discretion they are afforded.

As you review your compliance programs, assess internal controls and procedures, and face increasing regulatory and enforcement scrutiny, Alston & Bird’s White Collar, Government & Internal Investigations Team offers extensive experience in designing and implementing compliance programs, performing risk assessments, conducting credible internal investigations, and responding to government investigations and enforcement actions.

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