



White Collar, Government & Internal Investigations ADVISORY ■

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Sticks, Not Carrots: DOJ Announces Bold Approach to Corporate Criminal Enforcement

On October 28, 2021, in a [keynote speech](#) at the American Bar Association's 36th National Institute on White Collar Crime, Deputy Attorney General (DAG) Lisa O. Monaco previewed the Administration's corporate criminal enforcement priorities to date, signaling the Department of Justice's (DOJ) commitment to a more muscular approach to corporate criminal enforcement.

The Speech

In clear terms, the DAG declared the DOJ's renewed commitment to prosecuting individuals responsible for corporate wrongdoing, stating that "it is unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance" and urging DOJ prosecutors to be "bold in holding accountable those who commit criminal conduct."

Monaco added that this renewed focus on individual accountability for corporate criminal wrongdoing will not come at the expense of corporate accountability, explaining that "while the priority remains individual accountability, where appropriate, we will not hesitate to hold companies accountable." She also explicitly warned companies "to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct" and promised that failure to do so would "cost them down the line," adding that

companies serve their shareholders when they proactively put in place compliance functions and spend resources anticipating problems. They do so both by avoiding regulatory actions in the first place and receiving credit from the government. Conversely, we will ensure the absence of such programs inevitably proves a costly omission for companies who end up the focus of department investigations.

The DAG announced three specific DOJ initiatives in support of this renewed commitment to corporate enforcement:

- (1) **A return to a more demanding standard for receiving cooperation credit.** In order to receive any credit for cooperation with a DOJ investigation, companies will be required to provide all nonprivileged information about individuals involved in or responsible for the misconduct at issue, regardless of position, status, or seniority. This restores guidance first articulated in the DOJ's 2015 "Yates Memo," which had been modified

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in 2018 to require only the identification of every individual who was substantially involved in or responsible for the criminal conduct.

- (2) **An expanded range of matters that will be considered relevant as prior misconduct.** When determining the appropriate outcome of a corporate criminal investigation, DOJ prosecutors will be required to evaluate “all prior misconduct” by the company, including “the full criminal, civil, and regulatory record,” and “whether or not that misconduct is similar to the conduct at issue in a particular investigation” and whether or not the misconduct was the subject of a DOJ investigation.
- (3) **Greater willingness to impose independent corporate compliance monitors.** During the prior Administration, the DOJ issued guidance suggesting a predisposition against imposing independent compliance monitors. The DAG rescinded that guidance and emphasized the DOJ’s belief that independent compliance monitors should be imposed “whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA.”

According to Monaco, these are but the first steps in an increased focus by the DOJ to “combat corporate crime” and will be accompanied by a “surge” of resources to DOJ prosecutors who will carry out that commitment. The DOJ also will evaluate whether deferred prosecution agreements (DPAs) and nonprosecution agreements (NPAs) should be available to recidivist companies and will ensure companies that breach the terms of their DPAs and NPAs are reliably held to account.

Monaco also identified three substantive trends in corporate criminal enforcement: an increased national security dimension to corporate crime, the increased role of data analytics in investigations, and criminals’ increasing exploitation of emerging technologies.

While the DAG stated that the DOJ’s “responsibility is to incentivize responsible corporate citizenship, a culture of compliance, and a sense of accountability,” her remarks are a clear signal that the DOJ intends to do so not by increasing the benefits promised to companies that fully cooperate, but rather by increased and more robust corporate criminal enforcement. She promised that the DOJ “will not hesitate to take action when necessary to combat corporate wrongdoing,” and the policy pronouncements she announced and promised in the future leave no doubt of her and the DOJ’s commitment to that approach.

Key Takeaways

- **Corporate criminal enforcement is a renewed priority for the DOJ.** Monaco’s speech leaves no doubt that corporate criminal enforcement against companies and their executives and employees will receive significant attention and encouragement from the most senior levels of the Administration.
- **The terms of future corporate criminal enforcement actions may be more severe.** A renewed focus on violations of DPAs and NPAs, along with a focus on recidivist companies that seek pretrial diversion and an increased appetite for monitorships, suggest there may be fewer off ramps for corporations that find themselves under DOJ scrutiny.
- **The DOJ’s expectations of cooperating companies and its intolerance of recidivists will be greater.** The DOJ’s return to the principles set forth in the Yates Memo suggests there will be much greater pressure brought to bear on companies seeking cooperation credit and more prosecutions or threatened prosecutions of individual actors than has been the case.

- **Effective corporate compliance programs will be critically important.** Monaco's remarks make clear that the DOJ will continue to increase its scrutiny of corporate compliance programs when determining the appropriate outcome of its corporate criminal investigations and will not hesitate to penalize companies found to have inadequate or ineffective corporate compliance programs.

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

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