

DOJ's 'déjà vu all over again' for corporate crime

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On October 28, Deputy Attorney General Lisa O. Monaco delivered remarks at the ABA's 36th National Institute on White Collar Crime. U.S. Department of Justice officials have recently referenced the coming enforcement "surge,"¹ and Monaco's remarks last week provide a roadmap to corporate criminal enforcement under the current administration.

The upshot: (i) the Yates Memo² is back — full cooperation again means disclosing facts about *all* individuals involved in misconduct; (ii) corporate recidivism includes unrelated prior misconduct if it demonstrates an ineffective compliance program; and (iii) corporate monitors are back in the federal prosecutor's toolbox.

Monaco firmly reinforced the Department's commitment to combatting corporate crime and emphasized that the agency's mission includes standing as a bulwark against individuals and corporations who break the law.

The remarks covered extensive ground, outlining several corporate crime trends and related enforcement priorities, previewing three new actions the DOJ will undertake to strengthen its overall response to corporate crime and highlighting areas of the DOJ focus in the coming weeks and months.

Corporate crime trends

In her discussion of corporate crime trends and the DOJ's responses, Monaco recalled the early 2000s corporate enforcement — criminal actions against Enron (Monaco was an Enron Task Force Prosecutor), WorldCom, Tyco and others, recalling the DOJ's successes in those significant investigations due to the resources and support the agency provided to the agents and prosecutors working the cases.

In considering the current threats to the nation, and pledging the Department's support to tackle these threats much like it did with corporate enforcement nearly two decades ago, Monaco referenced the increasing national security dimension at play in sanctions

and export control cases and cyber vulnerabilities that expose U.S. industry to foreign attacks; the continued importance of data analytics in corporate crime investigations — including healthcare fraud, insider trading, and market manipulation; and the increase in threat actors capitalizing on emerging technology and financial industries (e.g., virtual currency) to defraud and exploit the investing public.

Companies seeking cooperation credit should continue to conduct rigorous internal investigations and now must identify all individuals with any relation to the alleged misconduct at issue.

While acknowledging these new threats, Monaco firmly reinforced the Department's commitment to combatting corporate crime and emphasized that the agency's mission includes standing as a bulwark against individuals and corporations who break the law.

Three immediate actions

Monaco announced three changes the DOJ will make to support its enforcement priorities:

- **Required disclosure of all individual involvement in corporate misconduct:** the DOJ has restored earlier guidance (i.e., the Yates Memo) that, companies must provide the agency with non-privileged information about all individuals implicated in the misconduct at issue — regardless of status, position, or seniority — to be eligible for any cooperation credit in an investigation or subsequent enforcement action. This requirement eliminates a company's ability to cabin disclosures to those individuals it deems "substantially involved" in the misconduct and extends disclosure requirements to those with "peripheral" involvement who may have information important to the investigation. Significantly, it also re-emphasizes the DOJ's view that its agents and prosecutors are best able to determine the relevance and/or culpability of any individuals involved.

- **Takeaway:** Companies seeking cooperation credit should continue to conduct rigorous internal investigations and now must identify all individuals with any relation to the alleged misconduct at issue.
- **Consideration of all prior corporate misconduct during current investigations:** the DOJ will evaluate all prior corporate misconduct when determining appropriate corporate dispositions, whether or not the prior conduct is similar to the conduct under investigation. The DOJ's consideration of this information includes evaluation of the historical misconduct and what it reveals about the overall effectiveness of a company's compliance programs and controls.
- **Takeaway:** Remediation is a critical factor and companies cannot rely on the existence of policies without regular updating, periodic training, and active enforcement. (For more information, see previous alert³ on the most recent update to DOJ Corporate Compliance Guidance). For example, an FCPA violation after an unrelated tax issue may pose more serious consequences for companies when the seemingly different infractions highlight flaws or ineffectiveness of the company's compliance apparatus.
- **Renewed focus and prioritization of independent corporate monitorships:** Rescinding prior guidance indicating that monitorships are disfavored or should be the exception to the rule, the DOJ prosecutors again have leeway to impose independent monitors when necessary to ensure that companies comply with their obligations under DPAs or NPAs.
- **Takeaway:** Companies should prepare for the DOJ to "trust but verify," which may include the imposition of an independent monitor. Such monitorships will require additional resources as a consequence of corporate resolutions.

Looking ahead

Forecasting additional changes in the DOJ policies and guidance, Monaco also highlighted areas the Department is reviewing for potential action in the coming weeks and months:

- **Treatment of repeat corporate offenders (10-20% of significant corporate resolutions involve companies that**

have previously had a resolution): Explaining that recidivism undermines the purpose of pretrial diversion programs, in which companies receive leniency for their cooperation and corrective actions, the DOJ will consider how to evaluate entities that are repeat offenders.

- **No "free passes" under NPA/DPAs:** the DOJ will hold accountable any company that breaches the terms of its NPA or DPA, to include serious consequences for any violations.
- **Creation of Corporate Crime Advisory Group:** Consisting of representatives from all parts of the DOJ responsible for corporate criminal enforcement, this group will have a "broad mandate" to consider the issues highlighted in Monaco's remarks, as well as others. It will also make recommendations for prioritizing individual accountability and ensuring adequate resources for "rigorous enforcement."

In light of the coming enforcement surge and the continued presence of new and evolving legal risks, companies should heed the four closing points highlighted by Monaco, which, in addition to warning that this is the beginning of the Department's actions, included:

- Active review of their compliance programs to ensure that those programs "adequately" surveil for and address misconduct.
- Understanding that the company's entire enforcement record — including civil and regulatory — will be considered by the Department in evaluating potential resolutions.
- Companies must identify all individuals involved in the misconduct and produce all non-privileged facts regarding those individuals' respective roles in order to be eligible for full cooperation credit.
- Corporate monitors are no longer disfavored and will be considered given the facts and circumstances within each investigation.

Notes

¹ <https://bit.ly/3wxfH6F>

² <https://bit.ly/3D0zo9j>

³ <https://bit.ly/3wuyhMN>

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