



## ALERTS

### Department Of Justice Cracks Down On Corporate Crime

November 1, 2021

#### Highlights

Address to the ABA's 36th National Institute on White Collar Crime came with a clear message: the Biden administration is cracking down on white collar crime

The DOJ laid out three specific changes to its enforcement approach, and foreshadowed further shifts in the near future

Effective immediately, companies confronting DOJ criminal investigations will encounter new challenges driven by announced policy changes

The message from the Department of Justice's Deputy Attorney General Lisa Monaco to the attendees at [the American Bar Association's 36th National Institute on White Collar Crime](#) was loud and clear: The Biden administration is cracking down on white collar crime.

Effective immediately, companies confronting DOJ criminal investigations will encounter new challenges driven by a series of significant policy changes. While internal investigations have never been easy, the costs and delays associated with performing this important work, and potentially cooperating with a DOJ probe, are likely to increase.

## RELATED PEOPLE



### Eric J. Beste

Partner-in-Charge, San Diego Office  
San Diego, Los Angeles

P 619-321-5015  
F 310-284-3894  
Eric.Beste@btlaw.com



### Alyssa C. Hughes

Associate  
Indianapolis

P 317-261-7881  
F 317-231-7433  
alyssa.hughes@btlaw.com

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In addition to foreshadowing a host of policy changes and additional resources to be devoted to investigating and prosecuting white collar crime, Monaco laid out three specific changes to the DOJ's enforcement approach, each of which was discussed in detail [in a memorandum](#) issued the same day:

1. In order to receive cooperation credit, corporations must disclose information about all employees who took part in alleged misconduct, instead of only those employees who were "substantially involved" in misconduct;
2. The DOJ will consider a corporation's entire history of criminal, civil, and regulatory missteps when evaluating how to resolve any new matters, a shift away from the DOJ's prior practice of only considering instances of "similar misconduct"; and
3. Outside monitors will be considered for all corporate criminal resolutions in which the DOJ believes there is a need for, and a clear benefit to be derived from, a monitorship, in a move away from prior DOJ guidance that encouraged fewer monitorships.

While these and other policy shifts will be elucidated in the coming weeks when the DOJ issues revisions to the Justice Manual, Monaco gave some insights as to how the DOJ expects these changes to impact its corporate crime enforcement efforts.

## **Cooperation Credit Now Requires *All* Instead of *Some***

In a return to the DOJ's [practice under the "Yates Memo,"](#) companies will once again be required to turn over all non-privileged information about all individuals involved in the misconduct under investigation – "regardless of their position, status or seniority" – in order to receive any cooperation credit from the department. This reverses a policy change enacted by the Trump administration, which had permitted leniency to cooperating companies that only disclosed information about employees who were "substantially involved" in misconduct.

The change is designed to remove the discretion previously afforded to a company to determine which of its employees' actions should be disclosed to the government, and to remove any ambiguity as to the company's obligations. But the change may result in longer delays and increased costs for companies conducting internal investigations, [as had been the case prior to DOJ's modification of this policy in 2018](#). More than ever, companies choosing to cooperate with the DOJ will need to partner with experienced counsel and investigators that can efficiently investigate allegations of wrongdoing, uncover the facts about all participants in the activity, and if necessary, make effective disclosures to the government.

## **Full Range of Past Actions**

Monaco also introduced the DOJ's new approach to evaluating a company's prior history with law enforcement agencies and regulators. Rather than only considering a company's past actions that were similar to the misconduct at issue – as had been the case under prior guidance –

the department will now evaluate all past misconduct by a company in determining the appropriate resolution. This includes all civil, criminal, and regulatory actions, whether in the United States or overseas, and vastly enlarges the potential inputs to a prosecutor's decision-making.

For example, if a company is being investigated for an environmental crime, the DOJ's Environmental and Natural Resources Division may consider that company's history of tax or regulatory infractions when formulating a proposal to resolve an investigation. Companies with a recent history of enforcement actions or regulatory violations are likely to see longer and more expensive investigations, and more onerous resolutions offered by the government. Consequently, each and every resolution with a law enforcement agency (domestically or abroad) should be undertaken with a clear-eyed understanding of how prosecutors will later view the matter if other unrelated misconduct comes to light.

## Monitorships on the Rise

The DOJ is moving away from prior suggestions that independent monitors are discouraged or to be used infrequently if the company is entering a Deferred Prosecution Agreement (DPA) or a Non-Prosecution Agreement (NPA). Now, prosecutors are encouraged to consider a monitorship requirement whenever it is appropriate, and especially when, [as Monico's memorandum states](#), "a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of the resolution."

While DOJ policies on selecting and overseeing monitors remains intact, the new guidance makes clear that companies negotiating a resolution with the DOJ should expect to see more frequent and forceful demands by prosecutors for monitorships.

## Takeaways

Prosecutors are expected to use these new tools to extract harsher penalties or more frequently require independent monitors for such investigations. The risk is particularly true for large corporations in highly regulated industries, where the size of the businesses and the industry itself increases the likelihood of past enforcement actions, which will now be taken into account for any future resolution.

Anticipating the question most clients will ask their white collar and investigations counsel – "What does this all mean? – Monaco summarized what the DOJ hopes to be the answers:

- Companies need to actively review their compliance programs to ensure they adequately deter, detect, and where necessary, remediate misconduct – failure to do so will almost certainly cost more down the line
- For clients facing investigations, expect the DOJ to review their entire criminal, civil and regulatory record, not just a sliver
- For clients cooperating with the government, the DOJ will require them to identify all individuals involved in the misconduct – not just those "substantially involved" – and to

produce all non-privileged information about those individuals' involvement

- For clients negotiating resolutions, there is no default presumption against corporate monitors; the decision about a monitor will be made by the facts and circumstances of each case

The DOJ also announced it will be forming a Corporate Crime Advisory Group, which will undoubtedly continue to roll out changes and modifications to policies, priorities, and resource allocations to more effectively – and more vigorously – enforce federal criminal laws targeting white collar crime

For more information, please contact the Barnes & Thornburg attorney with whom you work or Eric Beste at 619-321-5015 or [eric.beste@btlaw.com](mailto:eric.beste@btlaw.com) or Alyssa Hughes at 317-261-7881 or [alyssa.hughes@btlaw.com](mailto:alyssa.hughes@btlaw.com).

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