

ALERT

# Biden DOJ Stiffens Corporate Enforcement

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On October 28, 2021, Deputy Attorney General (DAG) Lisa Monaco announced sweeping policy changes to the U.S. Department of Justice's (DOJ) corporate enforcement at the ABA's 36th National Institute on White Collar Crime. DAG Monaco continued the Biden DOJ's reversal of several defense-friendly policies and rolled out an extensive agenda that is designed to be tough on corporations and individuals. She revealed three new policies and foreshadowed future reform all aimed at individual accountability and corporate culture. As she made clear, the Biden DOJ is serious about revamping corporate enforcement and this is just the first wave of reform.

## New Policies

Consistent with DOJ remarks at the same conference, DAG Monaco emphasized individual accountability is "unambiguously" DOJ's "first priority in corporate criminal matters" and vowed "to surge resources" to prosecutors. But since individual accountability is rooted in corporate culture, DOJ "will [also] ensure the absence" of corporate compliance "programs inevitably proves a costly omission" for corporations that become subjects in its investigations. While a nexus certainly exists between corporate compliance efforts and individual actions, this coupling provides DOJ a stronger basis for the ensuing rigid corporate enforcement: DAG Monaco's policy overhaul reversed two Trump administration policies on cooperation credit and corporate monitorship, and introduced a broad policy on prior misconduct.

- **Cooperation Credit**

- Policy: DAG Monaco has reinstated the 2015 Memorandum on Individual Accountability for Corporate Wrongdoing (the "Yates Memo"). Nearly three years ago,

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## Practice Areas

Internal Investigations and Compliance Programs

White Collar Defense & Government Investigations

then-DAG Rod Rosenstein scaled back the Yates Memo because identifying “**every** person involved in alleged misconduct in **any way**, regardless of their role” was “not practical.” Instead, he updated the Justice Manual to require identification of “all individuals **substantially** involved” for cooperation credit. Finding, however, that this caused confusion, allowed “too much discretion,” and prevented important information flow to the government, DOJ has now re-expanded cooperation credit criteria: companies must (1) “identify **all** individuals involved in the misconduct, **regardless** of their position, status or seniority” and (2) “produce **all** non-privileged information about those individuals’ involvement.”

- Challenges: This expansive disclosure does not guarantee any cooperation, let alone tangible credit; it merely makes a company **eligible** for credit. Setting such broad and ill-defined standards may disincentivize or delay cooperation as companies assess the benefits of revealing information relevant to defenses or try to meet the standard. In turn, this has the potential for reducing or delaying the information reaching DOJ, which is the opposite goal of the policy change.
- **Prior Misconduct**
  - Policy: When determining criminal charges and resolutions, prosecutors must now consider **all** prior misconduct regardless of similarities between the historic conduct and the instant investigation because the history reveals an “overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity.” This “holistic approach” encompasses **foreign** and domestic regulatory, civil, and criminal enforcement against the company and **other entities in its corporate family** like “parent, divisions, affiliates, subsidiaries.” Despite acknowledging that “[s]ome prior instances” might “prove less significant,” the policy provides no guidance for this assessment.
  - Challenges: While the goal of the policy may be laudable under certain circumstances, a company generally should not be held responsible for the misconduct of legally separate entities where they act under different authority—parents, affiliates, and subsidiaries. Nor is all history equal. Learning from and improving compliance vulnerabilities should diminish the weight of prior conduct.
- **Corporate Monitors**
  - Policy: DAG Monaco rescinded prior guidance suggesting corporate monitors were “disfavored” or an “exception.” Ultimately, DOJ will make a monitorship decision on an individualized basis. DOJ is studying this selection process and considering standardization.
  - Challenges: Companies negotiating resolutions should bear in mind that DOJ can freely use this tool when it has limited or questionable trust that a company will indeed “commit itself to improvement, change its corporate culture, and self-police its activities.” While DOJ failed to provide any other guidance, the troubling broad factors for prior misconduct are likely in play.

## Foreshadowing Future Policies

These bold policy shifts are just the tip of the iceberg. DAG Monaco announced the new Corporate Crime Advisory Group which has “a broad mandate” and will ultimately submit policy revisions. Its studies shall include benchmarks for measuring successful cooperation and recommendations for “more rigorous enforcement.” DAG Monaco’s remarks also suggest that policies aimed at recidivism are likely in the pipeline. First, DOJ is reviewing how to account for repeat offenders including the “immediate” consideration of “whether pretrial diversion—NPAs and DPAs—is appropriate for certain recidivist companies.” Second, DOJ is also examining whether companies take their NPA and DPA “obligations seriously enough.” DAG Monaco pledged DOJ accountability and “serious consequences” for the “outrageous behavior” of a company breaching NPA or DPA terms.

### **Takeaways**

DOJ’s newest corporate enforcement policies are broad, and they are the first of likely many. They are also an attempt to remedy DOJ’s low success rate prosecuting individuals by pouring more resources—more taxpayer dollars—to an already costly endeavor while simultaneously doubling down on corporations. Companies need to not only establish effective compliance programs but routinely review and update them. Stronger compliance programs further prevent and faster detect any potential misconduct. As an added incentive, implementing a program and documenting improvements will also serve a company well should it find itself under investigation. Companies should stay tuned as this enforcement landscape continues evolving.

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