

## DOJ's Torpedoes Are in the Water: Be Your Own Monitor, or One Will Be Appointed for You

Update

November 01, 2021 | 9 minute read

Last week, at a gathering of the nation's top white collar criminal defense attorneys in Miami, Florida, Deputy Attorney General Lisa Monaco announced material changes to the way the Department of Justice will investigate, prosecute and resolve corporate cases in the years ahead. In sum, the Department has modified the structure of its investigative and advisory teams, and changed the basic rules as to how a company under investigation will be evaluated and, ultimately, punished. In addition, based on conversations we've had with a senior government official since the DAG's remarks were released, the DOJ has assembled a list of "recidivist" corporations that are likely targets for monitorships, and it doesn't take much to end up on that list. The DAG's remarks have landed with a splash: the sound of torpedoes hitting the water.

### A Three-Pronged Attack

The Department's message is not subtle. The DOJ is taking three aggressive new actions to "strengthen the way [it] responds to corporate crime" and to "further invigorate the department's efforts." First, the Department is going to require corporations to disclose more information relating to individuals, to include information about any individuals who may have been involved in the conduct at issue, regardless of seniority or position in the company or how involved in the alleged misconduct they may have been. Second, the Department is going to consider a wider array of prior misconduct in selecting targets and fashioning resolutions, particularly where a corporation may have breached the terms of a non-prosecution or deferred prosecution agreement. Third, the Department is going to impose monitors with greater frequency. To accomplish these goals, the DOJ has created new teams of advisors and investigators, and expressly incentivized them to be aggressive. In trying to set a new tone, the DAG specifically invoked the

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WorldCom, Qwest Communications, Adelphia, Tyco and Enron cases as benchmark examples of what the Department can and should again accomplish. One can now expect the Department to do its best to bring comparable and even more aggressive corporate criminal cases.

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## **Combatting Corporate Malfeasance is a “National Security” Priority**

Perhaps sympathetic to the position of the lawyers advising corporations in this new landscape, the DAG gave some helpful clues as to where the Department will be focusing its attention. Not surprisingly, given that current senior leadership in the Department has a strong background in national security, as well as the nature of the current overall threat landscape, the DAG assessed that “corporate crime has an increasing national security dimension,” pointing to “the new role of sanctions and export control cases” and the “cyber vulnerabilities that open companies up to foreign attacks.” The DAG also emphasized that data analytics play an increasingly large role in corporate criminal investigations, citing as examples healthcare fraud, insider trading and market manipulation. Consistent with the Department’s recent announcements of a national crypto currency enforcement team, the DAG also recognized that “criminals are taking advantage of emerging technological and financial industries to develop new schemes that exploit the investing public.” Accordingly, corporations that have any footprint in critical infrastructure, digital currencies, the health care system or controlled technologies should pay particular attention to the heightened scrutiny these industries are facing.

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## **Take Chances, Go Fast**

Remarkably, the DAG acknowledged that in pursuing corporate criminal cases more aggressively, “the government may lose some of those cases,” and essentially told prosecutors not to worry too much about acquittals. While the same case-opening provisions in the Justice Manual still apply, the DAG emphasized that a case should be brought if “the admissible evidence will probably be sufficient to obtain and sustain a conviction.” With that standard in mind, the Department has now publicly instructed the nation’s federal prosecutors to feel assured in indicting cases where convictions are far from a sure thing, as long as they are acting in good faith and assess a probability of success.

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## **The Surge**

To increase both the volume and the tempo of corporate criminal investigations, the Department is “going to find ways to surge resources to the department’s prosecutors.” For example, and likely modeled on the way that the DOJ has historically combatted terrorism, organized crime and other high priority matters, the DOJ is now co-locating FBI agents with lawyers in the Criminal Fraud Section at Main Justice. Invoking a battlefield metaphor, the DAG asserted that, “As I’ve seen personally, putting agents and prosecutors in the same foxhole can make all the difference, particularly in complex cases.” The main difference that co-locating agents with lawyers will make is the speed with which investigative teams can act. Expect cases to move much faster, and for there to be more of them, due to the efficiency of the new model.

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## **Pay Now or Pay Later**

With an emphasis on the obligation to foster a corporate culture of integrity, the DAG warned that a corporation that fails to invest in compliance or “thumps its nose at compliance” will face consequences. What this means is that the government will expect companies to proactively review their compliance programs to address high-risk areas and to incorporate “lessons learned” from prior incidents. Somewhat ominously, the DAG promised that “we will ensure the absence of such programs inevitably proves a costly omission for companies who end up the focus of department investigations. Although we understand the costs that enforcement actions can place on shareholders and others, our responsibility is to incentivize responsible corporate citizenship, a culture of compliance and a sense of accountability. So, the department will not hesitate to take action when necessary to combat corporate wrongdoing.” In light of that guidance, companies should consider taking a fresh look at their compliance programs, including conducting an updated risk assessment and ensuring that its policies and procedures are reasonably designed from a risk-based approach. Companies also need to ensure that its words, and more importantly, actions, that a culture of compliance is emphasized through the right “tone at the top.” While perhaps a cliché phrase, the Department rightfully sees it as a successful foundation for any good compliance program and is making clear it will act more harshly when it sees contrary conduct.

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## **Bring us the Usual Suspects**

Of the three prongs of the Department’s new strategy, the first requirement is aimed at getting corporations to more quickly and fully disclose information about “the cast of characters involved in any misconduct.” To be eligible for any cooperation credit, companies now must provide “all non-privileged information about individuals involved in or responsible for the misconduct at issue . . . regardless of their position, status or seniority.” It is no longer

sufficient to limit disclosures to those individuals who are “substantially involved” in the misconduct, which means that the DOJ is now expecting much longer list of witnesses, subjects and targets to be handed over by the corporation in the first instance. The DAG believes that DOJ is better situated to judge the culpability of individuals involved in misconduct and that prosecutors can fairly determine who should ultimately be pursued. Of course, the DAG’s direction for prosecutors to “be bold” and more aggressive rightfully creates some concerns about over-prosecutions. Regardless of the ultimate charging decisions, this first requirement means far broader investigative activity at the outset as corporations must err on the side of being over inclusive if they hope to preserve avenues to cooperation credit. This shift back to prior Department policy also creates the need for investigation counsel to carefully consider and continually evaluate the need for individual representations during the course of an internal investigation.

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## Getting on the Naughty List

The second new tactic the DAG announced involves the assessment of a company’s prior misconduct, and how that affects a potential corporate resolution. The DAG stated that all prior civil and criminal misconduct would be considered in deciding what resolution terms would be available to a company, “whether or not that misconduct is similar to the conduct at issue in a particular investigation.” This is a substantial change that will result in a material amendment to the Department’s “Principles of Federal Prosecution of Business Organizations,” upon which corporations and their outside counsel have relied until now. As an example, while in the past the Department would normally be only concerned about prior violations of the Foreign Corrupt Practices Act in deciding whether increased penalties were appropriate for a new violation of the same statute, the company now will have to account for a history in which, for example, it faced a regulatory or civil sanction for wholly unrelated conduct, such as an environmental infraction.

To this end, the DOJ is now requiring subject matter specific components, such as the Fraud Section, to communicate and confer with other components, such as the Tax Division, the Environment and Natural Resources Division, and the civil and criminal arms of all U.S. Attorney’s Offices across the country, as well as other federal and state government agencies outside the Department, to determine whether a target has a history of running afoul of regulators. While the DOJ conceded that some prior misconduct may ultimately prove to have little significance, it directed that “prosecutors need to start by assuming all prior misconduct is potentially relevant.” Accordingly, corporations taking stock of their current condition should consider virtually any prior infractions as an aggravating factor with respect to their ability to resolve a matter favorably. According to reliable sources, the DOJ recently put together a long

list of corporations with what it considers to be a history of significant bad behavior.

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## The Department Will Be Monitoring You

To police corporate culture and implement stronger compliance measures, the Department is going to rely more heavily on the use of monitors, who will be required to satisfy regulators' heightened expectations for corporate conduct. The DOJ's prior practice used monitors sparingly. But, now, the DAG bluntly stated that, "To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance," establishing that current DOJ leadership will not hesitate to insert watchdogs into corporations, especially for those companies who have given the government reason to doubt that it can be trusted. The DAG added that the "department is free to require the imposition of independent monitors 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." The Department also signaled more developments to come in the process by which potential monitors are identified and ultimately selected, noting that these significant changes "are only the first steps."

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## Repeat Offenders are Top of the List

The DAG expressed concern over the number of repeat offenders known to the government, and initiated a review of outcomes in prior corporate resolutions. She further seemed to question the effectiveness of pretrial diversion in the form of non-prosecution and deferred prosecution agreements, which are typically the ways in which corporate criminal exposure has been resolved. The DAG posited the question: "Are there other approaches that can promote cultural and institutional changes that will have a greater impact on deterring misconduct?" suggesting that the Department is more seriously considering bringing formal charges against corporations with greater regularity, particularly where a corporation has previously failed to meet the government's expectations under the terms of a DPA. This suggestion that DPAs may be insufficient to adequately deter corporate misconduct presents an existential threat to corporations that are unable to independently maintain effective compliance programs, because measures beyond a DPA, which include indictment, can mean a death blow. In case there was any doubt as to the significance of this rhetorical question, the DAG added: "I want to be very clear — we have no tolerance for companies that take advantage of pre-trial diversion by going on to continue to commit crimes. . . . We will hold accountable any company that breaches the terms of its DPA or NPA."

DPAs and NPAs are not a free pass, and there will be serious consequences for violating their terms.”

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## The Corporate Crime Advisory Group – More Voices in the Room

Acknowledging that fashioning just punishments for corporations is complicated and that there may be multiple or competing equities even within the Department, the DAG unveiled a new “Corporate Crime Advisory Group,” made up of representatives “from every part of the department involved in corporate criminal enforcement,” and presumably reporting directly to ODAG. This advisory group will be involved in examining monitor selections, evaluating the significance of recidivism, and considering consequences for breaches of deferred prosecution agreements. Based on our most recent conversations with government officials and our past experience, we assess that the group likely will be overseen by one or more Associate Deputies Attorney General, with input and representation from multiple components in the Criminal Division, including but not limited to the Fraud Section, the Computer Crimes and Intellectual Property Section, as well as the National Security Division in cases involving export controls, sanctions, terrorism financing and CFIUS issues. Indeed, virtually every component in DOJ may have a say in the resolution of a corporate case if that component’s equities are implicated, and many if not all of them will want a seat at the table given the breadth of the Department’s new initiatives. Accordingly, companies that have issues relating to environmental, tax, cyber, national security and antitrust analyses should expect the Department to consider input from the corresponding subject matter components, far beyond traditional practices in the Criminal Division. As we have previously discussed<sup>1</sup>, these recent announcements are consistent with a series of DOJ and White House directives that have materially changed the way the Department views corporate and financial crime, particularly where it overlaps with national security prerogatives and ESG values.

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## What to Do About All This

Correctly anticipating that her remarks would cause a stir, the DAG concluded by offering five guiding directives for companies endeavoring to meet the Department’s new expectations, presented below:

- Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct — or else it’s going to cost them down the line.
- For clients facing investigations, as of today, the department will review their whole criminal, civil and regulatory record — not just a sliver of that record.



- For clients cooperating with the government, they need to identify all individuals involved in the misconduct — not just those substantially involved — and produce all non-privileged information about those individuals' involvement.
- For clients negotiating resolutions, there is no default presumption against corporate monitors. That decision about a monitor will be made by the facts and circumstances of each case.
- Looking to the future, this is a start — and not the end — of this administration's actions to better combat corporate crime.

To put perhaps a finer point on these recommendations, corporations should strongly consider subjecting themselves to vigorous internal reviews, particularly where the corporation has been subject to virtually any sanction previously by any regulatory or enforcement agency. Hiring outside counsel to stand in the shoes of the Department in this new environment may bring a sobering but essential perspective as to how to manage potential risk from government investigations, and if done correctly, could even stave off the government's appetite to insert a monitor into your company if you can establish that you already have scrutinized your compliance programs and made material changes and advancements well in advance of the government's desire to incentivize you. Given the marching orders that now have been loudly and publicly announced to the defense bar, as well as to the thousands of DOJ investigators and prosecutors who are tasked with meeting the expectations of senior leadership, we have little time to waste.

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1. **DOJ Trumpets New Multi-Faceted Cryptocurrency Task Force: What this Means for You, OFAC Ransomware Update, Biden Administration Prioritizes Increased and Broadened Anti-Corruption Enforcement, ESG, What Can This Be? A Conversation With Bracewell's Rachel Goldman, and SEC Underscores ESG Disclosure and Compliance Priorities**