THE UNITED STATES DEPARTMENT of JUSTICE
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Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime

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Remarks as Prepared for Delivery

Thank you, Ray, for that introduction, and thank you all for having me today. I'm sorry that I am not able to be there in person but appreciate the ability to join you virtually.

I have three priorities for my time with you. First, I want to describe three new actions that the department is taking today to strengthen the way we respond to corporate crime. Second, I want to look forward and tell you about some areas we will be studying over the next months, with an eye to making additional changes to help further invigorate the department's efforts to combat corporate crime. But before both of those, I want to set the scene by discussing trends, as well as the Attorney General's and my enforcement priorities, when it comes to corporate crime.

We can all agree the department's enforcement activities in the white-collar space ebb and flow due to a variety of factors — some internal to the department and some external. When I started as a newly minted AUSA, it was an active time for enforcement against corporate crime — one that witnessed the prosecutions of executives at WorldCom, Qwest Communications, Adelphia, Tyco and Enron. I've experienced how — when given the right resources and support including dedicated agents — prosecutors can uncover and prosecute the most sophisticated corporate criminals. As Deputy Attorney General, my goal is to set our investigators and attorneys up for continued success, so that they can enforce the criminal law fairly and vigorously, as the facts and law dictate.

At the same time, I am focused on ensuring the department is clear with those of you who are counselors and voices in the C-Suite and Boardroom — so that you can provide well-informed advice to your clients. Having served as a board member when I was out of government, I can appreciate the difficult conversations that arise surrounding compliance and measures designed to proactively stop misconduct, and the tradeoffs that may need to be considered when making investment decisions. Clear department guidance strengthens the case for these measures because it makes clear why taking steps to root out misconduct, and avoid the "edge case," often can be the most valuable guidance a general counsel or trusted legal advisor can provide.

Since returning to the Justice Department this year, I've spent time considering the current enforcement landscape. That landscape has evolved in some noticeable ways from my last tour. Corporate crime has an increasing national security dimension — from the new role of sanctions and export control cases to cyber vulnerabilities that open companies up to foreign attacks. Second, data analytics plays a larger and larger role in corporate criminal investigations, whether that be in healthcare fraud or insider trading or market manipulation. Third, criminals are taking advantage of emerging technological and financial industries to develop new schemes that exploit the investing public.

At the same time, these developments are changes of degree and not of kind. We have long had corporate criminal cases with national security implications. We have been using data to assist investigations for well over a decade. And prosecutors have always had to grapple with evolutions in corporate fraud —whether that be the junk bond firms of the 1980s, the various fraud schemes created by the so-called "smartest guys in the room" at Enron, or the prolific mortgage fraud of the 2000s, or cryptocurrency schemes today.

But throughout, our mission must remain the same — enforce the criminal laws that govern corporations, executives, officers and others, in order to protect jobs, guard savings and maintain our collective faith in the economic engine that

fuels this country. We will hold those that break the law accountable and promote respect for the laws designed to protect investors, consumers and employees.

Accountability starts with the individuals responsible for criminal conduct. Attorney General Garland has made clear it is unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance.

I recognize that cases against corporate executives are among some of the most difficult that the department brings, and that means the government may lose some of those cases. But I have and will continue to make clear to our prosecutors that, as long as we act consistent with the Principles of Federal Prosecution, the fear of losing should not deter them. As set forth in the Justice Manual, a prosecutor should commence a case if he or she believes that a putative defendant's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. So long as those principles are followed, we will urge prosecutors to be bold in holding accountable those who commit criminal conduct.

We are also going to find ways to surge resources to the department's prosecutors. As one example, a new squad of FBI agents will be embedded in the Department's Criminal Fraud Section. This team model has a proven track record and is one we've used in numerous high-profile cases. As I've seen personally, putting agents and prosecutors in the same foxhole can make all the difference, particularly in complex cases.

While the priority remains individual accountability, where appropriate, we will not hesitate to hold companies accountable.

Now, I recognize the resources and the effort it takes to manage a large organization and to put in place the right culture. The Department of Justice has over 115,000 employees across dozens of countries and an operating budget equivalent to that of a Fortune 100 company. So, I know what it means to manage and be accountable for what happens in a complex organization. But corporate culture matters. A corporate culture that fails to hold individuals accountable, or fails to invest in compliance — or worse, that thumbs its nose at compliance — leads to bad results.

Let me also be clear: a company can fulfill its fiduciary duty to shareholders and maintain a commitment to compliance and lawfulness. In fact, 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.

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.

With those priorities in mind, let me talk about three actions I am taking today with respect to department policies on corporate criminal enforcement. I anticipate that these changes are just a first step and will be followed by others as we study certain issues more closely. In the meantime, each of these will enable our prosecutors to continue to hold individuals and corporations accountable for their misconduct.

The first announcement augments our efforts to ensure individual accountability. To hold individuals accountable, prosecutors first need to know the cast of characters involved in any misconduct. To that end, today I am directing the department to restore prior guidance making clear that to be eligible for any cooperation credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue. To be clear, a company must identify all individuals involved in the misconduct, regardless of their position, status or seniority.

It will no longer be sufficient for companies to limit disclosures to those they assess to be "substantially involved" in the misconduct. Such distinctions are confusing in practice and afford companies too much discretion in deciding who should and should not be disclosed to the government. Such a limitation also ignores the fact that individuals with a peripheral involvement in misconduct may nonetheless have important information to provide to agents and prosecutors. The department's investigative team is often better situated than company counsel to determine the relevance and culpability of individuals involved in misconduct, even for individuals who may be deemed by a

corporation to be less than substantially involved in misconduct. To aid this assessment, cooperating companies will now be required to provide the government with all non-privileged information about individual wrongdoing.

I anticipate some may say this means the government is going to unfairly prosecute minimal participants. Asking for this information does not alter the principles that govern fair and just charging decisions. Like every case, prosecutors will make decisions about individuals implicated in corporate criminal matters based on the facts, the law and the Principles of Federal Prosecution.

The second change I am announcing today deals with the issue of a company's prior misconduct and how that affects our decisions about the appropriate corporate resolution.

Today, the department is making clear that all prior misconduct needs to be evaluated when it comes to decisions about the proper resolution with a company, whether or not that misconduct is similar to the conduct at issue in a particular investigation. That record of misconduct speaks directly to a company's overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity.

To that end, today I am issuing new guidance to prosecutors regarding what historical misconduct needs to be evaluated when considering corporate resolutions. This will include an amendment to the Department's "Principles of Federal Prosecution of Business Organizations." Going forward, prosecutors will be directed to consider the full criminal, civil and regulatory record of any company when deciding what resolution is appropriate for a company that is the subject or target of a criminal investigation.

Going forward, prosecutors can and should consider the full range of prior misconduct, not just a narrower subset of similar misconduct — for instance, only the past FCPA investigations in an FCPA case, or only the tax offenses in a Tax Division matter. A prosecutor in the FCPA unit needs to take a department-wide view of misconduct: Has this company run afoul of the Tax Division, the Environment and Natural Resources Division, the money laundering sections, the U.S. Attorney's Offices, and so on? He or she also needs to weigh what has happened outside the department — whether this company was prosecuted by another country or state, or whether this company has a history of running afoul of regulators. Some prior instances of misconduct may ultimately prove to have less significance, but prosecutors need to start by assuming all prior misconduct is potentially relevant.

Taking the broader view of companies' historical misconduct will harmonize the way we treat corporate and individual criminal histories, as well as ensure that we do not unnecessarily look past important history in evaluating the proper form of resolution.

The final change I am announcing today deals with the use of corporate monitors. Stepping back, any resolution with a company involves a significant amount of trust on the part of the government. Trust that a corporation will commit itself to improvement, change its corporate culture, and self-police its activities. But where the basis for that trust is limited or called into question, we have other options. Independent monitors have long been a tool to encourage and verify compliance.

In recent years, some have suggested that monitors would be the exception and not the rule. To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance. Instead, I am making clear 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.

Of course, the decision to use monitors must also include consideration of how the monitorship is administered and the standards by which monitors are expected to do their work. And the selection of monitors will continue to be accomplished in a fashion that eliminates even the perception of favoritism. The department will study how we select corporate monitors, including whether to standardize our selection process across the divisions and offices.

The changes I am announcing today are only the first steps to reinforce our commitment to combatting corporate crime. In addition to the issue of monitorship selection, we have other issues to explore. Let me now preview some of the other issues we will review and tell you how we'll go about conducting that review.

The first area will examine is how to account for companies who have a documented history of repeated corporate wrongdoing. In certain cases, the department sees the same company become the subject of multiple investigations — not just in the same office or section, but in multiple sections and divisions across the department. For example, a company might have an antitrust investigation one year, a tax investigation the next, and a sanctions investigation two years after that.

Because I'm concerned about this kind of repeat offender, I asked my office to start looking at the data on corporate resolutions. What we saw is that recently somewhere between 10% and 20% of all significant corporate criminal resolutions involve companies who have previously entered into a resolution with the department. So, we need to consider whether and how to differently account for companies that become the focus of repeated DOJ investigations.

One immediate area for consideration is whether pretrial diversion — NPAs and DPAs — is appropriate for certain recidivist companies. Corporate recidivism undermines the purpose of pretrial diversion, which is after all to give a break to corporations in exchange for their promise to fix what ails them, as well as to recognize a company's cooperation. Some have questioned whether pretrial diversion is appropriate for any company who has benefited previously from such an arrangement. Does the opportunity to receive multiple NPAs and DPAs instill a sense among corporations that these resolutions and the attendant fines are just the cost of doing business? Are there other approaches that can promote cultural and institutional changes that will have a greater impact on deterring misconduct? These are some of the questions we will be studying in the coming months.

Another issue we will be studying is whether companies under the terms of an NPA or DPA take those obligations seriously enough. 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, particularly if they then compound their wrongdoing by knowingly hiding it from the government. It is hard for me to think of more outrageous behavior by a company that has entered into a DPA or NPA in the first place.

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. Recently, two different multinational corporations separately announced that each had received a breach notification from the Justice Department. This is obviously not a step we take lightly, but we will do so where necessary and appropriate.

These issues implicate the work of many different parts of the department, and so this review will need to consult a range of stakeholders. We also want to get your views given the implications any changes may have for your clients.

To that end, today I am announcing the formation of the Corporate Crime Advisory Group, which will be made up of representatives from every part of the department involved in corporate criminal enforcement. This group will have a broad mandate and will consult broadly. It will consider some of the issues I previewed today — like monitorship selection, recidivism and NPA/DPA non-compliance — as well as other issues, like what benchmarks we should use to measure a successful company's cooperation. It will also make recommendations on what resources can assist more rigorous enforcement, and how we ensure that individual accountability is prioritized. The advisory group will then develop recommendations and propose revisions to the department's policies on corporate criminal enforcement.

I'm sure many of you in the audience are going to get calls from clients over the next few days with questions about what this all means. So, let me conclude by giving you the answers — with these five points:

- 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.

As we review and reassess our approach to corporate criminal enforcement, let me assure you that we will be in dialogue with those in this audience. We value your input and views on what are a complex set of issues.

Thank you again to the ABA for having me, and I look forward to speaking with you all soon.

Speaker:
Lisa O. Monaco, Deputy Attorney General

Topic(s):
Financial Fraud
Securities, Commodities, & Investment Fraud

Component(s):
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