Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement

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Remarks as Prepared for Delivery

Good afternoon. Thank you, Dean McKenzie, for the introduction and for hosting us today. I'm happy to be back at NYU, and to see so many friends and former colleagues in the room.

Let me start by acknowledging some of my DOJ colleagues who are here. That includes the U.S. Attorneys for the Southern and Eastern Districts of New York, New Jersey, and Connecticut.

But just as importantly, we're joined in person and on the livestream by line prosecutors, agents, and investigative analysts—the career men and women who do the hard work, day in and day out, to make great cases and hold wrongdoers accountable.

I also want to recognize our federal and state partners who play a critical role in corporate enforcement. And of course, let me also thank Professor Arlen and the NYU Program on Corporate Compliance and Enforcement for arranging this event and for serving as a bridge between the worlds of policymaking and academia.

Addressing corporate crime is not a new subject for the Justice Department. In the aftermath of Watergate, Attorney General Edward Levi was tasked not only with restoring the Department's institutional credibility, but also with rebuilding its corporate enforcement program.

In a 1975 speech, he told prosecutors that there was great demand to be more aggressive against, what he called, "white collared crime." He explained his distaste for that term, saying that it suggested a distinction in law enforcement based upon social class. But, nonetheless, he acknowledged that it was an area that needed to be given "greater emphasis." These words are as true today as they were then.

But Attorney General Levi also said that efforts to fight corporate crime were hampered by a lack of resources, specially trained investigators, and other issues. He answered those complaints as all great Attorneys General do—he said his Deputy Attorney General would take care of it. For at least a half-century, therefore, it has been the responsibility of my predecessors to set corporate criminal policy for the Department, and I follow in their footsteps.

Last October, I announced immediate steps the Justice Department would take to tackle corporate crime.

I also formed the Corporate Crime Advisory Group, a group of DOJ experts tasked with a top-to-bottom review of our corporate enforcement efforts.

To get a wide range of perspectives, we met with a broad group of outside experts, including public interest groups, ethicists, academics, audit committee members, in-house attorneys, former corporate monitors, and members of the business community and defense bar. Many of these people are here today.

Our meetings sparked discussions on individual accountability and corporate responsibility; on predictability and transparency; and on the ways enforcement policies must square with the realities of the modern economy. Every meeting resulted in some idea or insight that was helpful and that we sought to incorporate into our work. Today, you will hear how these new policies reflect this diverse input.

Let me turn now to substance—and the changes the Department is implementing to further strengthen how we prioritize and prosecute corporate crime.

First, I'll reiterate that the Department's number one priority is individual accountability—something the Attorney General and I have made clear since we came back into government. Whether wrongdoers are on the trading floor or in the C-suite, we will hold those who break the law accountable, regardless of their position, status, or seniority.

Second, I'll discuss our approach to companies with a history of misconduct. I previously announced that prosecutors must consider the full range of a company's prior misconduct when determining the appropriate resolution. Today, I will outline additional guidance for evaluating corporate recidivism.

Third, I'll highlight new Department policy on voluntary self-disclosures, including the concrete and positive consequences that will flow from self-disclosure. We expect good companies to step up and own up to misconduct. Voluntary self-disclosure is an indicator of a working compliance program and a healthy corporate culture. Those companies who own up will be appropriately rewarded in the Department's approach to corporate crime.

Fourth, I'll detail when compliance monitors are appropriate and how we can select them equitably and transparently. Today, I am also directing Department prosecutors to monitor those monitors: to ensure they remain on the job, on task, and on budget.

Finally, I'll discuss how the Department will encourage companies to shape financial compensation around promoting compliance and avoiding improperly risky behavior. These steps include rewarding companies that claw back compensation from employees, managers, and executives when misconduct happens. No one should have a financial interest to look the other way or ignore red flags. Corporate wrongdoers—rather than shareholders—should bear the consequences of misconduct.

Taken together, the policies we're announcing today make clear that we won't accept business as usual. With a combination of carrots and sticks—with a mix of incentives and deterrence—we're giving general counsels and chief compliance officers the tools they need to make a business case for responsible corporate behavior. In short, we're empowering companies to do the right thing—and empowering our prosecutors to hold accountable those that don't.

Individual Accountability

Let me start with our top priority for corporate criminal enforcement: going after individuals who commit and profit from corporate crime.

In the last year, the Department of Justice has secured notable trial victories, including convictions of the founder and chief operating officer of Theranos; convictions of J.P. Morgan traders for commodities manipulation; the conviction of a managing director at Goldman Sachs for bribery; and the first-ever conviction of a pharmaceutical CEO for unlawful distribution of controlled substances.

Despite those steps forward, we cannot ignore the data showing overall decline in corporate criminal prosecutions over the last decade. We need to do more and move faster. So, starting today, we will take steps to empower our prosecutors, to clear impediments in their way, and to expedite our investigations of individuals.

To do that, we will require cooperating companies to come forward with important evidence more quickly.

Sometimes we see companies and counsel elect—for strategic reasons—to delay the disclosure of critical documents or information while they consider how to mitigate the damage or investigate on their own. Delayed disclosure undermines efforts to hold individuals accountable. It limits the Department's ability to proactively pursue leads and preserve evidence before it disappears. As time goes on, the lapse of statutes of limitations, dissipation of evidence, and the fading of memories can all undermine a successful prosecution.

In individual prosecutions, speed is of the essence.

Going forward, undue or intentional delay in producing information or documents—particularly those that show individual culpability—will result in the reduction or denial of cooperation credit. Gamesmanship with disclosures and productions will not be tolerated.

If a cooperating company discovers hot documents or evidence, its first reaction should be to notify the prosecutors. This requirement is in addition to prior guidance that corporations must provide all relevant, non-privileged facts about individual misconduct to receive any cooperation credit.

Separately, Department prosecutors will work to complete investigations and seek warranted criminal charges against individuals prior to or at the same time as entering a resolution against a corporation. Sometimes the back-and-forth of resolving with a company can bog down individual prosecutions, since our prosecutors have finite resources.

In cases where it makes sense to resolve a corporate case first, there must be a full investigative plan outlining the remaining work to do on the individual cases and a timeline for completing that work.

Collectively, this new guidance should push prosecutors and corporate counsel alike to feel they are "on the clock" to expedite investigations, particularly as to culpable individuals. While many companies and prosecutors follow these principles now, this guidance sets new expectations about the sequencing of investigations and clarifies the Department's priorities.

History of Misconduct

Now, it's safe to say that no issue garnered more commentary in our discussions than the commitment we made last year to consider the full criminal, civil, and regulatory record of any company when deciding the appropriate resolution.

That decision was driven by the fact that between 10% and 20% of large corporate criminal resolutions have involved repeat offenders.

We received many recommendations about how to contextualize historical misconduct, to develop a full and fair picture of the misconduct and corporate culture under review. We heard about the need to evaluate the regulatory environment that companies operate in, as well as the need to consider the age of the misconduct and subsequent reforms to the company's compliance culture.

In response to that feedback, today, we are releasing additional guidance about how such histories will be evaluated. Now let me emphasize a few points.

First, not all instances of prior misconduct are created equal. For these purposes, the most significant types of prior misconduct will be criminal resolutions here in the United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct. But past actions may not always reflect a company's current culture and commitment to compliance. So, dated conduct will generally be accorded less weight.

And what do we mean by dated? Criminal resolutions that occurred more than 10 years before the conduct currently under investigation, and civil or regulatory resolutions that took place more than five years before the current conduct.

We will also consider the nature and circumstances of the prior misconduct, including whether it shared the same root causes as the present misconduct. Some facts might indicate broader weaknesses in the compliance culture or practices, such as wrongdoing that occurred under the same management team or executive leadership. Other facts might provide important mitigating context.

For example, if a corporation operates in a highly regulated industry, its history should be compared to others similarly situated, to determine if the company is an outlier.

Separately, we do not want to discourage acquisitions that result in reformed and improved compliance structures. We will not treat as recidivists companies with a proven track record of compliance that acquire companies with a history of compliance problems, so long as those problems are promptly and properly addressed post-acquisition.

Finally, I want to be clear that this Department will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company. Before a prosecution team extends an offer for a successive NPA or DPA, Department leadership will scrutinize the proposal. That will ensure greater consistency across the Department and a more holistic approach to corporate recidivism.

Companies cannot assume that they are entitled to an NPA or a DPA, particularly when they are frequent flyers. We will not shy away from bringing charges or requiring guilty pleas where facts and circumstances require. If any corporation still thinks criminal resolutions can be priced in as the cost of doing business, we have a message—times have changed.

<u>Voluntary Self-Disclosure</u>

That said, the clearest path for a company to avoid a guilty plea or an indictment is voluntary self-disclosure. The Department is committed to providing incentives to companies that voluntarily self-disclose misconduct to the government. In many cases, voluntary self-disclosure is a sign that the company has developed a compliance program and has fostered a culture to detect misconduct and bring it forward.

Our goal is simple: to reward those companies whose historical investments in compliance enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward.

Voluntary self-disclosure programs, in various Department components, have already been successful. Take, for example, the Antitrust Division's Leniency Program, the Criminal Division's voluntary disclosure program for FCPA violations, and the National Security Division's program for export control and sanctions violations. We now want to expand those policies Department-wide.

We also want to clarify the benefits of promptly coming forward to self-report, so that chief compliance officers, general counsels, and others can make the case in the boardroom that voluntary self-disclosure is a good business decision.

So, for the first time ever, every Department component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure. If a component currently lacks a formal, documented policy, it must draft one.

<u>Predictability is critical.</u> These policies must provide clear expectations of what self-disclosure entails. And they must identify the concrete benefits that a self-disclosing company can expect.

I am also announcing common principles that will apply across these voluntary self-disclosure policies. Absent aggravating factors, the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct. In addition, the Department will not require an independent compliance monitor for such a corporation if, at the time of resolution, it also has implemented and tested an effective compliance program.

Simply put, the math is easy: voluntary self-disclosure can save a company hundreds of millions of dollars in fines, penalties, and costs. It can avoid reputational harms that arise from pleading guilty. And it can reduce the risk of collateral consequences like suspension and debarment in relevant industries.

If you look at recent cases, you can see the value proposition. Voluntary self-disclosure cases have resulted in declinations and non-prosecution agreements with no significant criminal penalties. By contrast, recent cases that did not involve self-disclosure have resulted in guilty pleas and billions of dollars in criminal penalties, this year alone. I expect that resolutions over the next few months will reaffirm how much better companies fare when they come forward and self-disclose.

<u>Independent Compliance Monitors</u>

Let me turn to monitors. Over the past year of discussions, we heard a call for more transparency to reduce suspicion and confusion about monitors. Today, we're addressing those concerns.

First, we are releasing new guidance for prosecutors about how to identify the need for a monitor, how to select a monitor, and how to oversee the monitor's work to increase the likelihood of success.

Second, going forward, all monitor selections will be made pursuant to a documented selection process that operates transparently and consistently.

Finally, Department prosecutors will ensure that the scope of every monitorship is tailored to the misconduct and related compliance deficiencies of the resolving company. They will receive regular updates to verify that the monitor stays on task and on budget. We at the Department of Justice are not regulators, nor do we aspire to be. But where we impose a monitor, we recognize our obligations to stay involved and monitor the monitor.

Corporate Culture

As everyone here knows, it all comes back to corporate culture. Having served as both outside counsel and a board member in the past, I know the difficult decisions and trade-offs companies face about how to invest corporate resources, structure compliance programs, and foster the right corporate culture.

In our discussions leading to this announcement, we identified encouraging trends and new ways in which compliance departments are being strengthened and sharpened. But resourcing a compliance department is not enough; it must also be backed by, and integrated into, a corporate culture that rejects wrongdoing for the sake of profit. And companies can foster that culture through their leadership and the choices they make.

To promote that culture, an increasing number of companies are choosing to reflect corporate values in their compensation systems.

On the deterrence side, those companies employ clawback provisions, the escrowing of compensation, and other ways to hold financially accountable individuals who contribute to criminal misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance.

On the incentive side, companies are building compensation systems that use affirmative metrics and benchmarks to reward compliance-promoting behavior.

Going forward, when prosecutors evaluate the strength of a company's compliance program, they will consider whether its compensation systems reward compliance and impose financial sanctions on employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. They will evaluate what companies say and what they do, including whether, after learning of misconduct, a company actually claws back compensation or otherwise imposes financial penalties.

I have asked the Criminal Division to develop further guidance by the end of the year on how to reward corporations that employ clawback or similar arrangements. This will include how to help shift the burden of corporate financial penalties away from shareholders—who frequently play no role in misconduct—onto those more directly responsible.

Conclusion

But we're not done.

We will continue to engage and protect victims—workers, consumers, investors, and others.

We will continue to find ways to improve our approach to corporate crime, such as by enhancing the effectiveness of the federal government's system for debarment and suspension.

We will continue to seek targeted resources for corporate criminal enforcement, including the $250 million we are requesting from Congress for corporate crime initiatives next year.

Today's announcements are fundamentally about individual accountability and corporate responsibility. But they are also about ownership and choice.

Companies should feel empowered to do the right thing—to invest in compliance and culture, and to step up and own up when misconduct occurs. Companies that do so will welcome the announcements today. For those who don't, however, our Department prosecutors will be empowered, too—to hold accountable those who don't follow the law.

Thank you again for having me here today. I look forward to taking some questions.

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