

New DOJ Compliance Guidance: Incentives and Penalties, Cooperation Credits

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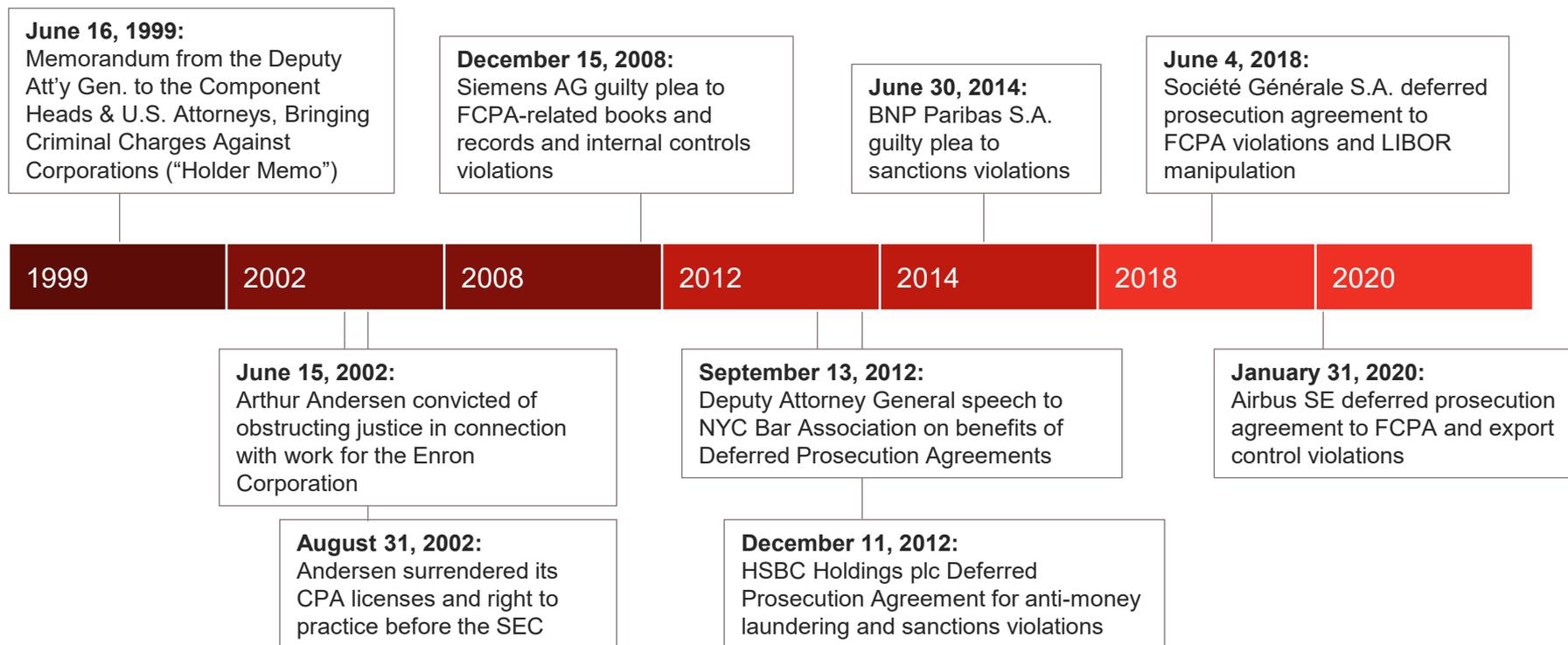
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Recent History: Corporate Criminal Resolutions

1999-2020



- DOJ Antitrust Division:
 - Historically, the Antitrust Division disfavored DPAs and NPAs
 - In July 2019, however, the Division announced a policy shift allowing more consideration of DPAs; NPAs continued to be disfavored

- Health Care Fraud:
 - DOJ Criminal Division and Civil Division frequently coordinate resolutions that can involve:
 - » Guilty pleas, DPAs, NPAs to felony or misdemeanor FDCA violations
 - » Civil False Claims Act violations; may be accompanied by a Corporate Integrity Agreement and external monitoring

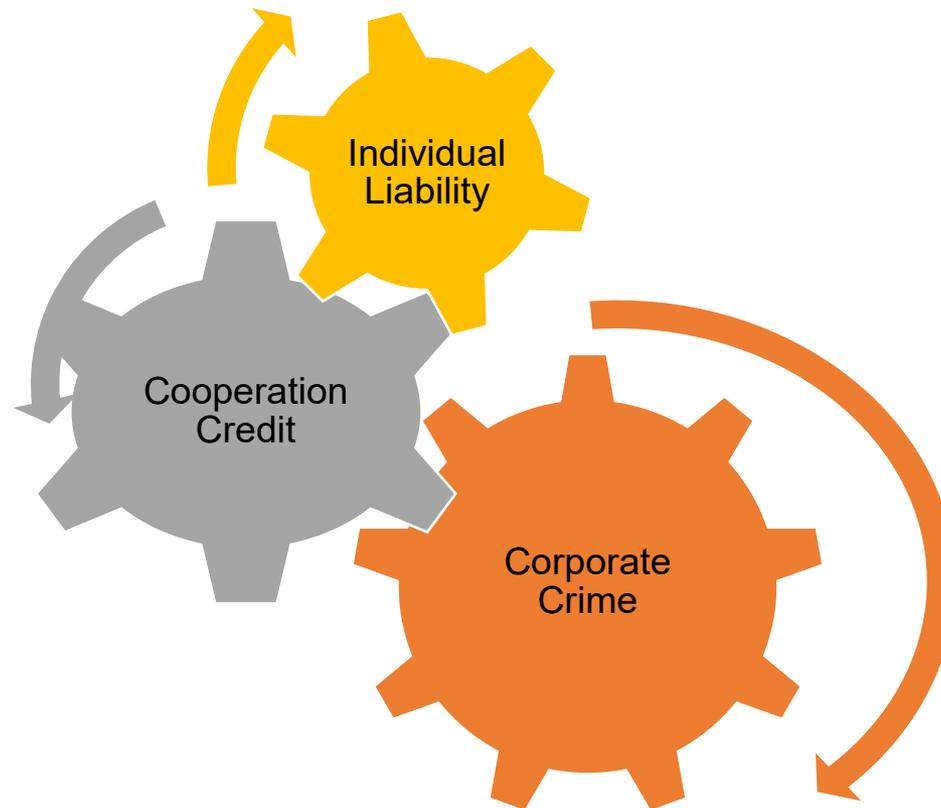
- DOJ Tax Division:
 - Corporate guilty pleas have been rare; the Tax division generally has entered into DPAs and NPAs with corporate entities and financial institutions
- Economic Sanctions (OFAC, DOJ):
 - Policies allow for NPAs in cases of voluntary self-disclosure
 - Outside of VSDs, settlements have included entity guilty pleas and DPAs

Justice Manual: Principals of Prosecution of Business Organizations

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating allegations of wrongdoing and bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, among other things: (1) protecting the integrity of our economic and capital markets by enforcing the rule of law; (2) protecting consumers, investors, and business entities against competitors who gain unfair advantage by violating the law; (3) preventing violations of environmental laws; and (4) discouraging business practices that would permit or promote unlawful conduct at the expense of the public interest.



Justice Manual: Principals of Prosecution of Business Organizations



Recent Corporate Prosecution Initiatives

Sept. 2015
Yates Memo

Oct. 2021
Monaco Memo

Nov. 2018
Rosenstein
Revisions to JM



Monaco Memo



- Four key initiatives:
 - Formation of a corporate criminal advisory group
 - Instruct prosecutors to consider corporation's entire criminal history
 - Clarify a corporation's obligation to provide all information concerning all persons involved in corporate misconduct to receive cooperation credit
 - Address the use of monitorships as part of corporate criminal resolutions



Monaco Memo

- Corporate Crime Advisory Committee
 - Broad mandate to update approach to corporate criminal enforcement
 - Consider cooperation credit, corporate recidivism, and factors determining when DPAs and NPAs should be used
 - Evaluate new technologies – such as AI – to assist in processing vast amounts of data involved in prosecutions
 - Solicit input from the business community, academia, and defense bar



Monaco Memo

Evaluate Past Misconduct

- Domestic or foreign criminal prosecution
- Civil or regulatory enforcement
- Guidance or warnings
- Across corporate structure
- Responsive action taken by corporation



U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 28, 2021

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, CIVIL

II. Considering a Corporation's History of Misconduct

A corporation's record of past misconduct—including violations of criminal laws, civil laws, or regulatory rules—may be indicative of whether the company lacks the appropriate internal controls and corporate culture to disincentivize criminal activity, and whether any proposed remediation or compliance programs, if implemented, will succeed. Prosecutors must therefore take a holistic approach when considering a company's characteristics, including its history of corporate misconduct, without limiting their consideration to whether past misconduct is similar to the instant offense.

Corporate Criminal Enforcement Policies¹

Fighting corporate crime is a top priority of the Department of Justice. By holding accountable individuals and companies responsible for criminal malfeasance, the Department protects the public, promotes the integrity of our markets, discourages unlawful business practices, fights transnational corruption, and upholds the rule of law. Additionally, we ensure public confidence in the fairness of our economic system and make clear that no one is above the law.

This Memorandum makes certain revisions to the Department's existing corporate criminal enforcement policies and practices. The changes announced today will aid Department attorneys immediately in our ongoing efforts to combat corporate crime and ensure consistency in our efforts to prevent corporate criminal conduct from occurring in the first instance; hold accountable individuals responsible for corporate crimes; and ensure that corporations take steps to prevent the recurrence of criminal conduct. I view these changes, which (1) instruct our attorneys to consider a corporation's entire criminal history, (2) clarify a corporation's obligation to provide all information concerning all persons involved in corporate misconduct in order to receive

¹ This Memorandum does not supersede or in any way alter the Antitrust Division's Corporate Leniency Policy.



Monaco Memo

Cooperation Credit

- Identify all individuals
- Substantially involved or responsible for misconduct
- No requirement to waive privilege
- Good faith exception



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ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, TAX DIVISION
ACTING ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION

To receive any consideration for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide to the Department all nonprivileged information relating to that misconduct. To receive such consideration, companies cannot limit disclosure to those individuals believed to be only substantially involved in the criminal conduct. This requirement includes individuals inside and outside of the company. Department attorneys are best situated to assess the relative culpability of, and involvement by, individuals involved in misconduct, to include those

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Increased Resources for Corporate Prosecutions

- 34 new attorneys for DOJ Criminal Fraud Section in 2021
- Funding for DOJ to hire another 120 prosecutors in 2022
- Funding to add more than 900 FBI agents to support the FBI's white collar criminal enforcement
- DOJ identified a chief prosecutor to lead specialized teams focused pandemic fraud
- Increasing focus and resources for use of data analytics



Impact on Internal Investigations

- Impact of DOJ policies on internal investigations:
 - Re-emphasizes the need to conduct internal investigations
 - Consider investigating individuals involved in conduct
 - Evaluate past history
 - Non-criminal guidance, warnings, sanctions, prior criminal charges
 - Look at history



Key Obligations of Corporate Criminal Settlements

- Affirmative obligations:
 - Cooperation with ongoing investigations
 - Disclosure of any new covered wrongdoing
 - Corporate compliance program and related monitoring
 - *Failure to meet these obligations may result in breach of agreement*
- In addition, a company may be in breach if it:
 - Commits a felony under U.S. law
 - Provides false, incomplete or misleading information about individual culpability
 - Commits any act that is repetitive of the type of conduct that formed the basis of the settlement agreement
 - » In the FCPA context, companies cannot commit any act that, if within the jurisdictional reach of the Act, would violate the FCPA
 - » In the healthcare and sanctions contexts, companies must commit to not violating regulations and laws at issue in the underlying agreements
 - Makes statements contradicting facts outlined in the agreement
- The DOJ, in its sole discretion, determines whether a breach has occurred

- Prosecution under the facts of the case, taking into account that:
 - Facts have been admitted
 - Statute of limitations has been waived
- Extension of the term of the agreement
- The above gives DOJ the leverage to secure:
 - Plea of guilty to underlying charges if the DOJ decides to prosecute
 - Negotiated extension of DPA or NPA obligations

Staying out of Trouble: DOJ's Guidance on Compliance Programs

Chris Bell bellc@gtlaw.com

July 28, 2022

DOJ Evaluation of Corporate Compliance Programs

- § 9-28.800 of the Justice Manual
- Serves as guidance for prosecutors in deciding:
 - Whether and how to bring a criminal case against organizations
 - A company's culpability score under U.S. Sentencing Guidelines
 - Whether an independent monitor is needed post-resolution
- Many other sources of guidance, including:
 - U.S. Sentencing Guidelines
 - Agency/Program-specific guidance
 - *e.g.*, SEC, EPA, FCPA, HHS/OIG, etc.
 - Private and non-governmental sources
 - *e.g.*, trade association codes, ISO standards (*e.g.*, ISO 14001 (environmental), 45001 (safety), 37001 (anti-bribery))

The Many Purposes of Compliance Programs

- Prevent non-compliance from happening in the first place
 - Maintain a good compliance history
 - Deputy A.G. Monaco: “That record of misconduct speaks directly to a company’s overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity.”
 - Protect/enhance reputation/brand, and support other organizational initiatives (e.g., ESG)
- Early detection
 - Decrease severity of non-compliance
 - Increase ability for early and effective mitigation
- Mitigate consequences
 - Civil vs. criminal
 - Organizational vs. individuals (the “bad apple” defense)
 - Mitigate penalties
 - Decrease possibility of monitorships

Deputy A.G. Monaco on Compliance Programs

- “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.”
- “In general, the Department should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship. Where a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, Department attorneys should consider imposing a monitorship. This is particularly true if the investigation reveals that a compliance program is deficient or inadequate in numerous or significant respects. Conversely, where a corporation's compliance program and controls are demonstrated to be tested, effective, adequately resourced, and fully implemented at the time of a resolution, a monitor may not be necessary.”

DOJ Evaluation of Corporate Compliance Programs

1. Is the corporation's compliance program well designed?

- A. Risk Assessment
- B. Policies and Procedures
- C. Training and Communication
- D. Confidential Reporting Structure and Investigation Process
- E. Third Party Management
- F. Mergers and Acquisitions (M&A)

2. Is the program being applied earnestly and in good faith? Is the program adequately resourced and empowered to function effectively?

- A. Commitment by Senior and Middle Management
- B. Autonomy and Resources
- C. Incentives and Disciplinary Measures

3. Does the corporation's compliance program work in practice?

- A. Continuous improvement, Periodic Testing, and Review
- B. Investigation of Misconduct
- C. Analysis and Remediation

DOJ Evaluation of Corporate Compliance Programs

1. Is the corporation's compliance program well designed?

- Senior management oversight
 - Sentencing Guidelines recommend Board-level oversight
- Comprehensive and tailored to company risk profile
 - Consider coordinating with company risk management programs (e.g., ERM)
- Allocates sufficient resources
- Performance assessments, auditing, key performance indicators, etc.: what gets measured gets done

A. Risk Assessment

B. Policies and Procedures

C. Training and Communication

D. Confidential Reporting Structure and Investigation Process

Best Practice: Integrate with Regular Business Operations & Systems

DOJ Evaluation of Corporate Compliance Programs

2. Is the program being applied earnestly and in good faith? Is the program adequately resourced and empowered to function effectively?

- Compliance program is not simply a “paper program” or “snapshot”
- Discipline for misconduct that is applied consistently and equally regardless of employee seniority: critical to credibility of program and “bad apple” defense
- Incentives to encourage good compliance behavior
- Continually reviewing and communicating performance data
- Program review and continual improvement

- A. Participation by Senior and Middle Management
- B. Autonomy and Resources
- C. Incentives and Disciplinary Measures

Visible and Regular Management Participation Critical to Effective Ethical and Compliance Culture

DOJ Evaluation of Corporate Compliance Programs

3. Does the corporation's compliance program work in practice?

- Instances of misconduct do not, by itself, mean that a compliance program was ineffective: perfection not expected
- Credible “culture of compliance”
- Improving performance: credible investigations, meaningful root cause analysis, and effective preventive & corrective action

- A. Continuous improvement, Periodic Testing, and Review
- B. Investigation of Misconduct
- C. Analysis and Remediation

Elevate Compliance & Ethics Performance Alongside Other Key Business Metrics

Some Closing Thoughts on Compliance Programs

- Deputy A.G. Monaco’s recommendation:
 - “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.”
- DOJ is not the only audience for compliance and ethics programs
 - Employees, neighbors, shareholders, Federal, State, local agencies, etc.
 - Not just for crime: they are general risk-management tools
- Integration into everyday business operations and systems can be a significant “force multiplier”
 - Successful companies already know how to manage complex challenges
- To repeat: direct and everyday management participation (not just “commitment”) is critical to the success of an effective compliance and ethics program

Additional Risk Mitigation Strategies

From siloes to coordinated risk management





Thank You

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