

DOJ Signals Increased Use of Corporate Monitors

November 18, 2021

On October 28, 2021, Deputy Attorney General Lisa Monaco announced revised Department of Justice (DOJ) guidance on corporate monitors. Going forward, prosecutors are free to require the imposition of a corporate monitor when they determine it is appropriate to ensure compliance. This is a stark departure from previous guidance, and companies should expect the DOJ to make greater use of corporate monitors as part of its more aggressive approach to corporate criminal enforcement.

Revised Guidance on Corporate Monitorships

When a corporation resolves a criminal investigation through a deferred prosecution or non-prosecution agreement, the DOJ often mandates the adoption of a strict compliance program evaluated by an independent corporate monitor. An independent corporate monitor assesses a corporation's compliance with the terms of a corporate criminal resolution.

In her keynote address to the ABA's 36th National Institute on White Collar Crime, Monaco previewed the DOJ's renewed focus on corporate criminal enforcement, including revisions to monitorship guidance.¹ Monaco made clear that "to the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception," that guidance is rescinded. Under the revised guidance, the DOJ "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."

Monaco's speech was accompanied by the release of a DOJ memorandum entitled "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (the Memorandum).² The Memorandum provides guidance to prosecutors on when to impose a corporate monitor. "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 monitor," the Memorandum notes. DOJ attorneys are more likely to impose a monitor where a corporation's compliance program and controls are untested, ineffective, or inadequately resourced. "This is particularly true if the investigation reveals that a compliance program is deficient or inadequate in numerous or significant respects," according to the Memorandum.

In short, there will be no default presumption against corporate monitors for companies cooperating with the government. Rather, prosecutors will determine whether to impose a corporate monitor in light of the facts and circumstances of each case, and companies can expect the DOJ to make more use of monitors going forward.

¹ Press Release, "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," Oct. 28, 2021, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

² Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021, available at <https://www.justice.gov/dag/page/file/1445106/download>.

DOJ Forms Corporate Crime Advisory Group

The revised guidance is part of the DOJ's "first steps to reinforce our commitment to combatting corporate crime." To that end, Deputy Attorney General Monaco announced the formation of a Corporate Crime Advisory Group tasked with reviewing the DOJ's approach to prosecuting criminal conduct by corporations and their executives, management and employees. The Advisory Group will be composed of representatives from every part of the DOJ involved in corporate criminal enforcement. As part of its broad mandate, the Advisory Group will consider the DOJ's standards and practices for selecting corporate monitors and develop recommendations and proposed revisions to the DOJ's policies on corporate criminal enforcement.

Katten is especially experienced with administering DOJ-imposed corporate monitorships and is prepared to help companies navigating the new enforcement landscape. Katten has had the rare distinction of being selected for two high-profile corporate monitorships at the same time. We bring that experience to every stage of the monitorship process – not only serving as monitors, but also advising companies that are subject to them.

Gil Soffer, managing partner of Katten's Chicago office, has deep experience in the area of independent corporate monitorships. As Associate Deputy Attorney General, Gil was a principal drafter of the DOJ's Corporate Monitor Principles. He has testified before the US House of Representatives Judiciary Committee's Subcommittee on Commercial and Administrative Law regarding the use and selection of corporate monitors in criminal cases. And in February 2017, the DOJ and SEC appointed Gil as the global corporate compliance monitor for the world's largest manufacturer of generic pharmaceuticals, in one of the most substantial FCPA resolutions to date. Another Chicago partner, Dan Collins, has served as counsel to a monitor imposed by the CFTC in an investigation of manipulative trading practices.

CONTACTS

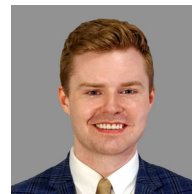
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