

The Department's Corporate Criminal Enforcement Policy Changes: Implications for Antitrust Practice

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On September 15, 2022, Deputy Attorney General Lisa Monaco announced revisions to the Department of Justice's (the "Department") corporate criminal enforcement policies that are anchored in commitments to individual accountability and ensuring more and faster prosecutions of corporate crime to counter the "overall decline in corporate criminal prosecutions over the last decade."²

The policy changes govern the Department as a whole but have several implications for the Antitrust Division (the "Division") and its criminal enforcement program, particularly when considered with the Division's April 2022 update to its Leniency Policy and July 2019 decision to consider compliance efforts at the charging stage of criminal cases.

This article outlines the Department's changes and their implications for antitrust enforcement, including (i) prioritizing individual prosecutions and increasing the Department's expectations of cooperating companies, (ii) expanding voluntary self-disclosure policies – like the Division's Leniency Policy – across the Department, (iii) considering a broader corporate criminal history in determining the appropriate form of resolution, (iv) removing any bars to corporate monitorships, and (v) increasing expectations for corporate compliance.

Individual Accountability & Cooperation

The Department's "top priority for corporate criminal enforcement" is prosecuting individuals "who commit and profit from corporate crime."³ To that end, the Department recently announced new policies that raise expectations of cooperating companies.

First, in a speech last year, the Department explained eligibility for cooperation credit requires "identify[ing] all individuals involved in the misconduct – not just those substantially involved – and produc[ing] all non-privileged information about those individuals' involvement."⁴

Second, companies that unduly or intentionally delay producing information or documents will have their cooperation credit reduced or denied outright.⁵ In particular, cooperating companies are expected to produce hot documents and evidence in real time. Department prosecutors, in turn, must work to seek individual charges before or at the same time as corporate resolutions.⁶

Both words and data indicate that the Division shares the Department's commitment to individual charges. Between 2012 and 2021, the Division prosecuted individuals at an overall average rate of nearly three for every company.⁷ And earlier this year, Antitrust Division Assistant Attorney General Jonathan Kanter touted the Division's 21 indicted cases against 42 individuals, including 9 CEOs and corporate

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² Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

³ *Id.*

⁴ Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

⁵ Monaco, *supra* note 2.

⁶ *Id.*

⁷ Criminal Enforcement Trends Charts, ANTITRUST DIV., U.S. DEP'T OF JUSTICE (Nov. 16, 2021), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

presidents.⁸ Although in the past, individual charges often trailed corporate resolutions in Antitrust Division investigations, a host of recent prosecutions have followed the sequence outlined by Monaco, with individual charges preceding corporate resolutions. Like Department leadership, Division officials have also stressed the importance of timely cooperation.⁹

So while these changes are in line with the Division's efforts to prioritize individual accountability, they also raise the bar for the expected speed and depth of cooperation.

Benefits of Voluntary Self-Disclosure

Monaco also announced a Department-wide effort to ensure that companies "benefit" from a decision to voluntarily self-disclose misconduct. Now, every Department component is required to develop a formal, documented policy – like the Antitrust Division's Leniency Policy – that rewards voluntary self-disclosure.¹⁰

Under the Antitrust Division's Leniency Policy, as updated in April 2022, the Division will not criminally prosecute companies and individuals that self-report their participation in a criminal conspiracy in violation of Section 1 of the Sherman Act.¹¹ Companies that self-report their conduct before the Division has received information about the conspiracy from any source are eligible for Type A leniency, which also protects the applicant's current employees from prosecution. In turn, Type B leniency is available if the Division does not yet have evidence likely to result in a sustainable conviction against the applicant. In that case, non-prosecution protection for the applicant's

employees is not guaranteed and is considered at the Division's discretion.

Under the Department's voluntary disclosure policy, the Department will not seek a guilty plea or impose a compliance monitor when the company voluntarily self-discloses, cooperates fully, and remediates the conduct, absent aggravating factors such as deeply pervasive misconduct.

The April 2022 updates to the Leniency Policy in many ways mirror the hallmarks of the Department's new voluntary disclosure policy.

First, the 2022 updates added the requirement that applicants promptly self-report after discovering misconduct.¹² Likewise, the Department guidance emphasizes that "voluntary self-disclosure only occurs when companies disclose misconduct promptly and voluntarily."¹³

Second, the Division added to its expectations of applicants' cooperation. Cooperation must not only be "continuing" and "complete," as it was under the earlier iteration of the Leniency Policy, but also "timely" and "truthful."¹⁴ Similarly, the Department's guidance emphasizes cooperation must occur "swiftly and without delay."¹⁵

Third, in addition to restitution, the Division added the requirement that the company undertake remedial measures to redress harm and improve its compliance program, which corresponds with the Department's requirement of appropriate remediation.

The Department left it to individual components to outline aggravating factors, such as deeply pervasive conduct. Again, clues about aggravating factors in Division investigations are contained in the Leniency Policy itself.

⁸ Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

⁹ See Richard A. Powers, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Remarks on the State of Criminal Antitrust Enforcement in 2020 (Feb. 7, 2020), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-state-criminal> (explaining the Division's expectation of timely cooperation both in its charging stage assessment of compliance programs and in the context of the U.S. Sentencing Guidelines' culpability score reduction for "timely and thorough cooperation.").

¹⁰ Monaco, *supra* note 2.

¹¹ U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 7-3.300 (2022), <https://www.justice.gov/jm/jm-7-3000-organization-division>.

¹² *Compare id.*, §§ 7-3.310–20, with U.S. DEP'T OF JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (1993), <https://www.justice.gov/atr/file/810281/download>.

¹³ Memorandum from Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Justice, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group 7 (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>.

¹⁴ JUSTICE MANUAL, *supra* note 11, § 7-3.300.

¹⁵ Monaco, *supra* note 13, at 3.

Leniency will not be granted if the applicant coerced another party to collude and was the leader or originator of that activity. Additionally, in the case of Type B leniency, the Division considers whether granting leniency would be unfair because of the nature of the illegal activity, the applicant's role, criminal history, and timing of its application.¹⁶ Criminal history was an April 2022 addition, which is consistent with the Department's focus on corporate recidivism, discussed further below.

Though these aggravating factors introduce discretion and therefore uncertainty for potential applicants, the Department's and Division's expectations are clear: companies "should seek a leniency marker at the first sign of potential wrongdoing"¹⁷ and Department policies, including the Leniency Policy, "must ensure that a corporation benefits from" voluntarily self-disclosure, "through resolution under more favorable terms than if the government had learned of the misconduct through other means."¹⁸

While the Division's Leniency Policy does not bind other components that could, at least in theory, prosecute applicants for offenses other than Sherman Act violations,¹⁹ the Department's explicit endorsement of policies like the Division's Leniency Policy may guide other components to honor the benefits afforded to antitrust leniency applicants. For example, during a 2019 roundtable, the American Bar Association's Antitrust Section urged the Department to limit False Claims Act ("FCA") recoveries to actual rather than treble damages from leniency recipients who cooperate with both the Antitrust and Civil Divisions.²⁰ Department edict that the Civil Division adopt a

policy similar to the Antitrust Division's Leniency Policy – and the April 2022 decision to enshrine the Leniency Policy in the Department-wide Justice Manual – may open the door to a Civil Division policy limiting leniency applicants' FCA exposure. As components introduce their own voluntary disclosure policies, it is also worth watching for additional guidance from Department leadership or components about the intersection of their voluntary disclosure policies, such as the Civil Division's treatment of Antitrust Division leniency applicants.

There are also implications for the Antitrust Division itself. The Leniency Policy only applies to violations of Section 1 and other offenses committed "in furtherance of" a Section 1 violation.²¹ But the Division's criminal enforcement extends beyond Section 1. The Division, and its Procurement Collusion Strike Force in particular, routinely "investigates and prosecutes criminal violations under Title 18 affecting the competitive process, or affecting investigations into anticompetitive conduct," such as conspiring to defraud the federal government.²² The Division has also renewed its commitment to criminal prosecution of Section 2 of the Sherman Act.²³ Under the new Department-wide voluntary disclosure policy, it appears that companies that voluntarily self-disclose to the Antitrust Division standalone Title 18 violations and Section 2 violations that do not amount to a Section 1 violation, may avoid a guilty plea by voluntary disclosure, cooperation, and remediation.²⁴ This is also in keeping with the Leniency Policy FAQs, which encourage applicants to seek a leniency marker at the first sign of "potential *wrongdoing*" – rather than a violation of Section 1 – "no matter how slight" and "even if it is not certain that the

¹⁶ JUSTICE MANUAL, *supra* note 11, § 7-3.300; see U.S. DEPT OF JUSTICE, ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM 10 (2022) [hereinafter FAQs], <https://www.justice.gov/atr/page/file/1490311/download>.

¹⁷ FAQs, *supra* note 16, at 2.

¹⁸ Monaco, *supra* note 13, at 6.

¹⁹ FAQs, *supra* note 16, at 5–6.

²⁰ ANTITRUST LAW SECTION, AMERICAN BAR ASS'N, COMMENTS OF THE ANTITRUST LAW SECTION OF THE AMERICAN BAR ASSOCIATION REGARDING THE U.S. JUSTICE DEPARTMENT ANTITRUST DIVISION ROUNDTABLE DISCUSSION OF THE ANTITRUST CRIMINAL PENALTY ENHANCEMENT & REFORM ACT (2019), <https://www.justice.gov/atr/page/file/1168676/download>.

²¹ FAQs, *supra* note 16, at 5.

²² JUSTICE MANUAL, *supra* note 11, § 7-2.100.

²³ See Press Release, Dep't of Justice, Executive Pleads Guilty to Criminal Attempted Monopolization (Oct. 31, 2022), <https://www.justice.gov/opa/pr/executive-pleads-guilty-criminal-attempted-monopolization>; see also Kanter, *supra* note 8.

²⁴ Monaco, *supra* note 13, at 7 ("All Department components must adhere to the following core principals regarding voluntary self-disclosure . . . absent the presence of aggravating factors, the Department will not seek a guilty plea where a corporation voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct.").

wrongdoing occurred,”²⁵ along with guidance that “[a]pplicants with exposure for both antitrust and non-antitrust crimes should report all crimes to the relevant prosecuting agencies.”²⁶

History of Corporate Misconduct

Monaco also announced the Department will take a holistic view of a company’s history of misconduct. Prosecutors will now consider a company’s “full criminal, civil, and regulatory record,” “whether or not that misconduct is similar to the conduct at issue in a particular investigation.”²⁷ Beyond the expectation that companies learn from specific mistakes, the changes emphasize that a history of misconduct may speak to the company’s commitment to compliance and respect for the law. Also underlying the Department’s broader assessment is the warning that recidivists cannot assume entitlement to serial deferred and non-prosecution agreements.

For corporations in the Antitrust Division’s crosshairs, the breadth of the inquiry may prove particularly wide ranging. The default is for corporations to report criminal resolutions within the last ten years, civil or regulatory resolutions within the last five years, and ongoing state, federal, and international investigations.²⁸ While resolutions older than these five- and ten-year defaults are accorded “less weight,” prosecutors’ assessment can date back to corporate inception. That task alone may prove burdensome in Division investigations.²⁹ For example, foreign companies account for over 80% of the Division’s resolutions with fines/penalties over \$10 million.³⁰ For companies with a long history, international reach, and significant size, a thorough accounting could lengthen and complicate the

resolution process, particularly if the company is deemed a recidivist whose resolution requires sign off by Department leadership.³¹ Acquisitions may also complicate matters. Companies that have acquired firms with a history of misconduct will not be treated as recidivists, but only if the misconduct is promptly and properly addressed post-acquisition, which puts a premium on effective “pre-acquisition diligence and post-acquisition integration.”³² While dated, distant, and distinguishable bad acts are unlikely to change the Division’s willingness to enter into a deferred prosecution agreement (“DPA”), expanding the calculus makes predicting the decision on the appropriate form of resolution less certain.

There is also the question of the effect of a prior resolution, including non-prosecution under the Leniency Policy, on a subsequent leniency applicant. In the case of Type A leniency, a prior resolution should not amount to a bar because a pristine past is not a prerequisite.³³ However, Type B leniency includes an additional requirement that granting leniency “would not be unfair to others,” an assessment that expressly includes consideration of “the applicant’s criminal history.”³⁴ Although a Type B applicant’s prior criminal history will be considered, there are arguments that a criminal history should not lead the Division to turn the applicant away as a recidivist. Indeed, both Type A and Type B applicants must promptly report misconduct. And the Department’s revised policy emphasizes that prosecutors should credit “timely, voluntary self-disclosure,”

²⁵ FAQs, *supra* note 16, at 2, 3.

²⁶ *Id.* at 5–6.

²⁷ Monaco, *supra* note 4.

²⁸ Monaco, *supra* note 13, at 5 n.5.

²⁹ *Id.*

³⁰ U.S. DEP’T OF JUSTICE, ANTITRUST DIV., SHERMAN ACT VIOLATIONS YIELDING A CORPORATE FINE OF \$10 MILLION OR MORE (2021), <https://www.justice.gov/atrp/page/file/991706/download>.

³¹ Monaco, *supra* note 13, at 6.

³² Marshall Miller, Principal Assoc. Deputy Att’y Gen., U.S. Dep’t of Justice, Keynote Address at Global Investigations Review (Sept. 20, 2022), <https://www.justice.gov/opa/speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-live-keynote-address>; see Monaco, *supra* note 13 **Error! Bookmark not defined.**, at 5–6.

³³ JUSTICE MANUAL, *supra* note 11, § 7-3.310.

³⁴ *Id.* § 7-3.320.

including for a company with a prior resolution.³⁵ Compliance improvements – which are now required to receive Type A or Type B leniency – are also critical because the assessment of prior misconduct includes resulting remediation and compliance program updates. As Monaco recognized, “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.”³⁶ Still, potential applicants should consider their criminal history and be mindful of the Division’s ability to exclude Type B applicants on the basis of that history.

Transparency & Leniency

While the Division has long emphasized its commitment to a transparent and predictable Leniency Policy, applicants themselves are treated “in strict confidence.”³⁷ The Department Guidance, however, commits to publication of corporate criminal resolutions on the Department’s public website, absent exceptional circumstances. It is left unstated, but presumably resolutions pursuant to the Division’s Leniency Policy amount to such an exceptional circumstance. Alternatively, because final leniency letters are only issued upon completion of the investigation and any resulting prosecutions, a process that can take years, confidentiality may no longer be required by the time of a final letter.

Corporate Monitorships

The Department also rescinded prior guidance discouraging the use of corporate monitors, in favor of an assessment based upon the facts and circumstances of each case. Monitors must be selected according to a documented process, like the Antitrust Division’s Memorandum on Selection of Monitors.³⁸ Historically, the Division’s use of monitors has been limited, and typically in the context of court-imposed probation following a guilty verdict or guilty plea.³⁹ While the imposition of a monitor will remain a fact-specific assessment based upon a range of factors including the risk of further corporate misconduct, a recent civil resolution proposing a ten-year monitorship may indicate a newfound willingness to impose monitorships.⁴⁰

Compliance

The Department also emphasized the importance of effective compliance programs and ethical corporate behavior. In addition to a broad commitment to reward “historical investments in compliance” and “incentivize other companies to make the same investments going forward,”⁴¹ Monaco highlighted two metrics applicable to antitrust compliance: compensation structures that promote compliance and monitoring and recovery of business data from personal devices and third-party messaging platforms.

In 2019, the Antitrust Division began considering corporate compliance efforts at the

³⁵ Monaco, *supra* note 13, at 6; see also Miller, *supra* note 32 (“[W]hile this Department will disfavor successive probationary agreements for the same company, we are not foreclosing their use. To the contrary, there remain available pathways to obtain DPAs, NPAs, and even declinations.”); Kenneth A. Polite, Assistant Att’y Gen., U.S. Dep’t of Justice, Criminal Div., Remarks at the University of Texas Law School (Sept. 16, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school> (“A history of misconduct will not necessarily mean an automatic guilty plea . . .”).

³⁶ Monaco, *supra* note 2; see also FAQs, *supra* note 13, at 34–35 (“In certain circumstances, a disposition short of a criminal conviction may be appropriate even if an organization does not qualify for leniency, especially when it has invested in an effective compliance program that allowed it to identify the misconduct and promptly self-report, despite that it was not the first to seek leniency.”); Monaco, *supra* note 13, at 6 (“timely voluntary disclosures . . . can also reflect that a corporation is appropriately working to detect misconduct and takes seriously its responsibility to instill and act upon a culture of compliance.”).

³⁷ FAQs, *supra* note 16, at 31–32.

³⁸ Monaco, *supra* note 13, at 13.

³⁹ See, e.g., Plea Agreement, *U.S. v. Hoegh Autoliners AS*, No. 1:17-cr-00505-GLR (D. Md. Dec. 8, 2017), <https://www.justice.gov/atr/case-document/file/347164/download>; Press Release, Dep’t of Justice, Taiwan-Based AU Optronics Corporation Sentenced to Pay \$500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sep. 20, 2012), <https://www.justice.gov/opa/pr/taiwan-based-au-optronics-corporation-sentenced-pay-500-million-criminal-fine-role-lcd-price>.

⁴⁰ Press Release, Dep’t of Justice, Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers (July 25, 2022), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

⁴¹ Monaco, *supra* note 2.

charging stage, opening the door to a DPA when warranted under the Principles of Federal Prosecution of Business Organizations.⁴² Although both compensation and preservation are mentioned in Antitrust Division guidance on its evaluation of corporate compliance efforts,⁴³ the Department's Memorandum expands on each metric.⁴⁴

First, prosecutors' evaluation of corporate compliance efforts will consider whether the company's compensation system rewards compliance and imposes financial penalties for misconduct, such as through provisions that claw back compensation paid to those who "engaged in or did not stop wrongdoing."⁴⁵ Here, the Department's expectations are clear and unequivocal: we expect "that companies will

have robust and regularly deployed clawback programs."⁴⁶

Second, the Department also pointed to compliance risks associated with the business use and preservation of data and communications on personal devices and third-party messaging applications. The Department expects enforced and effective policies governing the use (or forbidding the use) of personal devices and third-party messaging platforms for business purposes to prevent off-system activity and ensure that all key data and communications are preserved.⁴⁷ These efforts are particularly critical in antitrust investigations, where prosecutors will request and assess evidence of communications between competitors.⁴⁸

A commitment to greater and faster enforcement – backed by a request for \$250 million to fund the Department's corporate crime initiatives – combined with higher expectations for cooperation and compliance, makes consulting with experienced counsel about the intersection of Department and Division policy all the more critical. So too is an assessment of antitrust compliance efforts following the Department's message that "[c]ompanies 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."⁴⁹ Whether under the Division's Leniency Policy or the Department's expanded effort to promote voluntary self-disclosure, an ounce of prevention can put companies in the best position to avoid, or at least mitigate, the Department's commitment to imposing a pound of cure.

⁴² Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs (July 11, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-i-o>.

⁴³ U.S. DEP'T OF JUSTICE, ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS 5 (July 2019), <https://www.justice.gov/atr/page/file/1182001/download> ("Does the company have clear document retention guidelines and does it educate employees on the ramifications of document destruction and obstruction of justice?"); *id.* at 7 ("[A]s employees utilize new methods of electronic communication, what is the company doing to evaluate and manage the antitrust risk associated with these new forms of communication?"); *id.* at 12 ("Has the company considered the implications on antitrust compliance of its incentives, compensation structure, and rewards? . . . Have there been specific examples of actions taken (e.g., promotions or awards denied, or bonuses clawed back) because of compliance considerations?").

⁴⁴ See Monaco, *supra* note 13, at 10.

⁴⁵ Miller, *supra* note 32.

⁴⁶ *Id.*

⁴⁷ See Monaco, *supra* note 13, at 11 ("As a general rule, all corporations with robust compliance programs should have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, should provide clear training to employees about such policies, and should enforce such policies when violations are identified.")

⁴⁸ See Richard A. Powers, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Keynote at the University of Southern California Global Competition Thought Leadership Conference (June 3, 2022), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-keynote-university-southern> ("Companies should consider whether permitting their employees to use personal devices with encrypted apps to conduct business is consistent with a culture of compliance.")

⁴⁹ Monaco, *supra* note 4.