

# DOJ Steps Up Corporate Criminal Enforcement, Looks More Broadly at Past Misconduct

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## Takeaways

- The DOJ will take a more proactive approach to FCPA investigations.
- Companies seeking cooperation credit must disclose information about all culpable individuals, not just those “substantially involved” in misconduct.
- Corporate resolutions will take into account all prior misconduct, not just misconduct similar to that in the current case.
- Monitors will be required where deemed necessary to ensure corporate compliance with obligations imposed by resolution; they are not reserved for exceptional circumstances.

As was widely expected, the Department of Justice’s (DOJ’s) enforcement approach shifted when the Biden administration took over, with senior officials adopting a somewhat less corporate-friendly tone in their policy pronouncements and public statements concerning corporate crime. It remains to be seen whether this tougher approach will result in more investigations and charges against individuals and entities, or more significant penalties. But the message from the department is clear: Companies should actively review their compliance programs to ensure adequate monitoring and remediation of misconduct. Those that have entered into nonprosecution or deferred prosecution agreements with the department in the past should ensure they are compliant with the obligations imposed.

## Foreign Corrupt Practices Act Enforcement

The new administration has not revised the department’s Foreign Corrupt Practices Act (FCPA) enforcement policies, and 2021 was relatively quiet with respect to enforcement in this area. The DOJ brought 14 FCPA actions during 2021, compared to 30 in 2020. This decline could be a result of the diminishing investigation numbers over the past few years and, if so, might continue into 2022; but, based on statements from DOJ officials, we may instead see an uptick in cases over the next year.

In June 2021, then-Acting Assistant Attorney General Nicholas McQuaid, currently the principal deputy assistant attorney general for the Criminal Division, promised an entirely new approach to FCPA enforcement. In particular, he noted that the department is now more focused on proactive and innovative data mining, the use of law enforcement sources and close partnerships with foreign governments, as means to build cases.

His statements suggested that, to the extent the department previously sought to incentivize cooperation and voluntary self-disclosure in identifying misconduct, it will now rely more heavily on using proactive — and in many cases covert — investigative tools. He also predicted that FCPA enforcement results in 2021 would be on par with past years’ size, scope and significance, suggesting that, while the figures so far have lagged, these new investigative techniques could bear fruit in the coming year.

Other signs indicate the FCPA will be an area of enforcement focus. The White House has identified corruption as a “core” national security interest and developed a new five-pillar strategy to combat it. That includes new investigative tools, such as the recently expanded foreign bank subpoena power pursuant to the National Defense Authorization Act, which should allow the DOJ and its enforcement partners to obtain

additional information about overseas bank accounts. The department has also formed a new anticorruption task force to focus on Central America, seeking to mentor prosecutors in the region so they can build and charge their own cases, with the task force handling cases with jurisdictional links to the U.S.

### Corporate Enforcement More Broadly

On October 28, 2021, Deputy Attorney General Lisa Monaco announced what promises to be the first of a number of changes to the DOJ's policies concerning its response to corporate crime, simultaneously with the issuance of a memorandum memorializing those changes. Consistent with the approach of prior administrations, her remarks made clear that the department's first priority in corporate criminal cases is to prosecute individuals who engage in and profit from corporate misconduct. She noted that, while high-profile cases against corporate executives are difficult, the department will not shy away from meritorious charges, and plans to "surge resources" to its prosecutors. These resources will include embedding a squad of Federal Bureau of Investigation agents within the department's Criminal Fraud Section — a proven model for success in complex high-profile cases.

In addition, as anticipated, Deputy Attorney General Monaco announced several key policy changes set out in the October 28 memorandum, not only reversing some of the more corporate-friendly pronouncements of the Trump Justice Department, but also taking a tougher stance with respect to certain issues than the Obama DOJ.

#### Evidence of individual wrongdoing.

Newly enacted DOJ policy now requires companies that seek cooperation credit to disclose all nonprivileged information about individual wrongdoing. Policies imposed during the prior administration

allowed disclosure to be limited to individuals whom companies viewed as "substantially involved" in the misconduct.

The recent change shifts to the DOJ — and away from the corporate entity seeking cooperation credit — the responsibility for determining the relative culpability and importance of the individuals involved in the misconduct. This may not result in more charges, or more charges of minor participants, but, at a minimum, it changes the tone of the DOJ's approach to corporate cooperation.

**Past misconduct.** Another notable shift in DOJ policy pertains to the significance of historical misconduct in determining an appropriate resolution of a corporate criminal investigation. At least since 2008, the department has directed its prosecutors to consider a company's history of conduct *similar to the conduct under investigation* in deciding whether to bring criminal charges. Going forward, however, prosecutors are required to consider not only similar misconduct, but the entire domestic or foreign criminal, civil and regulatory record of a company when shaping a resolution. (See also the discussion of recidivism below.)

**Monitors.** Finally, as discussed in the October 28 memorandum and in Monaco's accompanying remarks, the DOJ has indicated it may be more willing to press for corporate monitors than the prior administration. The DOJ's 2018 guidance required prosecutors to consider a number of factors in determining whether a corporate monitor should be imposed, but noted that many corporate criminal resolutions will not require a monitor and directed that the scope of any monitorship be appropriately tailored to the specific needs and concerns at issue.

The prior guidance concerning principles governing whether a monitor should be required as part of a corporate resolution has been rescinded and superseded

— specifically to the extent it suggests that monitorships are disfavored or reserved for exceptional circumstances. While that change may not result in more frequent use of monitors, it makes clear that a monitor may appropriately be imposed whenever the DOJ feels that one is needed to ensure a company complies with its post-resolution obligations.

**Recidivism and deferred and nonprosecution agreements.** Deputy Attorney General Monaco made clear that the department is actively considering how to deal with corporate recidivists, raising the question whether they should be eligible for nonprosecution agreements (NPAs) or deferred prosecution agreements (DPAs), and how to ensure that companies subject to such agreements comply with their obligations.

The recent resolution of the DOJ's investigation of NatWest Markets Plc gives some insight into the effects of the department's new policies. On December 21, 2021, Deputy Attorney General Monaco announced that NatWest would plead guilty to one count of wire fraud and one count of securities fraud and pay \$35 million in criminal fines, restitution and forfeiture. The plea resolved an investigation of alleged spoofing by NatWest traders — placing orders with the intent to cancel them as a means of manipulating prices — from January 2008 through May 2014, and again in 2018, involving the secondary market for U.S. Treasury instruments and the market for U.S. Treasury futures.

The plea agreement detailed NatWest's criminal history, as well as prior civil and regulatory actions, and the DOJ's public statements about the resolution made clear that it considered the bank's status as a "repeat offender," both related and unrelated to the conduct at issue.

The DOJ also took the position that NatWest's 2018 conduct breached a prior NPA between the bank and government,

entered into to resolve a securities fraud scheme in 2017, and that the breach called for serious consequences, despite the fact that NatWest reported the spoofing giving rise to the breach. The DOJ further noted that NatWest's 2018 conduct occurred while it was on probation following its 2015 guilty plea and 2017 sentencing

for conspiring to manipulate the foreign currency exchange market. In light of these facts, despite the substantial improvements NatWest already had made to its compliance program, the government required NatWest to agree to the imposition of an independent compliance monitor.

While the DOJ has not yet issued new policies concerning corporate recidivists, this precedent indicates that the department may well insist on guilty pleas, as opposed to NPAs or DPAs, in such cases.