

April 6, 2023

Government Investigations: What Do You Do When the Government Comes Knocking?

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**ROBUST ENFORCEMENT
ENVIRONMENT**

ROBUST ENFORCEMENT ENVIRONMENT

First Monaco Memo, October 2021

- ❑ “Fighting corporate crime is a top priority” of DOJ, which formed a Corporate Crime Advisory Group
- ❑ “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.”
- ❑ “One of the most effective ways to combat corporate misconduct is to hold accountable the individuals who perpetrated the wrongdoing.”
- ❑ No presumption against corporate monitorships.

FROM:

THE DEPUTY ATTORNEY GENERAL *Cern Monaco*

SUBJECT:

Corporate Crime Advisory Group and Initial Revisions to 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.

ROBUST ENFORCEMENT ENVIRONMENT

Second Monaco Memo, September 2022

- ❑ DOJ is more inclined than before to prosecute individuals engaged in cross-border crimes notwithstanding prosecutions of those same individuals in other jurisdictions.
- ❑ Companies with U.S. criminal resolutions within the past 10 years will face substantial difficulties in reaching favorable resolutions, such as deferred prosecution agreements or non-prosecution agreements, for new conduct.
- ❑ Increased focus on voluntary self-disclosure prior to the initiation of a government investigation.

JUSTICE NEWS

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

New York City, NY ~ Thursday, September 15, 2022



ROBUST ENFORCEMENT ENVIRONMENT

USAO Voluntary Self-Disclosure Policy, February 2023

- ❑ Provides standardization across U.S. Attorney's Offices throughout the country.
- ❑ Companies that make full and timely disclosures can avoid guilty pleas absent aggravating factors. Less generous incentive than Criminal Division's self-disclosure policy, where the presumption is a declination or a non-prosecution agreement.
- ❑ Self-disclosing companies can avoid compliance monitors if they have, at the time of resolution, demonstrated that they have implemented and tested an effective compliance program.



United States Attorneys' Offices Voluntary Self-Disclosure Policy

INTRODUCTION

The Deputy Attorney General's September 15, 2022 memorandum, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," instructed that each component of the Department of Justice (the "Department") that prosecutes corporate crime should review its policies on corporate voluntary self-disclosure and, if there is no formal written policy to incentivize self-disclosure, it must draft and publicly share such a policy.

SIGNIFICANT PROSECUTIONS OF INDIVIDUALS

Gregg Smith and Michael Nowak, August 2022

- ❑ JPMorgan executive director and managing director convicted for role in manipulating precious metals markets.
- ❑ Related to deferred prosecution JPMorgan entered into in September 2020 in which the company admitted to wire fraud and agreed to \$920mm resolution.

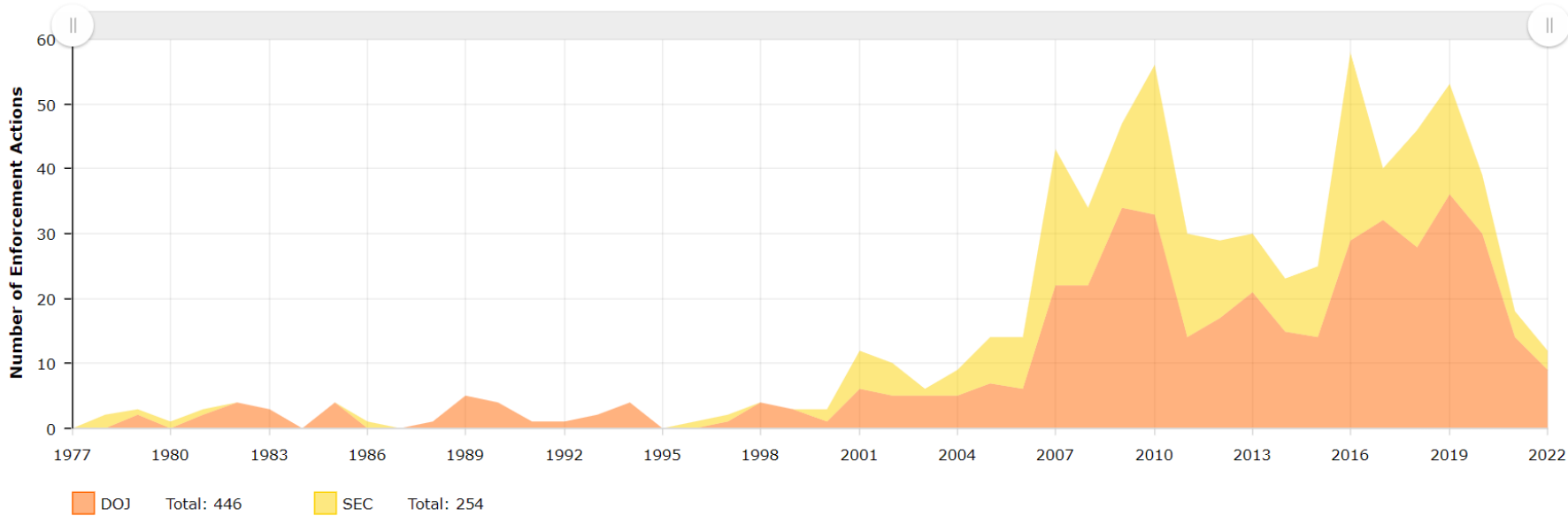
Laurence Doud, February 2022

- ❑ CEO of pharmaceutical company Rochester Drug Cooperative convicted of conspiring to unlawfully distribute oxycodone and fentanyl and conspiring to defraud DEA.
- ❑ First-ever conviction of pharmaceutical CEO for unlawful distribution of controlled substances.

Elizabeth Holmes and Ramesh "Sunny" Balwani, January and August 2022

- ❑ CEO and COO of Theranos convicted of fraud related to blood-testing company.

EXAMPLE: U.S. FCPA ENFORCEMENT ACTIVITY



FCPA Actions 1977-2006
DOJ: 76 (~2.5/year)
SEC: 41 (~1.4/year)

FCPA Actions 2007-2022
DOJ: 370 (~23.9/year)
SEC: 213 (~13.7/year)

Graph from <http://fcpa.stanford.edu/statistics-analytics.html>

STATE AG ENFORCEMENT ACTIVITY

- ❑ Aggressive enforcement activity in recent years.
- ❑ Investigations can often stem from issues uncovered during federal criminal probes. They can also start independently, including through data analytics or whistleblowers.
- ❑ Consumer protection has been a major focus of recent investigations.
- ❑ States frequently band together to form committees to investigate and resolve matters. This decreases the costs for states to litigate and increases the costs to settling companies.



SIGNIFICANT MULTI-STATE AG RESOLUTIONS

Navient, January 2022

- ❑ Allegations of unfair and deceptive student loan servicing practices and abuses in originating predatory student loans.
- ❑ \$1.85 billion resolution, consisting primarily of debt cancellation.

Google, November 2022

- ❑ Investigation into whether Google misled consumers about its location tracking practices.
- ❑ \$391.5 million resolution

JUUL Labs, December 2022

- ❑ Probe of sales and marketing practices, including with respect to youth.
- ❑ \$435 million resolution

02

IMPORTANCE OF COMPLIANCE PROGRAMS

COMPLIANCE – BEST PRACTICES

Why compliance programs matter

1. Prevent violations from occurring. Reduce likelihood of government investigations and private litigation (including shareholder suits).
2. Can lead prosecutors and regulators to reduce penalties if problems arise.
3. Can be a basis for avoiding charges against the company based on misconduct by individuals.
4. Reduces likelihood of a corporate compliance monitorship.

*“Let me also be clear: a company can fulfill its fiduciary duty to shareholders and maintain a commitment to compliance and lawfulness. 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.**”*

–DAG Lisa Monaco (Oct. 2021)

COMPLIANCE – BEST PRACTICES

DOJ Expectations at Time of Settlement:

- ❑ DOJ always reviews a company's compliance program as part of a corporate resolution.
- ❑ At time of review, DOJ expects the company to have implemented – not merely considered – comprehensive compliance improvements.

In DOJ communications, “it is important to demonstrate how a compliance program has been upgraded to address the root cause of the misconduct, and how it is being tested and updated to ensure that it is sustainable and adaptable to changing risk.”

Kenneth A. Polite Jr., AAG,
Criminal Division:

This means that the company not only needs to have already made the changes, but also evaluated them such that it can “demonstrate they are effective.”

A “‘check-the-box’ presentation from outside counsel” will not suffice.

COMPLIANCE – BEST PRACTICES

DOJ's Expectations at Time of Settlement:

- Will evaluate compliance program holistically.
- Will take a hard line when it perceives shortcomings.
- Not enough to simply fix the specific problem that led to the violations.
- Will ask whether a company has the type of compliance program that will prevent similar violations and other types of misconduct.

EFFECT OF COMPLIANCE PROGRAMS ON RESOLUTIONS

DOJ considers compliance in deciding whether to charge a company:

- Adequacy and effectiveness of compliance program at time of offense and time of charging decision.
- Remedial actions, including revisions to corporate compliance programs.

9-28.300 - FACTORS TO BE CONSIDERED

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See JM 9-27.220 et seq.* Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due

5. the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision (*see JM 9-28.800*);

EFFECT OF COMPLIANCE PROGRAMS ON RESOLUTIONS

DOJ considers compliance in deciding whether to charge a company:

- Even in cases that warrant charges, DOJ will sometimes agree to DPAs with companies that have demonstrated a commitment to compliance.
- DPAs give companies the chance to avoid indictment as long as they comply with certain requirements.
- DOJ may reduce penalties based on the strength of compliance programs.
- DOJ sometimes declines to prosecute companies for the actions of their employees if, among other factors, the companies have top-tier compliance programs.

UNITED STATES SENTENCING COMMISSION
GUIDELINES MANUAL
2018



§8B2.1. Effective Compliance and Ethics Program

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation – Organizations), an organization shall—
- (1) exercise due diligence to prevent and detect criminal conduct; and
 - (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

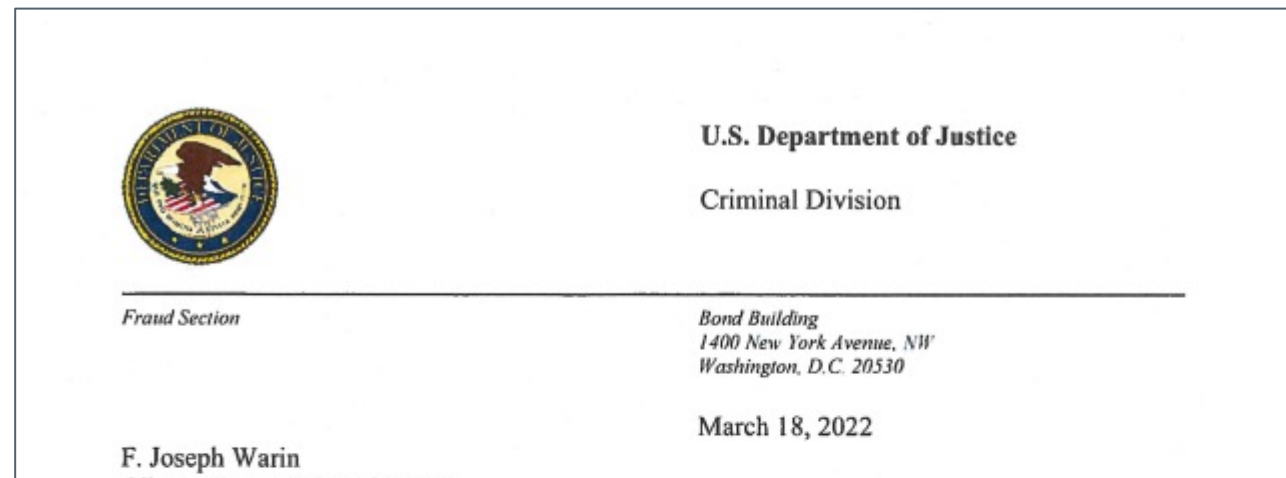
Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

COMPLIANCE PROGRAMS – EXAMPLES

High Quality Compliance Programs Have Led to More Favorable Resolutions:

Since 2016, DOJ has publicly declined to prosecute at least 15 companies notwithstanding FCPA violations by their employees.

Jardine Lloyd Thompson
Group Holdings, Ltd.
March 2022



The Department has decided to decline prosecution of this matter based on an assessment of the factors set forth in the Corporate Enforcement Policy, Justice Manual (“JM”) 9-47.120, and the Principles of Federal Prosecution of Business Organizations, JM 9-28.300, including but not limited to: (1) JLT’s voluntary self-disclosure of the misconduct; (2) JLT’s full and proactive cooperation in this matter (including its provision of all known relevant facts about the misconduct, including information about the individuals involved in the conduct) and its agreement to continue to cooperate in the Department’s ongoing investigations and any prosecutions that might result; (3) the nature and seriousness of the offense; (4) JLT’s timely and full remediation, including separation from the executive and third-party intermediary company involved in the misconduct and the efforts to enhance its anti-corruption training and compliance program; and (5) the fact that JLT agrees to and will disgorge the full amount of its ill-gotten gains (as described below).

COMPLIANCE PROGRAMS – EXAMPLES

High Quality Compliance Programs Have Led to More Favorable Resolutions:

One of the earliest examples of this trend was a 2012 decision not to charge Morgan Stanley.

Morgan Stanley
October 2012

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, April 25, 2012

Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA

WASHINGTON – A former managing director for Morgan Stanley’s real estate business in China pleaded guilty today for his

35 times. Morgan Stanley’s compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners.

himself and a Chinese government official,” said Assistant Attorney General Breuer. “As a managing director for Morgan Stanley, he had an obligation to adhere to the company’s internal controls; instead, he lied and cheated his way to personal profit. Because of his corrupt conduct, he now faces the prospect of prison time.”

COMPLIANCE PROGRAMS – EXAMPLES

High Quality Compliance Programs Have Led to More Favorable Resolutions:

Credit Suisse October 2021

- DPA and \$475mm monetary penalty to resolve wire fraud charges.
- DPA stated that an independent compliance monitor was unnecessary, in part based on the company's remediation and the current state of its compliance program.

[Company] has implemented and will continue to implement a compliance and ethics program designed to prevent and detect violations of [relevant laws] throughout its operations, including those of its affiliates, subsidiaries, agents, and joint ventures....

Epsilon Data Management January 2021

- DPA and \$150mm monetary penalty to resolve mail and wire fraud charges.

[Company] has made substantial investments in staffing and resources for its legal and compliance teams; updated policies, procedures, and supervisory structures...and expanded employee training....

COMPLIANCE PROGRAMS – EXAMPLES

Gaps in Compliance Programs Have Led to Unfavorable Resolutions:

Stericycle

April 2022

- Monitorship and \$84mm monetary penalty for FCPA violations

“Although Stericycle has taken extensive remedial measures, it has not fully implemented or tested its enhanced compliance program, necessitating the imposition of an independent compliance monitor for a term of two years.

- DOJ Press Release

Glencore

May 2022

- Guilty plea, three-year monitorship, and \$1bb monetary penalty for FCPA and commodity-pricing violations
- Resolution considered many factors, including Glencore’s compliance program and the progress of remediation

“Although Glencore has taken remedial measures, some of the compliance enhancements are new and have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, necessitating the imposition of an independent compliance monitor.”

- DOJ Press Release

COMPLIANCE PROGRAMS – BEST PRACTICES

A top-tier compliance program is:

- 1. Properly designed.**
2. Applied earnestly and in good faith: adequately resourced and empowered to function effectively.
3. Works well in practice.

A Well Designed Compliance Program Includes:

- Risk assessment
 - ✓ Proper methodology for identifying and prioritizing risks
 - ✓ Periodic review and incorporation of lessons learned
- Policies and procedures
 - ✓ Process for implementing, monitoring, and updating
 - ✓ Proper training for employees and for gatekeepers
- Confidential reporting structure and investigation process
 - ✓ Effective, well publicized mechanism for reporting
 - ✓ Properly scoped investigation by qualified personnel, with appropriate follow up

COMPLIANCE PROGRAMS – BEST PRACTICES

A top-tier compliance program is:

1. Properly designed.
2. **Applied earnestly and in good faith: adequately resourced and empowered to function effectively.**
3. Works well in practice.

What constitutes sufficient resources and independence?

- Structure
 - ✓ Independent compliance function headed by someone who has sufficient seniority and direct access to board of directors and audit committee
 - ✓ Head of compliance should have dotted-line reporting to management, with clearly defined autonomy and the ability to report around management
- Resources
 - ✓ Enough funding and staffing to carry out mission
 - ✓ Bigger companies require more resources
- Commitment
 - ✓ Proper tone and support from senior and middle management

COMPLIANCE PROGRAMS – BEST PRACTICES

A top-tier compliance program is:

1. Properly designed.
2. Applied earnestly and in good faith: adequately resourced and empowered to function effectively.
3. **Works well in practice.**

How should the program work in practice?

- Routine improvement, testing, and review
 - ✓ Internal audits and control tests with documented findings and remediation
 - ✓ Measuring and improving culture of compliance
- Investigation of and response to misconduct
 - ✓ Independent, properly scoped investigations
 - ✓ Obligation for employees to cooperate (and consequences for not cooperating)
 - ✓ Root cause analysis
 - ✓ Appropriate discipline if misconduct is found
 - ✓ Systemic changes to prevent recurrence

COMPLIANCE PROGRAMS – BEST PRACTICES

New CCO Certification Requirement

- New DOJ policy requires chief compliance officers (CCOs) to certify that compliance programs have been “**reasonably designed to prevent anti-corruption violations**”
- Potential to transfer corporate liability into individual liability for the CCO, specifically for “knowing misrepresentations”
- Targets foreign corrupt practices, but may signal introduction of similar certifications in other areas of fraud
- In line with DOJ’s prior stated intentions to “prosecute the individuals who commit and profit from corporate malfeasance”

COMPLIANCE PROGRAMS – BEST PRACTICES

Additional Considerations from Second Monaco Memo (September 2022)

- Expectation that compensation programs will incentivize compliance
 - ❖ Do performance metrics reward individuals who focus on compliance?
 - ❖ Are individuals responsible for non-compliance penalized, such as through clawing back compensation that they previously earned?
 - ❖ Does reality on the ground align with paper policies and procedures?
- Need for companies to address use of personal devices and third-party messaging apps through training, as well as policies and procedures