



Mini Summit 44: DOJ Agreements, Dual Reporting and the Role of the Compliance Officer

October 2023

ROPES & GRAY

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The Panel



**Tara Shewchuck, Medtronic
Global Chief Ethics and Compliance Officer, Medtronic**



**Shannon Kelley, Sanofi
Head of Ethics and Business Integrity, North America and
Global Specialty Care**



**Moderator: Beth Weinman, Ropes & Gray
Counsel, Life Sciences Regulatory & Compliance**

DOJ Policy Changes: DAG Monaco's Message to Industry October 2021



THE UNITED STATES
DEPARTMENT OF JUSTICE

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JUSTICE NEWS

Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 38th National Institute on White Collar Crime

Washington, DC - Thursday, October 28, 2021

Remarks as Prepared for Delivery

Thank you, Fay, for that introduction, and thank you all for having me today. I'm sorry that I am not able to be there in person but appreciate the ability to join you virtually.

I have three priorities for my time with you. First, I want to describe three new actions that the department is taking today to strengthen the way we respond to corporate crime. Second, I want to look forward and tell you about some areas we will be studying over the next months, with an eye to making additional changes to help further invigorate the department's efforts to combat corporate crime. But before both of those, I want to set the scene by discussing trends, as well as the Attorney General's and my enforcement priorities, when it comes to corporate crime.

We can all agree the department's enforcement activities in the white-collar space ebbed and flowed due to a variety of factors — some internal to the department and some external. When I started as a newly minted AUSA, it was an active time for enforcement against corporate crime — one that witnessed the prosecutions of executives at WorldCom, Qwest Communications, Adelphia, Tyco and Enron. I've experienced how — when given the right resources and support including dedicated agents — prosecutors can uncover and prosecute the most sophisticated corporate criminals. As Deputy Attorney General, my goal is to set our investigators and attorneys up for continued success, so that they can enforce the criminal law fairly and vigorously, as the facts and law dictate.

At the same time, I am focused on ensuring the department is clear with those of you who are counsellors and voices in the C-Suite and Boardroom — so that you can provide well-informed advice to your clients. Having served as a board member when I was out of government, I can appreciate the difficult conversations that arise surrounding compliance and measures designed to proactively stop misconduct, and the tradeoffs that may need to be considered when making those decisions. Other department guidance strengthens the cases in these measures because it makes clear why taking these steps, not just the "edge cases", often can be the most valuable guidance a general counsel or trusted legal advisor can provide.

Since returning to the Justice Department this year, I've spent time considering the current enforcement landscape. That landscape has evolved in some noticeable ways from my last tour. Corporate crime has an increasing national footprint, with a growing number of cases involving large, high-profile companies. The number of open cases has risen to 16,000, up from 14,000 in 2019. The number of cases involving large, high-profile corporate criminal investigations, whether that be in healthcare fraud or insider trading or market manipulation. Third, criminals are taking advantage of emerging technological and financial industries to develop new schemes that exploit the investing public.

At the same time, these developments are changes of degree and not of kind. We have long had corporate criminal cases involving large, high-profile companies. We have long had cases involving emerging technologies and prosecutors have always had to grapple with evolutions in corporate fraud — whether that be the junk bond firms of the 1980s, the various fraud schemes created by the so-called "smartest guys in the room" at Enron, or the prolific mortgage fraud of the 2000s, or cryptocurrency schemes today.

But throughout, our mission must remain the same — enforce the criminal laws that govern corporations, executives, officials and others, in order to protect jobs, guard savings and maintain our collective faith in the economic engine that

- 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.
- For clients facing investigations, as of today, the department will review their whole criminal, civil and regulatory record — not just a sliver of that record.
- For clients cooperating with the government, they need to identify all individuals involved in the misconduct — not just those substantially involved — and produce all non-privileged information about those individuals' involvement.
- For clients negotiating resolutions, there is no default presumption against corporate monitors. That decision about a monitor will be made by the facts and circumstances of each case.
- Looking to the future, this is a start — and not the end — of this administration's actions to better combat corporate crime.

Source: <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>

AAG Polite's Certification Policy: March 2022

“Chief Compliance Officers and their functions should have true independence, authority, and stature within the company. In order to further empower Chief Compliance Officers, for all of our corporate resolutions (including guilty pleas, deferred prosecution agreements, and non-prosecution agreements), I have asked my team to consider requiring both the Chief Executive Officer and the Chief Compliance Officer to certify at the end of the term of the agreement that the company’s compliance program is reasonably designed and implemented to detect and prevent violations of the law...and is functioning effectively...”
(emphasis added)

Source: <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-acams-2022-hollywood>

Glencore Plea Agreement Certification: May 2022

The undersigned certifies that such compliance program is reasonably designed to detect and prevent violations of the Foreign Corrupt Practices Act and other applicable anti-corruption laws throughout the Company's operations.

This certification shall constitute a material statement and representation by the undersigned, and by, on behalf of and for the benefit of, the Company to the executive Branch of the United States for the purposes of 18 U.S.C. 1001.

ATTACHMENT II
CERTIFICATION

To: United States Department of Justice
Criminal Division, Fraud Section
Attention: Chief of the Fraud Section
United States Department of Justice
Criminal Division, Money Laundering and Asset
Recovery Section ("MLARS")
Attention: Chief of the MLARS Section
United States Department of Justice
Section and Money Laundering and Asset
Recovery Section ("SDNY")
Attention: United States Attorney for SDNY

Re: Plea Agreement Compliance Certification

The undersigned certifies, pursuant to Paragraph 9 of the Plea Agreement (the "Plea Agreement") filed on May 24, 2022, in the United States District Court for the Southern District of New York (the "Court") by and between the United States and the Company, that the undersigned is aware of the Company's compliance program and has reviewed the program. In connection with the review, the Company has implemented an anti-corruption compliance program that meets the requirements set forth in Attachment C to the Agreement, and certifies that such compliance program is reasonably designed to detect and prevent violations of the Foreign Corrupt Practices Act and other applicable anti-corruption laws throughout the Company's operations. If applicable, the undersigned further certifies that based on a review of the Company's reports submitted to the Department of Justice, Criminal Division, Fraud Section and Money Laundering and Asset Recovery Section and the U.S. Attorney's Office for

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City of New York pursuant to Paragraph 30 of the Agreement, the reports were completed as of the date they were submitted.

I, the undersigned, hereby certify that they are respectively the Chief Executive Officer and the Chief Compliance Officer of the Company and that each has been duly authorized by the Board of Directors of the Company to sign this Certification on behalf of the Company.

Glencore shall constitute a material statement and representation by the undersigned on behalf of, and for the benefit of, the Company, to the executive branch of the United States for purposes of 18 U.S.C. § 1001 and such material statement and representation have been made in the Southern District of New York. This Certification shall constitute a material statement and representation by the undersigned on behalf of, and for the benefit of, the Company, to the executive branch of the United States for purposes of 18 U.S.C. § 1519, and such material statement and representation shall be deemed to have been made in the Southern District of New York.

Name (Printed): _____
Name (Signed): _____
Chief Executive Officer
GLENCORE GROUP

Name (Printed): _____
Name (Signed): _____
Chief Compliance Officer
GLENCORE GROUP

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Source: <https://www.justice.gov/criminal/file/1508266/download>

DAG Monaco Policy Statement: Sept. 2022

- On Sept. 15, 2022, DAG Monaco unveiled a series of new policies designed to strengthen DOJ's ability to promote corporate compliance.
- An accompanying memo outlining how these policies would be effectuated was released at the same time.
- Remarks and memo focus on:
 - Individual accountability
 - How historical misconduct will be evaluated
 - Global policies on self-disclosure
 - Forthcoming guidance on monitorships
 - Evaluation of compliance programs at time (1) when the offense occurred, and (2) when the charging decision was made

Source: <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>

AAG Polite Statement on Certification: Sept. 2022

“Let me add that there has been some concern raised about this certification process. I know and trust compliance personnel. I appreciate the challenges they often face. **For too long, they have complained that compliance doesn’t have the same voice in corporate decision-making. These certifications and other resources are empowering you to demand that voice.** A corporate leader who ignores the emphasis we are placing on compliance does so at his or her own risk. But you cannot shy away from this role. **You cannot run away from the responsibility. My call is that you embrace it, knowing full well that stronger, more empowered compliance voices are exactly what we need.”** (emphasis added)

Source: <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school>

Additional Recent Developments

- DOJ updates guidance on corporate compliance programs:
 - Revised Memorandum on Selection of Monitors in Criminal Division Matters
 - Criminal Division Revisions to the Evaluation of Corporate Compliance Programs
 - Criminal Division’s Pilot Program on Compensation Incentives and Clawbacks.

- DOJ’s Consumer Protection Branch, which enforces the FDCA, stands up a Corporate Enforcement, Compliance and Policy Unit to help craft and enforce corporate resolutions.
 - According to senior branch attorney, unit created to develop deferred prosecution agreement provisions and review compliance. Unit is standardizing provisions to “templatize” them.
 - The provisions envisioned will focus on “higher level” corporate compliance at the CCO level rather than “the head of your quality unit.”
 - Resolution of parallel investigations for FDA-regulated companies could see dual-reporting

Sources: <https://www.justice.gov/criminal-fraud/page/file/937501/download>; <https://www.justice.gov/criminal-fraud/file/1100366/download>;
<https://pink.citeline.com/PS147442/GMP-Violations-Wont-Trigger-Breach-Of-DOJ-Compliance-Agreement-Government-Attorneys-Say>