

## CEP Magazine – December 2022



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### Good things happen when enforcement listens

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By Gerry Zack, CCEP, CFE, CIA

In September, U.S. Department of Justice (DOJ) Deputy Attorney General Lisa O. Monaco announced new guidelines the department will use in connection with criminal enforcement. Those guidelines, described in a September 15 memorandum entitled “Further Revisions to Corporate Criminal Enforcement Policies,” reflect a thoughtful consideration of input DOJ received since announcing in 2021 that plans were underway for revising these guidelines and creating the Corporate Crime Advisory Group (CCAG).<sup>[1]</sup>

CCAG held many meetings with outside experts representing numerous interested parties, from in-house attorneys to academics, members of the business community and defense bar, ethicists, audit committee members, and public interest groups. I was pleased to represent SCCE in one of these listening sessions.

The new guidelines focus primarily on five areas: individual accountability, a corporation’s history of misconduct, voluntary self-disclosure, the use of monitors, and the use of incentives and deterrence provisions. I’ll focus on two of those areas in this month’s column.

How DOJ considers a corporation’s history of misconduct is the area that garnered the greatest attention from the business community, and it was the topic the group I participated in spent the greatest amount of time discussing with CCAG. There was concern DOJ would automatically consider any prior misconduct as a negative factor in any current proceeding. But the new guidelines reflect a careful consideration that prior misconduct can have a wide range of relevance to a current offense. DOJ will consider things like whether the current misconduct involves the same personnel as the past misconduct, how long ago the prior misconduct occurred, whether the corporation operates in a highly regulated industry, and other factors that may be quite different now than they were at the time of the prior misconduct. As Monaco noted, “not all instances of prior misconduct are created equal.” This is a practical approach and welcome news.

There is clearly also an added emphasis on companies reflecting their commitment to compliance through their compensation systems, including the use of metrics and benchmarks to reward compliance-promoting behavior, but also the use of clawback provisions and escrowing of compensation. In connection with clawbacks, DOJ plans to issue further guidance on this matter by the end of 2022.

The new guidelines are an excellent example of the positive steps forward that can result when the enforcement community takes the time to listen to input from the business community.

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<sup>1</sup> Deputy Attorney General Lisa O. Monaco, “Further Revisions to Corporate Criminal Enforcement Policies,” memorandum, U.S. Department of Justice, September 15, 2022,

<https://www.justice.gov/opa/speech/file/1535301/download>.

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