

## Alerts

# Attorney General Merrick Garland Emphasizes Criminal Corporate Enforcement and Individual Accountability

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On March 3, 2022, Attorney General Merrick B. Garland delivered a speech at the ABA Institute on White Collar Crime that underscored the Department of Justice's (DOJ) commitment to prosecuting corporate crime and holding individuals accountable.<sup>[1]</sup> Garland also described how the DOJ intends to expand its resources to accomplish these goals.

At the conference, Garland stated that the DOJ's top priority is the prosecution of corporate crime and that it intends to focus on "individuals who commit and profit from corporate malfeasance." Garland noted that obtaining individual convictions "rather than accepting big-dollar corporate dispositions" is difficult and resource-intensive. Accordingly, the DOJ is seeking \$36.5 million for the U.S. Attorneys' Offices and the Criminal Division to hire 120 new prosecutors focused on pandemic-related fraud and \$325 million to hire 900 FBI agents to support the FBI's White Collar Crime Program.

Garland said that the DOJ also is bolstering its resources by adding three "force multipliers" to its prosecutors and agents. In addressing the first force multiplier, partnerships at every level of government and around the world, Garland:

- Referenced the just-launched interagency task force to hold accountable Russian oligarchs and others who seek to evade U.S. sanctions or otherwise profit from corrupt conduct. Garland noted that the task force is intended to complement the work of a transatlantic task force announced by President Biden and European leaders on Feb. 26.
- Announced that he would be building on the existing work of the COVID-19 Fraud Enforcement Task Force (COVID-19 Task Force), which was established in May 2021, by naming a chief prosecutor, whose identity will be announced soon. The COVID-19 Task Force includes nearly 30 agencies that administer and oversee pandemic relief funding, including the Labor Department, the Treasury Department, the Small Business Administration, the U.S. Postal Inspection Service, and the Pandemic Response Accountability Committee.
- Stressed the importance of continuing the relationships and partnerships between the DOJ and inspectors general across the federal government, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Centers for Medicare & Medicaid Services, the Defense Criminal Investigative Services, and the Internal Revenue Service.

In addressing the second force multiplier, data analytics to identify the anomalies that are indicative of fraud, Garland stated that the DOJ is using its own "big data" as well as the data provided by other government departments and agencies. Garland also referenced the new FBI squad that is embedded in the Criminal Division's Fraud Section, stating that these efforts are "an enormous expansion of the data analytic work" carried out when he supervised the Fraud Section as a deputy assistant attorney general.

As for the third force multiplier, defense counsel who represent corporations and their boards of directors, Garland reiterated the new DOJ policy, announced by Deputy Attorney General Lisa Monaco in October 2021, that the DOJ has restored prior department guidance making it clear that to be eligible for cooperation credit, companies must provide the DOJ with all nonprivileged information about individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority and, notably, regardless of whether a company deems their involvement "substantial."<sup>[2]</sup> Garland stressed that "[w]hen we give a company the opportunity to come clean, it must come clean about everyone involved in the misconduct, at every level."

Garland concluded his speech by reaffirming the DOJ's commitment to prosecuting corporate crime. He said, "As a defense attorney, prosecutor and judge, I have also seen the Justice Department's interest in prosecuting corporate crime wax and wane over time. Today, it is waxing again." Garland stated that he expects enforcement activity only to accelerate as the country comes out of the COVID-19 pandemic.

During this time of increased white collar criminal enforcement, an ounce of prevention is worth a pound of cure. Companies should be proactive and review their compliance programs to ensure they are sufficiently robust and adequately communicated to all employees. Among other things, companies can:

- Conduct an enterprise wide risk assessment to identify the company's ethical, compliance and legal risks and ensure the company has the proper policies, procedures, and internal controls in place to address such risks.
- Ensure that the compliance program is supported by company leaders, appropriately resourced, sufficiently independent, and easily accessible to all employees; particularly with the DOJ's focus on individual prosecution, it is essential that the company maintain a culture of compliance.
- Ensure that all employees are being properly trained on compliance policies and procedures.
- Regularly test and monitor compliance programs, and when potential misconduct is identified, conduct internal investigations that are prompt, thorough, and result in appropriate remediation.

With respect to the DOJ's more exacting standards for companies seeking cooperation credit for disclosures, defense counsel should tread carefully, as disclosure of privileged information to the government can lead to a waiver vis-à-vis third parties in subsequent litigation. Companies should consult with experienced outside counsel and formulate an investigation and disclosure plan that maximizes privilege protections.

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[1] Press Release, "Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime," Mar. 3, 2022, available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

[2] See Press Release, "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," Oct. 28, 2021, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>; Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021, available at <https://www.justice.gov/dag/page/file/1445106/download>.

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