

DOJ Road Map for Enforcement

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When the DOJ evaluates a fraud case, it will make it a priority to evaluate the role executive leadership played regarding preventing or permitting the issues being investigated. The DOJ issued an “Evaluation of Corporate Compliance Program Effectiveness” in 2019 and updated it in [2020](#) to assist their attorneys in making informed prosecutorial decisions. There are many questions designed to assess the level of executive and board compliance commitment in determining (1) appropriate means to resolve the issue including prosecution; (2) any monetary penalty level; and (3) compliance obligations contained in any settlement agreement (e.g., monitorship or reporting obligations). Recently, Deputy Attorney General Lisa Monaco restated the DOJ’s commitment to applying these guidelines in reviewing the existence or absence of leadership commitment to compliance. She also called upon compliance officers to carry this message of the importance of compliance commitment to their board and executive leadership. It was made clear that any leniency would depend on executive leadership and boards evidencing a commitment to and promotion of compliance. Absence of such evidence would be considered an aggravating factor. All this was a restatement and underscoring of the DOJ’s long held position regarding how they prioritize and prosecute corporate cases. In making these decisions, they include the following key principles in their deliberative process:

- 1. Delaying Disclosure.** Delays in producing information or documents—particularly those that show individual culpability—will result in the reduction or denial of cooperation credit. DOJ often finds organizations and their legal counsel delaying disclosure of critical documents or information while considering how to mitigate the damage or protect leadership. However, this also undermines DOJ’s efforts to hold individuals accountable, delays pursuing leads, and obtaining evidence before it disappears.
- 2. Prior conduct.** DOJ considers an organization’s history important in determining mitigating and aggravating factors. Identifying past similar misconduct, such as wrongdoing occurring under the same management team or executive leadership, would be an aggravating factor in their prosecutorial decision.

- 3. Voluntary Self Disclosure.** DOJ states they have a commitment to providing incentives to those who voluntarily self-disclose misconduct to the government. Voluntary self-disclosure is the clearest path for avoiding criminal charges, reduced penalties, and for assignment of independent compliance monitors in their settlement agreements. It is also seen as a sign of having an effective compliance program.
- 4. Independent Compliance Monitors.** The DOJ is providing new guidance for prosecutors about determining the need for a monitor in a settlement agreement, how they would be selected, proper scoping of work, and how to better oversee the monitors.
- 5. Corporate Culture.** DOJ continues to emphasize the importance of corporate compliance culture. This relates to how organizations structure and foster their compliance program. This involves more than just building the program, but also how the leadership promotes a culture that rejects wrongdoing. When prosecutors evaluate the strength of a company's compliance program, they will consider whether its compensation systems reward compliance and impose financial sanctions on employees, executives, or directors whose direct or supervisory actions or omissions contributed to wrongful conduct.

For answers to compliance FAQs, see <https://www.compliance.com/faqs/>.

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About the Author

Richard P. Kusserow established Strategic Management Services, LLC, after retiring from being the DHHS Inspector General, and has assisted over 2,000 health care organizations and entities in developing, implementing and assessing compliance programs.