

A close-up of an hourglass with blue sand, set against a solid blue background. The sand is flowing from the top bulb to the bottom bulb, with a thin stream visible in the narrow neck. The top bulb is partially filled with sand.

This webinar will begin shortly.

FIA



Beyond Spoofing: What's Next for CFTC and DOJ Enforcement

19 May 2022



Reminders

- The webinar will be recorded and posted to the FIA website within 24 hours of the live webinar.
- Please use the “question” function on your webinar control panel to ask a question to the moderator or speakers.
- *Disclaimer: This webinar is intended for informational purposes only and is not intended to provide investment, tax, business, legal or professional advice. Neither FIA nor its members endorse, approve, recommend, or certify any information, opinion, product, or service referenced in this webinar. FIA makes no representations, warranties, or guarantees as to the webinar’s content.*

Speakers



Michael Murray
Partner, Paul Hastings LLP



Michael Spafford
Partner, Paul Hastings LLP



Leo Tsao
Partner, Paul Hastings LLP


DOJ's Corporate Enforcement Program



Deputy Attorney General
Lisa Monaco



Assistant Attorney General
Kenneth Polite

 U. S. Department of Justice
Office of the Deputy Attorney General

Washington, D.C. 20530
August 28, 2008

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Mark Filip *Mark Filip*
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Attached to this memorandum is a revision of the Principles of Federal Prosecution of Business Organizations, previously issued by Deputy Attorney General Paul McNulty in December 2006. The revised Principles will be set forth for the first time in the *United States Attorneys' Manual*, and will be binding on all federal prosecutors within the Department of Justice. The revised Principles will be effective immediately, on a prospective basis.

The Department of Justice, through the Deputy Attorney General's Office, has undertaken periodic revision of its policies concerning factors to consider in the prosecution of business organizations. Such revisions should not be understood as criticism of prosecutors who applied the prior policies diligently and in good faith, but rather as an effort to refine the Department's policy guidance in light of lessons learned from the Department's prosecutions as well as comments from other actors within the criminal justice system, the judiciary, and the broader legal community. As explained further below, the principal revisions to the Principles concern what measures a business entity must take to qualify for the long-recognized "cooperation" mitigating factor, as well as how payment of attorneys' fees by a business organization for its officers or employees, or participation in a joint defense or similar agreement, will be considered in the prosecutive analysis. Much of the remainder of the Principles is unchanged.



DOJ's Evolving Corporate Enforcement Program

Consideration of recidivism

- Broadens the scope of relevant prior misconduct.

Increased willingness to use monitorships.

- Reverses prior presumption against monitorships.

New requirements for corporate cooperation credit:

- (1) identification of “all individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority”; and
- (2) provision to the DOJ of “all non-privileged information relating to that misconduct.”



DOJ's Evolving Corporate Enforcement Program

Willingness to bring harder cases

- Prosecutors should not fear losing cases

Data analytics will play a larger role

- This will be particularly relevant to market manipulation cases

Focus on cryptocurrency

- Cryptocurrency may facilitate a wide range of misconduct

Engagement with the Private Sector

- Creation of the Corporate Criminal Advisory Group

Continued Coordination with Domestic and International Agencies

- CFTC cases include both market manipulation and foreign corruption

DOJ's Evolving Corporate Enforcement Program

The DOJ is closely focused on corporate compliance programs for corporate resolutions.

Three questions that the DOJ will ask:

- “Is the corporation’s compliance program well designed?”
- “Is the program being applied earnestly and in good faith?” In other words, is the program adequately resourced and empowered to function effectively?
- “Does the corporation’s compliance program work” in practice?

Will be a factor in the form of resolution, amount penalty, and monitorship

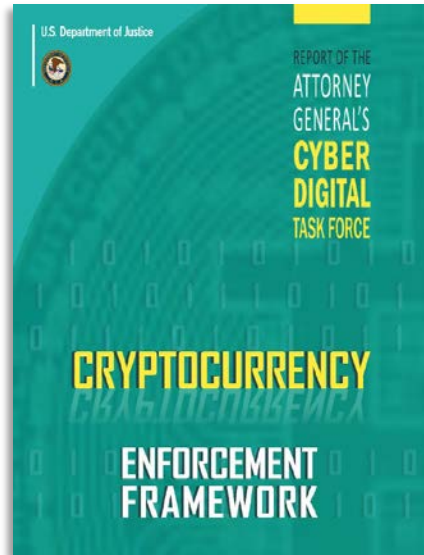
U.S. Department of Justice
Criminal Division
Evaluation of Corporate Compliance Programs
(Updated June 2020)

Introduction

The “Principles of Federal Prosecution of Business Organizations” in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include “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” and the corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.” JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. See U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, the memorandum entitled “Selection of Monitors in Criminal Division Matters” issued by Assistant Attorney General Brian Benczkowski (hereafter, the “Benczkowski Memo”) instructs prosecutors to consider, at the time of the resolution, “whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems” and “whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future” to determine whether a monitor is appropriate.

This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation’s compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).

DOJ Cryptocurrency Enforcement Priorities

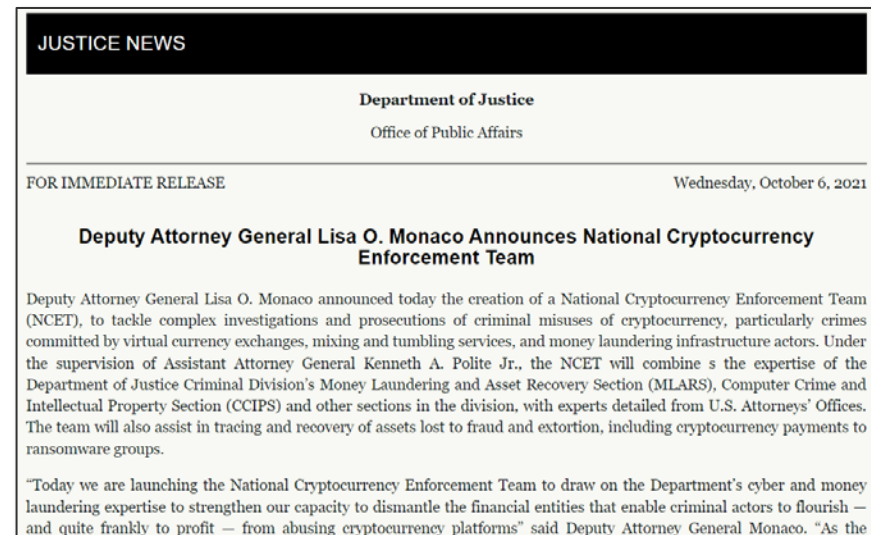


In October 2020, the DOJ issued its Cryptocurrency Enforcement Framework.

- Outlined the strategy for investigating and prosecuting cryptocurrency crimes.
- Focus was on Bank Secrecy Act and other corporate compliance-based crimes.

In October 2021, the DOJ announced the formation of the National Cryptocurrency Enforcement Team.

- Team dedicated to cryptocurrency investigations and prosecutions



The New U.S. Antitrust Environment

Executive Order on Promoting Competition

- Whole-of-government approach
- Sector specifics

Personnel and Policy

- White House
 - NEC
 - SAP
- Department of Justice



New Initiatives: Compliance, Leniency, Individual Accountability



SEC/DOJ MOU

- Establishes a framework for the SEC and the DOJ's Antitrust Division to continue regular discussions and review law enforcement and regulatory matters
- Provides for the exchange of information and expertise the agencies believe to be potentially relevant and useful to their oversight and enforcement responsibilities



UNITED STATES COURT OF APPEALS
for the **Second Circuit**
Chief Judge Debra Ann Livingston

United States v. Aiyer (2d Cir. May 2, 2002):
"We affirm the judgment of the district court."

New Initiatives: Compliance, Leniency, Individual Accountability



New Initiatives: Regulation and Enforcement



US DOJ's Kanter warns companies over algorithmic price-fixing, calls for corporate compliance



Muscular Role for Antitrust in Fintech, Financial Markets, and Banking: The Antitrust Division's Decision to Lean In



Insider Trading

Misappropriation of confidential information:

Whose duty? Whose information? Is it material? Who or what is harmed?

CFTC increasingly adopting SEC precedents to answer these questions

Continued cooperation with DOJ

Expansion to include tipper-tippee

What is the Scope of the Misappropriation Theory?

The Role of Intermediaries

- Brokers -- Classic cases (S.D. Tx)
- Consultants – Vitol (EDNY)

Shadow trading --SEC v. Panuwat (N.D. Cal)

SEC v. App Annie



Business Communications Records

17 CFR §1.35: “Keep all...communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices that lead to the execution of a transaction in a commodity interest...”

17 CFR §166.3: “Each Registrant...must diligently supervise the handling...of all commodity interest accounts...and all other activities of its partners, officers, employees and agents...relating to its business.

JP Morgan Securities Settles with SEC, CFTC



Mission Creep or Course Corrections?



Expansive Definition of Fraud

- Aggressive use of Wire Fraud
- *US v. Connolly* (Reversed by 2d Cir.)
- *SEC vs Im* (SDNY)
- Expect continued focus on conflicts of interest, block trading or other areas of potentially preferential treatment

Cross-market trading

Benchmarks

Increased focus on relationship between physical and financial markets



Reference Materials

U.S. Department of Justice, Memorandum from Deputy Attorney General Lisa O. Monaco, Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021)

<https://www.justice.gov/dag/page/file/1445106/download>

U.S. Department of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (June 2020)

<https://www.justice.gov/criminal-fraud/page/file/937501>

U.S. Department of Justice, Report of the Attorney General's Cyber Digital Task Force (October 2020)

<https://www.justice.gov/archives/ag/page/file/1326061/download>

U.S. Department of Justice, Press Release, Justice Department Announces First Director of National Cryptocurrency Enforcement Team (Feb. 17, 2022)

<https://www.justice.gov/opa/pr/justice-department-announces-first-director-national-cryptocurrency-enforcement-team>



Reference Materials

Exec. Order No. 14036, Promoting Competition in the American Economy (July 9, 2021)

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

Securities and Exchange Commission, Press Release, Securities and Exchange Commission and Justice Department's Antitrust Division Sign Historic Memorandum of Understanding (June 22, 2020)

<https://www.sec.gov/news/press-release/2020-140>

United States v. Aiyer, 33 F.4th 97 (2d Cir. 2022)

https://www.ca2.uscourts.gov/decisions/isysquery/f2abfbdf-cdee-4eed-be9a-8313aed56218/1/doc/20-3594_opn.pdf

United States Department of Justice, Press Release, Vitol Inc. Agrees to Pay over \$135 Million to Resolve Foreign Bribery Case (Dec. 3, 2020)

<https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case>



Reference Materials

Zanfagna, Gary, *Antitrust Isn't Headed to an Inflection Point; It's Already There*, The Hill (Sept. 7, 2021)

<https://thehill.com/opinion/judiciary/571087-antitrust-isnt-headed-to-an-inflection-point-its-already-there/>

Michael Murray, Department of Justice, Antitrust Enforcement in Labor Markets: The Department of Justice's Efforts (March 1, 2019)

<https://www.justice.gov/opa/speech/file/1142111/download>

Commodity Futures Trading Commission, Press Release, CFTC Charges Former Energy Broker and Its Owner with Misappropriation of Nonpublic Information, Fraud, and Supervision Violations (June 15, 2021)

<https://www.cftc.gov/PressRoom/PressReleases/8396-21>

Commodity Futures Trading Commission, Press Release, CFTC Charges Puerto Rico Resident and His Firm for Misappropriation of Nonpublic Information and Fictitious Trading (Dec. 10, 2021)

<https://www.cftc.gov/PressRoom/PressReleases/8468-21>



Reference Materials

U.S. Department of Justice, Classic Energy and Associated Cases (Updated April 9, 2022)

<https://www.justice.gov/criminal-vns/classic-energy-and-associated-cases>

U.S. Securities and Exchange Commission, Litigation Release, SEC Charges Biopharmaceutical Company Employee with Insider Trading (Aug. 17, 2021)

<https://www.sec.gov/litigation/litreleases/2021/lr25170.htm>

U.S. Securities and Exchange Commission, Press Release, JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay \$125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021)

<https://www.sec.gov/news/press-release/2021-262>



IDX▶▶▶



*Register Now for **IDX 2022!***

6-8 June 2022 | The Brewery

FIA.org/IDX



Reference Materials

Commodity Futures Trading Commission, Press Release, JPMorgan Admits Employees Used Texts and WhatsApp on Personal Devices to Conduct Business (Dec. 17, 2021)

<https://www.cftc.gov/PressRoom/PressReleases/8470-21>

United States v. Connolly, 24 F.4th 821 (2d Cir. 2022)

<https://law.justia.com/cases/federal/appellate-courts/ca2/19-3806/19-3806-2022-01-27.html>

Sec. & Exch. Comm'n v. Im, No. 17-CV-3613 (JPO), 2020 WL 4937465, at *1 (S.D.N.Y. Aug. 24, 2020)

<https://casetext.com/case/sec-exch-commn-v-im-2>



Commodities 2022

Connect with US-based legal, compliance and operations professionals that focus on the commodity derivatives markets

REGISTRATION IS OPEN!

21-22 June • The Houstonian • Houston, Texas



Thank you for joining us today!

Upcoming Webinar:



How We Keep Futures Markets Operational Through World Events
12:00 PM - 1:00 PM ET

FIA

The image features the letters 'FIA' in a bold, sans-serif font. The 'F' is dark grey. The 'I' is dark grey with a green and yellow-green geometric shape overlapping its right side. The 'A' is composed of two overlapping blue shapes. The background is a white canvas with large, overlapping geometric shapes in light green, light blue, and light yellow-green.