



*Session 1: The Use of DPAs*

*– Incentive Structure to Encourage Companies to  
Prevent and Detect Corporate Crimes –*

## 0. Speakers

Daisuke Fukamizu



Lorinda Laryea



Ben Morgan



Daniel Kahn



Brian Benczkowski



# 1. Introduction

- Monaco Remarks on Sep 15, 2022

*Taken together, the policies we're announcing today make clear that we won't accept business as usual. **With a combination of carrots and sticks—with a mix of incentives and deterrence—we're giving general counsels and chief compliance officers the tools they need to make a business case for responsible corporate behavior.** In short, we're empowering companies to do the right thing—and empowering our prosecutors to hold accountable those that don't. (Monaco Remarks on Sep 15, 2022)*

- US approach to fight against corporate crimes, which are often complex and difficult to monitor and detect, is to develop an effective incentive structure (carrots and sticks) to encourage companies to prevent and detect corporate crimes
- Discussing the DOJ's use of DPAs and related topics such as voluntary disclosure and cooperation from the perspective of incentive structure is helpful for many countries and companies to develop their governance systems

## 2. Differences between Guilty Plea and DPA/NPA

- What is the difference between a guilty plea and a DPA/NPA?
  - Collateral consequences
  - Reputational Damage?
- How important is it for a company subject to the DOJ investigation to obtain a DPA/NPA instead of a guilty plea?
  - Recidivism: History of Misconduct

*Finally, I want to be clear that this Department will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company. Before a prosecution team extends an offer for a successive NPA or DPA, Department leadership will scrutinize the proposal. (Monaco memo on Sep 15, 2022)*

### 3. DPA in the UK

- The background of “importing” DPAs in UK
- Main differences of DPAs between US and UK
  - the doctrine of ***respondeat superior***
  - the proof of ***Mens Rea***
  - *Judicial review*

## 4. Voluntary Disclosure

*All Department components must adhere to the following core principles regarding voluntary self-disclosure. First, absent of aggravating factors, the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct. Each component will, as part of its written guidance on voluntary self-disclosure, provide guidance on what circumstances would constitute such aggravating factors, but examples may include misconduct that poses a grave threat to national security or is deeply pervasive throughout the company. Second, the Department will not require the imposition of an independent compliance monitor for a cooperating corporation that voluntarily self-discloses the relevant conduct if, at the time of resolution, it also demonstrates that it has implemented and tested an effective compliance program.* (Monaco Memo on Sep 15, 2022)

- How important is it to encourage voluntary disclosure in the DOJ enforcement policy?
- How difficult a decision is it for companies to voluntarily disclose identified wrongdoings to the DOJ?
- DOJ's recent enforcement policy not to seek a **guilty plea** and **compliance monitor** if, absent of aggravating factors, a company voluntarily disclose wrongdoing

## 5. Cooperation

*Going forward, undue or intentional delay in producing information or documents—particularly those that show individual culpability—will result in the reduction or denial of cooperation credit. **Gamesmanship with disclosures and productions will not be tolerated.***

***If a cooperating company discovers hot documents or evidence, its first reaction should be to notify the prosecutors. This requirement is in addition to prior guidance that corporations must provide all relevant, non-privileged facts about individual misconduct to receive any cooperation credit. (Monaco Remarks on Sep 15, 2022)***

- The definition of cooperation in Rosenstein Remarks (reflected in the current Justice Manual) and Monaco memo (Oct 2021 and Sep 2022)
- New guidance regarding cooperation described in the Monaco Memo regarding the timeliness of sharing evidence with the prosecutor

## 6. Evaluation of Corporate Compliance Programs

- Compensation systems
  - Clawback

*Compensation systems that clearly and effectively impose financial penalties for misconduct can incentivize compliant conduct, deter risky behavior, and instill a corporate culture in which employees follow the law and avoid legal "gray areas." (Monaco memo on Sep 15, 2022)*

- Policy on Personal Devices, including monitoring and enforcement

*How companies address the use of personal devices and third-party messaging platforms can impact a prosecutor's evaluation of the effectiveness of a corporation's compliance program, as well as the assessment of a corporation's cooperation during a criminal investigation. (Monaco Memo on Sep 15, 2022)*

## **7. Takeaways and Discussion**

**Thank you for your attention.**

