

# **CORPORATE PROSECUTION DOLDRUMS**

In 2022, DOJ Corporate Crime Prosecutions Remain Near  
Record Low

By Rick Claypool

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## ACKNOWLEDGMENTS

This report was written by Rick Claypool, a research director in Public Citizen’s president’s office. Robert Weissman, Public Citizen’s president, edited the report. Paul Alan Levy, an attorney in Public Citizen’s litigation group, reviewed the report.

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### Contact Public Citizen

Main Office  
1600 20th St. NW  
Washington, DC 20009

Capitol Hill  
215 Pennsylvania Ave. SE, #3  
Washington, DC 20003

Texas Office  
309 E. 11th St., Suite 2  
Austin, TX 78701

Phone: (202) 588-1000

Phone: (202) 546-4996

Phone: (512) 477-1155

For more information, please visit [www.citizen.org](http://www.citizen.org).

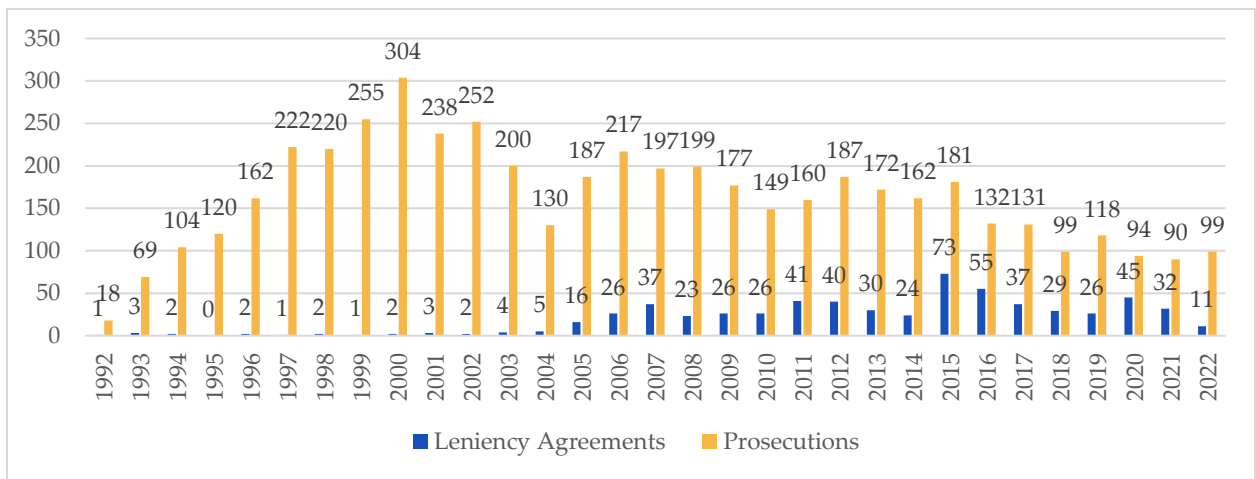


## Overview

Despite promises to ramp up enforcement, the Department of Justice under President Joe Biden prosecuted only 99 corporate offenders in 2022. As a result of this small uptick from the previous year’s 90 prosecutions, the Biden DOJ’s second year is tied with the Trump DOJ’s second year for having the fifth-lowest number of corporate prosecutions on record, the fourth-lowest since the Clinton administration.

The number of federal corporate prosecutions has been declining since 2000, when the DOJ prosecuted triple the number of corporations that it does today (304).

Corporate prosecutions and leniency agreements, fiscal years 1992-2022



Source: Public Citizen analysis of US Sentencing Commission and Corporate Prosecution Registry data

The DOJ has in recent years increasingly gone out of its way to avoid criminally charging large corporations. Prosecutors use leniency agreements – which the DOJ refers to as deferred prosecution agreements (DPAs) and nonprosecution agreements (NPAs) – to resolve criminal cases in a way that avoids filing charges against defendants. The agreements are supposed to deter corporations from committing subsequent crimes, but Public Citizen [research](#) shows 15% of the agreements between the DOJ and large corporations involve repeat offenders.

In 2022, the number of corporate leniency agreements fell to 11 – the lowest number since 2004, when there were just five. The agreements made up 10% of the total number of criminal enforcement actions against corporations – lower than the total has been since 2005, when there were 7%.

This decline in leniency agreements is notable. In 2021, one in four federal corporate cases (26%) were resolved using corporate leniency agreements; in 2020, it was one in three (32%).

But whether the shift can be seen as a sign of strengthened corporate enforcement is a separate question.

If the DOJ's interest in prosecuting corporate crime was truly waxing, one would expect to see increasing prosecutions accompany the decreasing leniency agreements. Instead, the near-record low number of corporate prosecutions combined with plunging corporate leniency agreements means the federal government concluded 110 criminal cases against corporations in fiscal year 2022 – fewer than any previous year since 1994, when it concluded 106.

Leniency agreement recipients tend to be bigger corporations. Public Citizen research into corporate recidivism found that the overwhelming majority of corporate repeat offenders that received leniency agreements from the Department of Justice were large multinationals. The inverse is true as well – smaller corporations are likelier to face prosecution. According to the [U.S. Sentencing Commission](#), about 70% of the 4,946 corporations the federal government prosecuted between 1992 and 2021 were small businesses with fewer than 50 employees. Only about 6% had 1,000 employees or more.

This trend continued in fiscal year 2022. According to the commission's [annual report](#), 81% of the corporations prosecuted had fewer than 50 employees, while 7% had 1,000 or more.

Among the 11 major corporations that were not prosecuted and instead resolved allegations of criminal misconduct through leniency agreements were the multinational financial corporation Credit Suisse, the global waste management corporation Stericycle, the transportation technology corporation Uber, and the Swiss multinational technology firm ABB.

- The [Credit Suisse agreement](#) resolved allegations three bankers engaged in wire fraud to enrich themselves through a kickback scheme involving a subsidiary's financing of a state-sponsored development in Mozambique. The DOJ prosecuted the bankers, who pleaded guilty. It is the third leniency agreement and fourth criminal enforcement action federal prosecutors have brought against the corporation since 2009.
- The [Stericycle agreement](#) resolved allegations the corporation engaged in illegal foreign bribery and corruption in Argentina, Brazil, and Mexico. No individuals are mentioned in the DOJ announcement.
- The [Uber agreement](#) resolved allegations the corporation concealed a data breach from federal officers investigating its data security practices. The corporation's former chief security officer [was convicted](#) over related misconduct.

- The [ABB agreement](#) resolved global foreign bribery charges. The case is a particularly worrisome example of a recidivist corporation being rewarded with a leniency agreement instead of facing actual prosecution. The DOJ announcement dismisses the previous criminal cases against ABB as a “decade old” – failing to mention that the ABB misconduct this new leniency agreement addresses began, according to the attached [criminal information](#), within a year of its [prior leniency agreement](#)’s dismissal.

The prosecution of culpable individuals is praiseworthy. It also doesn’t always work. When Boeing, which received a [scandalously generous leniency agreement](#) in 2021, allegedly [scapegoated](#) an engineer for its deadly 737 Max crashes, the jury [acquitted](#) this single individual the Justice Department prosecuted. When prosecutors in 2012 charged BP managers with manslaughter for the 11 Deepwater Horizon deaths, the case was ultimately [dismissed](#). In 2018, prosecutors charged [Martin Winterkorn](#), the CEO of Volkswagen at the time the corporation engaged in its criminally fraudulent scheme to use “defeat devices” to cheat on diesel emissions tests – but Winterkorn is a citizen of Germany, which [does not](#) extradite accused criminals to the U.S. (Winterkorn was subsequently also charged in Germany, though his trial has been [delayed](#).)

This is why the DOJ’s overemphasis on offering the carrot of leniency to corporate criminals is insufficient for disciplining the corporations themselves. If businesses are incentivized to pose as blameless victims of the bad apple employees they identify as scapegoats for violations – even those attributable to systemic failures – they will do so. To deter corporate crime, prosecutors must charge both individuals *and* the corporations themselves.

To be fair, this is sometimes what the Justice Department does. Notable cases of the DOJ prosecuting both culpable individuals and the corporate offender in 2022 include:

- FCA – the automaker formerly known as Chrysler, now a U.S. subsidiary of Stellantis – which [pleaded guilty](#) to a Volkswagen-like criminal scheme to design vehicles that cheat on diesel emissions tests. The DOJ also charged [three senior managers](#) at Stellantis. Two of the charged managers were [Italian citizens](#) who reside in Italy; the third, an Italian citizen residing in Michigan, [pleaded guilty](#) to a felony charge relating to his role in the conspiracy.
- Allianz Global, a multinational insurance and financial services corporation headquartered in Germany, which [pleaded guilty](#) to a criminal securities fraud scheme that defrauded investors, including pension funds for American workers, and will pay over \$5.7 billion in restitution and penalties. The DOJ also brought

charges against three portfolio managers, two of whom pleaded guilty. The criminal trial for the third has been set for [2024](#).

Strengthening corporate enforcement means making cases like these more the rule than the exception.

## Policy Analysis

If the Justice Department isn't prosecuting corporations that would in the past have received leniency agreements, why is the number of leniency agreements down? One possible reason is that the DOJ seems to be bringing fewer cases against large corporations. Another is that the DOJ may be relying more on declinations, including non-public declinations.

The Biden DOJ pledged to end the era of corporate impunity. In 2021, Deputy Attorney General Lisa Monaco urged prosecutors to "[be bold](#)" in holding corporate criminals accountable.

Attorney General Merrick Garland gave [a speech in 2022](#), declaring, "I have [...] seen the Justice Department's interest in prosecuting corporate crime wax and wane over time. Today, it is waxing again."

But the [modest](#) enforcement policies the administration later [announced](#) were far from bold. In practice, the policies seem likely to accelerate the crisis of corporate impunity instead of addressing it.

The worst part of the new policy is the Justice Department's renewed and expanded promise to reward corporate criminals that self-report misconduct with [declinations](#). A declination is a formal guarantee that the government will not bring a criminal case. Often, they include brief descriptions of alleged criminal misconduct. Despite a DOJ [web page](#) dedicated to posting declinations, they are not consistently disclosed. Corporate defense attorneys openly state their goal for clients subject to criminal investigations is to win a "[non-public declination](#)" – and may list [the achievement](#) on profiles they post to promote their services.

A DOJ [pilot program](#) under President Barack Obama started rewarding corporations that self-report violations of the Foreign Corrupt Practices Act (FCPA) with declinations. The FCPA criminalizes corporations paying bribes to foreign governments, among other acts of illegal corruption. Trump's DOJ made the pilot program [permanent](#) – and occasionally [expanded the practice](#) of rewarding self-disclosure with declinations to other offenses. The Biden DOJ has now expanded the practice of [offering declinations](#) to corporations that self-report, regardless of what criminal violation they are accused.

The idea is that corporations that come clean upon discovering criminal acts by their employees should not be prosecuted. Critics argue the policy encourages companies to

create a culture of lawbreaking, and then “discover” violations if they are about to be caught.

Such leniency should be expected not only to fail to deter corporate crime, but to actually reassure corporations that push the limits of legality that they will not face consequences when their misconduct crosses the line into criminal violations. Depending on how it is implemented, the policy effectively affirms that corporations are above the law.

Then-Assistant Attorney General for DOJ’s Criminal Division, Kenneth A. Polite, Jr., described the policy during [a speech in January](#), declaring, “if a company voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, there is a *presumption that we will decline to prosecute* absent certain aggravating circumstances involving the seriousness of the offense or the nature of the offender” (emphasis added). Polite then went on to announce an expansion of the policy:

“Namely, even if aggravating circumstances are present, although a company will not qualify for a presumption of a declination, under the revised [Corporate Enforcement Policy] I am announcing today, prosecutors may nonetheless determine that a declination is the appropriate outcome.”

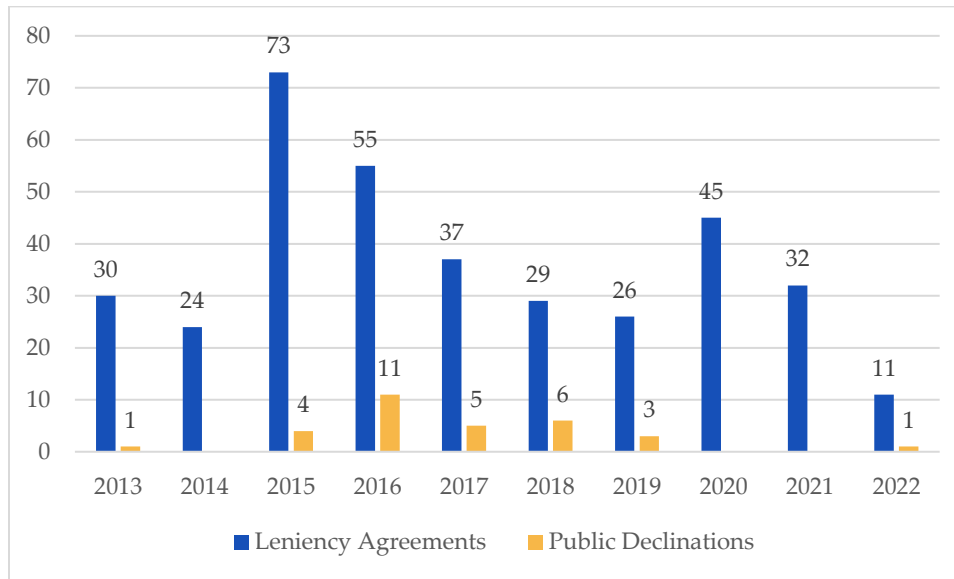
AAG Polite goes on to say that corporate penalties will be slashed by as much as 75% from the low end of the sentencing range and then affirms “we will generally not require a corporate guilty plea — including for criminal recidivists.” He concludes the speech with the claim, “We need corporations to be our allies in the fight against crime.”

Seven months later, Polite left the DOJ for private corporate defense practice at [Sidley Austin](#).

Interestingly, a [policy memo](#) for the DOJ’s 93 U.S. Attorney’s offices appears to somewhat conflict with the Polite corporate policy from Main Justice in Washington, D.C. The U.S. Attorney’s offices’ policy promises to reward voluntary self-disclosure not with a declination, but with the promise not to seek a guilty plea. This appears to open corporations that self-report to U.S. Attorney’s offices to leniency agreements – deferred and non-prosecution agreements – which are generally more punitive than declinations, though not nearly as punitive as prosecution.

[Bloomberg News](#) has reported on the conflict and quoted a former federal prosecutor who noted that the difference could lead to forum shopping. “I sort of wonder, instead of disclosing to the Fraud Section or disclosing to SDNY, maybe you talk to a USAO that doesn’t do big cases like this and you might get a better result,” Kevin Muhlendorf, a former DOJ official, now a partner at Wiley Rein, told Bloomberg. “If I’m the US attorney—pick any smaller jurisdiction—and I don’t get to do a lot of corporate resolutions, maybe I give a talk or get it out there that I’m going to look at these things more leniently and you can get a better deal. [...] I know that’s not the point of the new policy, “but I wonder if that ends up being the result.”

### Corporate leniency agreements and public declinations, fiscal years 2013-2022



Data Source: Duke University Corporate Prosecution Registry

The Justice Department posted a single public declination during the 2022 fiscal year. The [declination](#) states the government will not prosecute Jardine Lloyd Thompson Group Holdings Ltd., an insurance broker, over a scheme to pay more than \$3 million in bribes to the government of Ecuador. The company, which was acquired in 2019 by professional services firm Marsh McLennan, agreed to disgorge the full amount of its ill-gotten gains as calculated by the DOJ, a sum of about \$29 million. A former employee of the corporation reportedly [pleaded guilty](#) to related charges.

Looking at the JLT Group Holdings case, it is hard to see how declining to prosecute a business engaged in foreign corruption crime and requiring only that ill-gotten gains be paid back will serve as an effective deterrence for future misconduct. Corporations are the ultimate rational actors. They calculate risk while seeking profits. From the outside looking in at the JLT Group Holdings case, the risk the corporation took – engaging in criminal misconduct in order to expand its business – perhaps did not pay off, but the corporation has apparently been left no worse off than before risking its for-profit criminal scheme.

This is not how criminal penalties are normally imposed. According to U.S. Sentencing Guidelines, an offense that generates millions in [pecuniary gains](#) would have a [minimum multiplier](#) of two and a maximum multiplier of four. This means the penalty range for the corporation, if it had been prosecuted according to the guidelines, would have been between \$58 million and \$116 million. Supporters of the DOJ's approach might argue that the risk of a large penalty means the misconduct – which was voluntarily disclosed in 2018 – might never have been uncovered.



However, incentivizing the offending corporations themselves to self-report is not the only way to achieve disclosure. Another approach – which has achieved [significant successes](#) as implemented by the Securities and Exchange Commission – is to pay bounties to whistleblowers. But the Justice Department’s main whistleblower enforcement program, its False Claims Act case load, appears to be [on the decline](#). The DOJ filed fewer of these cases in 2022 than in any year since 2004.

## Conclusion

The corporate enforcement policies Attorney General Merrick Garland’s DOJ has adopted mean the corporate prosecution doldrums are likely to continue. As a state of affairs, it is both unsafe and unjust. The light-touch approach to enforcement creates opportunities for corporate scofflaws to push the limits of what is legally allowed – risking our health and safety, our environment, our finances, and our communities – in their efforts to maximize profits.

The DOJ’s practice of bending over backwards to protect corporate offenders from the consequences of their own misconduct creates the ideal criminogenic conditions for the next corporate catastrophe. The stories of two of the worst corporate-caused crises of the 21st Century – the pharmaceutical industry-driven opioid epidemic and the 2008 financial crisis – are partly stories about enforcement agencies failing to fight systemically criminal misconduct before it was too late. This foreseeable failure, combined with increasingly strident complaints from corporations to crack down on “organized retail theft” and other ill-defined and poorly measured crimes associated with poverty, threatens to accelerate the polarization of prosecution.

Looking into the 2023 fiscal year, which concluded at the end of September, and farther into the future, the signs for how the DOJ will proceed are mixed. Deputy Attorney General Monaco [announced in October](#) that structural remedies – including requiring corporations to divest lines of business – are on the table for corporate resolutions. The DOJ’s fresh willingness to impose this kind of structural reform as a consequence for corporate crime is a positive development for strengthened deterrence. However, another policy Monaco announced in the same speech may do more harm than good: a department-wide “Safe Harbor Policy” for criminal misconduct that is uncovered and disclosed when one corporation merges with or is acquired by another. This is another manifestation of the DOJ policy of overemphasizing rewarding voluntary self-disclosure. Depending how it is implemented, the policy can effectively reassure corporations that engage in criminal misconduct that they can avoid accountability if they are subsequently acquired by another corporation.

Crypto enforcement is another area prosecutors’ actions are sending mixed signals. The prosecution of alleged crypto-fraudster [Sam Bankman-Fried](#) by the U.S. Attorney’s Office for the Southern District of New York following the collapse of cryptocurrency exchange FTX suggests the department is capable of aggressive action to hold corporate offenders

accountable. However, the [reported reluctance](#) to charge Binance and CEO Changpeng Zhao, in spite of the DOJ's criminal investigation producing sufficient evidence, according to reports, raises concerns whether the department will take appropriately adversarial action.

Other ongoing criminal investigations worth watching are those that have been reported concerning [Abbott Labs](#) (over the tainted baby formula crisis of 2022), [Tesla](#) (over allegedly deceptive claims regarding self-driving vehicles), and TikTok parent corporation [ByteDance](#) (over allegations the corporation used its popular app for surveillance against U.S. journalists).

A society that punishes the crimes of the poor while permitting the crimes of the powerful is not a just society. The principle that no one should be above the law includes corporations.