CORPORATE PROSECUTION DOLDRUMS

In 2022, DOJ Corporate Crime Prosecutions Remain Near Record Low

By Rick Claypool

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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).

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.”
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.