Litigation Alert

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Deputy AG Announces Significant Changes to DOJ Policies Regarding Corporate Investigations

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Key Points

- On September 15, 2022, Deputy AG Lisa O. Monaco released a Memorandum and provided remarks announcing several DOJ policy changes to prioritize and strengthen the Department's prosecution of corporate crime.
- These changes align with the more aggressive approach that the DOJ has taken in prosecuting corporate crime since at least October of 2021, when Monaco announced several initiatives to enhance the DOJ's corporate enforcement efforts.
- Among the recently announced changes, the DOJ will further prioritize and expedite its investigation and prosecution of individuals; released additional guidance for evaluating corporate recidivism; will require every relevant DOJ component to release a policy on voluntary self-disclosures; released new guidance on the imposition and selection of compliance monitors; and adopted transparency requirements for corporate criminal agreements.
- The DOJ also revised its guidance on how it will evaluate corporate cooperation and compliance programs in the context of potential criminal resolutions. In particular, the DOJ can be expected to place renewed emphasis on the company's procedures regarding the use and retention of electronic communications, the incentives created by the company's executive compensation programs and whether the company provided speedy and proactive cooperation, including self-reporting and other forms of voluntary disclosure.

Background

On Thursday, September 15, Deputy Attorney General (AG) Lisa O. Monaco released a Memorandum announcing several changes the Department of Justice (DOJ) is implementing to further prioritize and strengthen its prosecution of corporate crime. In conjunction with the Memorandum, Monaco delivered a speech highlighting the changes at New York University School of Law.

These changes build upon Monaco's announcement in October of 2021 that clarified that the DOJ would (i) prioritize individual accountability, (ii) consider all of a company's prior misconduct in evaluating resolutions and (iii) reverse prior guidance

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suggesting corporate monitorships were disfavored. Monaco also then announced the formation of the Corporate Crime Advisory Group to complete a "top-to-bottom review" of the DOJ's corporate enforcement efforts.[1]

The changes Monaco announced on Thursday were the result of studies and recommendations by the Corporate Crime Advisory Group. The changes target six primary areas:

1. The DOJ will prioritize and expedite its investigation and prosecution of individuals.
2. The DOJ released additional guidance for evaluating the criminal, civil and regulatory record of companies when deciding on appropriate resolutions.
3. The DOJ is requiring all DOJ components that prosecute corporate crime to draft a formal policy on voluntary self-disclosures, including the positive consequences that will flow from self-disclosure.
4. The DOJ released new guidance on when compliance monitors are appropriate and how they can be selected equitably and transparently.
5. The DOJ released additional guidance on how prosecutors should evaluate compliance programs, including whether the programs use financial incentives to mitigate misconduct and whether they effectively address the use of personal devices and third-party apps.
6. The DOJ committed to being more transparent in its release of information regarding corporate criminal resolutions.

Expediting Investigations and Prosecutions of Individuals

Monaco said that the DOJ's number one priority is pursuing individuals who commit and profit from corporate crime, whether they are "on the trading floor or in the C-suite." Monaco said that the DOJ will expedite its investigations of such individuals.

In furtherance of this directive, the DOJ will take three primary actions. First, it will require cooperating companies to come forward with important evidence, particularly that which shows individual culpability, "on a timely basis."[2] Prosecutors will be directed to specifically assess companies' compliance with this directive, and if the DOJ determines that a company unduly or intentionally delayed in producing information, "cooperation credit will be reduced or eliminated."

Second, the DOJ will ask its prosecutors to pursue criminal charges against individuals, where warranted, "prior to or simultaneously with the entry of a resolution against the corporation." With this change, the DOJ seeks to overcome the delay to individual prosecutions that can result when corporations and the government go back-and-forth to reach a resolution. If the DOJ is going to resolve a corporate case first, prosecutors must draft a full investigative plan and outline for advancing the individual case.

Third, the DOJ released additional guidance for commencing a prosecution of individuals responsible for cross-border corporate crime. Current DOJ policy specifies that effective prosecution in another jurisdiction may be grounds to forego prosecution in the United States. The DOJ will now require prosecutors to make a "case-specific determination as to whether there is a significant likelihood" that the culpable individual will be effectively prosecuted in the other jurisdiction. Prosecutors are also directed not

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to delay prosecuting an individual in the cross-border context if it could negatively impact the U.S.-based prosecution, such as if there is a statute of limitations.

Monaco said that prosecutors and corporate counsel alike should feel that they are "on the clock" to expedite investigations.

Additional Guidance for Evaluating Corporate Recidivism

Last year, the DOJ announced that it would consider the full criminal, civil and regulatory record of any company when deciding an appropriate resolution. As a part of these current changes, the DOJ released additional guidance about how such histories will be evaluated.

First, not all prior misconduct will be considered equally. Criminal resolutions in the U.S. and prior wrongdoing involving the same personnel or management will be considered the most significant by the DOJ. Additionally, dated conduct will generally be accorded less weight, including criminal resolutions that occurred more than 10 years before, and civil or regulatory resolutions that took place more than five years before, the current relevant conduct.

The DOJ will also consider the "facts and circumstances" underlying a corporation's prior resolution. For example, the DOJ will consider the "seriousness and pervasiveness" of the prior misconduct, whether it was "similar in nature" to the instant misconduct and whether there are broader weaknesses in the company's compliance program or culture. The DOJ will also consider whether, at the time of its misconduct, the corporation was already serving a term imposed by a prior resolution. Furthermore, the fact that a corporation operates in a highly regulated industry may provide helpful context, and so corporations in that industry should be compared to other similarly situated corporations.

Monaco said that the DOJ does not want to discourage acquisitions that may result in companies with improved compliance structures. Therefore, prior misconduct by acquired entities "should receive less weight," as long as the acquiring corporation effectively integrated the entity into a well-designed compliance program and fully and timely remediated the past misconduct.

Finally, the DOJ will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company. Any such offers will be scrutinized by DOJ leadership. Companies cannot assume that they are entitled to a Non-Prosecution Agreement (NPA) or Deferred Prosecution Agreement (DPA). Monaco said that criminal resolutions cannot be priced in as the cost of doing business: "we have a message—times have changed."

Expanding and Clarifying Policies Addressing Voluntary Self-Disclosure

Monaco announced that the DOJ will expand and clarify its policies on voluntary self-disclosure, noting that it is the clearest path for a company to avoid a guilty plea or an indictment. In shaping these changes, the DOJ's goal will be to reward companies that have invested in compliance programs which enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward.

To implement these goals, the DOJ is requiring that every Department component that prosecutes corporate crime draft a formal written policy to incentivize self-disclosure, if

it has not already done so. Monaco cited examples of successful voluntary self-disclosure programs, including the Antitrust Division's Leniency Program, the Criminal Division's voluntary disclosure program for Foreign Corrupt Practices Act violations and the National Security Division's program for export control and sanctions violations.

All drafted policies must adhere to "core principles" regarding voluntary self-disclosure policies. For example, absent aggravating factors, the DOJ will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated and remediated the relevant misconduct, nor will it require an independent compliance monitor when the corporation has implemented and tested an effective compliance program as of the time of the resolution.

Monaco said that, through these policies, the DOJ will seek to clarify the benefits of self-disclosure so that chief compliance officers can show their Boards that self-disclosure can save their companies hundreds of millions of dollars in fines, penalties and associated costs. Resolutions over the coming months "will reaffirm how much better companies fare when they come forward and self-disclose."

Additional Guidance for Appointing Independent Compliance Monitors

Monaco acknowledged that there have been calls for there to be more transparency to reduce suspicion and confusion about monitors. To address these concerns, the DOJ released additional guidance about how it will identify, select and oversee monitors.

When evaluating whether a monitor is appropriate, prosecutors have been directed to conduct a case-by-case analysis in light of ten, non-exhaustive factors. There are several new factors in the guidance, including evaluating whether (i) the corporation voluntarily self-disclosed the conduct, (ii) the conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags and (iii) the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates.

Finally, the DOJ released guidance to ensure that the scope of every monitorship is tailored to the misconduct, and that the DOJ will "monitor the monitor." These provisions include, among others, ensuring the monitor's responsibilities are well-defined and requiring prosecutors to "remain apprised" of the ongoing work.

Changes to How the DOJ Evaluates Corporate Compliance Programs

Noting that "it all comes back to corporate culture," Monaco announced changes to the way the DOJ evaluates compliance programs. Specifically, prosecutors have been directed to consider, in addition to existing guidance for evaluating compliance programs, the extent to which (i) a corporation's compensation systems promote compliance and (ii) the effectiveness of the company's policies and procedures on the use of personal devices and third-party messaging applications.

First, prosecutors will now consider whether a company's compensation system rewards compliance and imposes financial sanctions on employees involved in criminal conduct. Financial sanctions may include, for example, clawback provisions, the escrowing of compensation and "other ways to hold financially accountable

individuals who contribute to criminal misconduct." Financial incentive tools may include affirmative metrics and benchmarks to reward compliance-promoting behavior. Prosecutors should also evaluate whether corporations follow their policies in practice, and whether corporations use non-disclosure agreements to inhibit public disclosure of wrongdoing.

Monaco announced that the Criminal Division will develop further guidance by the end of 2022 on how to reward corporations that employ clawbacks or similar arrangements, which will help shift the burden of corporate financial penalties to those directly responsible.

Second, noting that personal devices and encrypted messaging apps can negatively impact the Government's investigation, prosecutors will now consider whether a corporation has implemented effective policies governing the use of such devices and third-party apps. In line with this, the Criminal Division is going to further study best corporate practices in this area and their findings will be incorporated in the next Evaluation of Corporate Compliance Programs.

Commitment to Transparency

Finally, citing the need for transparency to encourage companies to address misconduct, Monaco announced new guidance for corporate criminal resolutions. NPAs and DPAs shall now have, to the greatest extent possible (i) an "agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement" and (ii) a "statement of relevant considerations that explains the Department's reasons for entering into the agreement."

Takeaways

The policy changes outlined in Monaco's Memorandum and remarks send a clear signal that the DOJ will be expecting more of corporations and businesses that are in the crosshairs of government investigations, especially where those companies are at risk of being considered "recidivists." To best position themselves in the event of a potential government investigation, corporations should assess their compliance programs to ensure that they are appropriately resourced and continue to be effective in the face of evolving regulatory and business developments. In conducting their own assessments of such programs, the DOJ will now scrutinize the incentive structures created by management and employee compensation programs. The DOJ has also indicated its continued interest in addressing the use of personal devices and encrypted messaging apps by corporate employees, which has been a focus area for regulatory agencies such as the U.S. Securities and Exchange Commission and Commodity Futures Trading Commission in the past year. Corporations should evaluate the effectiveness of their policies with these issues in mind and closely review the updated Evaluation of Corporate Compliance Programs once it is available.

The DOJ has also raised the bar with respect to its expectations for corporate cooperation after potential misconduct has been identified or an investigation has begun. To incentivize companies to meet its expectations, the DOJ appears to be taking "a carrot and stick" approach, rewarding companies that self-report and provide timely and proactive cooperation, and potentially penalizing companies that are perceived as having failed to do so. These policy changes will have a significant and

immediate impact on how the DOJ will assess compliance programs and the quality of corporate cooperation going forward.

[1] Lisa O. Monaco, Deputy Attorney General, Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022).

[2] Lisa O. Monaco, Deputy Attorney General, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022).

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