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DOJ Announces Significant Changes to Corporate Criminal Enforcement Policies

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By Members of the Government Investigations and White Collar Defense Practice Group

On October 28, 2021, Deputy Attorney General Lisa Monaco issued a Memorandum entitled “Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies,” which she explained the same day in her Keynote Address at the ABA National Institute on White Collar Crime. Together, the DAG Memo and her Keynote Address provide insight into efforts of the Department of Justice (DOJ) to more aggressively pursue corporate criminal enforcement. Below we address three policy changes and what companies can do to address risks of increased criminal enforcement.

Weight Given to History of Past Corporate Misconduct

The current DOJ Manual indicates that in exercising prosecutorial discretion, DOJ considers “the corporation's history of *similar* misconduct.” Justice Manual (JM) 9-28.600 (emphasis added). The DAG Memo indicates that the Justice Manual will be amended to require that prosecutors:

> “[t]ake a holistic approach when considering a company's characteristics, including its history of corporate misconduct, without limiting their consideration to whether past misconduct is similar to the instant offense. To that end, when making determinations about criminal charges and resolutions for a corporate target, prosecutors are directed to consider *all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family. Some prior instances of misconduct may ultimately prove less significant, but prosecutors must start from the position that all prior misconduct is potentially relevant” (DAG Memo at 3, emphasis in the original).

The Deputy Attorney General explained that the complete “record of misconduct speaks directly to a company's overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity.”

Qualifying for Cooperation Credit

The DAG Memo explains that in order "to receive *any* consideration for cooperation, the company must identify *all* individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide to the Department *all* nonprivileged information relating to that misconduct. To receive such consideration, companies cannot limit disclosure to those individuals believed to be only substantially involved in the criminal conduct. This requirement includes individuals inside and outside of the company." DAG Memo at 3 (emphasis added).

This change signals a return to the policy articulated in the Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015) (the "Yates Memo"), which was rescinded by the Trump Administration in November 2018.

The Deputy Attorney General elaborated on the reasons for the change in her Keynote Address:

> "It will no longer be sufficient for companies to limit disclosures to those they assess to be "substantially involved" in the misconduct. Such distinctions are confusing in practice and afford companies too much discretion in deciding who should and should not be disclosed to the government. Such a limitation also ignores the fact that individuals with a peripheral involvement in misconduct may nonetheless have important information to provide to agents and prosecutors. The department's investigative team is often better situated than company counsel to determine the relevance and culpability of individuals involved in misconduct, even for individuals who may be deemed by a corporation to be less than substantially involved in misconduct. To aid this assessment, cooperating companies will now be required to provide the government with all non-privileged information about individual wrongdoing."

Increased Use of Corporate Monitors

In future resolutions of corporate criminal prosecutions through a deferred prosecution agreement "DPA) or non-prosecution agreement (NPA), DOJ will "favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship. Where a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution, Department attorneys should consider imposing a monitorship. This is particularly true if the investigation reveals that a compliance program is deficient or inadequate in numerous or significant respects. Conversely, where a corporation' s compliance program and controls are demonstrated to be tested, effective, adequately resourced, and fully implemented at the time of a resolution, a monitor may not be necessary" (DAG Memo at 4-5).

In her Keynote Address, the Deputy Attorney suggested the use of corporate monitors will reduce the recidivism of corporations that have entered into DPAs and NPAs.

Additional Policy Changes to Come

The DAG Memo also announced the formation of a "Corporate Crime Advisory Group" consisting of representatives from throughout the Department. In particular, the Advisory group will evaluate and make recommendations on:

- What benchmarks should be used to measure a successful company's cooperation;
- The process to select corporate monitors;
- When to rely on the pretrial diversion tools of DPAs, NPAs, and plea agreements;
- Identify resources that can facilitate more rigorous enforcement and individual accountability; and
- Expanded use of new technologies, including artificial intelligence, and data analytics to detect violations and measure compliance.

See DAG Memo. at 2; Keynote Address.

Prudent Steps to Reduce Risk of Corporate Criminal Liability

The Deputy Attorney General concluded her Keynote Address warning that there will be more rigorous criminal enforcement to come and "[c]ompanies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct — or else it's going to cost them down the line." While it is difficult to predict how and when implementation of these new policies will take effect and whether increased corporate criminal prosecutions will result, prudent companies can take the following steps to reduce the risk of serious non-compliance that could result in prosecution and to enhance a company's claim for cooperation credit:

1. **Enhance existing compliance systems.** With the government's increased use of data analytics to detect non-compliance and evaluation of unrelated violations by affiliated corporate entities, companies have even greater incentive to implement robust company-wide compliance programs that make rigorous use of relevant data to detect and address non-compliance that could tarnish the compliance record of the entire enterprise. Companies should encourage whistleblowers to report any concerns internally through well-publicized and established routes, and any such reports should be taken seriously and addressed promptly and appropriately.
2. **Conduct objective and thorough internal investigations.** Company management and boards must ensure that internal investigations are conducted in an objective and rigorous manner to harvest all relevant information concerning all those within the company and its goods and services supply chain involved in the wrongdoing. Failure to provide such information could jeopardize a company's ability to obtain cooperation credit and enter into a DPA or NPA. Early engagement of value-oriented and skilled separate JDA counsel for at least key individuals may help seamlessly

address government outreach to individual current and former employees.

3. **Corrective measures.** Failure to immediately address non-compliance in the aftermath of a significant violation known to the government, especially if the company has a record of prior significant non-compliance, exposes the weaknesses of the company's compliance systems and culture, subjecting the company to the risk of criminal prosecution and imposition of a compliance monitor. In contrast, immediate cooperation with government investigators and implementation of corrective measures, including use of outside compliance consultants, can reduce the risk of prosecution and imposition of a compliance monitor. Companies should also ensure that the effective operation of existing compliance initiatives is thoroughly documented to ensure a detailed evidentiary record of compliance.
4. **Track government enforcement initiatives.** Prudent companies track civil and criminal enforcement initiatives, actions and settlements in their industry sector, and learn vicariously from the compliance failures of other companies by undertaking a “there by the grace of God go we” analysis to identify areas needing improvement in their own compliance systems and corporate culture.

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