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Deputy Attorney General Lisa Monaco announces new guidance on DOJ corporate enforcement

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On September 15, 2022, Deputy Attorney General Lisa Monaco provided additional guidance around DOJ's corporate criminal enforcement. In a speech and accompanying memorandum, the DAG reiterated DOJ's commitment to corporate criminal enforcement and addressed topics such as individual accountability, corporate cooperation, recidivism, voluntary self-disclosures, independent compliance monitors, off-systems communications and the promotion of compliance through financial incentives.

On Thursday, September 15, 2022, Deputy Attorney General Lisa Monaco made good on her pledge to provide additional guidance around DOJ's corporate criminal enforcement. During a speech and in an accompanying memorandum, the Deputy Attorney General reiterated DOJ's commitment to corporate criminal enforcement—including through a request to Congress for $250 million for corporate criminal enforcement initiatives—and addressed topics such as individual accountability, corporate cooperation, recidivism, voluntary self-disclosures, independent compliance monitors, off-systems communications and the promotion of compliance through financial incentives, including compensation clawbacks. In crafting the new guidance, the DAG noted that the Department collected a broad range of perspectives from outside experts, including public interest groups, ethicists, academics, audit committee members, in-house attorneys, former corporate monitors, and members of the business community and defense bar, and incorporated the insights collected. These varying perspectives appear to have impacted the new guidance and approach by the DAG, which continued to strike an exacting tone but, unlike her speech in October 2021, included some carrots in addition to the sticks.

Although the speech and memorandum include specific details, the ultimate impact of the new guidance is not yet clear, including because the guidance still leaves prosecutors considerable discretion and because additional guidance is yet to come. Nonetheless, there are several key aspects that clients should review closely and we will continue to monitor whether these changes will be a significant "game changer."

1. Individual accountability and speed of investigations

The DAG reiterated that DOJ's number one priority is individual accountability, and emphasized its intention to prosecute individuals who commit and profit from corporate crime. This priority is of course not new, and dates back at least a decade. To "empower" prosecutors, the DAG announced that prosecutors will have the ability to reduce or eliminate cooperation credit "[w]here prosecutors identify undue or intentional delay in the production of information or documents—particularly with respect to documents that impact the government's ability to assess individual culpability." Although "timeliness" is also not an entirely new focus of DOJ in evaluating cooperation credit, what does appear new is an implied timeline for the disclosure of evidence discovered during the course of an investigation. According to the DAG, "if a company discovers hot documents or evidence, its first reaction should be to notify the prosecutors." This may embolden prosecutors to claim that companies are delaying when in fact they are carrying out their fiduciary duties to shareholders and attempting to understand evidence before they provide it to DOJ.

Additionally, the DAG stated that prosecutors should aim to bring individual prosecutions prior to or at the same time as a corporate resolution in order to efficiently resolve individual prosecutions. In instances where it is beneficial to resolve a corporate case prior to an individual prosecution, prosecutors must have an investigative plan detailing any outstanding work and a timeline to complete that work. The presumption in favor of individual prosecutions prior to or contemporaneous with a corporate resolution will likely slow down corporate enforcement because preparing a case for an indictment most often takes more time than resolving a negotiated resolution (for both individuals or corporations).

2. Corporate recidivism

The DAG announced additional helpful guidance for evaluating corporate recidivism, and in so doing clarified the comments in her October 28, 2021 speech, in which she stated that the Department would consider the full criminal, civil, and regulatory record of any company when deciding the appropriate resolution. The DAG acknowledged that this aspect of her October 2021 speech received the most criticism from the defense bar and companies, and on Thursday, the DAG acknowledged that "not all instances of prior misconduct are created equal." This is a step forward.

When considering prior misconduct in connection with a corporate resolution, the DAG explained that DOJ would give more weight to prior misconduct in the United States, as well as prior misconduct involving the same personnel or with the same root cause as the current misconduct under investigation. On the flip side, the DAG explained that "dated" prior misconduct, which she defined as criminal misconduct that occurred more than 10 years earlier or civil/regulatory misconduct that occurred more than five years earlier, would not be viewed as negatively as misconduct closer in time. Addressing the fact that almost all companies in highly regulated industries have some instances of prior misconduct, the DAG stated that in evaluating corporate recidivism, the Department would compare companies in highly regulated industries with other companies in those industries. Likewise, the memorandum instructs prosecutors to examine the "factual admissions" in prior resolutions, which appears to address a criticism of her October 2021 speech that a no-admit-no-deny resolution should carry less weight than a resolution with factual admissions.

The DAG also made clear the Department's desire to encourage companies to reform and improve the compliance structure of less-compliant companies that have been acquired, echoing a sentiment from the FCPA corporate enforcement policy. The DAG noted that an acquiring company with a strong record of compliance would not be treated as a recidivist company as long as it promptly addressed compliance issues in the acquired company.

Nevertheless, the DAG reiterated her skepticism from her October 2021 speech in which she questioned whether companies should get the benefit of successive non-prosecution agreements or deferred prosecution agreements. On Thursday, the DAG stated that DOJ would "disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company," and, in order to ensure consistency, the Department will scrutinize any such proposal and notice must be given to the Office of the DAG.

3. Voluntary self-disclosures

Attempting to build in more carrots for good corporate behavior, the DAG described the Department's new policy on voluntary self-disclosures. Here, the DAG instructed that "every component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure," and any components lacking a formal policy will be required to draft one. She expressed the Department's interest in expanding Department-wide programs like the Antitrust Division's Leniency Program, the Criminal Division's voluntary disclosure program for FCPA violations, and the National Security Division's program for export control and sanctions violations.

In an effort to increase predictability and provide clearer expectations for disclosure, the DAG announced common principles applicable across all such voluntary self-disclosures policies. In particular, "[a]bsent aggravating factors, the Department will not seek a guilty plea when a company voluntarily self-disclosed, fully cooperated, and remediated misconduct." Although the DAG emphasized that the Department will not implement a compliance monitor where a company has already implemented and tested an effective compliance program, that statement already reflects current DOJ policy even absent a voluntary disclosure.

This new DOJ-wide policy of not seeking a guilty plea absent aggravating circumstances where the company voluntary self-discloses, fully cooperates, and fully remediates, is nonetheless harsher than the three programs cited as exemplars by the DAG—the Antitrust leniency program, the FCPA corporate enforcement policy, and the NSD voluntary disclosure program, which in such circumstances provide for immunity, a presumption of a declination, and a presumption of a non-prosecution agreement, respectively. Whether these new policies will lead to more voluntary self-disclosures will depend on how they are constructed and implemented, and how they interface with the other guidance announced by the DAG.

For example, if there is a heightened expectation that companies must turn over all "hot documents" immediately or risk losing all cooperation credit, companies could be less likely to self-disclose.

4. Compliance monitors

In another clarification from the DAG's October 2021 speech, the new guidance memorandum makes clear that although there will not be a "presumption against requiring an independent compliance monitor" as part of a corporate resolution, there also will not be a "presumption in favor of imposing one." In the memorandum, the DAG announced new guidance on the selection and oversight of monitors in order to increase transparency and consistency, including about when a monitor is needed, how a monitor is selected, and the oversight necessary for a monitor to succeed. Specifically, the Department provided a non-exhaustive list of 10 factors to evaluate the necessity and potential benefits of a monitor, and stated that "[m]onitor selection should be performed pursuant to a documented selection process that is readily available to the public." These factors are similar to, but expand upon, the guidance released by DOJ's Criminal Division in 2018 on the Selection of Monitors in Criminal Division Matters.

In a welcome development, the DAG recognized the importance of tailoring the scope of the monitor to the company's misconduct and acknowledged DOJ's obligation to "monitor the monitor." Specifically, "for the term of the monitorship, Department prosecutors must remain apprised of the ongoing work conducted by the monitor" and "[p]rosecutors should receive regular updates from the monitor about the status of the monitorship and any issues presented," including updates to "verify that the monitor stays on task and on budget." The decision to review "issues relating to the cost of the monitor's work" is a departure from how DOJ has historically dealt with such matters.

5. Compliance programs and additional guidance underway

One theme that has been consistent across DOJ speeches and policies over the past year has been the importance of compliance programs. Earlier this year, DOJ's Criminal Division announced a new compliance certification that CEOs and CCOs would be required to sign in connection with corporate resolutions. Likewise, the Fraud Section—a key component of DOJ that prosecutes corporate crime—just last week onboarded their new Chief, Glenn Leon, who previously served as the Chief Compliance Officer for HP Enterprise, as well as a new Compliance Counsel, Matt Galvin, who previously was the Chief Compliance Officer for AB InBev. These new hires will compliment DOJ's understanding of the complexity of companies' compliance programs.

The DAG continued beating this drum, announcing a plan to encourage companies to shape financial compensation in order to promote compliance. Specifically, the DAG said that companies would be rewarded for clawing back compensation, escrowing compensation, imposing other financial penalties for those employees who contributed to misconduct, and for creating a compensation system that uses affirmative incentives for "compliance-promoting behavior," such as compliance metrics and benchmarks and performance reviews. The DAG stated that DOJ's Criminal Division will develop guidance by the end of the year for DOJ to apply these principles.

Similarly, the DAG also announced that the Criminal Division would study and develop guidance for the use of personal devices and ephemeral messaging apps to assist prosecutors in evaluating a company's compliance program as it relates to these issues. The memorandum recognizes the ubiquity of these messaging apps and the use of personal devices by employees, an area to which the U.S. Securities and Exchange Commission and Commodity Futures Trading Commission have likewise paid particular attention recently, levying fines in the hundreds of millions of dollars. According to the new guidance, "[a]s a general rule, all corporations with robust compliance programs should have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, should provide clear training to employees about such policies, and should enforce such policies when violations are identified."

Lastly, the DAG instructed that "prosecutors should consider whether a corporation uses or has used non-disclosure or non-disparagement provisions in compensation agreements, severance agreements, or other financial arrangements so as to inhibit the public disclosure of criminal misconduct by the corporation or its employees." Although these provisions are fairly common in such agreements, companies should consider including language that makes clear the provisions do not prohibit the disclosure of information to regulatory or enforcement authorities, for example the way that publicly traded companies do in order to comply with Securities Exchange Act Rule 21F-17(a).

6. Takeaways

Overall, the new guidance may not significantly alter existing corporate enforcement guidance, or at least, how that landscape will change may depend on promised forthcoming guidance. Of note, the DAG's policy pronouncements are premised on the notion that corporate criminal enforcement needs "greater emphasis," a proposition that is not borne out by DOJ's recent efforts, and may overlook the possibility that companies are improving their compliance programs and becoming more compliant as a general matter. Additionally, the DAG announced efforts to address debarment issues, in recognition of Senator Elizabeth Warren and Ben Ray Lujan's August 11, 2022 letter to the Department urging it "to pursue more robust use of its suspension and debarment authority," by committing to "enhancing the effectiveness of the federal government's system for debarment and suspension," notwithstanding the fact that the Department plays no statutory role in the debarment process.

Importantly, the DAG clarified many of the positions outlined in her October 2021 speech, reflecting greater nuance and a better understanding of some of the key issues implicated by corporate criminal enforcement.

One certain takeaway is the continued emphasis on compliance, an area where companies can be proactive. Given the new policies, companies should continue to assess ways to improve their compliance programs, including by considering implementation of policies relating to financial penalties or rewards to incentivize compliance, and policies addressing the use of personal devices and messaging apps.

This is likely even more true for companies that have prior resolutions for misconduct and which might fall into a category likely to elicit harsher treatment by DOJ.

And companies that are facing a DOJ investigation and have made the decision to cooperate should ensure that they are communicating frequently and clearly with the prosecutors to ensure that they are meeting DOJ's expectations for cooperation.

DAG Monaco's speech can be found here and the memorandum can be found here.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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