

Deputy Attorney General Lisa Monaco announces significant DOJ corporate enforcement policy changes

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On Thursday, October 28, 2021, Deputy Attorney General Lisa Monaco announced significant changes to the DOJ's corporate enforcement program during her speech at the ABA's National Institute on White Collar Crime. The changes address: (1) corporate cooperation requirements; (2) the treatment of a corporation's history of prior resolutions with the Department; and (3) the imposition of corporate compliance monitors.

Together these new or revised policies will likely have a significant impact on DOJ's corporate enforcement program, and they signal harsher treatment of corporate actors who are confronted with a DOJ investigation and resolution. DAG Monaco also announced a new Corporate Crime Advisory Group to evaluate DOJ's corporate policies and said that more changes are coming. Notably, the DAG also forecasted heightened scrutiny of companies' compliance with the requirements of their prior criminal [resolutions](#) with the Department, which follows the disclosures made by two companies that the DOJ has declared them in breach of existing resolution agreements, one a Non-Prosecution Agreement (NPA) and one a Deferred Prosecution Agreement (DPA). Taken together, along with the DAG's commitment to "surge resources" to white collar enforcement, the DOJ is following through on recent messaging that it will ratchet up white collar enforcement and will treat companies more harshly than in prior administrations.

1. Changes to cooperation requirements

First, the DAG announced that the DOJ would revert to an earlier formulation in its memorandum on "Individual Accountability for Corporate Wrongdoing" (the so-called Yates Memo), which required that, in order to receive cooperation credit, companies under investigation would need to provide information related to *all* individuals involved in the alleged misconduct. In 2018, the Trump Administration narrowed the Yates Memo's effect by requiring companies only to provide information related to individuals "substantially involved in or responsible for" the alleged misconduct.

According to the DAG, the "substantially involved in or responsible for" limitation is "confusing in practice and afford[s] companies too much discretion in deciding who should and should not be disclosed to the government," and also "ignores the fact that individuals with a peripheral involvement in misconduct may nonetheless have important information to provide to agents and prosecutors." Whether this change will allow the government to charge more corporate officers and employees engaged in misconduct is unclear, but the change will require companies to meet a heightened standard to receive cooperation credit.

2. Treatment of prior misconduct

Second, the DAG announced that in reaching a resolution, prosecutors should consider "all prior misconduct ... when it comes to decisions about the proper resolution with a company, whether or not that misconduct is similar to the conduct at issue in a particular investigation." Thus, "[a] prosecutor in the FCPA unit needs to" determine whether the company

has “run afoul of the Tax Division, the Environment and Natural Resources Division, the money laundering sections, the U.S. Attorney’s Offices, and so on,” as well as “whether this company was prosecuted by another country or state, or whether this company has a history of running afoul of regulators.”

This change will significantly broaden the scope of misconduct that prosecutors consider when determining whether and how to resolve a corporate criminal investigation. Many companies – particularly large corporations – routinely face regulatory scrutiny by different authorities, both domestic and foreign. Such actions – even those involving the lowest level employees and totally unrelated conduct – are now fair game for DOJ to consider as part of any resolution. And while the DAG conceded that “[s]ome prior instances of misconduct may ultimately prove to have less significance,” the consideration of prior misconduct and resolutions will almost certainly lead to harsher treatment of corporations.

In addressing what changes are yet to come, the DAG stated that the DOJ will be reviewing “whether and how to differently account for companies that become the focus of repeated DOJ investigations” and whether NPAs and DPAs are appropriate for such companies. If a decision is made that companies with prior DOJ resolutions will automatically be forced to resolve matters by pleading guilty, this may decrease the incentives these companies have to self-disclose misconduct to the government and cooperate with the government’s investigation.

3. Resurgence of monitorships

Third, the DAG stated that, to the extent that prior DOJ guidance suggested that monitors were “the exception and not the rule” or that “monitorships [were] disfavored,” she is “rescinding that guidance.” The DAG’s remarks signal a meaningful increase in the appointment of monitors.

Clients should expect heightened scrutiny of their compliance programs and a frequency of monitors more akin to 2016 when, for example, eight FCPA monitors were imposed in that year alone, as compared to the six FCPA monitorships that were imposed in the last five years combined. It will become increasingly important that clients continue to review and enhance their compliance programs and, with the help of defense counsel, appropriately communicate to DOJ the effectiveness of these programs early and often throughout the investigation and resolution process.

4. More to come

In addition to the changes announced Thursday, the DAG also revealed the creation of a Corporate Crime Advisory Group composed of representatives from across the DOJ with corporate enforcement experience, to review and evaluate existing corporate enforcement policies and to determine what additional changes should be made. The group will “consider some of the issues [the DAG] previewed,” including “monitorship selection, recidivism and NPA/DPA non-compliance — as well as other issues, like what benchmarks we should use to measure a successful company’s cooperation.” The DAG also announced that this group will “consult broadly,” which suggests that it may engage in outreach to the business community and defense bar for feedback on potential changes.

One of the issues on the Corporate Crime Advisory Group’s agenda will be a consideration of how to treat companies that violate the terms of existing resolution agreements. According to the DAG, DOJ will have “no tolerance for companies that take advantage of [DPAs and NPAs] by going on to continue to commit crimes, particularly if they then compound their wrongdoing by knowingly hiding it from the government,” and noted that “[i]t is hard for me to think of more outrageous behavior by a company that has entered into a DPA or NPA in the first place.” This comes on the heels of disclosures by two multinational companies that each had received a breach notification from the DOJ, declaring them in breach of existing resolution agreements.

The DAG also reiterated what PADAG Carlin had previously noted – that the DOJ would “surge resources” to white collar enforcement, providing as an example “a new squad of FBI agents [that] will be embedded in the Department’s Criminal Fraud Section,” responsible for FCPA cases, financial fraud, and healthcare fraud. She further indicated that “[t]his team model has a proven track record and is one we’ve used in numerous high-profile cases.”

5. Takeaways

Overall, DAG Monaco underscored the DOJ’s commitment to increased—and harsher—enforcement of companies that engage in corporate crimes. The speech presents a compelling reason for companies to ensure that both company and counsel understand the DOJ’s expectations and communicate effectively with the Department. Companies should also continue to prioritize the implementation of effective compliance programs. These factors will allow clients to distinguish themselves from companies that may face the imposition of a monitor and overall harsher resolutions. But more

importantly, implementing these mechanisms increases a company's ability to avoid a DOJ investigation altogether.

DAG Monaco's speech can be found [here](#).

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