September 20, 2022

DOJ Announces Material Revisions to Corporate Criminal Enforcement Policies

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On September 15, 2022, Deputy Assistant Attorney General ("DAG") Lisa Monaco announced several important revisions to the corporate criminal enforcement policies of the Department of Justice ("DOJ"). In a speech at New York University School of Law and in a memorandum released together with her remarks (the "September 15 Memorandum"), DAG Monaco re-emphasized DOJ policy of rewarding companies that self-report corporate misconduct on a timely basis and that implement strong and effective compliance programs. At the same time, she made clear that DOJ would prioritize individual accountability through aggressive prosecution and require companies seeking cooperation credit to assist early in that effort through production of "priority evidence." She also emphasized the importance of compensation incentives, as well as policies governing personal communication devices and encrypted applications, as core components of effective compliance programs.

These revisions have significant implications for all organizations and their leadership in their efforts to implement effective compliance programs and confront allegations of misconduct, as follows.

Individual Accountability. DAG Monaco emphasized that DOJ's "first priority" in corporate criminal matters "is to hold accountable the individuals who commit and profit from corporate crime." Individual accountability has been a DOJ priority since DAG Sally Yates announced in 2015 that companies seeking cooperation credit must disclose all relevant facts regarding individual misconduct. Last year, DAG Monaco reaffirmed that message in a memorandum announcing revisions to DOJ's corporate criminal enforcement policies. The September 15 Memorandum sharpens that policy in two ways.

First, companies seeking full cooperation credit in the resolution of criminal matters must (1) produce all relevant information about individual misconduct to DOJ on a timely basis and without delay, and (2) prioritize producing evidence that is most relevant to assessing individual culpability ("priority evidence") so that DOJ has a meaningful opportunity to evaluate and investigate.

Implications: The expectation for early production of "priority evidence" will likely accelerate the timetable for hard decisions about voluntary disclosure. Prosecutors may expect the disclosure of such information upon discovery and before internal investigations and determinations of criminal liability are complete. To preserve their ability to obtain cooperation credit, companies conducting internal investigations should assess early on, and continuously, whether voluntary disclosure is appropriate, and if so, prioritize information about involved

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individuals. Companies who voluntarily disclose matters should be prepared to explain and defend the timing of such disclosures.

Second, DAG Monaco directed that prosecutors should strive to complete investigations into individuals, and either bring or decline prosecutions against them, prior to or simultaneously with the entry of a resolution against the corporation. If not feasible, then prosecutors must explain why that is not the case and seek approval for an investigation plan extending beyond corporate resolution.

Implications: This development will certainly complicate and impact the negotiating dynamics and pace of corporate resolutions generally. The crucible of simultaneous resolution/charging decision for the company and individuals may extend the time it takes to achieve corporate resolution. It will also intensify scrutiny of charging decisions with respect to individuals, especially where the recommendation is declination.

Evaluation of Historical Corporate Misconduct. In reaching charging decisions, DAG Monaco re-emphasized that prosecutors should closely examine any prior instances of misconduct in the U.S. or abroad, including any prior Deferred Prosecution Agreements ("DPA"s) or Non-Prosecution Agreements ("NPA"s), and regulatory violations. As part of that analysis, prosecutors should "assign the greatest significance to recent U.S. criminal resolutions, and to prior misconduct involving the same personnel or management." Notably, "[d]ated conduct"—such as criminal resolutions from over a decade ago, or civil or regulatory resolutions from over five years—should be accorded less weight. Multiple DPAs and NPAs will be disfavored. Prosecutors are directed to closely examine whether the company sufficiently remediated and strengthened its compliance program following misconduct, and whether the same personnel and management team are involved in the conduct under consideration. In the case of acquisitions, misconduct of acquired entities should be accorded less weight where the acquiring company integrated its new business into an effective compliance program, and remediation was completed.

Implications: Following any instance of criminal, civil, or regulatory action, companies will benefit from root cause analysis, remediation, and recording of their efforts. They will also benefit from the continuous evaluation and enhancement of their compliance programs so they are aligned with the evolution of their businesses. For new acquisitions, companies should integrate the new business into the existing compliance program. Should the need arise to explain those efforts, that record will come in handy.

Incentivizing Voluntarily Self-Disclosure. DAG Monaco reiterated DOJ's commitment to providing incentives to companies that voluntarily self-disclose misconduct and indicated that "clarity" and "predictability" were necessary for companies to understand those benefits. Therefore, "for the first time ever," DAG Monaco ordered every DOJ component to establish a documented policy that incentivizes self-disclosure. DAG Monaco further identified several "core principles" regarding self-disclosure, including that absent "aggravating factors," DOJ will not seek a guilty plea where the corporation voluntarily self-disclosed misconduct, fully cooperated, and timely remediated the criminal conduct. DOJ will also not seek a compliance monitor if the company demonstrates that it has implemented and tested an effective compliance program.

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Implications: For companies faced with clear evidence of criminal misconduct -- but not "aggravating factors" such as national security implications or perhaps patient harm -- the prospect of avoiding a guilty plea is a significant incentive to voluntary disclosure. For those facing less clear evidence or with strong defenses, the choice to self-disclose, and the collateral implications beyond cooperation credit and the avoidance of a guilty plea, remain daunting. The prospect of avoiding a monitor is a strong incentive to simultaneously evaluate, enhance, and test a company's compliance program parallel to any internal and/or government investigation.

Emphasis on Compensation Incentives and Data Preservation in Evaluation of Compliance Programs. DAG Monaco directed prosecutors to consider two particular factors in their evaluation of a company's compliance program in the course of reaching charging decisions.

The first is to evaluate the extent to which companies build compliance incentives and disincentives into their compensation systems. For incentives, DAG Monaco provided as an example the "use of compliance metrics and benchmarks in compensation calculations." For disincentives, prosecutors are instructed to consider whether companies include "claw back provisions" in corporate compensation agreements that enable a company to levy penalties against corporate officers who engage in or supervise malfeasance.

Implications: In the hierarchy of compliance program elements, compensation incentives have historically not received as much attention as others as a matter of investment, structure, and operation. Companies will want to evaluate whether their evaluation and compensation systems for directors, officers, and employees adequately incorporate compliance measures and whether the company can demonstrate action pursuant to those systems.

The second is whether the company, as part of an effective compliance program, had policies and procedures governing the use of personal devices and third-party applications, including the use of "ephemeral or encrypted messaging" technology that inhibits the preservation and review of corporate communications (and, in turn, impedes investigations into misconduct). Helpfully, DAG Monaco directed the Criminal Division to issue new guidance on this front by year end.

Implications: Establishing effective policies on the use of personal devices and third-party encrypted applications, especially for multinational companies, so that all company communications and data are preserved, is a significant challenge. Nonetheless, companies should continue to work towards effective policies on a risk-based basis, recognizing new guidance will be forthcoming.

Guidance on Monitorships: In response to a "call for more transparency to reduce suspicion and confusion about monitors," DAG Monaco announced new guidance for prosecutors on how to identify the need for a monitor, the selection of monitors, and oversight over the monitor's work, as follows:

- There is neither a presumption of nor a bias against monitorships. DOJ will employ a "facts and circumstances" test.
- DAG Monaco identified ten factors that will be evaluated in determining the need for a monitor. The list is "non-exhaustive," but includes, for example, whether the company voluntarily self-disclosed the

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conduct in a manner that satisfies the particular DOJ component's self-disclosure policy and whether the company had implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct at the time of the violation and at the time of resolution.

- DAG Monaco addressed the process for selection of monitors, which will require, among other things, the inclusion of an ethics officer in the decision to avoid conflicts and consideration of DOJ's commitment to diversity and inclusion.
- DOJ's oversight responsibilities are increased, including requiring a well-defined scope of work and clear work plan, regular communications with DOJ concerning progress, prompt notice of problems with access or resources, efforts to ensure work remains tailored to work plan, cost control, and potential adjustment of term.

Implications: The use of monitorships may become more frequent at the margins. But the selection, monitorship plan, and work may become more standardized, cost-effective, and itself monitored for consistency with original intent and avoidance of unnecessary expansion.

Transparency. In an effort to increase transparency, the September 15 Memorandum directs prosecutors to include an agreed statement of facts and a discussion of DOJ's decision to enter into any corporate resolution of criminal allegations.

Implications: The standardization of this requirement will be a welcomed development.

Final Thoughts. What steps should corporate leadership take in response to this evolution of DOJ policy?

First, corporate directors and officers should understand and internalize that DOJ is quite serious about its focus on individual culpability. We suggest corporate executives take steps to ensure that their personal record of creating a culture of compliance and support for the compliance program is clear and unequivocal.

Second, companies should continue to evaluate and invest in a comprehensive and robust risk-based compliance program that incentivizes good behavior and penalizes misconduct. In doing so, companies will both reduce the risk of violations and create a track record of commitment that will be helpful should DOJ seek to evaluate the program.

Third, from the moment they begin considering allegations of misconduct and throughout any internal investigation, companies should evaluate and reevaluate the desirability, timing, and content of any voluntary disclosure if they wish to maximize cooperation credit. Any voluntary disclosure will need to prioritize evidence of individual misconduct. We suggest these decisions be made with the benefit of seasoned counsel so they can be defended as necessary.

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