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Corporate Compliance Crackdown: DOJ Announces New Enforcement Policies for Business Entities

Deputy Attorney General (DAG) Lisa Monaco delivered an exacting message to the white-collar defense bar at the ABA's 36th National Institute on White Collar Crime—the U.S. Department of Justice (DOJ) is stepping up its enforcement of corporate crime through several new initiatives.

Speaking to an audience of white-collar criminal defense attorneys, DAG Monaco marched through a series of initiatives that will roll back more lenient enforcement policies adopted during the prior administration. This increase in enforcement will be buoyed by a surge of resources provided to DOJ prosecutors, including a new squad of FBI agents embedded in the DOJ's Criminal Fraud Section—placing "agents and prosecutors in the same foxhole," as DAG Monaco described it. As discussed in further detail below, these efforts have ramifications on both the individual and corporate level, including: (1) increased individual accountability, (2) a focus on corporate recidivism, and (3) greater scrutiny of corporate resolutions with the DOJ.

Focus on Individual Accountability. First, the DOJ is renewing its focus on holding individual actors responsible for corporate wrongdoing. As such, DAG Monaco announced that the DOJ is reviving its policy that companies will only be eligible for cooperation credit in resolutions with the DOJ if they provide prosecutors with non-privileged information about all individuals involved in or responsible for the misconduct at issue—regardless of the individual's position, status, or seniority. This pronouncement reverses the DOJ's prior guidance, which allowed companies to receive cooperation credit for disclosing only those individuals "substantially involved" in the misconduct.

An Expansive View of Corporate Recidivism. Second, DAG Monaco announced a significant change in how historical misconduct will factor into corporate resolutions. Under new DOJ guidance, prosecutors will evaluate a company's full criminal, civil, and/or regulatory record in evaluating the appropriate resolution for a subject or target of a criminal investigation, not just similar violations. This broader vantage of historical misconduct—including whether a company has been targeted by another regulatory agency or even another country—brings in a host of additional, potentially relevant, misconduct. DAG Monaco explained that this policy change will usher in an amendment to the DOJ's "Principles of Federal Prosecution of Business Organizations," which should provide further detail on how prosecutors will weigh a corporation's criminal and regulatory record in determining an appropriate resolution to corporate misconduct. DAG Monaco also suggested that the DOJ will be considering data on corporate recidivism with an eye toward guidance as to whether pretrial diversionary avenues—including declinations, non-prosecution agreements (NPAs), and deferred prosecution agreements (DPAs)—should be available to recidivist companies.

Corporate Monitorship Comeback. Third, DAG Monaco advised that, where appropriate, the DOJ will deploy corporate monitors to verify compliance and disclosure obligations imposed by the terms of NPAs and DPAs entered into between companies and the DOJ. Monaco's pronouncement explicitly revoked 2018 guidance issued by then-Assistant Attorney General Brian Benczkowski. The "Benczkowski memo" was generally viewed as a more "business-friendly" approach to the DOJ's practice of imposing corporate monitorships as a condition of settlement, setting a presumption against monitorships except in extenuating circumstances. However, in her recent remarks, DAG Monaco suggested the DOJ may more frequently utilize monitorships to ensure that companies live up to their end of requirements imposed through corporate resolutions.

More broadly, the DOJ will also evaluate corporate criminal enforcement through the newly-formed "Corporate Crime Advisory Group," which will be comprised of representatives from every department involved in corporate criminal enforcement. As DAG Monaco explained, the advisory group has a broad mandate to study corporate resolutions, recidivism, monitorships, and benchmarks for cooperation credit in enforcement penalties,

and make recommendations to DOJ leadership on potential enhancements to the enforcement of corporate crime.

Guidance Going Forward

Aware that these sweeping pronouncements would reverberate amongst white-collar defense practitioners and their clients, DAG Monaco concluded her remarks with some practical advice, summarized as follows:

- Companies should review their compliance policies and procedures to ensure they are effectively implemented and provide appropriate levels of detection and remediation of wrongdoing.
- Going forward, the DOJ will consider a company's whole criminal, civil and regulatory record in evaluating corporate resolutions.
- To obtain cooperation credit with the DOJ in negotiating a corporate resolution, companies will need to identify all individuals involved in the misconduct—not just those "substantially" involved—and produce all non-privileged information about those individuals' involvement.
- For companies negotiating resolutions, there is no default presumption against corporate monitors. Corporate monitors will be imposed on a case-by-case basis.

The whipsaw of corporate enforcement policies that comes with each new administration is not a foreign concept to many business entities that fall within the jurisdiction of the DOJ. However, to those taking a wait-and-see approach, DAG Monaco delivered a clear message that now is the time to redouble compliance and ethics reporting efforts, including internal detection and remediation of potential misconduct. As DAG Monaco alluded, these recently announced policy shifts are just "a start" to this administration's corporate compliance mission.

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