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September 16, 2022

DOJ Announces Sweeping Policy Updates Targeting Corporate Criminal Enforcement and Individual Accountability

Deputy Attorney General (DAG) Lisa Monaco [announced](#) several significant policy updates affecting the U.S. Department of Justice's (DOJ) enforcement practices for both corporations and individuals on September 15, 2022. Speaking to attendees at the [NYU Program on Corporate Compliance and Enforcement](#) (PCCE), DAG Monaco detailed a series of initiatives, some of which appear to have emerged from the [Corporate Crime Advisory Group](#) formed last fall to conduct a full-scale review of the DOJ's corporate enforcement efforts. The DOJ simultaneously released a memorandum outlining the guidance announced by DAG Monaco.

The new guidance bolsters enforcement priorities that DAG Monaco has emphasized over the [past year](#). As discussed in further detail below, the DOJ's policy updates are substantive and have significant ramifications on both the individual and corporate level, including: (1) continued focus on individual accountability; (2) enhanced policies to predictably reward voluntary self-disclosure; (3) further clarity on the impact of corporate recidivism considerations on negotiated resolutions with the DOJ; and (4) new metrics for evaluating effective corporate compliance, including compliance-conscious compensation structures and policies on the use of personal devices and third-party messaging applications.

Increased incentives to identify corporate wrongdoers. From the "trading floor [to] the C-suite," DAG Monaco promised that individuals who break the law will continue to be held accountable, regardless of their "position, status, or seniority." To support this effort, DAG Monaco called upon corporations and prosecutors to "do more and move faster." This renewed focus on individual accountability will result in several policy changes.

Under existing [DOJ guidance](#), companies are already required to provide all relevant, nonprivileged facts about individual misconduct to receive cooperation credit. But now, DAG Monaco has advised that cooperation credit will *also* hinge on the speed at which companies provide this information to the DOJ. Under the new DOJ policy, "in connection with every corporate resolution, Department prosecutors must specifically assess whether the corporation provided cooperation in a timely fashion," and, as DAG Monaco warned, undue or intentional delays in producing information or documents reflecting individual culpability will result in the reduction or denial of cooperation credit. DAG Monaco emphasized that a defense attorney's first reaction to so-called "hot documents" should be disclosure. This admonition garnered follow-up questions from the audience, and DAG Monaco clarified that loss of cooperation credit would be a penalty for "strategic delays" and "gamesmanship," and not for disclosure delays prompted by a genuine investigative need.

DAG Monaco has further instructed prosecutors to complete investigations and seek warranted criminal charges against individuals prior to, or at the same time, as entering a resolution with a corporation. And, when circumstances warrant a corporate resolution moving ahead of other defendants, prosecutors will be required to provide a full investigative plan outlining the remaining work to do on the individual cases and a timeline for completing that work.

In short, DAG Monaco is bringing the heat to both prosecutors and defense counsel so they feel they are "on the clock" to expedite investigations and bring wrongdoers to justice.

Enhanced policies to predictably reward voluntary self-disclosure. Extolling the benefits of voluntary self-disclosure of corporate wrongdoing, DAG Monaco highlighted the DOJ's Antitrust Leniency Program; Foreign Corrupt Practices Act (FCPA) Voluntary Disclosure Program; and National Security Division Program for Export and Sanctions Violations. She noted that such programs can save companies millions of dollars in fines,

penalties, and costs, and avoid reputational harms that arise from a guilty plea. However, she also acknowledged that more can be done to enhance the consistency and transparency for corporations mulling self-disclosure decisions. Accordingly, DAG Monaco directed that every DOJ component that prosecutes corporate crime must adopt a formal, documented policy, incentivizing voluntary self-disclosures. In particular, these newly adopted policies must provide clear expectations of what self-disclosure entails, and must identify the concrete benefits that a self-disclosing company can expect.

Significantly, DAG Monaco instructed that all voluntary self-disclosure policies must adopt the following principles:

- First, in the absence of aggravating factors, the DOJ will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct.
- Second, the DOJ will not require an independent compliance monitor for such a corporation if, at the time of resolution, it also has implemented and tested an effective compliance program.
- Finally, in circumstances where the appointment of an independent corporate monitor is appropriate, DAG Monaco committed to increased oversight to ensure monitors stay within their mandate and remain on task and on budget.

DAG Monaco emphasized that the motivation underpinning this initiative is the DOJ's desire for predictable outcomes that will help concretely "make the case in the boardroom that voluntary self-disclosure is a good business decision." No specific timeline was provided for implementation of these new policies.

Increased clarity on corporate recidivism policies. Last year, DAG Monaco directed prosecutors to 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. This broader vantage of historical misconduct caused much consternation about the host of additional—potentially irrelevant—misconduct that could negatively affect a corporation's efforts to negotiate a resolution with the DOJ. However, in her recent remarks, DAG Monaco acknowledged that "not all instances of prior misconduct are created equal." Rather, DAG Monaco signaled that in considering acts of prior misconduct, the DOJ will most significantly weigh the following:

- Prior criminal resolutions within the United States, especially those involving the same personnel or management involved in the current misconduct.
- The age of the prior criminal misconduct, with less weight accorded to criminal resolutions over 10 years old, and civil or regulatory resolutions over five years old.
- The nature and circumstances of the prior misconduct, including whether the acts share the "same root causes" as the present misconduct.
- The industry in which the company operates—i.e., if a corporation operates in a highly regulated industry, its history will be compared to similarly situated companies, to determine if the entity is an outlier.

DAG Monaco also specifically highlighted the DOJ's desire not to penalize compliant companies for their willingness to acquire companies with a history of misconduct, confirming that "[w]e will not treat as recidivists companies with a proven track record of compliance that acquire companies with a history of compliance problems, so long as those problems are promptly and properly addressed post-acquisition."

Finally, DAG Monaco clarified that DOJ leadership disfavors "successive" nonprosecution or deferred prosecution agreements with the same company and vowed that "frequent flyers" will be subject to strict scrutiny in resolving allegation with the DOJ. To that end, DOJ policy will now require written approval of the responsible U.S. Attorney or Assistant Attorney General and notice to the Office of the Attorney General before making a corporate resolution offer that would result in multiple nonprosecution or deferred prosecution agreements for a corporation (including its affiliated entities).

New metrics for effective corporate compliance: compliance-conscious compensation structures and information technology governance. Lastly, DAG Monaco encouraged corporate compliance departments to tie financial compensation to compliant behaviors and address the use of personal devices and third-party messaging applications. Additional details appear in the newly issued DOJ memorandum, which states that prosecutors must now consider the following in evaluating the effectiveness of a corporate compliance program for purposes of determining appropriate corporate resolutions:

- Whether a company's compensation systems includes elements that deter misconduct, such as compensation clawback provisions, and incentivize a culture of compliance, such as the adoption of compliance metrics and performance reviews that reward conduct that promotes compliance.
- Whether the corporation has implemented effective policies governing the use of personal devices and third-party messaging platforms, which DOJ's memorandum notes is an expectation of "all corporations with robust compliance programs." Notably, record-keeping requirements, particularly for employee communications on personal devices and third-party messaging platforms, has also emerged as an enforcement priority for financial regulators, including the SEC and Commodity Futures Trading Commission (CFTC).

DAG Monaco has further directed the DOJ to develop guidance by the end of the year regarding how it will reward companies that implement clawback policies, aimed at shifting the burden of corporate misconduct away from shareholders and more onto the shoulders of individual wrongdoers.

What To Expect Going Forward

DAG Monaco concluded her remarks by underscoring the DOJ's intention to empower both prosecutors and compliance departments. She stressed that this updated guidance offers a mix of incentives and deterrents to encourage compliance departments to make the business case for corporate responsibility and hold wrongdoers accountable. She also noted that the DOJ is continuing to expand its resources focused on corporate criminal enforcement, including seeking \$250 million in appropriations from Congress for corporate crime initiatives in the next year.

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 we await even further guidance from the DOJ on the impact of these updated policies, companies should review their compliance programs to ensure they are effectively implemented consistent with this new guidance and provide appropriate levels of detection and remediation of wrongdoing.

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