Investigations, Compliance and Defense

Deputy Attorney General Announces Significant Changes to DOJ's Corporate Criminal Enforcement Policies

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On October 28, 2021, Deputy Attorney General (DAG) Lisa Monaco delivered a speech and issued a memorandum announcing several important changes to the Department of Justice (DOJ)'s corporate criminal enforcement policies and practices. These changes, which will apply to current and future corporate defendants, include:

1. Restoring prior DOJ guidance admonishing that, in order to receive any cooperation credit in resolutions, companies must provide all non-privileged information regarding *all* individuals involved in the wrongdoing—not just individuals who were *substantially* involved;

2. Signaling an increased willingness to impose corporate compliance monitors on companies when resolving criminal investigations;

3. Considering a company's *entire* history of misconduct—rather than only similar past misconduct—in deciding how to resolve a criminal investigation; and

4. Applying heightened scrutiny to companies' adherence to deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), as well as demonstrating increased willingness to declare companies in breach of those agreements when warranted.

Taken together, these revisions signal DOJ's intent to pursue broader investigations and implement stricter enforcement measures than were the norm during the previous administration. We discuss each policy change in turn, followed by certain structural changes that DOJ plans to implement to support these initiatives.

1. Cooperation Credit Requires Disclosure of *All* Individuals Involved in Wrongdoing.

The Principles of Federal Prosecution of Business Organizations instruct prosecutors to take into account a company's cooperation with the investigation when determining the form of resolution and appropriate penalty. Under the new policy, companies will only qualify for such cooperation credit if they "identify *all* individuals involved in or responsible for the misconduct at issue, regardless of their position, status, or seniority, and provide to the Department all non-privileged information relating to that misconduct."[1] This requirement supplants the more lenient approach implemented by former DAG Rod Rosenstein during the Trump administration—which gave prosecutors discretion to award cooperation credit when companies provided information about "all individuals *substantially* involved" in the misconduct[2]—and effectively marks a return to the policy originally promulgated under the Obama administration in what is commonly known as the "Yates Memo" after then-DAG Sally Yates.[3]

This change indicates that DOJ is disinclined to defer to companies' internal assessments of which individuals were "substantially" involved in wrongdoing. In her remarks delivered on October 28, 2021 to the American Bar Association (ABA) announcing these policy changes, DAG Monaco explained that the "substantially involved" standard was "confusing in practice and afford[ed] companies too much discretion in deciding who should and should not be disclosed to the government."[4] DAG Monaco

added that the government's investigators are often "better situated" to evaluate individuals' culpability for corporate misconduct.[5] That said, she also noted that the heightened disclosure requirement "does not alter the principles that govern fair and just charging decisions" and will not lead to unfair prosecutions of "minimal participants."[6]

2. There Is a Renewed Interest in Imposing Independent Compliance Monitors.

As a matter of policy, DOJ will now be leaning further forward toward the use of independent compliance monitors, especially "[w]here a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented *at the time of a resolution*."[7]

The new guidance rescinds in part prior guidance issued by former Assistant Attorney General Brian Benczkowski in October 2018.[8] Although both the new and old guidance speak of requiring monitors where "necessary," the prior guidance counseled substantially more restraint than the guidance announced last week. For example, both policies instruct prosecutors to weigh the benefit of a monitorship to the public and the company against its cost and impact on the company's operations. But the Monaco memorandum tells prosecutors to "favor the imposition of a monitor where there is a demonstrated need for, and a clear benefit to be derived from, a monitorship,"[9] whereas the Benczkowski memorandum counseled in favor of a monitor "*only* where" there was a demonstrated need and benefit to be derived "relative to the projected costs and burdens."[10] In her remarks to the ABA, DAG Monaco made the thrust of these changes more explicit, explaining that prior DOJ guidance was rescinded "[t]o the extent that [it] suggested that monitorships are disfavored or are the exception."[11]

Of note, the increased emphasis on monitors comes less than a year after the Criminal Division's Fraud Section reported that it had only called for the installation of one independent compliance monitor in 2020.

3. A Company's Entire History of Misconduct Must Be Considered—Not Just Similar Prior Misconduct.

The new policy directs prosecutors "to consider *all* misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family."[12] That framing substantially broadens the way DOJ will view a company's record when making a charging decision or negotiating a resolution; under the prior policy, prosecutors were advised that they "*may* consider a corporation's history of *similar* conduct."[13]

In her remarks to the ABA, DAG Monaco explained that the full record of a corporation's misconduct "speaks directly to [its] overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity."[14] It remains to be seen what weight will be given to unrelated corporate misconduct; as DAG Monaco noted, "[s]ome prior instances of misconduct may ultimately prove to have less significance, but prosecutors need to start by assuming all prior misconduct is potentially relevant."[15]

4. Companies' Adherence to Their DPAs and NPAs Will Be More Strictly Enforced.

DOJ also plans to exercise heightened scrutiny over companies' adherence to the terms of their DPAs and NPAs. In her ABA remarks, DAG Monaco warned that "DPAs and NPAs are not a free pass, and there will be serious consequences for violating their terms," particularly where companies try to hide later misconduct from the government.[16] DAG Monaco's remarks echo those made a few weeks earlier by Principal Deputy Associate Attorney General John Carlin, who said that companies that breach their DPAs and NPAs should expect "serious repercussions," including increased punishment, for doing so.[17]

Indeed, DOJ is already showing an increased willingness to find companies in breach of their DPA or NPA requirements. Both the Swedish telecom equipment manufacturer Ericsson and the Scottish bank NatWest announced within the last month that DOJ had determined that they materially breached their respective DPA and NPA.

5. DOJ Is Making Structural Changes to Bolster Its Enforcement Capabilities.

In addition to the substantive policy revisions described above, DAG Monaco announced several changes to DOJ's internal organization that underscore the Department's renewed commitment to corporate criminal enforcement.

In particular, DOJ will convene a Corporate Crime Advisory Group to review and recommend improvements to DOJ's approach to prosecuting corporate crimes. This group will have a broad mandate to review the Principles of Federal Prosecution of Business Organizations (set forth in Justice Manual §§ 9-28.000 *et seq*.) and to consider how DOJ can invest in new technologies (*e.g.*, artificial intelligence) to assist in processing vast amounts of data. The group will comprise different DOJ components and, in order to ensure that its recommendations are well-informed, will also solicit input from the business community, academia, and the defense bar.

Monaco also announced that a squad of FBI agents will now be embedded in DOJ's Criminal Fraud Section as part of an effort to "surge resources to [DOJ's] prosecutors."[18] Monaco explained that close coordination between agents and prosecutors has been crucial in prior high-profile and complex cases.

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Taken on their own terms, many of these changes amount to modest revisions to current policy, reflecting a reversion to prior Obama-era policies. As such, their significance may rest not as much in the substantive changes they effect as in the signal they are intended to send to corporations about the Department's intent to move aggressively in corporate criminal investigations. But those signals are important to companies facing potential or actual DOJ scrutiny: Companies should not expect to receive the same benefit of the doubt when resolving corporate criminal cases that they may have received in the past Administration.

Two areas that may signal a more substantive change in philosophy are DOJ's policy on monitorships and its assertedly increased willingness to declare companies in breach of their resolutions. As referenced above, monitorships effectively became an endangered species under the prior DOJ, which appointed roughly 2.5 monitors per year during the period 2017–2020.[19] The new policy signals a return to the prevalence of monitorships under the Obama DOJ, which required the appointment of monitors at nearly twice that rate.[20] And although it is not unheard of for DOJ to find companies in breach of their DPAs or NPAs (*e.g.*, Zimmer Biomet Holdings Inc.) or otherwise extend or alter the terms (*e.g.*, Standard Chartered Bank saw a 2012 DPA stemming from sanctions violations amended to require a monitor and extended several times, ultimately into 2021), such findings have historically been rare. Because DOJ resolutions typically contain strict requirements—such as disclosing all factual information requested by DOJ[21]—prosecutorial discretion plays a significant role in setting the parameters for required conduct. Going forward, companies should expect prosecutors to take a stricter line regarding those requirements.

Negotiating a corporate resolution to a DOJ investigation has always been a consequential process. Last week's announcements underscore the risk areas that companies face when doing so, and companies should ensure that they have considered those risks when considering the pros and cons of voluntary self-disclosure, or the company's negotiating posture once an investigation is underway.

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[1] Memorandum from the Deputy Attorney General re: "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download [hereinafter "Monaco Memorandum"], at 3 (emphasis added).
[2] DOJ, "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act" (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.
[3] Memorandum from Deputy Attorney General Sally Quillian Yates re: "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.
[4] DOJ, "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime" (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute [hereinafter "Monaco ABA Remarks"].
[5] *Id.*
[6] *Id.*
[7] Monaco Memorandum, at 4 (emphasis added).
[8] Memorandum from Assistant Attorney General Brian A. Benczkowski re: "Selection of Monitors in Criminal Division Matters" (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download [hereinafter "Benczkowski Memorandum"].
[9] Monaco Memorandum, at 4.
[10] Benczkowski Memorandum, at 2 (emphasis added).
[11] Monaco ABA Remarks.
[12] Monaco Memorandum, at 3.
[13] Justice Manual § 9-28.600 (emphasis added).
[14] Monaco ABA Remarks.
[15] *Id.*
[16] *Id.*
[17] "John Carlin on Stepping Up DOJ Corporate Enforcement," Global Investigations Review (Oct. 11, 2021), https://globalinvestigationsreview.com/news-and-features/in-house/2020/article/john-carlin-stepping-doj-corporate-enforcement.
[18] Monaco ABA Remarks.
[19] *See* Brandon L. Garrett, "Declining Corporate Prosecutions," 57 Am. Crim. L. Rev. 109, 128 (2020), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6679&context=faculty_scholarship (reporting that four new monitorships were installed in 2017 and that one new monitorship was installed in 2018); DOJ, "Fraud Section Year in Review 2019," at 47 (2020), https://www.justice.gov/criminal-fraud/file/1245236/download (reporting four new monitorships in 2019) DOJ, "Fraud Section Year in Review 2020" at 41 (2021), https://www.justice.gov/criminal-fraud/file/1370171/download (reporting one new monitorship in 2020).
[20] *See* Anthony S. Barkow, Neil M. Barofsky, & Thomas J. Perrelli, "The Guide to Monitorships" (2020), at 5 (noting that DOJ appointed at least 51 monitors between January 2008 and January 2017).
[21] *See, e.g.*, Amended Deferred Prosecution Agreement, United States v. Standard Chartered Bank, No. 12-cr-262 (JEB), ECF No. 16-1 at ¶ 5(a) (D.D.C. Apr. 9, 2019).
