Patterson Belknap

White Collar Defense and Investigations Alert
September 23, 2022

Deputy Attorney General Announces Further Revisions to Corporate Criminal Enforcement Policies

On September 15, 2022, Deputy Attorney General ("DAG") Lisa Monaco announced a series of changes to the United States Department of Justice's (the "Department" or "DOJ") corporate enforcement policies. This follows a prior speech and memo by DAG Monaco in October 2021, outlining three principle changes to white collar enforcement and cooperation. Collectively, these changes will be of significant interest and importance to companies of all types as well as their directors and officers, and signal the DOJ's renewed and enhanced interest in prosecuting white collar crime.

October 2021 DOJ Memo

As a reminder, the October 2021 Monaco Memo set forth three revisions to corporate enforcement and cooperation, some of which was a return to Obama-era polices: *first*, to be eligible for "**any** cooperation credit," companies must provide information about **all** individuals involved in corporate misconduct, not just those "substantially involved"; *second*, prosecutors must consider a company's **entire criminal, civil, and regulatory history** when making resolution decisions; and *third*, independent **monitorships** are to be used more often. DAG Monaco also emphasized the Department's renewed focus on prosecuting **individuals**. The October 2021 Monaco Memo further signaled that there would be additional changes to come, including with regard to the treatment of **recidivist** companies and violations of Non-Prosecution Agreements ("NPA") and Deferred Prosecution Agreements ("DPA"), and the prioritization of **compliance** programs.

September 2022 DOJ Memo

As a follow-up to the October 2021 Monaco Memo, last week, in a speech and memo, DAG Monaco outlined additional changes to corporate enforcement and provided clarity on the points she discussed last year. As described by DAG Monaco, the Department views this as a "carrot and stick" approach. We highlight the ***key takeaways*** from the September 2022 Memo below.

- ***Emphasis on Individuals and Expedited Investigations***: DAG Monaco reinforced the Department's commitment to prosecuting **individuals** and emphasized that it expects prosecutors to act **more quickly** and efficiently in bringing those actions.

- ***Emphasis on Self-Disclosure***: The memo reflects the Department's continued interest in a company's voluntary self-disclosure and the timing thereof. DAG Monaco noted that, when a corporation becomes aware of misconduct before it is public or otherwise known to the Department and it decides to come forward to the Government, DOJ policies "must ensure that a company benefits from its decision" to do so. DAG Monaco announced that every DOJ component will be implementing "a program that **incentivizes voluntary self-disclosure**," and set forth two core principles: (1) "[a]bsent aggravating factors, the Department will not seek a guilty plea when a company voluntarily self-disclosed, fully cooperated, and remediated misconduct," and (2) the DOJ "will not require the imposition of an independent compliance monitor for a cooperating corporation that voluntarily self-discloses the relevant conduct if, at the time of resolution, it also demonstrates that it has implemented and tested an effective compliance program." While it has always been the case that self-reporting was seriously considered by the DOJ in assessing a company's cooperation credit, per this memo, the timing and nature of disclosure also appears to be critical in evaluating cooperation credit. In particular, the DOJ emphasized that companies should come forward with important evidence **more quickly**, with a focus on sharing relevant information about

individuals. The memo notes that "[i]f a cooperating company discovers hot documents or evidence, its first reaction should be to notify the prosecutors," and "undue or intentional delay in producing" such documents "will result in the reduction or denial of cooperation credit."

- ***Clarification of Treatment of Criminal History***: DAG Monaco provided further clarification regarding how prosecutors should consider a company's past criminal, civil, and regulatory conduct. Prosecutors have been advised that criminal resolutions that occurred **more than 10 years** before the misconduct and civil/regulatory settlements **five years or older** will be given less weight. In addition, prosecutors "should assign the greatest significance to **recent U.S. criminal resolutions**, and to prior misconduct involving the **same personnel or management**." Recognizing that many companies operate in highly regulated industries, prosecutors are directed to compare a company's history of regulatory compliance or other issues with that of similarly situated companies in the industry. Finally, when thinking about future acquisitions, DAG Monaco noted that a corporation will not be treated as a "recidivist company" if it has a proven track record and acquires a company with a history of compliance problems, so long as those problems are promptly and properly addressed post-transaction.

- ***Independent Monitors***: DAG Monaco again stated that there is no longer a presumption against independent monitors as part of a corporate criminal resolution, nor a presumption in favor of one. Among other things, the DOJ provided a **non-exhaustive list of ten factors** that prosecutors should consider when evaluating the need for a monitor on a case-by-case basis, including: an assessment of whether a company voluntarily self-disclosed the misconduct; the effectiveness of its compliance program; whether the underlying conduct was long-lasting, pervasive, or known/ignored by senior management; and the company's remedial measures. In addition, DAG Monaco explained that prosecutors must employ "consistent and transparent" procedures for selecting monitors, and that once a monitor is imposed, prosecutors are responsible for "**monitor[ing] the monitor**," ensuring it is appropriately tailored to the scope of misconduct.

- ***Emphasis on Compliance Programs and Corporate Culture***: DAG Monaco reiterated that an "effective compliance program and ethical corporate culture . . . can have a direct and significant impact on the terms" of a resolution, and a company's compliance program should be assessed both **at the time of the offense and the time of charging**. In a new development this summer, DOJ leadership announced that it may mandate that CEOs and **CCOs certify** corporate resolutions. It has imposed this requirement in at least one case to date. DAG Monaco further announced that the DOJ will be closely examining whether a company's compensation structure promotes compliance; companies would be rewarded for **clawing back** compensation and imposing other financial penalties for those involved in wrongdoing, and for creating a compensation structure that **incentivizes** "compliance-promoting behavior."

- ***Foreign Counterparts***: The DOJ continues to cooperate closely with its foreign counterparts, and though prosecution of an individual in a foreign jurisdiction might be grounds not to pursue one by the Department, prosecutors have discretion to determine that a parallel DOJ case is nonetheless warranted.

- ***Record-keeping and Preservation***: DAG Monaco highlighted two areas of interest with regard to data and record-keeping. First, across the Department, companies are being incentivized to figure out how to navigate **foreign data privacy laws** and produce records. Second, DAG Monaco noted DOJ plans to develop policies to ensure the collection of business records on **third-party devices and messaging services**, and will assess whether a company has implemented effective policies and procedures governing the use of personal devices/messaging platforms to ensure preservation and collection.

Practical Considerations

Below we highlight some practical points to consider in light of the September 2022 Monaco Memo.

- The DOJ's emphasis on *early self-disclosure* is critical for companies to keep in mind at the outset of any investigation or even before that. That said, with each DOJ component creating *its own* policy for self-reporting, this has the potential to create confusion and uncertainty for companies trying to comply with a particular policy, especially if multiple DOJ components are involved. Moreover, the September 2022 Monaco Memo does not make clear exactly how much cooperation credit a company will receive for its self-reporting. For example, the memo suggests that companies must turn over "hot documents" immediately or risk losing *all* cooperation credit. Finally, the emphasis on *early* self-reporting about key facts and individuals has the potential to intersect with questions about privilege waiver. For each of these reasons, the decision to self-report should be carefully considered and discussed with counsel, and the expectations of self-reporting and cooperation should be discussed early on with the Government.

- A strong compliance program is essential to ensuring that a company identifies issues early and remediates, but it also contributes greatly to a company's successful cooperation and avoidance of an independent monitor. Companies should consider ways to implement new policies consistent with both DOJ memos.

- Companies must be attentive to the ways and means in which its employees and executives communicate about work-related matters, including on personal devices and third-party messaging services, and consider how best to ensure compliance with any record-keeping obligations. This has been a focus for not just the DOJ, but the SEC and CFTC as well.

- Prosecutors continue to have significant discretion in determining the degree of a company's cooperation, including the speed at which it discloses information, and the treatment of a company's prior conduct, among other things. Companies and their counsel should discuss the contours of cooperation with the Government early in an investigation.

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