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New DOJ Corporate Crime Approach May Deter Self-Reporting

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Deputy U.S. Attorney General Lisa Monaco described important changes to the U.S. Department of Justice's corporate criminal enforcement policies during her Oct. 28 keynote address to the American Bar Association's 36th National Institute on White Collar Crime.

Her address outlined the department's enforcement priorities, new and altered guidance, and issues targeted for further study.

DOJ's Mission and Enforcement Priorities

Monaco first reaffirmed that despite an evolution in corporate crime: "Accountability starts with the individuals responsible for criminal conduct." To that end, Monaco announced that the DOJ is actively evaluating ways to allocate additional resources to the prosecution of individuals.

Already in play is the creation of a new squad of Federal Bureau of Investigation agents that will be embedded in the Fraud Section of the DOJ's Criminal Division — which houses the nation's largest constellation of white collar prosecutors — to work in tandem with prosecutors. Being in the foxhole together, Monaco noted from her personal experience, is often the key to making cases.

Second to the prosecution of individuals, Monaco repeatedly emphasized the need for proactive compliance measures by companies. She issued a warning: A company that "thumbs its nose at compliance" by failing to proactively implement compliance functions will be making a "costly omission."

Immediate Actions on Corporate Criminal Enforcement

Against this backdrop, Monaco announced three immediate actions the DOJ is taking to target corporate crime. These measures amount to a predictably more aggressive enforcement policy and are described further in an Oct. 28 DOJ memorandum regarding corporate criminal enforcement policies.

1. Individual Accountability

The DOJ is restoring prior guidance issued by former Deputy Attorney General Sally Yates in her Sept. 9, 2015, individual accountability for corporate wrongdoing memorandum. That policy makes clear that eligibility for cooperation credit hinges on companies providing the DOJ with all nonprivileged information about individuals involved in or responsible for the misconduct at issue.

Gone is the narrowing principle promulgated under the last administration requiring companies to provide information about only those individuals substantially involved in the misconduct. Companies will no longer have the discretion to make such as assessment; instead, the DOJ will be the determinative authority on whether an individual is relevant and culpable given that those on the periphery, according to Monaco, often have valuable information to provide.

2. Prior Misconduct

The DOJ will now consider all historical misconduct of a company when deciding what resolution is appropriate in a criminal investigation. Although the term "misconduct" was left undefined — leaving open some question of which prior actions or issues will make the cut in terms of potentially influencing a resolution with the DOJ — Monaco made clear that historical misconduct may include the company's entire criminal, civil and regulatory record, regardless of whether the misconduct is similar to the conduct at issue in the instant investigation.

For example, a prosecutor in the Foreign Corrupt Practices Act unit must also consider previous enforcement by the Tax Division, the U.S. Attorney's Office, the Environment and Natural Resources Division, and so on. This determination must also include actions against other entities within the target company's corporate family. Modifications to the Justice Manual, Section 9-28.600, consistent with the guidance are forthcoming.

3. Corporate Monitors

To the extent prior guidance indicated a presumption against corporate monitors in recent years, such guidance is being rolled back. More specifically, the DOJ memo revises, supplements and, in part, supersedes guidance provided in an October 2018 memorandum by then-Assistant Attorney General Brian Benczkowski on the selection of monitors in Criminal Division matters.

It further supplements a March 2008 memorandum by then-Acting Deputy Attorney General Craig Morford, which provided standards for independent corporate monitors. The DOJ memo directs the department to favor the imposition of a monitor in cases with a demonstrated need for, and clear benefit to be derived from, a monitorship.

The DOJ will look to whether compliance programs are untested, ineffective, inadequately resourced or not fully implemented at the time of a resolution as evidence of a demonstrated need for a monitor. If the opposite is true of a compliance program, the memo explains, a monitor may not be necessary.

This pronouncement is a key piece of the DOJ's stated goal to reduce the risk of repeat misconduct — based on department data analyzed in the early days of the Biden-Harris administration, 10%–20% of corporate resolutions involve companies that have previously entered into at least one pretrial diversion form of resolution, according to Monaco.

Areas of Further DOJ Study

Monaco also noted three trends the DOJ is actively monitoring:

1. The increasing national security dimension to corporate criminal matters.

2. The larger role that data analytics plays in corporate criminal investigations.

3. The impact of emerging technological and financial industries and their potential to exploit the investing public.

She will convene a corporate advisory group within the DOJ to review the issues previewed above and to make recommendations and propose revisions to the department's policies on corporate criminal enforcement. One of the first priorities for review is how to account for companies with a documented history of repeated wrongdoing.

Specifically, the DOJ will consider whether pretrial diversion is appropriate for recidivist companies. The DOJ will also review whether companies under the terms of a deferred or nonprosecution agreement are taking their obligations seriously enough, signaling a more aggressive approach to enforcement of breaches of these terms.

Implications for Corporations

The real impact of the DOJ's announcement has yet to be seen but could result in companies being less willing to self-report corporate wrongdoing and thereby unravel years of progressive efforts by the department to incentivize companies to come forward. Reasons for such include the following:

- High-level and senior executives might be less willing to self-report to the government now that the DOJ's first priority is to prosecute individuals engaged in wrongdoing. This is particularly likely given the DOJ's restoration of guidance that states companies must divulge nonprivileged information about any individual involved in misconduct regardless of their substantial involvement — a standard that the companies themselves will no longer be allowed to determine.

- Companies may be less willing to self-report based on the DOJ's elimination of the presumption against corporate monitors. Now, self-reporting carries a much greater risk that the DOJ will regularly require corporate monitors, which can be an onerous, disruptive and expensive burden on a company seeking to recover and carry on with its normal course of business following a government investigation. The broad discretion the DOJ holds in deciding when and how to impose corporate monitors, coupled with uncertainty regarding how that discretion will be imposed, creates a disincentive for companies to self-report corporate wrongdoing and may have the opposite effect of what the DOJ is seeking to accomplish.

- The announcement that the DOJ will judge a company based on all prior misconduct will potentially deter a company from self-reporting. Not only is this guidance a stark departure from the past, but it tends to neglect the fact that in the years after an investigation, companies may undergo significant structural changes such that the individuals involved in prior misconduct are no longer employed by the company. It also ignores the practical realities that large multinational companies, particularly those operating in highly regulated industries, may reach corporate resolutions with regulators that do not reflect a lack of commitment to

compliance or a deficient compliance program. Indeed, this is one reason the U.S. Sentencing Guidelines do not consider the full scope of a company's record of misconduct when making sentencing recommendations.

One other potential result of the DOJ's announcement stems from the department's focus on corporate recidivism and the view that companies with a history of misconduct may not be able to avail themselves of a deferred or nonprosecution agreement.

Based on this view, especially when combined with the guidance that prosecutors must consider the company's entire history of misconduct, it is possible that companies will be less willing to enter into resolutions with the government and, instead, may be incentivized to proceed with defending an investigation through to completion.

Especially when considering companies that are publicly traded, the DOJ's guidance could affect the calculus of corporate directors when deciding what course of action — resolution or investigation — is in the best interest of shareholders.

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