ALERT MEMORANDUM

DOJ Announces First Set of Revisions Strengthening Corporate Criminal Enforcement Policies

November 1, 2021

On October 28, 2021, as part of her Keynote Address at the ABA's 36th National Institute on White Collar Crime, Deputy Attorney General Lisa O. Monaco announced the administration's first significant changes to the DOJ's policies on corporate criminal enforcement.[1] The announcement was accompanied by the release of a DOJ memorandum from Deputy Attorney General Monaco entitled "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies." (the "Memorandum").[2]

The announcement highlights departures from polices under the Trump administration and a return to corporate criminal enforcement policies in place under the prior Obama-led DOJ. Deputy Attorney General Monaco made clear that these changes are part of a broader effort to revisit, reassess, and strengthen the DOJ's corporate enforcement policies and "invigorate" the DOJ's prosecution of corporate criminal conduct.

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[1] Press Release, "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime," Oct. 28, 2021, *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

[2] Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021, *available at* https://www.justice.gov/dag/page/file/1445106/download.

Specifically, for all future DOJ investigations of corporate wrongdoing and matters pending as of October 28, 2021, three new policies will apply:

1. Individuals and Corporate Misconduct: to be eligible for cooperation credit, companies must provide the DOJ with all non-privileged information about individuals involved or responsible for the misconduct at issue, regardless of their position, status, or seniority;
2. Consideration of Prior Misconduct: all prior misconduct will be evaluated as part of the DOJ's decision-making on proper corporate resolution, whether or not that misconduct is similar to the conduct at issue for a particular investigation; and
3. Revisions to Corporate Monitorship Guidance: for companies cooperating with the government, there will be no default presumption against corporate monitors. Rather, the decision on whether to impose a corporate monitor will be determined on the facts and circumstances of each case.

I. Providing Information About All Individuals Involved in Corporate Misconduct

The Memorandum "reinstates" the prior "all or nothing" guidance set forth in the Yates Memorandum issued in 2015, which modified the "Principles of Federal Prosecution of Business Organizations" in Section 9-28 of the Justice Manual to require companies to provide "all relevant facts relating to the individuals responsible for the misconduct" in order to receive cooperation credit. That prior guidance was subsequently revised in 2018 by the Trump-era DOJ to specify that companies need only provide information on individuals who were "substantially" involved in or responsible for the misconduct.

Deputy Attorney General Monaco explained in reinstating the prior Yates Memorandum guidance that to qualify for any DOJ cooperation credit, going forward, corporations must provide all relevant facts relating to individuals responsible for the misconduct.[3] In other words, to receive any cooperation credit, corporations will be required to provide all non-privileged information relating to the misconduct of all individuals, regardless of position, status or seniority, inside and outside the company, without qualification as to whether someone was "substantially" involved or not.

In her speech, Monaco noted that limiting disclosure of misconduct to those "substantially involved . . affords companies too much discretion in deciding who should and should not be disclosed to the government" and added that "the department's investigative team is often better situated than company counsel to determine the relevance and culpability of individuals involved in misconduct." Monaco sought to deflect the possible criticism that this approach could lead to DOJ unfairly targeting minimal participants by noting that prosecutors would continue to exercise their discretion in charging decisions.

II. Considering a Corporation's History of Misconduct

Under the Memorandum's new guidance, a company's full record of misconduct, not just misconduct similar to the misconduct at issue, will be taken into account as part of a prosecutor's "holistic approach" when determining criminal charges and resolutions for a corporate target. The guidance broadly defines corporate misconduct to include domestic or foreign criminal, civil, or regulatory enforcement actions against the company, including parents, divisions, affiliates, subsidiaries, and other entities within the corporate family.

In her speech, Monaco highlighted that corporate recidivism is a prime motivation for this policy development, noting that "between 10% and 20% of all significant corporate criminal resolutions involve

[3] *See* Memorandum from Deputy Attorney General Sally Q. Yates, "Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015, *available at* https://www.justice.gov/archives/dag/file/769036/download.

companies who have previously entered into a resolution with the department" and "not just in the same office or section, but in multiple sections and divisions across the department. For example, a company might have an antitrust investigation one year, a tax investigation the next, and a sanctions investigation two years after that." Going forward, such misconduct will be considered as part of the prosecutor's decision-making process. Of course, this guidance seems to place a handicap in the resolution process of large, multinational institutions operating in highly-regulated industries that are likely to have had prior misconduct (including non-criminal) as well as more established companies that, by virtue of a longer lifespan, are more likely to have had some history of misconduct.

III. Revisions to Monitorship Guidance

Last year marked the first year in a decade without the imposition of any new compliance monitors for FCPA resolutions – a result of the shift in October 2018 in the DOJ's policy on the selection and imposition of corporate monitors in Criminal Division matters.[4] In her speech, the Deputy Attorney General dispelled any suggestion that corporate monitorships should be the exception and not the rule:[5] "To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance." The Memorandum echoed the importance of avoiding "repeat misconduct" through the use of corporate monitors by ensuring remediation and the avoidance of recurring compliance deficiencies through the use of corporate monitors. Untested, ineffective, and inadequately resourced compliance programs will be more likely to require the imposition of a monitor than compliance programs that show that they have been tested and well-resourced.

Next Steps

In her speech, Deputy Attorney General Monaco noted that the policy changes she was announcing were just the Department's "first steps to reinforce our commitment to combatting corporate crime." In that regard, she announced the creation of a "Corporate Crime Advisory Group" within the DOJ tasked with "reviewing [DOJ's] approach to prosecuting criminal conduct by corporations and their executives, management and employees." Among the first areas the Advisory Group will consider, according to Monaco, are the effectiveness of pre-trial resolutions in the context of recidivist corporations, as well as the standards and practices followed by the DOJ in selecting corporate monitors.[6]

In concluding her spoken remarks, Monaco provided a number of recommendations, in light of the announced changes, that companies should consider. First, she advised companies to make certain to maintain their corporate compliance programs and ensure they are

[4] *See* Memorandum from Assistant Attorney General Brian A. Benczkowski, "Selection of Monitors in Criminal Division Matters," Oct. 11, 2018, *available at* https://www.justice.gov/criminal-fraud/file/1100366/download. ("In general, the Criminal Division should favor the imposition of a monitor only where there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens. Where a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary."). The Benczkowski Memorandum supplemented prior guidance on the 2008 "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations," issued by then-Acting Deputy Attorney General, Craig S. Morford. The Benczkowski Memorandum expanded the Morford Memorandum by providing guidance on the benefits to consider when appointing a corporate monitor.

[5] Brian Benczkowski, Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance, Oct. 12, 2018, *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program (stating that "corporate monitors as the exception, not the rule")

[6] Monaco also stressed investment in data-processing technologies such as artificial intelligence. This is consistent with recent DOJ statements regarding the increased use of "independent" and "proactive" data mining methods for enhanced detection of FCPA enforcement actions. *See* Nicholas McQuaid, Acting Assistant Attorney General, Dep't of Justice, Keynote Address at the Foreign Corrupt Practices Act New York, June 2, 2021.

appropriately detecting and preventing misconduct. Second, she cautioned companies to be on notice that in evaluating whether a corporation is a bad actor, the DOJ will be reviewing the entirety of their civil, regulatory and criminal record. Third, she stated that any company expecting to receive cooperation credit will need to identify all individuals involved in the misconduct and produce all non-privileged information about their involvement. Fourth, she reiterated that the decision whether or not to impose a monitor will be based on the facts and circumstances of each case and there is no presumption against imposing monitors. Finally, she warned that these policy changes were just the start to the Biden administration's actions to "better combat corporate crime."

This initial set of changes to the DOJ's corporate enforcement policies signals what most expected from the new administration: a renewed and aggressive focus on and approach to corporate misconduct. For a company facing criminal investigation, therefore, advocacy around these issues – such as which individuals were "involved" in misconduct, the relevance of prior criminal conduct, and whether a monitor is warranted – will be of critical importance.

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