ALERT MEMORANDUM

DOJ Announces Changes to Corporate Criminal Enforcement Policies

September 19, 2022

On September 15, 2022, Deputy Attorney General Lisa O. Monaco ("DAG Monaco") announced further changes to the enforcement policies and practices of the Department of Justice ("DOJ" or the "Department") at an event at New York University Law School[1], in particular building on previously announced revisions relating to individual misconduct and corporate recidivism.

The Department released a memorandum that same day titled, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group"[2] (the "Monaco Memorandum"), which provides guidance to prosecutors in five key areas:

1. Individual and Corporate Accountability
2. Evaluation of a Corporation's History of Misconduct
3. Voluntary Self-Disclosure and Cooperation Credit
4. Evaluation of Existing Corporate Compliance Programs
5. Use of Monitors, Including Monitor Selection Criteria

If you have any questions concerning this memorandum, please reach out to your regular firm contact or any member of the White-Collar Defense and Investigations Team listed under the "Our Practice" section of our website.

[1] Speech, "Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement" (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

[2] Deputy Attorney General Memorandum dated Sept. 15, 2022, https://www.justice.gov/opa/speech/file/1535301/download.

Revisions to Corporate Criminal Enforcement Policies

1. Individual and Corporate Accountability

In her speech, DAG Monaco emphasized the importance of holding individual corporate wrongdoers accountable, and the Monaco Memorandum dictates that in order "[t]o receive full cooperation credit, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals."[3]

Likewise, the memorandum directs prosecutors to accelerate their assessment of individual culpability and to seek criminal charges against individuals "prior to or simultaneously with" the entry of corporate resolutions, without letting the negotiation of a corporate resolution unduly delay the charging of individuals.[4]

In light of this guidance, companies should continue to carefully balance the need to fully investigate and understand the facts with the goal of maximizing any potential cooperation credit, if the underlying facts amount to a criminal violation for which the company may be liable.

2. Evaluation of a Corporation's History of Misconduct

DAG Monaco's announcement last year that the DOJ will consider all past misconduct (criminal or civil, domestic or foreign) by a corporation in its charging decisions, whether or not the past misconduct was similar to the conduct currently at issue, drew strong reactions from the defense bar.[5]

Responding to this reaction, the Monaco Memorandum provides further guidance on how past misconduct will be evaluated:

- Past criminal resolutions will be weighed more than past civil resolutions, with recent U.S. criminal resolutions assigned the greatest significance.
- Prior criminal resolutions that are over 10 years old and civil resolutions that are over five years old will generally receive less weight than more recent conduct. This is especially so where the company's compliance program has evolved in that same time period.
- The DOJ will also evaluate whether the prior conduct involved the same personnel or similar activity to that currently under investigation. The memorandum makes clear, however, that DOJ typically will not treat a company as a recidivist simply because it acquired a different company with a history of compliance problems, so long as the acquirer promptly took steps to integrate the acquired company into an effective compliance program.
- The memorandum also advises that prosecutors will conduct an "apples-to-apples" comparison of prior misconduct. For example, companies that operate in "highly-regulated" industries (and thus are more likely to have a history of civil resolutions) will be evaluated alongside similar companies.

3. Voluntary Self-Disclosure

The Monaco Memorandum stresses the importance of voluntary self-reporting to DOJ, promising that in the ordinary course, "the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct."[6]

[3] Monaco Memorandum at 3.

[4] Prosecutors achieving corporate resolutions before making decisions on individuals will need to still address all potentially culpable individuals in a specific memorandum. Id. at 3.

[5] See our Alert Memorandum on this topic, "DOJ Announces First Set of Revisions Strengthening Corporate Criminal Enforcement Policies," dated Nov. 1, 2021, available at https://www.clearygottlieb.com/-/media/files/alert-memos-2021/doj-announces-first-set-of-revisions-strengthening-corporate-criminal-enforcement-policies.pdf

[6] Monaco Memorandum at 7.

While some DOJ divisions already have clear policies regarding the treatment of companies who voluntarily report their misconduct on a timely basis, such as the FCPA unit's Corporate Enforcement Policy or the DOJ Antitrust Division, many do not, and the Monaco Memorandum directs all DOJ components, including U.S. Attorney's Offices, to draft and publicly share their policies, including what qualifies as timely disclosure, what kinds of information must be reported, and what benefits may be received.[7]

Acknowledging that companies may operate in multiple jurisdictions, the Monaco Memorandum flags that while companies that find ways to produce records and navigate foreign blocking statutes and data privacy laws will be awarded cooperation credit, those that "capitalize on data privacy laws and similar statutes to shield misconduct inappropriately from detection and investigation by U.S. law enforcement" may be subject to "adverse inferences."[8]

This push towards greater predictability and consistency relating to each DOJ division's policies is clearly intended to encourage voluntary disclosures. But challenges will remain for companies faced with allegations of corporate misconduct to determine in a timely way their scope and severity (and whether any misconduct even occurred) in order to make a decision about whether, how and to whom to report such misconduct.

4. Evaluation of Existing Corporate Compliance Programs

At various opportunities throughout the year, Kenneth Polite, Assistant Attorney General for the Criminal Division ("AAG Polite") has underscored the importance of strong corporate compliance programs and the DOJ's commitment to "empowering" compliance officers to build strong controls to detect and prevent corporate misconduct.[9] Earlier this year, AAG Polite indicated that the Department would consider requiring chief executive officers and chief compliance officers to certify to the effectiveness of their company's compliance program as part of a resolution and, following those statements, the DOJ required its first such certification in its FCPA resolution with Glencore in May 2022.[10]

Recent hires within the Department reinforce this focus on compliance programs and the expertise the DOJ has developed to conduct its own evaluation of such programs. In June, Glenn Leon joined the DOJ as Chief of the Fraud Section. While Leon previously served many years as a supervisor within the Fraud Section and as a federal prosecutor, he most recently occupied the role of Chief Compliance Officer of Hewlett Packard. Earlier this month, Matt Galvin, former Global Compliance Chief at Anheuser-Busch InBev, joined the DOJ in a newly created position as the section's compliance and big data expert.[11]

Following these recent developments, the Monaco Memorandum specifies that a strong compliance program should be woven into a company's compensation structure including by providing financial incentives for contributing to a good compliance culture and structuring compensation in ways that deter bad conduct, such as by including "compensation clawback provisions" in contracts with corporate management. In her speech, DAG Monaco indicated that DOJ will develop further policies by the end of the year that reward companies that adopt such

[7] Id.
[8] Id. at 8.
[9] See, e.g., Speech, "Assistant Attorney General Kenneth A. Polite Jr. Delivers Remarks at NYU Law's Program on Corporate Compliance and Enforcement" (Mar. 25, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate.
[10] United States v. Glencore International A.G., Plea Agreement (May 24, 2022), https://www.justice.gov/criminal/file/1508266/download.
[11] Dylan Toker, "Hewlett Packard Enterprise Executive to Lead Justice Department's Fraud Section" (June 7, 2022), https://www.wsj.com/articles/hewlett-packard-enterprise-executive-to-lead-justice-departments-fraud-section-11654609305; Dylan Toker, "Justice Department Recruits AB InBev Data Expert to White-Collar Crime Force" (Sept. 8, 2022), https://www.wsj.com/articles/justice-department-recruits-ab-inbev-data-expert-to-white-collar-crime-force-11662659234

compensation policies. The Monaco Memorandum also directs prosecutors to take into account the extent to which a company under investigation used non-disclosure or non-disparagement clauses in employment contracts to hinder employees from reporting misconduct to authorities. In light of this guidance, companies – particularly those facing potential DOJ investigations – should consider revisiting financial incentive structures in employee compensation.

The Monaco Memorandum also instructs prosecutors to take into account in their charging decisions the extent to which a company's compliance program included policies around employees' use of personal communications devices or third-party communications applications, such that records of employees' activities were—or were not—maintained and readily available to investigators. Further guidance on this issue is also apparently forthcoming.

5. Use of Monitors, Including Monitor Selection Criteria

Corporate compliance monitorships reached a low-water mark in 2020, with DOJ not imposing any monitors, the first time in a decade where DOJ had done so. Under the Biden Administration, DOJ has changed course, beginning in October 2021, with DAG Monaco rejecting any past DOJ policies limiting the imposition of monitors, and the trend has continued, with DOJ officials touting monitors in speeches and two monitors being imposed this year in connection with criminal resolutions.[12] While there is no presumption in favor or against imposing a compliance monitor, the memorandum provides a non-exhaustive list of factors that should be considered when deciding whether to impose a monitor:

1. Voluntary self-disclosure;
2. The effectiveness of the corporate compliance program at the time of resolution;
3. Whether the compliance program has been tested;
4. The role of senior management in the misconduct, if any, including tolerating misconduct or risky behavior;
5. Whether the misconduct was the product of the exploitation of an inadequate system of internal controls;
6. Whether compliance personnel were involved in the misconduct or failed to act on red flags;
7. Whether and how the company acted on the detection of misconduct, including remediation efforts, disciplinary action and termination of business relationships, where warranted;
8. How the risk profile of the company has changed and how it has adapted to those changes;
9. Unique risks to the company, due to its industry, geography of operation or customer base;
10. Oversight by other regulators and whether a monitor is being imposed by a foreign or other regulator.

[12] Notably, DAG Monaco last year rescinded the prior monitorship policy in place under the Trump Administration (also known as the Benczkowski Memorandum). Speech, "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. The Benczkowski Memorandum had limited the imposition of a corporate compliance monitor to instances "when there was a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens." See DOJ Criminal Division, Selection of Monitors in Criminal Division (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.

The Monaco Memorandum also directs that by the end of the year, all DOJ components must either create a new process for selecting corporate monitors, or adopt one in use by another DOJ component. Corporate monitor selection must abide by principles of consistency, transparency, and predictability. The memorandum requires that monitors be selected by a committee, encourages consideration of diversity and inclusion, and requires prosecutors to document their rationale for selection and to obtain approval from the DAG's office for a non-court ordered monitor.

The Monaco Memorandum casts corporate monitors as being in an ongoing dialogue with prosecutors and specifies that "[m]onitors should promptly alert prosecutors if they are being denied access to information, resources, or corporate employees or agents necessary to execute their charge."[13] Finally, potentially recognizing the high costs often associated with corporate monitorships, the memorandum also directs prosecutors to consider the scope of the monitor's work and to shorten or lengthen the monitorship if warranted.

Conclusion

The Monaco Memorandum is the most recent step in the direction of more robust corporate enforcement practices – with a focus on individual prosecutions – as well as greater transparency, predictability and consistency in such DOJ practices. There are several key takeaways from this guidance:

— First, individual accountability will be paramount to how DOJ expects corporations and their counsel to conduct investigations, with potential consequences for corporations that do not prioritize prompt reporting on individual misconduct.
— Second, companies with a history of misconduct, regardless of its nature, will need to be prepared to address that history and distinguish it from the conduct at issue.
— Third, voluntary self-disclosure will be rewarded, and the Department has committed to providing further guidance on the benefits of self-reporting.
— Fourth, senior management and compliance officers are empowered and encouraged to adopt mechanisms that strengthen their compliance programs, and clawback provisions and other incentive structures have been recommended by DOJ as potential tools to achieve that goal.
— Fifth, the Monaco Memorandum reinvigorates the corporate monitorship program and sets forth new guidance for how monitors are to be selected and held accountable to prosecutors.
— Finally, companies should carefully follow and analyze upcoming DOJ resolutions to see how this new guidance is being implemented and should be watching for additional guidance as the DOJ has made clear there is more to come.

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[13] Id. at 14.