

Deputy attorney general announces revisions to criminal enforcement policies for corporate entities

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In a September 15, 2022 speech at New York University School of Law's Program on Corporate Compliance and Enforcement, Deputy Attorney General Lisa Monaco announced revisions to the Department of Justice's (DOJ) enforcement policies concerning corporate entities.

These revisions, documented in a 15-page, Department-wide memorandum released on the same date (the Memo), are the product of a top-to-bottom review initiated by Monaco last year through the DOJ's Corporate Crime Advisory Group.

They constitute a notable reworking of certain policies that govern corporate cooperation, with the stated purposes of motivating companies to voluntarily self-report misconduct to the Department as early as possible, prioritizing disclosure of evidence relevant to individual accountability, and encouraging companies to engage in compliance remediation during the pendency of investigations.

Although Deputy Attorney General Monaco described the policies as "a combination of carrots and sticks" meant to empower in-house lawyers and compliance officers to make the "business case for responsible corporate behavior," certain of the policies will undoubtedly increase the pressure on corporate entities facing sensitive situations to make critical decisions earlier in the process when the facts concerning potential criminal exposure may be unclear.

The Monaco address focused on five key areas of policy revisions:

Voluntary self-disclosure

Deputy Attorney General Monaco announced that every DOJ component that prosecutes corporate criminal conduct must have a formal, documented program that incentivizes voluntary self-disclosure, and that common across these programs will be the principle that, barring the presence of aggravating factors, DOJ will not seek a guilty plea where a company has voluntarily self-disclosed, cooperated, and remediated misconduct.

Monaco also announced that DOJ will not push for an independent compliance monitor where the self-reporting company has implemented and tested an effective compliance program at the time of the resolution. Monaco stated that recent cases have demonstrated the divergent fates of self-reporting entities and

other companies, noting that self-reporting companies have received declinations and non-prosecution agreements (NPAs) that do not involve significant financial penalties, while companies that have not self-reported have had to plead guilty and pay substantial financial penalties.

Individual companies and their counsel will be left to assess their circumstances and determine how substantial an incentive the promise of avoiding a guilty plea is, particularly since the policies offer no promises concerning the potentially punitive terms of a non-prosecution agreement or deferred prosecution agreement (DPA).

DOJ line prosecutors will now be pushed to complete investigations and seek any appropriate criminal charges against individuals prior to or at the same time as entering a resolution against a corporation.

The policy is also a far cry from the Criminal Division's current policy of a presumption of a declination against self-reporting companies in FCPA matters, a policy that, in recent years, had been extended as nonbinding guidance to all Criminal Division investigations.

Further, the actual benefit to self-reporting companies of avoiding monitors if they have an effective compliance program is difficult to assess, as a later section of the same Memo observes that it may also be appropriate for non-self-reporting companies to similarly avoid monitors if they already have effective and proven compliance programs.

Individual accountability

In reaffirming DOJ's priority on prosecuting individual defendants yet at the same time acknowledging a decline in individual prosecutions over the past decade, Monaco announced that in order to empower prosecutors to charge such cases, it will incentivize

corporate entities to come forward with evidence more quickly. Specifically, Monaco noted, undue or intentional delay in producing information or documents, particularly those that demonstrate individual culpability, will result in the reduction or denial of cooperation credit.

While timely cooperation against individuals has long been considered by DOJ in assessing the case for cooperation credit, the Memo requires prosecutors to specifically assess the timeliness of the entity's disclosure of evidence in connection with every corporate resolution, and appears to place the burden on the company to demonstrate that it turned over the evidence promptly after it was discovered.

Under the policy changes described, it will certainly be more difficult for companies to secure multiple NPAs or DPAs, even when the facts may otherwise warrant such treatment.

Monaco specified that this guidance is in addition to prior guidance from DOJ that companies must provide all relevant, non-privileged facts about individual misconduct to receive any cooperation credit.

Relatedly, Monaco announced that DOJ line prosecutors will now be pushed to complete investigations and seek any appropriate criminal charges against individuals prior to or at the same time as entering a resolution against a corporation.

Where the facts of a specific investigation counsel in favor of resolving the corporate case first, the prosecutor must have a robust investigative plan going forward, including a timeline for completing the remaining work involving the consideration of individual charges. According to the Memo, the plan must be submitted and approved by the supervising U.S. Attorney or Assistant Attorney General concurrently with the approval of the corporate resolution.

The overall intended effect of these policies, as Monaco acknowledged, is to push prosecutors and corporate counsel alike to feel as though they are "on the clock" to expedite investigations of potentially culpable individuals. We also suspect that they are intended to discourage prosecutors, following corporate resolutions, from moving on to other matters before completing the investigation of individuals.

Adjustments to recidivism approach

Nearly a year ago, in a speech given at the ABA's Institute on White Collar Crime, Deputy Attorney General Monaco caused some alarm when she announced that in evaluating historical misconduct when considering corporate criminal resolutions, prosecutors would review all prior criminal, civil, and regulatory misconduct, a sweeping approach that did not appear to eliminate misconduct that was old or unrelated to the new conduct at issue.

In her remarks at NYU, and in the text of the Memo, Monaco clarified her earlier statements, acknowledging that not all instances of prior misconduct are created equal. She announced that dated conduct — conduct reflected in criminal resolutions from more than 10 years before the conduct at issue, and civil and regulatory resolutions from more than five years before the conduct at issue — will generally be accorded less weight.

The Memo details other relevant factors, including whether the prior misconduct involved the same management or personnel; and the nature and circumstances of the prior conduct, with a specific eye toward whether it shared the same root cause as the present misconduct. Facts that suggest broader, unifying weaknesses in the compliance culture would be accorded more weight.

The Memo directed prosecutors to be mindful of ensuring apples-to-apples comparisons, observing that entities operating in highly regulated industries should be compared to similarly-situated companies in the same industry.

Monaco announced that DOJ would disfavor "multiple, successive" NPAs or DPAs with the same company, and the Memo requires prosecutors to secure prior written approval by the responsible U.S. Attorney or Assistant Attorney General, as well as provide advanced notice to the Deputy Attorney General's Office, prior to making an offer that would result in multiple NPAs or DPAs to a company.

Although corporate entities will likely welcome the Department's rejection of the one-size-fits-all guidance regarding recidivism, as well as the Memo's attempt to formally document factors that prosecutors should consider in deciding the form of a corporate resolution, the expansive time thresholds for what constitutes "dated" conduct may still cause concern, particularly for large, complex companies with a broad array of regulatory obligations.

Likewise, DOJ's stated aversion to successive non-guilty plea resolutions may prompt particular concern among large, heavily regulated corporate entities that are more vulnerable to multiple episodes of misconduct that stem from distinct, unrelated causes.

The Memo does include important caveats, including that repeat DPAs or NPAs may still be appropriate where the matters involve substantially different misconduct and/or different personnel or executives, or to reward companies that have self-reported the new conduct. Nonetheless, under the policy changes described, it will certainly be more difficult for companies to secure multiple NPAs or DPAs, even when the facts may otherwise warrant such treatment.

Monitoring the monitors

Deputy Attorney General Monaco also addressed the issue of monitorships. She announced that, in an effort to reduce suspicion and confusion about monitors, new guidance would be issued to prosecutors concerning when monitors are needed, how they are to be selected, and how to oversee a monitor's work.

Relatedly, monitor selections will, going forward, be made pursuant to a consistent and transparent selection process, and the monitorships will be tailored to the misconduct and related compliance deficiencies of the resolving company.

The Memo includes a multi-factor list for determining when a monitor is appropriate, including whether the company self-disclosed, whether the corporation has a tested and effective compliance program, and whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls.

It also emphasizes the need for prosecutors to oversee monitorships on an ongoing basis, including receiving regular updates about the work being done, to make sure that monitors remain on task and on budget.

Culture, compensation and texting

Finally, Deputy Attorney General Monaco announced that when prosecutors evaluate the strength of a company's compliance program, they will consider whether its compensation systems are designed to reward compliance and penalize individuals whose actions or omissions contributed to criminal conduct.

Monaco specifically referenced whether companies claw back compensation or otherwise impose financial penalties on such individuals. Monaco indicated that DOJ's Criminal Division would develop further guidance designed to reward corporations that use compensation clawback policies.

Perhaps most significantly, the Memo references policies to "shift the burden of corporate financial penalties away from shareholders — who in many cases do not have a role in misconduct — onto those more directly responsible."

This development follows a renewed push from the Securities and Exchange Commission (SEC) regarding clawback-related provisions within the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act. Clawback regulation was first mandated by Dodd-Frank, with the SEC proposing specific rules to implement that mandate in 2015.

The timing of the finalization of those rules has been subject to some uncertainty, but numerous companies have voluntarily adopted clawback policies as part of corporate governance initiatives in the years since.

Unmentioned in Deputy Attorney General Monaco's remarks but prominent within the Memo is a section on the use of personal devices and third-party applications for communication. Building on an elevated attention to personal messaging that began with changes to DOJ's FCPA Corporate Enforcement Policy in 2017, the Memo notes that prosecutors should evaluate whether companies have effective policies and procedures governing the use of personal devices and messaging platforms as part of their evaluation of companies' policies for identifying and reporting potential violations of law.

This directive follows a number of high-profile instances in which regulators, most notably the SEC, have scrutinized and in some cases penalized companies for failing to keep records of business-related text messages sent using employees' personal devices as required by recordkeeping and books-and-records rules.

Conclusion

Companies that interface with the Justice Department will need to consider closely a number of the implications of the announced policy changes. While the adjustments may be intended to "empower" in-house counsel, they also create numerous challenges.

The policies regarding individual culpability will increase the pressure for companies to produce documentary evidence to prosecutors at the earliest possible point — and, generally, to begin cooperation at a point in time when complex fact patterns confronting them may not be fully understood. And the promise of a non-guilty plea disposition will not necessarily provide comfort.

Companies that face potential labeling as recidivists will still confront hard choices under the revised guidance, particularly where they may have benefitted from NPA or DPA dispositions in the past.

And, finally, an overall emphasis on speed could limit the options available to companies, and how thoroughly those options can be investigated and considered before difficult decisions are made, particularly since the facts at issue are often complex.

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