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U.S. Department of Justice Announces Priorities and Expectations in Prosecuting Corporate Crime

Deputy Attorney General Lisa Monaco and Assistant Attorney General Kenneth Polite Discuss Incentives for Companies to Cooperate and Self-Disclose Corporate Misconduct

SUMMARY

On September 15 and 16, 2022, Deputy Attorney General Lisa Monaco and Assistant Attorney General Kenneth Polite, respectively, gave speeches announcing the Department of Justice's current approach to prosecuting corporate crime. Both sets of remarks built upon an October 2021 speech by Deputy AG Monaco[1] and further clarified the Department's position, priorities, and expectations with respect to five key areas in white collar enforcement: (i) individual accountability; (ii) recidivism; (iii) self-disclosure and cooperation; (iv) monitors; and (v) corporate culture and compliance programs. Deputy AG Monaco indicated that the Department's policies in connection with these key areas—"a combination of carrots and sticks"—would empower companies to "do the right thing," while also empowering prosecutors to "hold accountable those that don't." Deputy AG Monaco's remarks were accompanied by a memorandum to federal prosecutors regarding the announced revisions to the Department's corporate criminal enforcement policies and procedures.

(1) Individual Accountability

Deputy AG Monaco stressed that individual accountability remains the Department's "top priority" for corporate criminal enforcement. Noting that "in individual prosecutions, speed is of the essence," Deputy AG Monaco indicated that in addition to providing all relevant, non-privileged facts about individual misconduct, the Department would require cooperating companies to "come forward with important evidence more quickly" and that "the first reaction" of a cooperating company that discovers interesting

documents or evidence "should be to notify the prosecutors." She observed that "delayed disclosure" and "gamesmanship with disclosures and productions" undermines the Department's efforts to hold individuals accountable. Her memo notes that companies seeking cooperation credit bear the burden of ensuring that the documents most relevant to the assessment of individual culpability are produced in a timely manner.

Deputy AG Monaco also directed prosecutors, whenever possible, to complete investigations and seek criminal charges against individuals prior to, or at the same time as, entering a resolution against the corporate entity.

The memo also touches on non-U.S. prosecutions of individuals engaged in cross-border corporate crime and directs federal prosecutors to make a case-specific determination as to whether there is a "significant likelihood" that a putative defendant will be subjected to "effective prosecution" in that jurisdiction before declining to initiate a prosecution in the United States.

(2) Recidivism

Deputy AG Monaco released further guidance for how prosecutors should evaluate a company's prior history of misconduct. She indicated that the most significant types of misconduct will be recent criminal resolutions in the United States, along with instances of previous wrongdoing involving the same personnel or management as the current misconduct. Conversely, dated misconduct should be given less weight by prosecutors, particularly criminal resolutions that occurred more than ten years before the conduct currently under investigation and civil or regulatory resolutions that occurred more than five years before the conduct currently under investigation. Additionally, Deputy AG Monaco stated that the Department would also take into account "the nature and circumstances" of the prior misconduct, including the seriousness and pervasiveness of the misconduct, and whether it shared root causes with the conduct currently under investigation. She further stated that a company's history of misconduct should be evaluated by comparing it to other similarly situated companies. Deputy AG Monaco also indicated that the Department will not treat as recidivists "companies with a proven track record of compliance" that acquire companies with a history of compliance issues, so long as the acquiring company "promptly and properly" addresses those issues after the acquisition.

Deputy AG Monaco also reiterated the Department's prior stance that multiple non-prosecution or deferred prosecution agreements with the same company are disfavored, and that companies, "particularly when they are frequent flyers," cannot assume that they are entitled to DPAs and NPAs. The memo notes, however, that this should not dis-incentivize companies from voluntary self-disclosures, and that, when determining the appropriate form and substance for a corporate criminal resolution, prosecutors should consider whether the conduct came to light as the result of a voluntary self-disclosure and credit such disclosure accordingly, even for companies with prior criminal resolutions.

(3) Self-Disclosure and Cooperation

Deputy AG Monaco pointed to voluntary self-disclosure as "the clearest path for a company to avoid a guilty plea or an indictment." Notably, she indicated that the Department "must ensure" that corporations benefit from the decision to voluntarily self-disclose misconduct and that such benefits should be clear and predictable. Accordingly, Deputy AG Monaco directed all components of the Department to draft their own formal, documented policies incentivizing voluntary self-disclosure, similar to those that have already proven successful in antitrust, FCPA, and national security matters.

Deputy AG Monaco's memo sets forth core principles regarding voluntary self-disclosures to which all Department components must adhere. Importantly, absent aggravating factors, the Department "will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct." In addition, the Department will not require an independent compliance monitor for self-disclosing companies that, by the time of the resolution, have also implemented and tested an effective compliance program.

Deputy AG Monaco's memo also sets forth criteria for prosecutors to evaluate a company's cooperation, including that companies seeking cooperation credit "timely preserve, collect, and disclose relevant documents located both in the United States and overseas." To the extent that data privacy or other foreign law provisions restrict the company's ability to produce documents located overseas, the memo puts the burden on cooperating companies to establish the existence of any restrictions and identify "reasonable alternatives to provide the requested facts and evidence." Where companies "actively seek[] to capitalize" on foreign data privacy laws "to shield misconduct inappropriately" from U.S. law enforcement, "an adverse inference as to the corporation's cooperation may be applicable."

(4) Independent Compliance Monitors

Deputy AG Monaco's memo directs prosecutors, in evaluating whether to impose a monitor, to consider whether:

- the corporation voluntarily self-disclosed the underlying misconduct;
- at the time of the resolution, and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;
- at the time of the resolution, the compliance program and internal controls have been adequately tested to demonstrate they would likely detect and prevent similar misconduct in the future;
- the underlying misconduct was long-lasting or pervasive across the business or was approved, facilitated, or ignored by senior management, executives, or directors;
- the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;
- compliance personnel actively participated in the misconduct or failed to appropriately escalate or respond to red flags;

- the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships or practices as well as the discipline or termination of the employees involved in the misconduct;
- at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of the misconduct recurring in the future is minimal or non-existent;
- the corporation faces unique risks or compliance challenges; and
- to what extent the corporation is subject to oversight from industry regulators or a monitor imposed by another domestic or foreign enforcement authority or regulator.

The memo further directs prosecutors to follow "consistent and transparent procedures" in selecting monitors. Moreover, prosecutors are directed to ensure that the scope of every monitorship is "tailored to the misconduct and related compliance deficiencies" of the company upon which the monitorship is imposed, and to "stay involved and monitor the monitor" to make sure that the monitor "stays on task and on budget."

(5) Corporate Culture, Compliance Programs, and Clawbacks

Deputy AG Monaco's memo directs that in assessing a company's compliance program, prosecutors must evaluate "the corporation's commitment to fostering a strong culture of compliance at all levels of the corporation" and consider whether the compliance program is well designed, adequately resourced, empowered to function effectively, and working in practice. The memo states that as a general rule, companies with robust compliance programs should have effective policies governing the use of personal devices and third-party platforms for company communications; should provide clear training to employees about such policies; and should enforce such policies when violations are identified. Whether a company has enacted policies that will enable it to collect and provide to the government all non-privileged responsive documents and data that may be stored on any device that its employees use for business purposes will factor into prosecutors' decisions to award or withhold cooperation credit. AAG Polite indicated that the Criminal Division will examine whether additional guidance is necessary regarding best corporate practices on use of personal devices and third-party messaging applications, including those offering ephemeral (or disappearing) messaging.

Deputy AG Monaco also announced that in evaluating a company's compliance program, prosecutors will consider whether a company has enacted clawback provisions, the escrowing of compensation, and compensation systems that "clearly and effectively impose financial penalties for misconduct" as measures that can "deter risky behavior and foster a culture of compliance." Moreover, prosecutors are directed to look not only at whether such policies exist, but also at whether the company actually followed through on clawback agreements against employees who engaged in criminal conduct. Deputy AG Monaco also indicated that additional guidance will be provided by the end of the year on how to reward companies that employ clawbacks or other financial sanctions against employees who engage in misconduct. Both Deputy AG Monaco and AAG Polite indicated that the Department also would try to find additional ways to shift the

burden of corporate financial penalties away from shareholders, who in many cases are not involved in the misconduct, onto those more directly responsible.

IMPLICATIONS

While not breaking new ground, these announcements have signaled several important points of emphasis in DOJ's corporate enforcement program:

First, companies seeking cooperation credit will need to be mindful of the DOJ's insistence that "hot documents"—those that bear particular relevance to the question of individual employee misconduct—be brought to the DOJ's attention quickly upon discovery.

Second, as part of a robust compliance program, companies must take up the question of individual accountability themselves and ensure both that policies exist to punish wrongdoers financially and that such policies are enforced.

Third, every DOJ component will soon be instituting policies that incentivize self-reporting as a means of avoiding a criminal conviction.

Fourth, on the question of corporate recidivism, the DOJ will provide a more nuanced and thoughtful analysis than practitioners feared following Deputy AG Monaco's October 2021 speech.

Fifth, companies should review their policies and controls concerning the use of personal devices and third-party platforms for company communications and their ability to preserve and collect such communications.[2]

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ENDNOTES

1 https://www.sullcrom.com/files/upload/sc-publication-deputy-AG-announces-new-guidance-corporate-criminal-prosecutions.pdf

2 For an analysis of off-platform communications, *see* Alexander J. Willscher, Anthony J. Lewis, and John B. Sarlitto, *Employee Communications Practices and Investigations*, Bloomberg Law (March 2021), available online at Corporate Compliance, Professional Perspective - Employee Communications Practices and Investigations (bloomberglaw.com)

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