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U.S. Department of Justice Announces Key Policy Changes in the Prosecution of Corporate Crime

Deputy Attorney General Lisa Monaco Announces Revisions to Justice Department Policy in Prosecuting and Resolving Corporate Investigations

During a keynote address delivered Thursday at the American Bar Association's 36th National Institute on White Collar Crime, Deputy Attorney General Lisa O. Monaco announced certain significant changes to current Department of Justice policies on the prosecution of corporate crime. Deputy AG Monaco noted at the outset that "[w]hile the priority remains individual accountability," the Department "will not hesitate to hold companies accountable." The policy changes significantly affect three key areas of corporate enforcement: (i) the conditions that a company must satisfy in order to obtain cooperation credit; (ii) the definition of recidivism in the corporate context and its application to the form of corporate criminal resolutions; and (iii) the scope and use of corporate monitors. Deputy AG Monaco also emphasized the importance of corporate compliance programs and remediation and echoed recent comments made by Principal Associate Deputy Attorney General John Carlin about the consequences of breaching corporate criminal resolutions.

First, with respect to cooperation, the guidance announced by Deputy AG Monaco alters the policy announced by then-Deputy AG Rod Rosenstein in November 2018. Under that prior policy (which had narrowed the DOJ policy laid out in the September 2015 Yates Memo), a company could be eligible for cooperation credit if it identified to DOJ individuals who the company had determined were "substantially involved" in the misconduct. Under the revised guidance, however, "to be eligible for any cooperation credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue . . . regardless of their position, status or seniority." Deputy AG

Monaco explained that the shift was necessary because, among other reasons, the prior policy afforded "companies too much discretion in deciding who should and should not be disclosed to the government," and "ignore[d] the fact that individuals with a peripheral involvement in misconduct may nonetheless have important information to provide to agents and prosecutors."

Second, the new guidance substantially broadens the Department's definition of corporate recidivism in the Principles of Federal Prosecution of Business Organizations, which have since their inception focused on a corporation's history of similar misconduct, and suggests less lenient settlement resolutions in the future for corporations that previously have engaged in criminal misconduct. The new guidance—which will be reflected in an amendment to the Principles—establishes that prosecutors must take "all prior misconduct" into account when determining an appropriate resolution with a company, "whether or not that misconduct is similar to the conduct at issue in a particular investigation." The new policy expressly directs prosecutors to "start by assuming that all prior misconduct is potentially relevant" and to consider "the full criminal, civil and regulatory record of any company when deciding what resolution is appropriate for a company that is the subject or target of a criminal investigation." Deputy AG Monaco stressed the importance of not only a "Department-wide" assessment of prior misconduct, but also prior foreign and state prosecutions and civil and regulatory matters. This approach is likely to create challenges for companies operating in highly regulated industries and those subject to regulatory oversight and enforcement by multiple government agencies in multiple countries.

With respect to "pretrial diversion" programs such as non-prosecutions agreements ("NPAs") and deferred prosecution agreements ("DPAs"), Deputy AG Monaco indicated that the Department will be studying whether these resolutions are "appropriate for certain recidivist companies," particularly companies that have previously benefited from an NPA or DPA, and whether the possibility of receiving multiple NPAs and DPAs discourages a culture of strong compliance, resulting instead in a view that these resolutions are simply the "cost of doing business." Deputy AG Monaco also noted that the DOJ would be studying whether companies under a DPA or NPA "take their obligations seriously enough" and would hold accountable any company that breaches the terms of such an agreement. These comments echo remarks by Principal Associate Deputy Attorney General John Carlin, who recently stated that the consequences of breaching a resolution "may be worse than the original punishment."

Third, the new guidance changes the Department's approach to monitors. Expressly rescinding any previous Department guidance that "monitorships are disfavored or are the exception," Deputy AG Monaco made clear that "the department is free to require the imposition of independent monitors wherever it is appropriate to do so" in order to satisfy prosecutors that a company is "living up to its compliance and disclosure obligations under the DPA or NPA." She also stated that the DOJ will assess how monitorships are administered and the selection criteria for monitors, explaining that the DOJ will ensure that the process will be accomplished free of "the perception of favoritism." This guidance suggests that monitors may be

imposed more frequently in corporate criminal cases going forward, at least in cases where the Department's "[t]rust that a corporation will commit itself to improvement, change its corporate culture, and self-police its activities" is "called into question."

In her conclusion, Deputy AG Monaco provided the key takeaways for corporate entities as well as a roadmap of future DOJ enforcement priorities:

1. Companies are strongly encouraged to "actively review their compliance programs to ensure they adequately monitor for and remediate misconduct";

2. For companies facing investigations, the Department "will review their whole criminal, civil, and regulatory record—not just a sliver of that record";

3. To be eligible for cooperation credit, companies "need to identify all individuals involved in the misconduct—not just those substantially involved—and produce all non-privileged information about those individuals' involvement"; and

4. When negotiating a resolution, there will be "no presumption against corporate monitors." Rather, the decision about whether to install a monitor "will be made by the facts and circumstances of each case."

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