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Practice Update

Carrots and Sticks: DOJ Announces Policy Shift on Corporate Crime

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On September 15, Deputy Assistant General of the United States (DAG) Lisa Monaco announced new U.S. Department of Justice (DOJ) policy changes during a speech on corporate criminal enforcement at New York University Law School in New York City.

In October 2021, DAG Monaco announced that DOJ would be creating a Corporate Crime Advisory Group made up of DOJ experts, whose goal would be to conduct a top-to-bottom review of DOJ's corporate enforcement policies and strategies. As a result of that review, DAG Monaco announced new changes to DOJ policy related to prosecution of corporate crimes. She stated that the new policies make clear that the U.S. government will not accept "business as usual" when it comes to violations by U.S. corporations as well as international corporations that fall within the scope of U.S. jurisdiction. Notably, she emphasized that DOJ would proceed with implementing its new policies using a combination of "carrots and sticks" — using a mix of incentives and deterrents — to encourage corporate compliance.

The Need for Speed: Individual Accountability

Monaco stressed that DOJ's top priority is individual accountability, meaning that employees of corporate offenders, even top executives, can and will be held responsible for corporate violations of U.S. law. This suggests that the number of prosecutions against

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corporate entities in which no individual is held responsible may soon be greatly diminished.

Moreover, Monaco acknowledged that prosecution data reflects an overall decline in criminal prosecutions over the last decade, and pledged that DOJ would empower its prosecutors to "do more and move faster," including providing resources facilitating DOJ's ability to expedite and increase investigations of individuals involved in corporate misconduct.

DOJ will accomplish this by raising the bar for corporate offenders when it comes to voluntary disclosure and cooperation. The Department will require cooperating companies to come forward with important evidence more quickly than before, which will no doubt put even more pressure on corporations to ensure that they have effective compliance programs in place and the ability to actively monitor high-risk activities and transactions.

DOJ now will require companies to notify the U.S. government as soon as they discover key documents or evidence related to potential misconduct. DAG Monaco noted that companies and their counsel often engage in "gamesmanship" and delay the disclosure of critical documents and information while conducting internal investigations and considering mitigation strategies. She said that DOJ will now focus on speed and will penalize companies that engage in undue or intentional delay in providing documents and information to the government — particularly when the information suggests individual culpability on any level. Specifically, where DOJ finds that companies fail to satisfy these heightened requirements, the Department will reduce or outright deny approving cooperation credit that can significantly reduce penalties and fines.

DOJ hopes that this new guidance will push prosecutors and corporations alike to feel the

pressure of being "on the clock," and will result in expedited investigations, particularly as they suggest the existence of individual misconduct. Overall, this new guidance sets new and heightened requirements regarding the chronology of investigations and clarifies DOJ's priorities.

History Matters: Recidivist Companies

Monaco noted that the most popular topic for discussion amongst the Corporate Crime Advisory Group was DOJ's existing commitment to consider the full criminal, civil, and regulatory record of any company when deciding the appropriate resolution to an investigation.

Monaco disclosed new guidance as to how DOJ will evaluate a corporate actor's history of compliance. She stated that "not all instances of prior misconduct are created equal." In light of this, DOJ will consider U.S. criminal history as the most significant, as well as prior wrongdoing involving the same personnel or management as the current misconduct. DOJ will accord "less weight" to more dated conduct that occurred in the past (more than 10 years ago for criminal resolutions, and more than five years ago for civil or regulatory resolutions) under different executive leadership and management.

DOJ will also, as has been the practice, consider the nature and circumstances of the prior misconduct, and will focus on whether the same root causes or compliance failures are at issue, or whether the wrongdoing occurred under the supervision of the same individuals or management teams. DOJ will evaluate each company and any prior misconduct within the context of its industry, size, and sophistication. For example, if a company operates in an industry which is highly regulated, its history will be compared to peer companies that are similarly situated.

Monaco emphasized that DOJ does not want to discourage or interrupt the business of acquisitions,

especially when those acquisitions result in improved internal compliance structures and overall cultures of compliance. Going forward, DOJ will not treat companies with a strong compliance track record as recidivists if they have acquired a company with a history of compliance issues or other corporate misconduct, as long as the acquiring company promptly addresses those issues through post-acquisition due diligence and compliance evaluations.

Additionally, DOJ will adopt a policy that disfavors multiple non-prosecution or deferred prosecution agreements with the same companies. Monaco suggested that before a prosecution team is permitted to extend an offer, DOJ leadership will review the case carefully to ensure greater consistency across the Department with respect to corporate repeat offenders. Monaco quipped that companies cannot simply assume they are entitled to a non-prosecution or deferred prosecution agreement, "particularly when they are frequent flyers."

Stepping Forward: Voluntary Self-Disclosure & Investing in Compliance

DAG Monaco stated that DOJ is committed to providing incentives to companies that come forward and voluntarily disclose misconduct to the U.S. government. This is not a new concept; DOJ has always had an informal policy in place in which it views self-disclosure as an indication that a company has designed and implemented effective policies and procedures that foster a culture of compliance and encourage the detection and reporting of misconduct.

What is new, is that for the first time ever, every single component within DOJ that prosecutes corporate crimes will adopt a formal, documented policy that incentivizes voluntary self-disclosure. These policies must provide "clear expectations of what self-disclosure entails" and must "identify the

concrete benefits that a self-disclosing company can expect." This imperative creates greater urgency for companies to consider how and when to address potential self-disclosure issues with outside counsel – the sooner the better.

Monaco said that common principles will apply to these policies across all DOJ components. "Absent aggravating factors, the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct." DOJ will also not require an independent compliance monitor if a company implements and tests an effective compliance program to account for their failures. This is a significant policy change, as independent compliance monitors typically cost companies hundreds of thousands, or even millions of dollars.

Monaco said that DOJ's "goal is simple: to reward those companies whose historical investments in compliance enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward." This is a strong signal to all companies that they need to consistently reevaluate and update existing compliance programs. And for companies that do not yet have a robust compliance program in place, this is a clear directive that now is the time to devote the time and resources to investing in such a program. By taking preventive action, companies can protect themselves from significant financial and reputational harm, and can also reduce the risk of resulting consequences such as secondary sanctions (SDN designation), as well as suspension and debarment in certain industries.

DOJ has had success with its corporate voluntary disclosure programs, particularly within the Criminal Division for Foreign Corrupt Practices Act ("FCPA") violations, as well as the National Security Division's program for export control and sanctions violations. Given today's international political climate, these cross-border issues where the United

States can often assert jurisdiction over foreign companies are of the utmost importance. In sum, it is wise, in terms of a value proposition, for companies to invest in compliance. Down the line, if a company is involved in a governmental investigation, a strong compliance program and voluntary disclosure will yield significant benefits, most likely resulting in a more favorable resolution as compared to companies that do not have such measures in place.

Money Talks: Clawback Provisions and Financial Incentives for Individuals

Finally, DAG Monaco announced a policy shift whereby DOJ will now take into consideration, when evaluating a company's compliance program, whether the company's "compensation systems reward compliance and impose financial sanctions on employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct." Importantly, DOJ will evaluate both what companies say publicly (including in press releases or public statements as well as regulatory filings), as well as what companies actually do when they learn of misconduct that can be attributed in any way to an individual employee, manager, or executive. Monaco said that she has asked DOJ's Criminal Division to develop further guidance by the end of the year on how to reward companies that implement and execute compensation clawbacks or other such arrangements. DOJ's objective with respect to this policy is to shift the burden of corporate financial penalties away from shareholders who bear no responsibility for misconduct, onto corporate actors who are directly responsible for compliance failures and the resulting misconduct.

Conclusion

These new policies will impact the way that in-house counsel, outside lawyers, and companies approach investigations. The calculus for reaching a resolution under the most favorable terms must include

consideration of these new directives to avoid unwarranted or avoidable penalties.

Akerman is engaged in implementing and tracking best practices in corporate self-disclosures and resolutions, and is available to conduct compliance program assessments and audits and advise on considerations for specific situations and business operations.
