DOJ Issues New Guidance on Criminal Enforcement

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On September 15, 2022, Deputy Attorney General ("DAG") Lisa Monaco delivered remarks announcing updated guidance on how the Department of Justice will be prioritizing and prosecuting corporate crime. Her remarks were accompanied by a formal memo titled "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group." However inelegant the title, the memo contains important and substantive updates to how the Department will be approaching corporate criminal investigations, and the DAG stated those updates would be incorporated into the Justice Manual in future revisions.

INDIVIDUAL ACCOUNTABILITY

The new guidance reiterates the importance placed by the Department on individual accountability but now imposes a requirement that cooperating companies produce evidence *quickly* in order to receive cooperation credit. The DAG made clear that given the importance of timely cooperation to successful investigations and prosecutions: "Going forward, undue or intentional delay in producing information or documents – particularly those that show individual culpability – will result in the reduction or denial of cooperation credit. Gamesmanship with disclosures and productions will not be tolerated." Companies will also be expected to prioritize evidence that is "most relevant for assessing individual culpability." In addition to assessing the timeliness of the cooperation, prosecutors will be expected to try to complete investigations of individuals and bring any appropriate charges prior to or simultaneously with the entry of the corporate resolution.

HISTORY OF MISCONDUCT

The new guidance also discusses the Department's approach to corporate recidivism. The DAG explained that, in assessing the significance of prior misconduct, "the most significant types of prior misconduct will be criminal resolutions here in the

United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct." At the same time, the guidance recognizes that past misconduct may not always reflect a company's "current culture and commitment to compliance" and, accordingly, criminal resolutions of corporate misconduct that occurred more than 10 years before the conduct under investigation, and civil/administrative resolutions that are more than 5 years old, will not receive as much weight. The Department will also consider whether the current misconduct has the same root causes as past misconduct and whether it involved the same management team and executive leadership. Additionally, companies with a proven track record of compliance will not be penalized for acquiring companies with a history of noncompliance, provided the problems are promptly addressed post-acquisition. Consideration will also be given to whether the company under investigation is an outlier when compared to its peers.

The DAG stressed, however, that the Department disfavors successive non-prosecution or deferred prosecution agreements with the same company and that any proposal from the prosecution team for that type of successive resolution will be scrutinized by Department leadership. The DAG further commented that the Department "will not shy away from bringing charges or requiring guilty pleas where facts and circumstances require" and that criminal resolutions can no longer "be priced in as the cost of doing business."

VOLUNTARY SELF-DISCLOSURE

The DAG also spoke about the benefits of voluntary self-disclosure, which, in many cases, is viewed as "a sign that the company has developed a compliance program and has fostered a culture to detect misconduct and bring it forward." The DAG announced that every component of the Department that prosecutes corporate crime will be required to have a program that incentivizes voluntary self-disclosure and that "[i]f a component currently lacks a formal, documented policy, it must draft one." The policy must explain what constitutes self-disclosure and what the benefits will be for meeting that standard. The goal, according to the DAG, is to create predictability concerning the benefits of self-disclosure so that relevant stakeholders "can make the case in the boardroom that voluntary self-disclosure is a good business decision." The DAG also announced common principles for such Department policies. One such principle is that, absent aggravating circumstances, the Department will not seek a guilty plea against a company that self-discloses, cooperates and remediates misconduct. Another is that the Department will not require an independent compliance monitor for such a company if, at the time of the resolution, it has also implemented an effective compliance program.

INDEPENDENT COMPLIANCE MONITORS

The DAG also announced new guidance for the appointment of independent compliance monitors, including guidance for identifying the need for a monitor, how to select a monitor and how to oversee the monitor's work. The guidance also mandates a documented selection process that is designed to operate transparently and consistently.

Factors for determining the need for a monitor include the following:

1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy;
2. Whether at the time of the resolution and after a thorough risk assessment, the corporation implemented an effective compliance program and internal controls;
3. Whether, at the time of the resolution, the corporation adequately tested its compliance program and internal controls;
4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior personnel;
5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;
6. Whether the underlying criminal conduct involved active participation of compliance personnel or their failure to appropriately escalate or respond to red flags;
7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct;
8. Whether, at the time of the resolution, the corporation's risk profile has decreased, making the risk of recurrence of the misconduct minimal or nonexistent;
9. Whether the corporation faces any unique risks or compliance challenges, including the region or business sector in which it operates or the nature of its customers; and
10. Whether and to what extent the corporation is subject to oversight from industry regulators or a monitor imposed by another enforcement authority or regulator.

EVALUATION OF COMPLIANCE PROGRAMS

The DAG announced that, in evaluating the effectiveness of corporate compliance programs, the Department will consider whether the company has adopted compensation systems that "employ clawback provisions, the escrowing of compensation, and other ways to hold financially accountable individuals who contribute to criminal misconduct" and/or that "use affirmative metrics and benchmarks to reward compliance-promoting behavior." The stated rationale is that such compensation systems "can deter risky behavior and foster a culture of compliance" and so prosecutors will consider the nature of an organization's compensation systems in evaluating the strength of its program. The Department will be developing additional guidance on how to reward companies that adopt these kinds of arrangements.

The new policy also addresses the rise of personal devices and third-party messaging platforms and the corporate compliance risks they pose. In evaluating compliance programs, prosecutors are being encouraged to consider whether the corporation has implemented policies to ensure that "business-related electronic data and communications are preserved" and that the company "will be able to collect and provide to the government all non-privileged responsive documents relevant to the investigation. . ."

The DAG closed her remarks by reiterating the importance of individual accountability and corporate responsibility, stating: "Companies should feel empowered to do the right thing – to invest in compliance and culture, and to step up and own up when misconduct occurs. Companies that do so will welcome the announcements today. For those who don't, however our Department prosecutors will be empowered, too – to hold accountable those who don't follow the law."

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