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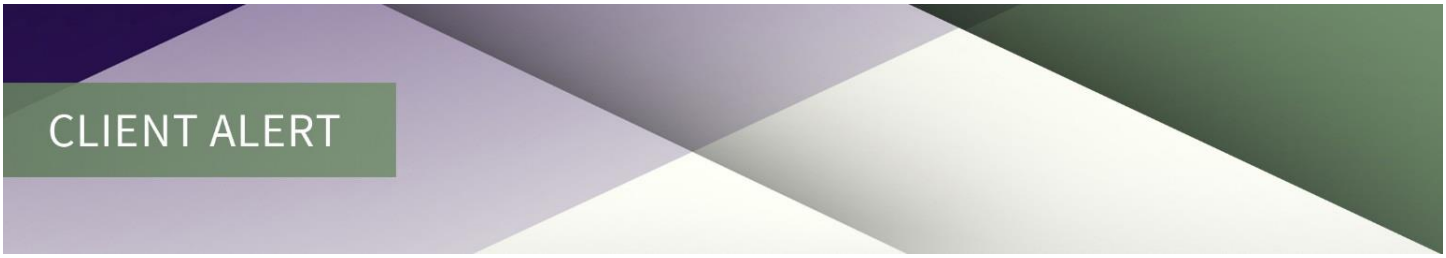

Back to the Future: DOJ's Most Recent Corporate Enforcement Guidance

DOJ's Recently Announced Corporate Enforcement Priorities Echo Rules of Past

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AUTHORS

William J. Stellmach | Michael S. Schachter | Michael J. Gottlieb | Randall W. Jackson
Casey E. Donnelly | Sean Sandoloski | Zachary Cobb

On September 15, 2022, U.S. Deputy Attorney General ("DAG") Lisa Monaco delivered a speech to the NYU School of Law's Program on Corporate Compliance and Enforcement. In her speech, DAG Monaco announced new corporate criminal enforcement priorities, detailed more fully in a memorandum released the same day,[1] addressing five aspects of the U.S. Department of Justice's (the "Department") corporate enforcement program: (1) the importance of individual accountability; (2) the weight given by prosecutors to previous corporate misconduct; (3) the weight given by prosecutors to voluntary self-disclosure; (4) the imposition of compliance monitors to oversee and evaluate corporate remediation; and (5) the weight given by prosecutors to proactive methods to ensure corporate compliance, principally business efforts to incentivize compliance by tying compliance outcomes to executive compensation.

Many of DAG Monaco's pronouncements reiterate previous announcements by the Department,[2] and her speech and accompanying memorandum can be viewed as a repackaging of these pronouncements. But, all together, they reiterate

[1] https://www.justice.gov/opa/speech/file/1535301/download. The memo was circulated to the Assistant Attorney General ("AAG") for the Criminal Division, the Principal Deputy AAG for the Civil Division, the AAG for the Antitrust division, the AAG for the Environmental and Natural Resources Division, the Deputy AAG for the Tax Division, and the AAG for the National Security Division, as well as all United States Attorneys.

[2] For previous client alerts discussions developments in DOJ's corporate enforcement efforts, please *see, e.g.*, here; here; and here.

the Biden Administration's promise of robust enforcement with a few small, new twists. Ultimately, more guidance for companies is almost always better, and the Department is providing concrete information for corporations to follow, including how it will look favorably upon certain aspects of corporate compliance programs. It is reasonable to assume that what DAG Monaco announced last week will set the stage for the next two years of white-collar enforcement—and perhaps beyond.

Individual Prosecutions

Echoing her predecessor in the Obama Administration, DAG Sally Yates, DAG Monaco identified individual accountability as the top priority for the Department in corporate criminal enforcement matters. DAG Monaco put the onus on corporations to assist in the Department's efforts, explicitly tying its ability to prosecute individual corporate criminals to full corporate cooperation with DOJ investigations. Because companies maintain all the necessary documents and information for an individual prosecution, the Department views corporations as gatekeepers for holding such individuals accountable. The Department will require "timely" cooperation and disclosure of relevant and inculpatory documents and information about individuals in order for a company to receive full cooperation credit. And the Department will concomitantly reduce or deny cooperation credit for "undue or intentional delay in producing information or documents—particularly those that show individual culpability." Our experience tells us that the downside risk of being viewed as dilatory will be significant. In conjunction with the application of pressure on companies to help facilitate individual prosecutions, and to ensure incentives remain properly aligned, the Department will push prosecutors to bring criminal charges against an individual either prior to or contemporaneous with any corporate resolution. To the extent that is not possible, prosecutors must create a "full investigative plan outlining the remaining work to do on the individual cases and a timeline for completing that work." Companies should anticipate heavy pressure by prosecutors to produce documents and information relevant for individual prosecutions in the course of any Department investigation moving forward. This also should serve as a stark reminder for individual employees to pay close attention to their compliance obligations and ensure strict adherence to their responsibilities.

Historical Misconduct

Somewhat striking in DAG Monaco's remarks and the accompanying memorandum is the Department's announced plan to take a more nuanced view of historical misconduct and its applicability to the conduct at issue in an investigation. When considering whether a corporation is recidivist or not, the Department will now only consider criminal resolutions within ten years of the conduct under investigation and civil or regulatory regulations within five years of the same marker. This is a shift away from DAG Monaco's earlier, harsher instruction for prosecutors to consider all prior misconduct with no limitations.[3] Built into the new analytical framework are instructions to consider similarities and differences between the alleged and the prior misconduct and any implications that might have on the compliance atmosphere of the recidivist.

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[3] *See* Memorandum from the Deputy Attorney General re Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021), here.

The new guidance is not all sunshine, however. The Department also announced that it will disfavor multiple, successive non-prosecution or deferred prosecution agreements ("NPA or DPA") for the same company.[4] This guidance could have a large impact on corporate strategy in dealing with white-collar matters—particularly self-disclosure analysis.

Voluntary Self-Disclosures and Avoiding a Monitor

Citing the success of the longstanding voluntary disclosure programs in the Antitrust[5] and National Security Divisions as well as the Foreign Corrupt Practices Act Unit, the DAG announced an expansion of those Components' systematized approach towards voluntary self-disclosures across the entire Department. Department Components that do not currently have a formalized policy will be required to draft such a policy. Each of these policies must reflect two principles: (1) that the Department will not seek a guilty plea "when a company has voluntarily self-disclosed, cooperated, and remediated misconduct" absent aggravating factors; and (2) that the resolution for a cooperating company will not include the imposition of a compliance monitor,[6] provided that the company has "implemented and tested an effective compliance program." The Deputy Attorney General failed to explain how voluntary disclosure policies will account for the Department guidance regarding corporate recidivists, but this should serve as some comfort and provide greater incentives for companies to self-disclose potential misconduct.

It is worth noting, additionally, that the Department's requirement that a self-disclosing company have "implemented and tested an effective compliance program" to avoid the imposition of a compliance monitor means that companies should be updating and testing their compliance programs on a continual basis, rather than merely reacting to malfeasance or the looming specter of a self-disclosure. Put another way, by the time you are considering calling up the Department to self-disclose, it will be too late to test your compliance program.

Compliance-Related Compensation Structures

Finally, the Deputy Attorney General announced a new consideration for prosecutors as part of their evaluation of a company's compliance culture during investigations. Noting that many companies have started to structure financial incentives around compliance efforts—both through incentive payments tied to compliance metrics and claw-back provisions tied to misconduct—DAG Monaco indicated that the Department would evaluate the implementation and

[4] Historically, the DOJ has entered into multiple, successive NPAs or DPAS with a number of companies, include JP Morgan, Deutsche Bank, Pfizer, and Standard Charter Bank. *See* Renae Merle, Repeat Offenders: Corporate Misdeeds Often Settled with Deferred Prosecution Agreements, Washington Post (Sept. 26, 2019), here.

[5] The Antitrust Division's program, which dates back to 1993, provides a first come first serve component that might make it less applicable as a model for other corporate criminal enforcement components within the Department.

[6] The Deputy Attorney General also announced that the Department will release new guidance on the appointment process for monitors that is meant to provide more transparency. Every component involved in corporate criminal resolutions is required to create a documented monitor selection procedure, that will be available to the public, to the extent it has not previously adopted such a document. The aim of this process is to promote "consistency, predictability, and transparency." Prior to the start of a monitorship, a clear written work plan must be negotiated and agreed to between the Department and the company. This work plan can be modified if the appointed monitor identifies additional issues through its evaluation or the company demonstrates quicker than anticipated improvement to its compliance functions.

execution of policies tying compensation to compliance outcomes as part of its review of compliance programs. While the details around the impact of such policies is still being developed, we expect that successful implementation and enforcement will be viewed favorably and help a company convince the Department that it takes compliance seriously if it finds itself negotiating a resolution. Open questions to be resolved include: (1) What sort of event is, in the Department's view, appropriate to trigger a compliance-based claw back; and (2) how such a policy can be reconciled with a company's independent obligation to indemnify certain board members, officers, and employees. We will continue to monitor this area for future developments and guidance from the DOJ.

Conclusions

Overall, the priorities announced by the Deputy Attorney General indicate a robust approach towards enforcement, even if we have heard much of it before. We anticipate that this speech was meant to serve as a preview for a more active enforcement approach by the Department. As ever, the DAG's remarks highlight the importance of a vigilant compliance function within a company, both to detect issues to receive the self-disclosure benefits, but also to mitigate against the imposition of a monitor when the DOJ decides to take action. We will remain vigilant for forthcoming resolutions to evaluate whether these announced priorities cause an actual shift in the Department's behavior.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

William J. Stellmach
202 303 1130
wstellmach@willkie.com

Michael S. Schachter
212 728 8102
mschachter@willkie.com

Michael J. Gottlieb
202 303 1142
mgottlieb@willkie.com

Randall W. Jackson
212 728 8216
rjackson@willkie.com

Casey E. Donnelly
212 728 8775
ssandoloski@willkie.com

Sean Sandoloski
202 303 1047
ssandoloski@willkie.com

Zachary Cobb
202 303 1169
zcobb@willkie.com