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Cutting Through the Noise: Take-Aways from the DOJ's Recent Announcements Regarding Corporate Criminal Enforcement

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September 22, 2022 – On September 15, 2022, Deputy Attorney General Lisa Monaco announced a series of policy revisions to the U.S. Department of Justice's (the "Department") approach to criminal enforcement actions against corporations. The policy revisions center on five key areas: (1) compensation structures as part of a wider compliance culture; (2) individual accountability; (3) the evaluation of past misconduct; (4) voluntary self-disclosure; and (5) the use of compliance monitors. Taken together, these policy revisions seek to enable prosecutors to more effectively investigate and prosecute individual wrongdoers and to incentivize corporations to voluntarily disclose information as soon as possible, while endeavoring to further incentivize corporations to create environments that foster compliance and inhibit misconduct. Regarding the use of compliance monitors, the policy revisions expand the criteria under which a monitorship may be deemed appropriate (which could lead to an increase in monitorships being imposed). Prosecutors are now required to consider factors beyond just the current effectiveness of a compliance program, including the severity of the underlying conduct, the geography and industry the company operates in, and whether the company self-reported the misconduct.

On September 16, 2022, Assistant Attorney General Kenneth Polite followed with remarks at the University of Texas Law School, where he discussed the Department's policy revisions and highlighted the Department's new requirement that CEOs and CCOs sign certifications as part of corporate resolutions attesting to the existence of a corporate compliance program that is "reasonably" designed and implemented "to deter and prevent violations of the law, and is functioning effectively." AAG Polite acknowledged "there has been some concern raised about the certification process," but reiterated the Department's commitment to requiring such certifications "for all Criminal Division corporate resolutions" and belief that the certifications "are designed to give compliance officers an additional tool that enables them to raise and address compliance issues within a company or directly with the department early and clearly."

1. Restructuring Corporate Compensation

In an effort to identify new ways to combat corporate misconduct, the Department highlighted corporate efforts to deter misconduct through financial incentives. According to the Department, compensation systems that financially penalize wrongdoers, whether through claw back provisions or other financial sanctions, can be effective tools to deter misconduct. Conversely, compensation structures that reward compliance-promoting behaviors can foster a culture of compliance. The goal of these efforts is to hold individuals financially responsible and to ensure that the wrongdoers, not the shareholders, bear the burden of the misconduct. Essentially, these requirements seek to incentivize tone-from-the-top and -middle by putting current and future remuneration of senior managers at risk for failing to prevent misconduct by subordinates.

2. Holding Individuals Accountable

Citing a decline in corporate criminal prosecutions in the previous administration, DAG Monaco stated that the Department's "number one priority is holding individuals accountable for their wrongdoing." To empower prosecutors to investigate individuals, the Department announced two key policy changes.

- First, the Department will deny or reduce cooperation credit if a corporation unduly or intentionally delays producing information related to the misconduct. This policy change discourages companies from withholding information for strategic reasons and encourages them to disclose information as quickly as possible.
- Second, to utilize its resources more efficiently, the Department will endeavor to complete investigations into individuals, and bring any associated charges, prior to or at the same time as investigations into the company are resolved.

3. Contextualizing Past Misconduct

The Department also announced a series of new policies related to its evaluation of prior misconduct. These policies signal the Department's intention take a more balanced approach when evaluating historical misconduct, with a focus on repeat offenders.

Under the new policies, the Department will heavily weigh a company's past misconduct if it involved the same individuals and the same type of wrongdoing as the current misconduct. Such similarities may be a sign of larger weaknesses in the company's compliance culture, practices, or leadership. Similarly, the Department will negatively view companies who have paid their way out of trouble by entering into "multiple, successive non-prosecution or deferred prosecution agreements"—as well as past misconduct that resulted in a criminal resolution in the US.

However, the Department will give less weight to "dated conduct," criminal resolutions occurring more than ten years prior and civil or regulatory resolutions occurring more than five years prior. The Department will also consider the level of industry regulation when determining if a company is an "outlier" with regard to the number of prior investigations, comparing companies in highly regulated industries with those similarly situated. Finally, companies with histories of strong compliance will not be penalized for acquiring companies with a history of misconduct, so long as they address the misconduct promptly upon acquisition.

4. Rewarding Voluntary Self-Disclosure

The Department confirmed that, barring any aggravating factors, in negotiating a settlement of a criminal charge, it will no longer seek a guilty plea by a company that has: (1) voluntarily self-disclosed misconduct; (2) cooperated with the Department's investigation, and (3) remediated the misconduct. Furthermore, the Department will not require a compliance monitor where a company implements and tests a compliance program at the time of resolution. In essence, companies now have the chance to avoid guilty pleas and monitors, and lessen fines and other penalties, if they voluntarily disclose misconduct and if they take the initiative to implement an effective compliance program prior to reaching a resolution with the government.

5. Adding Transparency and New Considerations to Compliance Monitorships

Finally, in recognition of "suspicion and confusion about monitors" the Department also announced a series of changes to its monitor selection and oversight policies. The Department listed factors prosecutors should consider when deciding whether to impose a monitor, which include the current state of the company's compliance program, as well as considerations related to self-reporting and the underlying misconduct. The Department also required components of the Department that do not currently have a written, transparent policy regarding the selection of monitors to establish such a process and directed prosecutors to remain apprised of the work of the monitor throughout the monitorship and ensure that monitorships are tailored to the misconduct they are trying to remedy.

Considerations Going Forward

Overall, the announced policies do not represent a major change from past practice, but rather offer minor changes or clarifications of previously announced policies and ensure consistency in those policies throughout the Department. Nevertheless, there are several aspects of the recent announcements that are particularly interesting and have the potential to have a noticeable impact.

- Focus on Corporate Compensation: While proper (and improper) compensation incentives have been discussed as part of a properly functioning compliance system for some time, the emphasis on the implementation of financial penalties and claw backs could call for a renewed look by companies at their corporate compensation policies, particularly for executives and other managers and top earners. Not only has the Department indicated that it may reward companies that implement financial penalties for malfeasance such as claw backs, it has suggested it may penalize companies that do not take such steps or that otherwise have compensation structures that incentivize misconduct or poor oversight. These changes are not always easy to implement and have to be carefully tailored to ensure that they can be effectively enforced.
- Guidance on the Treatment of Past Misconduct: In January 2022, DAG Monaco announced a policy change requiring prosecutors to consider all prior corporate misconduct, rather than just similar types of misconduct, when shaping a corporate resolution. Since then, questions abounded regarding the scope of this requirement. How would prosecutors treat historic misconduct or misconduct of an entirely different nature, scale, or circumstance? The Monaco Memo provides helpful guidance in this area, even if a few questions remain. In evaluating a company's past misconduct, the Department is looking for signs of change. Therefore, a company will not be penalized where years have passed between the current and prior misconduct and the company has changed in ways material to the prior misconduct. However, companies with significant past misconduct involving the same individuals and/or type of wrongdoing should expect their historical misconduct to weigh against them.
- Monitors: The use of corporate compliance monitors decreased significantly during the Trump Administration, particularly following the "Benczkowski Memo" in October 2018. DAG Monaco previously made clear that monitorships were not disfavored and should be required by prosecutors whenever appropriate, and she reiterated that sentiment in the Monaco Memo. Moreover, the "non-exhaustive" list of factors the Monaco Memo directs prosecutors to consider when deciding if a monitor is necessary may lead to an increase in monitors. Prosecutors are now required to consider factors beyond just the current effectiveness of a compliance program, including the severity of the underlying conduct, the geography and industry the company operates in, and whether the company self-reported the misconduct. While a company's remedial steps remain a key factor in determining whether to require a monitor, we will have to wait to see whether, and in what circumstances, remedial efforts can overcome the impact of the other factors. The Monaco Memo may offer some relief to companies subject to monitors however, as it directs prosecutors to actively supervise and "monitor" the monitor to ensure the review is reasonable, both in scope and in cost.
- Reiteration of Commitment to CEO and CCO Certifications: In March 2022, AAG Polite announced that the Department's Criminal Division was considering requiring CEOs and CCOs to sign certifications at the conclusion of corporate resolutions confirming that the company's compliance program is "reasonably designed" to prevent and detect violations of law. Last week, AAG Polite reemphasized the Department's intent to empower CCOs in particular via the certification requirement, which also carries with it potential criminal liability for intentionally false certifications, "for all Criminal Division corporate resolutions (including guilty pleas, deferred prosecution agreements, and non-prosecution agreements)." The Department has used these certifications in its recent resolutions with Glencore Limited, Glencore International AG, and Brazil-based GOL Airlines, all of which specifically extended the scope of the certification to cover all of the companies' operations worldwide and included further a certification that the companies, at the time of the certification, have also fulfilled their obligations to cooperate under their respective resolutions. While AAG Polite acknowledged "there has been some concern raised about this certification process," he—a former compliance officer himself—explained that the certifications were meant to respond to compliance personnel's past complaints about not having the same voice in corporate decision-making as other functions. "These certifications and other resources are empowering you to demand that voice," said AAG Polite, who also cautioned "you cannot shy away from this role. You cannot run away from the responsibility. My call is that your embrace it, knowing full well that stronger, more empowered compliance voices are exactly what we need."

In sum, these new policy revisions show the Department's desire to take an approach to criminal enforcement that targets the individuals directly responsible for corporate misconduct and encourages companies to assist in preventing misconduct by creating effective compliance programs and cultures. To do so, the Department is implementing policies that contain benefits for companies to incentivize them to work with prosecutors and to create cultures of corporate compliance. Companies should carefully review these policy changes and identify steps they can take to put themselves in the best position possible should they be subject to a criminal investigation in the future.

If you have questions about these policy revisions or other criminal enforcement issues, please contact one of the authors or any member of our Anti-Corruption & Internal Investigations practice.

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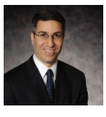
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