DOJ Revises Corporate Criminal Enforcement Policies

November 1, 2021

On October 28, 2021, Deputy Attorney General Lisa Monaco announced revised corporate enforcement policies including rollbacks of certain DOJ policies softened under the Trump Administration.[1] In this update, we discuss DAG Monaco's speech (the "Monaco Speech") and accompanying internal memo (the "Monaco Memo"), focusing on what's old, what's new, and what to watch for.

In addition to signaling generally a "get tough" approach to white collar crime designed to differentiate the Biden Administration, the recent pronouncements suggest an increased focus on when corporate entities should be considered recidivists and potentially ineligible for pretrial diversion. DAG Monaco addressed four developments with potentially significant implications for corporations considering whether to self-report potential misconduct and for those already under investigation:

- ***First***, and perhaps most significantly, prosecutors now must consider *all* prior corporate conduct—and not just *similar* conduct—in deciding whether to charge a corporation. In combination with the new advisory panel just announced (see below), this change may impact meaningfully companies caught in DOJ's crosshairs, particularly given its increasingly aggressive stance on what constitutes criminal behavior (such as in areas like the FCPA).

- ***Second***, DAG Monaco announced a return to the "Yates Memo" standard on individual liability, requiring companies to disclose all relevant facts regarding all persons involved in corporate misconduct—both inside and outside the company—to obtain *any* cooperation credit. This reinstatement reversed previous Trump Administration guidance limiting the disclosure obligation to those "substantially

[1] United States Department of Justice, "Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime" (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute [hereinafter the "Monaco Speech"]; Memorandum from the Deputy Attorney General (Lisa O. Monaco), "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download [hereinafter the "Monaco Memo"].

involved" in misconduct. The re-imposition of this broader requirement may increase the burdens associated with certain white collar investigations and provide prosecutors additional leverage in negotiations with defense counsel.

- ***Third***, DAG Monaco rolled back Trump Administration guidance that independent corporate monitors would be imposed as the exception. Instead, the new guidance notes that prosecutors should consider a monitor where a company's compliance program and controls are "untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution."[2] This signals a return to the more frequent use of monitors in corporate resolutions, as well as the accompanying post-resolution costs and burdens.

- ***Last***, the DAG announced the formation of a Corporate Crime Advisory Group (the "CCAG") within DOJ to consider issues such as recidivism and noncompliance with non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs"). We'll be closely watching what comes out of the CCAG in the coming months.

DAG Monaco also underscored the substantial premium on risk-based compliance programs, stressing that corporations can mitigate risks when they "proactively put in place compliance functions and spend resources anticipating problems." Otherwise, as she noted, DOJ will "ensure the absence of such programs inevitably proves a costly omission for companies who end up the focus of department investigations."[3]

Consideration of Prior Misconduct in Charging Decisions

The latest guidance expands the past conduct prosecutors must consider when deciding whether to charge business entities. The Justice Manual previously required prosecutors to consider "the corporation's history of similar misconduct."[4] But prosecutors are now directed to consider "*all* misconduct," even if dissimilar to the conduct under investigation and involving different entities within a corporate family.[5] Although the new guidance recognizes that some prior acts "may ultimately prove less significant," prosecutors now "must start from the position that all prior misconduct is potentially relevant."[6]

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2 Monaco Memo at 4.

3 Monaco Speech.

4 Justice Manual (JM) 9-28.600.

5 Monaco Memo at 3.

6 *Id.*

DAG Monaco stated that this change would align the treatment of corporate and individual criminal histories.[7] However, there is a difference between an individual recidivist—who presumably controls completely his or her own behavior and can choose not to violate the law in the future—and a large multinational company that employs hundreds of thousands of people around the world. As acknowledged in the Justice Manual (and repeatedly under both Republican and Democratic administrations), no compliance program in the world can prevent all misconduct.[8]

The Monaco Memo does not address how prosecutors should view such factors as the passage of time or the fact that the prior conduct occurred in different regions or by different employees, or other distinguishing factors particular to companies in assessing "all prior misconduct." Subject to future guidance, this change in DOJ approach could disadvantage large companies (or those part of large corporate families) and those operating in heavily regulated industries, such as financial services, natural resources, energy, and healthcare.

Perhaps anticipating such concerns, DAG Monaco suggested that prior misconduct is most relevant to assessing a company's culture and compliance program. A record of past misconduct may indicate an absence of "appropriate internal controls and corporate culture to disincentivize criminal activity" and that proposed remediation may fail.[9] Accordingly, companies defending themselves should expect to address how compliance systems implemented after a past episode or misconduct are relevant—or not—to the occurrence of conduct presently under DOJ investigation.

The Re-imposition of the Yates Memo

Although every administration stresses the importance of individual prosecutions, DAG Monaco called it "unambiguously [DOJ's] first priority in corporate criminal matters."[10] As part of this emphasis, DAG Monaco announced that DOJ would reinstate the requirement from a 2015 memo by then-Deputy Attorney General Sally Yates that companies disclose all information about all individual wrongdoers to obtain any cooperation credit (the "Yates Memo").[11]

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7 Monaco Speech.

8 JM 9-28.800 ("[T]he Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees.").

9 Monaco Memo at 3.

10 Monaco Speech.

11 Memorandum from Sally Quillian Yates, Deputy Attorney General, "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

Three years after the Yates Memo, the Trump Administration rejected this all-or-nothing approach. While noting that the Yates Memo's framework "seemed like a great idea," then-Deputy Attorney General Rosenstein acknowledged the practical challenges a company faces in complying with the guidance.[12] In fact, Rosenstein noted that DOJ sometimes did not strictly enforce the Yates Memo "because it would have impeded resolutions and wasted resources."[13] As a result, DAG Rosenstein announced that, in order to receive cooperation credit, a company would be required to identify only "all individuals *substantially* involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct."[14]

DAG Monaco re-imposed the Yates Memo's requirement that, to obtain *any* cooperation credit, a corporation now must provide "all nonprivileged information relevant to *all* individuals involved in the misconduct," both "inside and outside the company."[15] In explaining this reversion, DAG Monaco stated that: (1) distinctions between who was substantially involved or just involved are "confusing in practice and afford companies too much discretion in deciding who should and should not be disclosed to the government;"[16] (2) even individuals with nonsignificant involvement may have important information to provide prosecutors; and (3) prosecutors (and not defense counsel) "are best situated to assess the relative culpability of, and involvement by, individuals involved in misconduct."[17]

As we've noted previously,[18] this requirement sometimes may place a heavy burden on cooperating companies to identify all those involved in misconduct. Depending on the ultimate contours of this mandate's enforcement, companies could face substantially increased investigative expenses and lengthier investigations as a result. With these considerations in mind, it is in the interest of cooperating companies, whenever possible, to reach agreement with the government on the appropriately defined temporal and geographic scope of particular investigations.

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12 United States Department of Justice, "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act," (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

13 *Id.*

14 JM 9-28.700 (emphasis added); JM 9-47.120 (credit for cooperation in FCPA matters).

15 Monaco Memo at 3 (emphasis added).

16 Monaco Speech.

17 Monaco Memo at 3-4.

18 *E.g.*, Kara Brockmeyer, Andrew M. Levine, Sarah Wolf, & Javier Alvarez-Oviedo, "DOJ Revises Yates Memo to Provide More Flexibility in Corporate Investigations," FCPA Update, Vol. 10, No. 5 (Dec. 2018), https://www.debevoise.com/insights/publications/2018/12/fcpa-update-december-2018.

Reversal of Course on Monitorships

Another Trump-era policy reversed by the recent guidance concerns the use of independent monitorships. Corporate resolutions sometimes include the imposition of such monitors: professionals from outside the company (and often but not always ex-DOJ officials) appointed to oversee a company's compliance with conditions of an NPA or DPA. These appointments often follow long investigations and years of identifying and remediating compliance weaknesses.

Monitors—whose fees are paid for by the company—can be extremely expensive and burdensome. Recognizing the potential intrusiveness and expense of monitors, in 2018, then-Assistant Attorney General Brian A. Benczkowski issued guidance on the selection of corporate monitors, providing that prosecutors must weigh the benefits of a monitorship against the potential costs to the company and that monitors should be the exception and not the rule.[19]

In her speech, DAG Monaco directly dispelled any impression that "monitorships are disfavored or are the exception."[20] The Monaco Memo states that a monitorship should be considered "[w]here a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of resolution."[21] That prospect, of course, further underscores the criticality of companies' enhancing their compliance controls over the course of a government investigation.

Formation of a New Advisory Group Suggesting More to Come

The DAG also announced the creation of the CCAG, a new advisory group to "consider various topics that are central to the goal of updating our approach to corporate criminal enforcement." The CCAG will include relevant representatives from within DOJ and also solicit input from external groups including "the business community, academia, and the defense bar."[22]

According to the Monaco Memo, the CCAG will address topics such as cooperation credit, corporate recidivism, and factors bearing on whether a case should be resolved by an NPA, DPA, or guilty plea.[23] As an example of recidivism, the DAG cited a situation

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[19] Memorandum from Brian A. Benczkowski, Assistant Attorney General, "Selection of Monitors in Criminal Division Matters" (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.

[20] Monaco Speech.

[21] Monaco Memo at 4.

[22] *Id.* at 2.

[23] *Id.*

where "a company might have an antitrust investigation one year, a tax investigation the next, and a sanctions investigation two years after that."[24] The implication here is that DOJ is grappling with whether and when diversion programs like NPAs and DPAs will remain available to companies that previously resolved other criminal matters through diversion—possibly a reaction in part to criticism by some where DOJ has agreed to successive NPAs or DPAs with the same company.

Conclusion

The latest revisions to DOJ guidance regarding corporate criminal enforcement mark in part a substantive return to Obama Administration guidance, with the prospect of increasing the burden on corporations attempting to cooperate and settle with DOJ. These updates include requiring prosecutors to consider more broadly *all* of a company's past misconduct in making charging decisions; increasing DOJ's expectations regarding what constitutes cooperation, in line with the earlier Yates Memo; and eliminating any perceived presumption against monitors. Additionally, the newly created CCAG appears poised to grapple with important issues such as whether and when a company that received a DPA or NPA in a previous DOJ case can qualify again for pretrial diversion.

These changes may impact meaningfully the calculus of companies and their counsel in considering whether to self-report certain matters to DOJ, underscoring that corporate decisions about whether and how to cooperate or self-disclose, and how to navigate DOJ investigations, require careful attention.

Only time will demonstrate how the recent developments translate into enforcement outcomes. But the current administration has sent a clear warning about its intended surge in white collar prosecutions. Indeed, the importance for companies of developing and maintaining effective risk-based compliance programs has never been clearer. As DAG Monaco cautioned at the end of her recent address: "Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct—or else it's going to cost them down the line."[25]

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Please do not hesitate to contact us with any questions.

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[24] Monaco Speech.

[25] *Id.*

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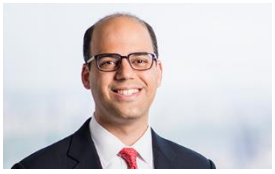

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