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From the Broader Perspective: Deputy Attorney General Announces Additional Revisions to DOJ's Corporate Criminal Enforcement Policies

Client Alert | October 3, 2022

On September 15, 2022, Deputy Attorney General Lisa Monaco announced updates, new policies, and clarifications to the U.S. Department of Justice's ("DOJ") corporate criminal enforcement policies. After seeking feedback from industry stakeholders and practitioners, the announcement touches on six key areas: (1) voluntary self-disclosure; (2) cooperation credit; (3) compliance programs; (4) prior corporate misconduct; (5) corporate monitors; and (6) individual prosecutions.[1]

This announcement was followed by the release of a memorandum, titled *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions With Corporate Criminal Advisory Group*.[2] The announcement and memorandum (collectively, the "New Policy") also builds upon and clarifies the Deputy Attorney General's policy announcements from October 2021 (collectively, the "2021 Policy"), following the Deputy Attorney General's consultation with key stakeholders including members of the defense bar.[3] Later speeches by Assistant Attorney General Kenneth Polite[4] and Principal Associate Deputy Attorney General Marshall Miller[5] further expounded on the New Policy.

Based on our collective experience and tracking of DOJ actions over decades, the New Policy is notable for both what it does and what it does *not* do. As discussed below, for example, while the New Policy broadens the use of written policies on voluntary self-disclosure credit across the Department, it leaves undisturbed DOJ's prior guidance that cooperation credit cannot be conditioned on waiver of attorney-client privilege. And the New Policy does not rescind or revisit one of the prior administration's more notable criminal policy pronouncements, the so-called anti-"piling on" policy that directs DOJ to avoid duplicative fines or penalties for the same underlying conduct. Moreover, much of what the New Policy articulates underscores priorities and guidance previously enunciated by the Department.

Nevertheless, both its language and the precision of some elements make clear that the Department intends for the New Policy to be viewed as a meaningful pivot in several important ways. Accordingly, the New Policy is bound to affect how companies conduct risk assessments; build, test, and refine their compliance programs; investigate potential misconduct; and structure compensation plans and the type of incentives and clawbacks implemented. It will also change the voluntary self-disclosure calculus. For prosecutors, the New Policy will likely affect charging assessments and the imposition and management of corporate monitorships.

Below we provide a summary of the key policy changes and clarifications, along with our observations regarding their potential implications.

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1. Voluntary Self-Disclosure

- DOJ will institute transparent policies and procedures ensuring that voluntary self-disclosure will result in more favorable resolutions than if DOJ learned of the misconduct through other means and that the benefit of such a disclosure is clear and predictable.

- To this end, every DOJ component that prosecutes corporate crime must have a formal written policy that incentivizes voluntary self-disclosure.

- Absent "aggravating factors," prosecutors will not seek a guilty plea in instances where the company has voluntarily self-disclosed the misconduct, cooperated, and remediated the misconduct. The Department will not require an independent compliance monitor for such a corporation if, at the time of resolution, it has also implemented and tested an effective compliance program.

Although DOJ has long strived to incentivize voluntary self-disclosure, this is the first policy statement that articulates the promised benefits so clearly and concretely and on a Department-wide basis. Although some individual DOJ components have policies encouraging self-disclosure, such as the Foreign Corrupt Practices Act ("FCPA") Unit's Program, the National Security Division's disclosure policy, and the Antitrust Division's Leniency Program, this is the first time DOJ has required *all* components that prosecute corporate crime to draft and publicly share a formal written voluntary self-disclosure policy. DOJ components that currently investigate and prosecute corporate crime without such a policy include, for example, the Consumer Protection Branch, the Money Laundering & Asset Forfeiture Section, and U.S. Attorneys' Offices.

Although DOJ has committed not to seek a guilty plea in instances where the company has self-disclosed, cooperated, and remediated, DOJ has preserved some flexibility for itself with the phrase "absent the presence of aggravating factors."[6] Assistant Attorney General Polite clarified that the aggravating factors the Criminal Division will consider include involvement of executive management in the misconduct, significant profit to the company from the misconduct, or "pervasive or egregious" misconduct.[7] Notwithstanding the considerable flexibility this leaves the Department, this commitment is significant if for no other reason than that it appears to foreclose, absent aggravating factors, the possibility of the Department seeking a guilty plea even from a subsidiary—a course that DOJ has sometimes taken instead of parent-level guilty pleas. Voluntary self-disclosure has now become the fundamental gating issue under the New Policy. Consequently, consideration of whether disclosure is truly voluntary will be hotly debated in this context.

2. Cooperation Credit

- DOJ will update its Justice Manual, a comprehensive collection of standards that guide prosecutors from the start of an investigation through prosecution, to ensure greater consistency across components regarding the standard to receive maximum cooperation credit.

- Regarding the 2021 Policy's reinstatement of a requirement that corporations must provide all non-privileged information about all culpable individuals to qualify for cooperation credit, DOJ now expects *prompt* delivery of such information.

- DOJ will provide cooperation credit to companies that find solutions to address data privacy laws, blocking statutes, and other foreign restrictions and may draw adverse inferences if companies improperly use such restrictions to prevent detection or hinder a DOJ investigation.

Updating the Justice Manual to create consistent standards for cooperation credit across DOJ components and U.S. Attorney's Offices is a welcome change that will better ensure

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corporate defendants are not held to uneven standards by different components.

DOJ's willingness to provide cooperation credit to companies that find creative solutions to address privacy laws, blocking statutes, and other restrictions to evidence collection in foreign jurisdictions is likely an outgrowth of DOJ's perception, albeit mistaken, that companies are hiding behind foreign legal restrictions for self-serving purposes. When DOJ proposes a potential solution to address complications presented by foreign law restrictions—based at least in part on DOJ's experience with cooperating companies in other investigations—companies risk losing cooperation credit in rejecting such solutions without a persuasive explanation as to why they are infeasible.

In his speech, Principal Deputy Attorney General Marshall Miller underscored the importance of "timeliness" in obtaining cooperation credit, noting that "delay is the prosecutor's enemy."[8]

3. Corporate Compliance Programs

- When assessing a company's compliance program, prosecutors must consider whether the company's compensation systems include clawback or deferred compensation provisions for bad actors and incentivize compliant behavior.

- The Department will scrutinize policies and procedures to ensure that business-related communications on employees' personal devices and third-party messaging platforms are preserved and provided to DOJ in an investigation.

Deputy Attorney General Monaco directed the Criminal Division to provide further guidance by the end of this year on how to reward corporations that develop and apply compensation clawback policies and place the burden of financial penalties onto those responsible for misconduct. The day after the guidance was released, Assistant Attorney General Polite further noted that the DOJ would work with agency partners and experts on executive compensation to help develop this guidance.[9]

The New Policy's changes regarding the preservation and production of communications are likely a manifestation of DOJ's frustration with companies that are unable to retrieve communications stored on employees' personal devices or third-party platforms. The use of personal devices for work has become an increasingly challenging issue in corporate criminal investigations. Assistant Attorney General Polite offered more background on this policy, noting that the Criminal Division has seen a rise in companies and individuals using messaging applications offering ephemeral (or disappearing) messaging and that companies must ensure the ability to appropriately monitor and retain these communications.[10] DOJ is now willing to offer the carrot of cooperation credit to companies that have policies to retain and provide such communications. To obtain cooperation credit, companies will be expected to implement company-wide policies and procedures that prevent employees from using personal devices and third-party messaging applications to conduct business or otherwise find a way to preserve such communications. The Criminal Division will examine whether additional guidance is needed regarding best practices on use of personal devices and third-party messaging applications.

Also notable is the fact that the New Policy does not address certifications regarding a company's compliance program, a topic that has raised concerns from industry experts and the defense bar. In his March 2022 speech, Assistant Attorney General Polite stated that he was considering requiring that both the Chief Executive Officer and the Chief Compliance Officer certify as part of any settlement that the company's compliance program is effective, reasonably designed, and implemented to detect and prevent legal violations.[11] Assistant Attorney General Polite also addressed this issue in his speech on September 16, following the announcement of the New Policy. DOJ has imposed these certifications in prior resolutions on a case-by-case basis, including in two recent resolutions, but has not gone so far as to adopt a policy of requiring such certifications in

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every resolution. The New Policy leaves that approach undisturbed.

4. Prior Misconduct

- With respect to the 2021 Policy announcement that prosecutors must consider a corporation's full criminal, civil, and regulatory record, even if dissimilar from the conduct at issue, DOJ articulated standards regarding the kind of prior misconduct that will receive greater weight—for example, conduct involving the same personnel or management.

- Dated prior conduct, measured by the time that conduct was addressed in a resolution, will be afforded less weight—in the case of a criminal or civil/regulatory resolution, the timing is 10 years and 5 years, respectively.

DOJ's clarification that the history of highly regulated companies should be compared to other similarly situated companies is particularly important. This messaging is an important clarification of Deputy Attorney General Monaco's announcement in October 2021 that prosecutors should consider "all" prior civil and regulatory actions in assessing whether a company is a recidivist. Many in the white-collar defense bar have been concerned about the consequences of such an open-ended inquiry into prior non-criminal actions involving our largest, most heavily regulated clients, and the delineation of which prior actions should be given greater weight is welcome.

5. Corporate Monitorships

- Regarding the 2021 Policy announcement that prosecutors are free to impose monitors whenever appropriate, the Deputy Attorney General clarified that there is no presumption in favor of monitorships and that it will not seek to impose a monitor if the company has implemented *and tested* an effective compliance program.

- All DOJ components will adopt a consistent, transparent and public monitor selection process that ensures there are no conflicts of interest in the selection of the monitor and the process adheres to DOJ's commitment to diversity and inclusion. Prosecutors must follow new standards to ensure the monitorship is tailored to the misconduct, adheres to its anticipated scope, and remains on budget.

The New Policy significantly ratchets up incentives for companies to create robust compliance programs by reducing the specter of prolonged and costly compliance monitorships. DOJ has previously commented on what it means to have an effective and "tested" compliance program. In March 2022, Assistant Attorney General Polite noted the importance of seeing a company's compliance program working in practice and "compliance success stories," including rewarding positive behavior, disciplining poor behavior, rejecting transactions due to compliance risk, positive trends in whistleblower reporting, and other positive developments.[12]

6. Individual Prosecutions

- In the Deputy Attorney General's speech, she noted that the "Department's number one priority is individual accountability" and linked expedited voluntary self-disclosures and production of key documents and information involving individuals to cooperation credit.[13]

- Prosecutors must seek warranted criminal charges against individuals prior to or at the same time as entering a resolution against a corporation or, if it makes more sense to resolve the corporate case first, have a full investigation plan to bring individual charges.

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The extent to which this new guidance practically affects the outcomes of particular criminal investigations remains unclear. The Yates Memorandum, issued during the Obama Administration in 2015, called for a similar work plan where corporate cases should not be resolved without a clear plan to resolve related individual cases, though the Yates Memorandum did not explicitly require prosecutors to work toward sequencing their investigations in this way.[14] In addition, one advantage of corporate resolutions is that prosecutors and corporate defendants need only reach a generally agreed-upon understanding of the facts and legal standard. This approach allows for speedier resolutions while avoiding endless and costly investigations. But the level of investigation to resolve a corporate matter is often insufficient to prevail against individuals who are far more inclined to fight charges in court. Thus, it remains to be seen whether prosecutors will actually succeed in bringing individual criminal charges before or concurrently with corporate resolutions.

As a result of this DOJ reset, we recommend:

1. An examination of compensation policies to more tightly align compliance goals with pay;
2. An implementation of a clawback policy for misconduct that would mirror in material respect the clawback policies associated with financial restatements;
3. Refreshing the board of directors of its *Caremark* responsibilities;
4. Updating compliance training materials to underscore an employee's obligation to escalate to the company's legal and compliance departments any problematic conduct; and
5. Broadening values and compliance training company wide and to selected third parties (consultants, lobbyists, logistical advisors, technical experts, etc.).

* * *

Over the coming weeks and months, we will carefully monitor DOJ's implementation of these aspects of the revised guidance.

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[1] Speech, U.S. Dep't of Justice, Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement, (September 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement [hereinafter Deputy Attorney General Monaco Speech (September 15, 2022)].

[2] Memorandum, Dep't of Justice, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (September 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download [hereinafter DOJ Memorandum (September 15, 2022)].

[3] *See* Client Alert, Gibson Dunn, Deputy Attorney General Announces Important Changes to DOJ's Corporate Criminal Enforcement Policies (October 29, 2021), https://www.gibsondunn.com/deputy-attorney-general-announces-important-changes-to-doj-corporate-criminal-enforcement-policies/.

[4] Speech, U.S. Dep't of Justice, Assistant Attorney General Kenneth A. Polite Delivers Remarks at the University of Texas Law School (September 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school [hereinafter Assistant Attorney General Polite Speech (September 16, 2022)].

[5] Speech, U.S. Dep't of Justice, Principal Associate Deputy Attorney General Marshall

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Miller Delivers Live Keynote Address at Global Investigations Review (September 20, 2022), https://www.justice.gov/opa /speech/principal-associate-deputy-attorney-general-marshall-miller-delivers-live-keynote-address [hereinafter Principal Associate Deputy Attorney General Miller Speech (September 20, 2022)].

[6] DOJ Memorandum (September 15, 2022).

[7] Assistant Attorney General Polite Speech (September 16, 2022).

[8] Principal Associate Deputy Attorney General Miller Speech (September 20, 2022).

[9] *Id.*

[10] Assistant Attorney General Polite Speech (September 16, 2022).

[11] Speech, U.S. Dep't of Justice, Assistant Attorney General Kenneth A. Polite Jr. Delivers Remarks at NYU Law's Program on Corporate Compliance and Enforcement (PCCE) (March 25, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate [hereinafter Assistant Attorney General Polite Speech (March 25, 2022)].

[12] Assistant Attorney General Polite Speech (March 25, 2022).

[13] Deputy Attorney General Monaco Speech (September 15, 2022).

[14] Memorandum, Dep't of Justice, Individual Accountability for Corporate Wrongdoing (September 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

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