Investigations, Compliance and Defense

Deputy Attorney General Announces Revisions to DOJ's Corporate Criminal Enforcement Policies and Practices

By: David Bitkower, Erin R. Schrantz, Anthony S. Barkow, Brandon D. Fox, and Philip B. Sailer

On September 15, 2022, Deputy Attorney General (DAG) Lisa Monaco issued a memorandum and delivered a speech, announcing several revisions to the Department of Justice's (DOJ)'s corporate criminal enforcement policies and practices. The new revisions reflect input from DOJ's Corporate Crime Advisory Group, which DOJ convened in late 2021 to review and recommend improvements to DOJ's approach to prosecuting corporate crimes, and the imprint of DOJ's compliance-minded leadership. The new revisions, which will apply to current and future corporate defendants, include:

1. Emphasizing that a corporation's cooperation with DOJ must be timely and not strategically delayed if the corporate seeks maximum cooperation credit;
2. Clarifying how prosecutors should evaluate a company's record of prior misconduct when deciding how to resolve a criminal investigation;
3. Requiring the development of additional written guidance to govern the Department's overarching approach to voluntary self-disclosure, the selection of independent compliance monitors, and policies governing mobile devices and ephemeral messaging platforms; and
4. Heightened attention to DOJ's evaluation of the effectiveness of corporate compliance programs, including detailed guidance on how prosecutors should assess employee compensation systems and the impact of compliance programs on corporate culture.

Overall, the new revisions reinforce DOJ's commitment to the principles announced in DAG Monaco's October 28, 2021 memorandum, while clarifying areas of potential confusion and promoting consistency across the Department on corporate crime issues. Taken together, they reflect the consistent DOJ trends of broadcasting aggressiveness against corporate crime; developing more guidance for the exercise of prosecutorial discretion; and centralizing departmental attention, if not control, over corporate prosecutions.

Key aspects of the new policy memo are highlighted below:

1. Corporations Must Not Foot-Drag when Cooperating

Existing DOJ policy already requires that, to receive any cooperation credit in a DOJ resolution, the corporation must provide the government "all relevant, non-privileged facts about individual misconduct."[1] The new policy underscores that such information must be provided "on a timely basis," such that "prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals."[2] As such, the policy asks in particular that cooperating corporations prioritize the production of information that could be useful to investigate individuals. If such cooperation is not timely in the prosecutors' eyes—that is, if the Department identifies "undue or intentional delay"—cooperation credit may be "reduced or eliminated."[3]

Although this emphasis is not completely new—prosecutors have traditionally had leeway to downgrade cooperation credit where they see productions as sluggish or strategically delayed[4]—it will provide prosecutors with an explicit basis in Department policy to direct and put pressure on a company's internal investigation and production of materials to the government.

2. Prosecutors Should Weigh a Company's History of Misconduct Based on Recency and Similarity

In her 2021 memorandum, DAG Monaco directed prosecutors "to consider all misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family." In writing about the 2021 memorandum at the time, we (and other commentators) observed that such framing substantially broadened the way DOJ would view a company's record when making a charging decision or negotiating a resolution. We also questioned what weight would be given to old or unrelated corporate misconduct, because as DAG Monaco noted, "[s]ome prior instances of misconduct may ultimately prove to have less significance."[5] Indeed, we noted, overemphasis on old or unrelated conduct in resolution determinations could chill voluntary disclosures if companies fear being brandished as recidivists and ineligible for a more lenient resolution.

Under the new revisions, DOJ has clarified its approach largely as anticipated, stating that "[n]ot all instances of prior misconduct . . . are equally relevant or probative."[6] The new revisions clarify that "prosecutors should consider the form of prior resolution and the associated sanctions or penalties, as well as the elapsed time between the instant misconduct, the prior resolution, and the conduct underlying the prior resolution."[7] The "greatest significance" should be given to "*recent*" U.S. criminal resolutions, and to prior misconduct "involving the same personnel and management."[8] The new revisions explain that conduct addressed by prior criminal resolutions more than ten years old, or civil or regulatory resolutions more than five years old "should generally be accorded less weight," although prosecutors are still directed to consider the particular facts and circumstances of each prior resolution.[9] Prosecutors are also instructed to consider the nuances of a company's particular industry when evaluating the weight to assign prior historical shortcomings: "For example, if a corporation operates in a highly regulated industry, a corporation's history of regulatory compliance or shortcomings should likely be compared to that of similarly situated companies in the industry."[10] Similarly, the new revisions direct prosecutors to give less weight to prior resolutions that involve entities that do not have common management with the entity under investigation, or involve acquired entities that have since been integrated into robust compliance programs and subjected to full remediation.[11]

At the same time, the policy memo takes head-on the concern that a "recidivist" label would disqualify a corporation from receiving a non-prosecution or deferred-prosecution agreement, stating that, "[w]hile multiple deferred or non-prosecution agreements are generally disfavored, nothing in this memorandum should disincentivize corporations that have been the subject of prior resolutions from voluntarily disclosing misconduct to the Department."[12]

DOJ's clarified approach to the weight afforded to historical misconduct is a helpful development. But corporations and the defense bar will no doubt carefully monitor how the Department in practice approaches circumstances where a corporation with a prior criminal resolution voluntarily self-discloses new conduct. A voluntary disclosure of criminal activity is already a weighty decision for a corporation, and it is weightier still if the Department's approach to prior misconduct narrows the opportunity to secure an NPA or DPA.

3. DOJ Directs a Consistent, Transparent Department-Wide Approach to Certain Policies and Compliance Guidance

Throughout the revisions, DOJ directs components within the Department to implement consistent and formalized policies in the name of transparency, and to leverage best practices the Department has developed and is developing around evaluating compliance programs. In many cases, these directives elevate policies and practices already in place at the Criminal Division and other components, and expands them Department-wide:

> *Voluntary Self-Disclosure*: The revisions direct each DOJ component that prosecutes corporate crime "to review its policies on corporate voluntary self-disclosure, and if the component lacks a formal, written policy to incentivize such self-disclosure, it must draft and publicly share such a policy."[13] The revisions set forth specific parameters for the self-disclosure policies and expressly

requires that all DOJ components "must adhere" to certain "core principles."[14] Among those, DOJ will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct, absent aggravating circumstances.[15]

Cooperation Credit: DOJ "will update the Justice Manual to ensure greater consistency across components as to the steps that a corporation will need to take to receive maximum credit for full cooperation."[16] The new revisions highlight the challenges that come with gathering evidence overseas, particularly data privacy laws, blocking statutes, or other restrictions imposed by foreign law. The revisions direct prosecutors to "provide credit to corporations that find ways to navigate such issues of foreign law and produce such records."[17] "Conversely, where a corporation actively seeks to capitalize on data privacy laws and similar statutes to shield misconduct inappropriately from detection and investigation by U.S. law enforcement, an *adverse inference* as to the corporation's cooperation" may apply.[18]

Bring-Your-Own-Device Policies and Ephemeral Messaging Platforms: In March 2019, DOJ updated its Foreign Corrupt Practices Act (FCPA) corporate enforcement policy to clarify that, among other requirements, companies will not receive full remediation credit unless they implement "appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records[.]"[19] DOJ has now broadly acknowledged "the ubiquity" of mobile devices and ephemeral messaging applications that pose "significant corporate compliance risks."[20] Following the lead of the FCPA enforcement policy, DOJ instructs prosecutors to "consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved."[21] To assist prosecutors in that effort, DAG Monaco has instructed the Criminal Division "to further study best corporate practices regarding the use of personal devices and third-party messaging platforms and incorporate the product of that effort into the next edition of its Evaluation of Corporate Compliance Programs, so that the Department can address these issues thoughtfully and consistently."[22] In a follow-up speech delivered on September 16, 2022, Kenneth Polite, Assistant Attorney General (AAG) for DOJ's Criminal Division, advised that DOJ "has seen a rise in companies and individuals using these types of messaging systems, and companies must ensure that they can monitor and retain these communications as appropriate."[23]

Monitor Selection Processes: After DAG Monaco's 2021 memorandum, we observed that, as a matter of policy, DOJ would be leaning further forward toward the use of independent compliance monitors, especially "[w]here a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution."[24] Since that time, DOJ has in fact announced several resolutions requiring monitorships. The new policy sets forth factors indicating when the Department should seek a monitorship, and also requires that the selection of monitors must be performed via a "documented selection process that is readily available to the public."[25] DAG Monaco has instructed that "[e]very component involved in corporate criminal resolutions that does not currently have a public monitor selection process must adopt an already existing process, or develop and publish its own selection process" by the end of the year.[26]

These efforts at requiring and in some cases standardizing written guidance across Department components are generally positive for corporations facing DOJ scrutiny. Although most corporate resolutions already involved components, such as the Criminal or Antitrust Divisions, that rely on such written guidance, it will be helpful if other components adopt similar guidance as well. It remains to be seen whether components will adopt policies that differ in material ways, creating an incentive to self-report to one component of DOJ rather than another.

4. DOJ Sharpens Focus on Details of Compliance Programs, Including Compensation Structures, Compliance Metrics, and Positive Incentives

Starting with a quietly published white paper in 2017, DOJ has provided more extensive and specific guidance on how prosecutors should evaluate corporate compliance programs and assess corporate culture.[27] That guidance has become the benchmark by which companies present to DOJ regarding their compliance programs, and for many companies it has also become a resource to direct internal compliance efforts. This guidance parallels DOJ's increasing focus on the importance of effective compliance programs and empowerment of compliance personnel. Under the current Administration, the Criminal Division has also added compliance professionals to its ranks.[28]

Building on its existing guidance, DOJ's new policy revisions instruct prosecutors to examine a corporation's compensation structures——both as written and applied——in evaluating whether they promote an ethical corporate culture. For example, DOJ instructs prosecutors to consider:

- Whether the company's "compensation systems" (including compensation agreements, arrangements, and packages) include clawback provisions "that enable penalties to be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct."[29] Because misconduct may be discovered after culpable personnel have left a company, the new revisions instruct prosecutors to examine whether companies have——*and use*——clawback measures to impose "retroactive discipline."[30]
- Whether compensation systems provide "affirmative incentives for compliance-promoting behavior" such as compliance metrics and benchmarks in performance reviews that measure and reward compliant conduct.[31]
- Whether non-disclosure or non-disparagement provisions in compensation or severance agreements "inhibit the public disclosure of criminal misconduct by the corporation or its employees."[32]

Consistent with these revisions and DAG Monaco's direction, AAG Polite's announcement that the Criminal Division "will examine whether, in some cases, we may be able to shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible."[33]

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In sum, DAG Monaco's speech and memorandum reflects an aggressive posture toward corporate crime embedded in an incrementalist approach designed to hone an incentive structure that will—DOJ hopes—lead companies to self-report more, and cooperate in a way to permit more individual prosecutions. Declining corporate enforcement statistics make clear that this is a difficult task for DOJ, and we should expect that the current Administration will continue to seek ways to hone that structure.

In the meantime, corporations should ensure that:

- Their compliance programs are well-tailored to the expectations set forth by DOJ.
- In particular, bring-your-own-device policies and employee use of ephemeral messaging apps are appropriately tailored to maximize the company's ability to preserve and collect relevant business records.
- In the event that they discover misconduct, they seek sophisticated counsel regarding the available self-disclosure incentives and disincentives based on the nature of the misconduct, the relevant DOJ component policies, and the likely range of outcomes.

Contact Us

David Bitkower
dbitkower@jenner.com | Download V-Card

Erin R. Schrantz
eschrantz@jenner.com | Download V-Card

Anthony S. Barkow
abarkow@jenner.com | Download V-Card

Brandon D. Fox
bfox@jenner.com | Download V-Card

Philip B. Sailer
psailer@jenner.com | Download V-Card

Meet Our Team

Practice Leaders

Anthony S. Barkow
Co-Chair
abarkow@jenner.com
Download V-Card

David Bitkower
Co-Chair
dbitkower@jenner.com
Download V-Card

Christine Braamskamp
Co-Chair
cbraamskamp@jenner.com
Download V-Card

Brandon D. Fox
Co-Chair
bfox@jenner.com
Download V-Card

Erin R. Schrantz
Co-Chair
eschrantz@jenner.com
Download V-Card

Katya Jestin
Co-Chair
kjestin@jenner.com
Download V-Card

[1] DOJ, "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.
[2] Memorandum from the Deputy Attorney General re: "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, at 3 (emphasis in original) [hereinafter "Monaco Memo"].
[3] *Id*.
[4] DOJ Press Release, "Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan" (March 7, 2019), https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department.
[5] DOJ, "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.
[6] *Id*. at 5.
[7] *Id*.
[8] *Id*. at 6 (emphasis added).
[9] *Id*. at 5.
[10] *Id*.
[11] *Id*.
[12] *Id*. at 6.
[13] *Id*. at 7.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 8.
[17] *Id*.
[18] *Id*. (emphasis added).
[19] Justice Manual § 9-47.120.
[20] *Id*. at 11.
[21] *Id*.
[22] *Id*.
[23] DOJ, "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 "Polite Texas Law Remarks"].
[24] Memorandum from the Deputy Attorney General re: "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download, at 4.
[25] Monaco Memo at 13.
[26] *Id*.
[27] See DOJ, Evaluation of Corporate Compliance Programs (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download; DOJ, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019), https://www.justice.gov/atr/page/file/1182001/download; DOJ Press Release, Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (April, 30, 2019), https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs; DOJ, Evaluation of Corporate Compliance Programs (February 2017).
[28] Polite Texas Law Remarks.
[29] Monaco Memo at 10.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] Polite Texas Law Remarks.