

US Department Of Justice Announces Key Policy Changes Impacting Enforcement

On September 15, 2022, the Department of Justice (DOJ) released a Memorandum from Deputy Attorney General Lisa O. Monaco on Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (“Memorandum”). This Memorandum was published concurrently with her remarks on Corporate Criminal Enforcement delivered on the same day to New York University School of Law’s Program on Corporate Compliance and Enforcement.

The Memorandum and Ms. Monaco’s remarks signaled significant department-wide policy shifts in the DOJ’s efforts to investigate and combat white-collar criminal activity, while providing additional clarifications to the previous issued October 2021 Memorandum in which the Department originally

outlined its corporate criminal enforcement policies in a variety of areas.[1] While the October 2021 Memorandum revealed a hard stance on three policy areas — (1) individual accountability; (2) past misconduct; and (3) external monitors — the new guidance moderates the DOJ’s approach in these areas and provides or calls for guidelines for companies in making decisions regarding compliance and cooperation prior to or during the investigation. Specifically, the new DOJ policy makes considerable changes by:

- Placing high value on voluntary self-disclosures and concretely defining the benefits to companies for self-disclosure;
- Lessening the necessity to implement compliance monitors;
- Outlining encouraged compliance policies;
- Emphasizing individual accountability; and
- Weighing various factors related to past misconduct;

New Policies

Voluntary Self-Disclosure and Cooperation Credit

The DOJ has long sought to incentivize voluntary self-disclosure of misconduct, but Deputy AG Monaco’s announcement offers the clearest and most concrete benefits of such disclosure.

Indeed, Deputy AG Monaco announced that “the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct.” Moreover, internal compliance monitors may not be necessary, if at the time of a resolution with the DOJ, a company has “implemented and tested an effective compliance program.” Notably, Deputy AG Monaco’s announcement allows for some flexibility, stating that “aggravating factors” – such as senior-level

involvement in the misconduct or “pervasive or egregious” misconduct or the extent to which the company profited from the misconduct – may be considered in denying the cooperation credit for voluntary self-disclosure.

Further, based on the recent DOJ Memorandum, each division of the DOJ that prosecutes corporate crime is obligated to review its policy on voluntary self-disclosure and produce a formal, publicly available written policy with several key factors and core principles to guide companies. For example, these rules will guide companies on preservation rules and timelines for disclosure. Although many DOJ units already have such guidance, 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. Companies

and counsel should look to these new policies when determining when and how to self-disclose.

In addition to clarifying the benefits of voluntary self-disclosure, Deputy AG Monaco offered new guidance on factors the DOJ may consider in determining cooperation credit. Based on the DOJ's newly issued guidance, there are several key principles to consider when assessing cooperation credit:

1. **Timely Disclosure.** Where individuals within a corporation self-disclose misconduct before an investigation has begun, they increase their chances of being issued full cooperation credit.
2. **Access to Individuals' Data.** Documents provided for voluntary self-disclosure purposes should include the detailed conduct of involved individuals, including relevant communications of such individuals.
3. **Access to All Relevant Information.** DOJ will now provide cooperation credit to companies that find creative solutions to address data privacy laws, blocking statutes, and other foreign restrictions on the document collection, and may draw adverse inferences if DOJ determines that such restrictions are being used to hinder the investigation.

This guidance dovetails with the DOJ's emphasis on individual liability. The DOJ is clearly concerned with obtaining relevant information that may be evidence of individual wrongdoing, and is seeking to incentivize companies to retrieve information in the individual's possession or otherwise outside the reach of the DOJ.

Compliance Programs

The effectiveness of a company's compliance program has long been a factor in determining corporate resolutions. But Deputy AG Monaco's announcement clearly seeks to provide more guidance on what aspects of a compliance program

the DOJ will consider material. When assessing a company's compliance program, prosecutors may now consider a companies' "clawback provisions and the escrowing of compensation" and other ways a company holds employee "financially accountable" for misconduct for purposes of deterrence. Moreover, consistent with the overall push for more certainty, Deputy AG Monaco directed the components of the DOJ to provide guidance on how companies will be rewarded when they develop and implement such policies.

With respect to the emphasis on disclosure of documents, Deputy AG Monaco also highlighted the concern of individuals using personal devices and the use of ephemeral communication platforms, directing prosecutors to scrutinize policies affecting the company's ability to monitor and retain relevant communications, such that they are available for production to the DOJ in an investigation.

Individual Accountability

Deputy Attorney General Monaco reaffirmed that the Department's priority in corporate criminal matters is to hold individual actors accountable, linking expedited voluntary self-disclosures and production of key documents and information involving individual misconduct to the determination of the company's cooperation credit. Specifically, Deputy AG Monaco notes that "such accountability deters future illegal activity, incentivizes changes in individual and corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in [the DOJ's] justice system."^[2]

However, the DOJ emphasized in the most recent guidance that prosecutors should complete expedited investigations and prosecute individuals before or during the investigation of the corporation, as the Department determines that companies' strategic delay in disclosing essential information would undermine efforts to hold individuals accountable. Indeed, the new policy seeks to deny individuals

the ability to take advantage of “the lapse of statutes of limitations, dissipation of evidence, and the fading of memories” by requiring companies to quickly produce instances of individual misconduct, prior to completing an internal investigation, in order to receive any cooperation credit.[3] The practical effect of this policy, as well as the ability of federal prosecutors to comply with it, is unclear. Often, a corporate resolution is easier to achieve than one involving individuals, in part because the level of proof necessary to arrive at an agreed-upon set of facts in a corporate resolution differs from the level of proof necessary to seek an indictment against individuals.

Further, the DOJ will increase its efforts to cooperate with foreign law enforcement in parallel prosecutions and investigations into the same or related conduct. The Principles of Federal Prosecution recognize that effective prosecution in another jurisdiction may be grounds to forego federal prosecutions. However, under the circumstances, although U.S. prosecutors generally wait to initiate a federal prosecution to examine the scope and effectiveness of foreign prosecution, the DOJ has reiterated its stance that it is cautious against the delay in commencing prosecutions that might undermine the strength of the federal case.

History of Misconduct

The previous guidance from the DOJ issued in 2021 broadly allowed for the use of the history of misconduct in corporate enforcement. This guidance led to concerns about the consequences of a wide-ranging probe into all of a company’s potential misconduct. The new guidance is more tempered, where certain factors in a corporation’s past misconduct are weighed individually. To determine the appropriate resolution to corporate criminal matters, a corporation’s history of misconduct, including prior criminal, civil, and regulatory resolutions, both domestically and internationally, will be weighed. Prosecutors will consider the form of prior resolution, the elapsed time from past misconduct, and the

specificities of the past misconduct.

For example, the recent guidance has now stipulated that “dated” past conduct (i.e., conduct that will not be utilized against a corporation under criminal enforcement) includes criminal conduct that occurred 10 or more years before the conduct under investigation and civil or regulatory resolutions occurring five or more years before the current resolution. Moreover, the DOJ will now place a high value on the recent U.S. criminal resolutions and past conduct involving the same people within a company. Further, multiple non-prosecution or deferred prosecution agreements will generally be disfavored. Finally, unlike past guidance, which took a “holistic” approach to instances of past misconduct, regardless of whether such conduct involved similar circumstances and individuals, the DOJ will now require that prosecutors take such dissimilarities into consideration.

Key Takeaways

Guilty Plea Policy

The emphasis on voluntary self-disclosure is higher than ever, as it is the key to foreclosing the possibility of a guilty plea under the new guidance.

Full Disclosure

Timely cooperation by corporations is key in assessing cooperation, insofar as delays may materially affect the DOJ’s ability to seek charges against individuals. Further, if a company fails to solve for circumstances that preclude full disclosure – such as information on personal devices or subject to data privacy laws — DOJ may draw an adverse inference and cooperation credit may be reduced or denied.

Compliance Programs

Companies are well-advised to develop robust policies that penalize individual misconduct and effectively retain relevant documents.

Monitors

Implemented, tested, and effective compliance policies, at the time of resolution, will negate the need for compliance monitors. This institutes a much more lenient and definitive policy on issuing compliance monitors upon corporate misconduct, where policy favored the implementation of monitors per past guidance.

Past Misconduct

A more nuanced approach to reviewing such things as differences between past and current misconduct.

[1] In October 2021, DOJ published a memorandum to outline the three steps in strengthening the Department's corporate criminal enforcement policies and practices: (1) individual accountability, (2) the treatment of a corporation's prior misconduct, and (3) the use of corporate monitors. See Memorandum from Deputy Attorney General Lisa O. Monaco, Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 2021).

[2] Memorandum from Deputy Attorney General Lisa O. Monaco, Further Revision to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 2022) (quoting Memorandum from Deputy Attorney General Sally Quillian Yates, Individual Accountability for Corporate Wrongdoing (Sept. 2015)).

[3] Press Release, Dep't of Justice, Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.



Sam Amir Toossi
Partner - New York
atoossi@akrivelaw.com
+1.646.517.0687



Farhad R. Alavi
Partner - Washington D.C.
falavi@akrivelaw.com
+1.202.686.4859

Special thanks to Hope Mirski (Washington) and Xander Peng (New York) for their contributions on this piece.

This Client Alert is intended solely for informational purposes and should in no way be construed as legal advice. If you have any questions or are unclear on any of the subject matters addressed or discussed in this Client Alert, please consult a licensed legal professional.