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White Collar Criminal Defense

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Deputy Attorney General Lisa O. Monaco Doubles Down on Prior Commitment to Aggressively Prosecute Corporate Crime

By Robert A. Johnston Jr., Rachel Maimin, Kathleen A. McGee, and Christopher Schafbuch

On September 15, 2022, the Department of Justice ("DOJ") announced several important changes to its policies for prosecuting corporate crime. Deputy Attorney General Lisa O. Monaco, who made the announcement in a speech at New York University School of Law, emphasized the DOJ's interest in expediting investigations, cracking down on repeat offenders, and encouraging a corporate culture that rejects wrongdoing for the sake of profit by, among other things, holding financially accountable individuals who contribute to criminal misconduct.

Most notably, the DOJ is making these policy changes to motivate more companies to voluntarily self-disclose, through promises of leniency and other benefits. Deputy Attorney General Monaco, said: "We expect companies to step up and own up to misconduct." For the first time ever, every DOJ component that prosecutes corporate crime must have a formal, documented program and policy that incentivizes voluntary self-disclosure. Monaco said that the DOJ's goal "is simple: to reward those companies whose historical investments in compliance enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward." Two common principles that will apply across all DOJ self-disclosure policies are that the DOJ will not (1) seek a guilty plea, absent aggravating factors, when a company has voluntarily self-disclosed, cooperated, and remediated misconduct; or (2) require an independent compliance monitor for such a corporation if, at the time of resolution, it also has implemented and tested an effective compliance program.

Monaco also announced several other overarching changes to the DOJ's corporate enforcement policies. Key points from this new guidance include:

1. Expediting individual investigations and prosecutions
   - Going forward, undue or intentional delay in producing information or documents—particularly those that show individual culpability—will result in the reduction or denial of cooperation credit for the corporate defendant.
   - Gamesmanship with disclosures and productions will not be tolerated.

2. Reconsidering how to evaluate history of misconduct
   - The most significant types of prior misconduct will be criminal resolutions here in the United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct. But past actions may not always reflect a company's current culture and commitment to compliance. Accordingly, the DOJ will give less weight to criminal resolutions that occurred more than 10 years before the conduct currently under investigation, and civil or regulatory resolutions that took place more than five years before the current conduct.
   - The DOJ will also consider the nature and circumstances of the prior misconduct, including whether it shared the same root causes as the present misconduct. Some facts might indicate broader weaknesses in the compliance culture or practices, such as wrongdoing that occurred under the same management team or executive leadership. Other facts might provide important mitigating context.
   - Finally, the DOJ will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company. "Companies cannot assume that they are entitled to an NPA or a DPA, particularly when they are frequent flyers," said Monaco.

3. New guidance for prosecutors about how to identify the need for a monitor, how to select a monitor, and how to oversee the monitor's work to increase the likelihood of success

- All monitor selections will be made pursuant to a documented selection process that operates transparently and consistently.
- The DOJ will receive regular updates to verify that the monitor stays on task and on budget.

4. Promoting "a corporate culture that rejects wrongdoing for the sake of profit"
   - Going forward, when prosecutors evaluate the strength of a company's compliance program, they will consider whether its compensation systems reward compliance and impose financial sanctions on employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. They will evaluate what companies say and what they do, including whether, after learning of misconduct, a company actually claws back compensation or otherwise imposes financial penalties.
   - On the deterrence side, companies should use claw back provisions, the escrowing of compensation, and other ways to hold financially accountable individuals who contribute to criminal misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance.
   - On the incentive side, companies should build compensation systems that use affirmative metrics and benchmarks to reward compliance-promoting behavior.

Monaco's full speech can be read here.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

ROBERT A. JOHNSTON JR.
Partner
T: 212.419.5898
rjohnston@lowenstein.com

RACHEL MAIMIN
Partner
T: 212.419.5876
rmaimin@lowenstein.com

KATHLEEN A. MCGEE
Partner
T: 646.414.6831
kmcgee@lowenstein.com

CHRISTOPHER SCHAFBUCH
Associate
T: 212.419.5879
cschafbuch@lowenstein.com

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