DOJ 'Invigorates' Efforts to Combat Corporate and White Collar Crimes

By Robert A. Johnston Jr., Rachel Maimin, and Lauren E. Van Driesen

The Department of Justice (DOJ or Department), under the leadership of Attorney General Merrick Garland, has expressed that one of its top priorities in corporate criminal matters is "to prosecute the individuals who commit and profit from corporate malfeasance." Nevertheless, the Department will not cease efforts to hold companies accountable. Recently, in a speech to attendees at the American Bar Association's 36th National Institute on White Collar Crime, U.S. Deputy Attorney General Lisa Monaco announced significant policy changes that demonstrate the DOJ is moving the goalpost on what constitutes cooperation with DOJ investigations, will consider a broader range of prior misconduct in determining the ultimate charging decision against a corporate defendant, and is opening the door to imposing corporate monitors more frequently as a condition of declining to prosecute the company pursuant to a non-prosecution agreement (NPA) or deferred prosecution agreement (DPA).

On October 28, 2021, in a speech to attendees at the American Bar Association's 36th National Institute on White Collar Crime, Monaco announced three significant policy changes to "invigorate" the DOJ's efforts to combat corporate and white collar crime.[1]

1. In order to be eligible for cooperation credit, a company "must provide the department with **all** non-privileged information about individuals involved in or responsible for the misconduct at issue . . . regardless of their position, status, or seniority." (Emphasis added.) Previously, it was sufficient for companies to provide the Department with limited disclosures related to individuals whom the company or its counsel deemed to be "substantially involved" in the misconduct.
2. In determining the appropriate resolution for a corporate defendant, prosecutors will now consider a company's entire criminal, civil, and regulatory history. Previously, prosecutors considered whether the at-issue conduct was similar to the conduct at issue in a prior case—for example, whether a company had prior anti-corruption offenses where the company allegedly violated the Foreign Corrupt Practices Act (FCPA). Going forward, in that same hypothetical FCPA case, a prosecutor will assess **all** prior corporate misconduct—antitrust, environmental, tax, etc.—in determining whether the company has an appropriate compliance program and corporate culture to prevent corporate recidivism.
3. Regarding the use of corporate monitors, "the Department is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA." To the extent prior administrations signaled that monitorships are the exception or otherwise disfavored, Monaco expressly rescinded that guidance.

Monaco continued by stating that these policy changes are just the beginning of the Department's review of the efficacy of its existing corporate criminal prosecution

[1] Dep't 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.

policies. The Department expects to review the appropriateness and effectiveness of pretrial diversion programs for companies—namely, DPAs and NPAs—and whether it is appropriate for recidivist companies to resolve a case in this manner. According to Monaco, between 10 percent and 20 percent of all significant corporate criminal resolutions involve companies that previously entered into a resolution with the Department. Accordingly, the DOJ intends to review whether repeat offender companies should be held accountable in a different way—presumably through guilty pleas—in order to deter misconduct rather than signal to companies that DPAs and fines are just the cost of doing business. Relatedly, the DOJ will hold companies accountable for breaching DPAs and NPAs in order to ensure that companies are taking their compliance obligations in those agreements seriously. Monaco noted that two multinational companies recently disclosed that they had received a DPA breach notice from the Department.[2]

Monaco concluded with what she believes to be the "five points" that corporations should take away from her speech:

1. Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct. Failure to do so will cost them down the line.
2. For clients currently facing investigations, the Department will review their entire criminal, civil, and regulatory record—not just a sliver of that record.
3. Clients cooperating with the government will need to identify all individuals involved in the misconduct—not just those substantially involved—and produce all non-privileged information about those individuals' involvement.
4. For clients negotiating resolutions, there is no default presumption against corporate monitors. Decisions about a monitor will be made based on the facts and circumstances of each case.
5. Looking to the future, this is just the beginning of this administration's actions to better combat corporate crime.

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[2] *See, e.g.*, "Update on Deferred Prosecution Agreement," Ericsson Press Release (Oct. 22, 2021), https://mb.cision.com/Main/15448/3438066/1484624.pdf.

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