

DOJ ANNOUNCES MAJOR CHANGES TO CORPORATE CRIMINAL ENFORCEMENT POLICIES

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By: Brian F. Saulnier, Mark A. Rush, Andrew M. Wright, David C. Rybicki, Robert S. Silverblatt

In a keynote address to the American Bar Association's 2021 National Institute on White Collar Crime, Deputy Attorney General (DAG) Lisa O. Monaco outlined major changes to the U.S. Department of Justice's (DOJ) priorities for white collar enforcement. Monaco focused her presentation on four themes that encapsulate DOJ's tougher approach. These changes highlight the need for companies to focus on their compliance programs and to carefully scrutinize the collateral effects of government investigations and litigation.

EMPHASIS ON PROSECUTION OF INDIVIDUALS

In a return to an Obama-era policy, DAG Monaco announced that in order to obtain corporate cooperation credit, companies must now “identify all individuals involved in the misconduct—not just those substantially involved—and produce all non-privileged information about those individuals' involvement.” This move reinstates the policy outlined by then-DAG Sally Yates in the so-called “Yates Memo” of 2015 stating that companies which seek cooperation credit face an all-or-nothing choice: They can identify everyone, from executives to low-level employees, involved in the conduct, or they can forego the substantial benefits of cooperation. DAG Monaco argued that distinctions between substantial and tangential involvement in corporate criminal misconduct are “confusing” and that they “afford companies too much discretion in deciding who should and should not be disclosed to the government.” This new requirement to identify all persons involved, however tangentially, in misconduct is also part of a broader push by DOJ to ramp up prosecutions of individuals, including corporate executives. DAG Monaco conceded that “cases against corporate executives are among some of the most difficult that the department brings,” but she expressed a desire to forge ahead with such cases, contending that “the fear of losing” should not deter prosecutions “as long as we act consistent with the Principles of Federal Prosecution.” She added that it is “unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance.”

COMPREHENSIVE EXAMINATION OF ALL CONDUCT—CRIMINAL, CIVIL, AND REGULATORY

DAG Monaco announced that for companies facing investigations involving corporate misconduct, “as of today, the department will review their whole criminal, civil, and regulatory record—not just a sliver of that record.” That means, for example, that a company's prior misconduct with respect to environmental compliance or taxes will be evaluated when determining the appropriateness of a resolution to a Foreign Corrupt Practices Act investigation. DAG Monaco contended that a company's “record of misconduct”—even if unrelated to the present

investigation—“speaks directly to a company’s overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity.”

This move is sure to change the calculus for companies engaged in government litigation or investigations. In particular, the new guidance increases the need to consider collateral consequences when resolving cases. It also emphasizes the importance of companies taking an across-the-board review of compliance policies and procedures, even in areas that are not part of their core business.

NO PRESUMPTION AGAINST MONITORSHIPS

Corporate compliance monitors continue to loom large. DAG Monaco explained that for companies negotiating resolutions, “there is no default presumption against corporate monitors.” To the extent that prior DOJ guidance “suggested that monitors would be the exception and not the rule,” DAG Monaco rescinded that guidance.

This renewed focus on monitorships emphasizes that a company’s obligations do not end when a settlement is inked. Instead, all companies, and in particular those with compliance monitors, should implement comprehensive safeguards to protect against future violations. DAG Monaco added that DOJ has “no tolerance for companies that take advantage of pre-trial diversion by going on to continue to commit crimes, particularly if they then compound their wrongdoing by knowingly hiding it from the government.”

TOUGHER STANDARDS FOR NPAS AND DPAS

Many companies facing criminal investigations choose to accept responsibility and enter into non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) with the government. Noting that “somewhere between 10% and 20% of all significant corporate criminal resolutions involve companies who have previously entered into a resolution with the department,” DAG Monaco questioned whether recidivist corporations should continue to get a “break.” She noted that DOJ will be “studying” that question in coming months and looking to determine whether “the opportunity to receive multiple NPAs and DPAs” creates a sense that “these resolutions and the attendant fines are just the cost of doing business.”

Like the holistic focus on a company’s record, this announcement underscores the need to take a global approach to compliance and to carefully evaluate the potential for collateral consequences. Because companies that do not receive NPAs or DPAs could instead face a full panoply of criminal penalties, the need to avoid being a repeat player is even more acute.

Taken together, these announcements foreshadow a broader focus by DOJ on the role of corporate compliance programs to prevent misconduct from occurring and, where such violations have already occurred, to implement changes to prevent and punish recidivism. K&L Gates’s cross-disciplinary team of regulatory experts and white collar lawyers can assist clients with reviewing their compliance programs in an across-the-board fashion and in navigating government investigations.

KEY CONTACTS



BRIAN F. SAULNIER
PARTNER

PITTSBURGH, LONDON
+1.412.355.6504
BRIAN.SAULNIER@KLGATES.COM



ANDREW M. WRIGHT
PARTNER

WASHINGTON DC
+1.202.778.9387
ANDREW.WRIGHT@KLGATES.COM



ROBERT S. SILVERBLATT
PARTNER

WASHINGTON DC
+1.202.778.9132
ROB.SILVERBLATT@KLGATES.COM



MARK A. RUSH
PARTNER

PITTSBURGH, WASHINGTON DC
+1.412.355.8333
MARK.RUSH@KLGATES.COM



DAVID C. RYBICKI
PARTNER

WASHINGTON DC
+1.202.778.9370
DAVID.RYBICKI@KLGATES.COM

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