



White Collar, Government & Internal Investigations ADVISORY ■

SEPTEMBER 23, 2022

Deputy Attorney General Monaco Announces Updates to Corporate Criminal Enforcement Policy

On September 15, 2022, Deputy Attorney General Lisa O. Monaco delivered a [speech at the New York University School of Law](#) to announce updates to Department of Justice (DOJ) corporate criminal enforcement policy. Described further in a DOJ [memorandum](#) issued the same day (“the memo”), and echoed in remarks in subsequent days by other senior DOJ officials, these updates build on the steps announced by Monaco in October 2021 (discussed in a prior [advisory](#)).

Framed by Monaco as “a combination of carrots and sticks,” the memo focuses on several areas.

Individual accountability

The memo reemphasizes that “the Department’s first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime” and reiterates the DOJ’s policy that in order to be “eligible for any cooperation credit, corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct.” While this policy is not a new one, the memo focuses on the timing of such disclosure, reminding prosecutors to assess not only whether a corporation provides such information but also whether a corporation did so “promptly” and “in a timely fashion.” It notes that “[w]here prosecutors identify undue or intentional delay ... cooperation credit will be reduced or eliminated.”

Corporate recidivism

In October 2021, the DOJ announced that prosecutors, when determining how best to resolve an investigation, would consider all prior misconduct by a corporation. This requirement raised significant concern, as it was unclear how broadly such “consideration” would extend. The memo provides additional clarity and constraints, explaining that “criminal resolutions here in the United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct” will be of most relevance to the DOJ’s recidivism analysis and that older misconduct—such as a criminal resolution more than 10 years ago or a civil or regulatory resolution more than five years ago—will be given less weight. The memo also explains that an acquired entity’s prior misconduct will not necessarily be considered part of the acquirer’s prior misconduct, provided that “the acquired entity has been integrated into an effective, well-designed compliance program” and the prior misconduct has been addressed and remediated before the conduct currently under investigation. Finally, the memo reiterates that “[m]ultiple non-prosecution or deferred prosecution agreements are generally disfavored” and requires prosecutors to obtain senior-level DOJ approval before making a resolution offer that would result in such multiple agreements.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

Voluntary self-disclosure of misconduct

The memo directs DOJ components investigating and prosecuting corporate cases to ensure they have in place (and publish) “a formal, written policy to incentivize such self-disclosure,” citing as examples the Criminal Division’s FCPA Corporate Enforcement Policy (which has also been applied outside the FCPA context), and the Antitrust Division’s Leniency Policy and Procedures, among others.

Corporate cooperation

The memo also reiterates the DOJ’s criteria for corporate cooperation and commits the DOJ to harmonizing its requirements and expectations regarding such cooperation across its components.

Compensation structures

The memo directs DOJ prosecutors to consider as part of their evaluation of a company’s compliance program the extent to which measures are in place to “incentivize compliant conduct, deter risky behavior, and . . . avoid legal ‘gray areas.’” Prosecutors are required to look for “affirmative incentives for compliance-promoting behavior” in companies’ compensation systems, such as “the use of compliance metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior, both as to the employee and any subordinates whom they supervise.” Likewise, prosecutors are directed to consider “whether a corporation uses or has used non-disclosure or non-disparagement provisions in compensation agreements, severance agreements, or other financial arrangements so as to inhibit the public disclosure of criminal misconduct by the corporation or its employees.” And, perhaps most notably, Monaco said the Criminal Division will develop guidance by the end of the year “on how to reward corporations that develop and apply compensation clawback policies, including how 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.”

Personal device policies

The memo explicitly directs that in evaluating a company’s compliance program, “prosecutors should 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.” It further embeds this analysis in prosecutors’ determination of a company’s eligibility for cooperation credit by requiring that they consider whether “a corporation seeking cooperation credit in connection with an investigation has instituted policies to ensure that it will be able to collect and provide to the government all non-privileged responsive documents relevant to the investigation, including work-related communications (e.g., texts, e-messages, or chats), and data contained on phones, tablets, or other devices that are used by its employees for business purposes.”

Independent compliance monitors

The memo claims that “Department prosecutors will not apply any general presumption against requiring an independent compliance monitor as part of a corporate criminal resolution, nor will they apply any presumption in favor of imposing one.” It also: (1) reiterates a long-standing DOJ commitment to “consistency, predictability, and transparency” in the selection of independent compliance monitors; (2) sets out a non-exhaustive list of 10 factors to guide prosecutors’ determination of whether a monitor is required in a corporate criminal case; (3) reiterates and standardizes monitor selection processes with the DOJ; and (4) highlights the importance of prosecutors “remain[ing] apprised of the ongoing work conducted by the monitor.”

Corporate criminal resolutions

The memo affirms a “commitment to transparency in corporate criminal enforcement” and requires prosecutors to ensure that corporate criminal resolutions include (and make available to the public) “an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement” and a “statement of relevant considerations that explains the Department’s reasons for entering into the agreement.” These minimum requirements, which have long been staples of such resolutions when brought by the Criminal Division, will now be required department-wide.

Monaco noted that the DOJ will continue to make improvements to its corporate criminal enforcement policies and practices, such as victim engagement and protection, enhancing the effectiveness of debarments and suspensions, and seeking \$250 million from Congress for targeted resources.

Key Takeaways

“Speed is of the essence” in providing information to the DOJ

The memo and Monaco’s remarks signal a near-zero-tolerance approach to companies that provide what the DOJ sees as “delayed disclosure” of information about individual accountability. Companies engaging with the DOJ can expect significant pressure and scrutiny of not just what they are producing to the DOJ but how quickly they are doing so. Companies should also expect that the DOJ will be looking to demonstrate this near-zero-tolerance approach in the near term by heavily reducing or denying cooperation credit based on what will be framed as delayed disclosure. Quickly identifying, collecting, reviewing, and (as appropriate) producing information to the DOJ in corporate criminal investigations is now more important than ever.

“Prior misconduct” does have some limits

While not narrowing the DOJ’s definition of prior misconduct as much as might have been hoped, the memo offers some limited comfort to companies facing DOJ scrutiny about the extent to which certain types of prior conduct will affect the nature of an upcoming corporate resolution by prioritizing: (1) prior domestic criminal resolutions within the past 10 years; (2) prior domestic civil or regulatory resolutions within the past five years; and (3) prior misconduct involving the same root causes, personnel, or management as the current misconduct. In addition, the confirmation that an acquiring company that appropriately integrates an acquired company into the acquirer’s effective compliance program will not have the acquired company’s prior resolutions counted against the acquirer is a welcome reassurance in the mergers and acquisitions context. In light of the memo’s guidance, it will be critically important for companies and counsel to understand any prior enforcement actions to identify that are and are not relevant under this modified DOJ approach.

Successive NPAs or DPAs will be harder to come by

The DOJ’s stated “disfavoring” successive non-conviction-based resolutions means companies with prior non-prosecution agreements or deferred prosecution agreements likely will need to demonstrate prompt and thorough self-reporting, cooperation, and remediation to have any hope of avoiding a criminal conviction at the end of a DOJ investigation.

Corporate enforcement policies—including policies surrounding monitorships—will be more consistent and standardized across the DOJ

While much of what was set out in the memo and Monaco’s remarks may be familiar to companies and counsel who regularly engage with DOJ components and offices most prominent in the DOJ’s corporate criminal enforcement efforts, the DOJ’s new commitment to standardizing some of those familiar policies and practices across its components

and offices is valuable for companies and counsel in clarifying expectations, providing predictability, and reducing potential confusion.

Heightened expectations for corporate compliance

Reaffirming its belief in the centrality of corporate compliance issues to its corporate criminal enforcement efforts, the DOJ will now consider additional issues—most notably incentives in and related to companies' compensation structures and companies' policies regarding personal device use—when evaluating corporate compliance programs. Ensuring well-designed, adequately resourced and empowered, and sufficiently tested measures are in place in these and other compliance-related areas remains critically important.

You can subscribe to future *White Collar* and *Government & Internal Investigations* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Joanna C. Hendon

212.210.1244
joanna.hendon@alston.com

Edward T. Kang

202.239.3728
edward.kang@alston.com

R. Joseph Burby IV

404.881.7670
joey.burby@alston.com

Mark T. Calloway

704.444.1089
mark.calloway@alston.com

Isabelle De Smedt

+32 2 486 8823
isabelle.desmedt@alston.com

Brian D. Frey

202.239.3067
brian.frey@alston.com

Michael R. Hoernlein

704.444.1041
michael.hoernlein@alston.com

Joseph H. Hunt

202.239.3278
404.881.7811
jody.hunt@alston.com

William H. Jordan

404.881.7850
202.756.3494
bill.jordan@alston.com

Meredith Jones Kingsley

404.881.4793
meredith.kingsley@alston.com

Jenny Kramer

212.210.9420
jenny.kramer@alston.com

Emily McGowan

704.444.1027
emily.mcgowan@alston.com

Paul N. Monnin

404.881.7394
paul.monnin@alston.com

Byung J. "BJay" Pak

404.881.7816
bjay.pak@alston.com

Jason D. Popp

404.881.4753
jason.popp@alston.com

T.C. Spencer Pryor

404.881.7978
spence.pryor@alston.com

Albert B. Stieglitz, Jr.

202.239.3168
albert.stieglitz@alston.com

Thomas G. Walker

704.444.1248
919.862.2212
thomas.walker@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2022

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500

BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32.2.550.3700 ■ Fax: +32.2.550.3719

CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ 214.922.3400 ■ Fax: 214.922.3899

LONDON: 4th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100

NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260

SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001

SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA, 94303 ■ 650.838.2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333