

DOJ Announces Far-Reaching Guidance on Corporate Criminal Enforcement

Insights

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PROFESSIONAL

The U.S. Department of Justice (“DOJ”) periodically announces shifts in its enforcement priorities. The announcements tend to correlate when the presidency changes hands, reflecting the law enforcement priorities of the new administration. While the day-to-day work of the DOJ, conducted by thousands of federal prosecutors around the country, is largely unaffected by high-level policy pronouncements, in the long term, shifts in enforcement priorities can have a tangible impact on companies and individuals subject to DOJ investigations. Thus, updates to the DOJ’s approach to investigating and prosecuting corporate crime announced recently by Deputy Attorney General (“DAG”) Lisa Monaco (“Monaco”) bear close scrutiny.



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These changes, documented in a detailed 15-page DOJ memorandum and announced in a speech on September 15, 2022,[1] supplement a well-publicized DOJ pronouncement issued a year earlier, in October 2021.[2] Taken together, they constitute a notable shift in DOJ enforcement priorities, including a renewed focus on motivating companies to voluntarily self-report misconduct as early as possible, prioritizing disclosure of evidence relevant to individual accountability, and encouraging companies to engage in compliance remediation during the pendency of investigations. In DAG Monaco’s words, using a “combination of carrots and sticks” approach, DOJ wants to “empower” companies to “do the right thing” by incentivizing them to invest in compliance and to identify and voluntarily disclose misconduct in a timely manner. DOJ is attempting to put teeth behind the announcement with a request of \$250 million from Congress next year for corporate crime initiatives. Given these developments, health care providers should carefully evaluate their compliance programs to ensure that they align with the DOJ’s new priorities.

Key Takeaways

There are five key takeaways from the new guidance where the DOJ has made policy changes intended to hold individuals and companies accountable for wrongdoing and encourage good behavior:

1. Individual accountability
2. Prior corporate misconduct
3. Voluntary self-disclosure
4. Compensation incentives
5. Independent compliance monitors

1. Individual Accountability

DAG Monaco underscored that the DOJ’s first priority in corporate criminal matters remains holding individuals accountable who commit and profit from corporate crime. Individual accountability has been a hallmark of DOJ enforcement since 2015, when former DAG Sally Yates first announced that prosecuting individuals responsible for corporate misconduct would be a DOJ priority.[3] For companies under DOJ investigation, assisting the DOJ with prosecuting culpable individuals is often critical to gain “credit” for cooperating with the government’s investigation to avoid criminal prosecution or reduce the amount of a fine. Indeed, DAG Monaco stressed that the DOJ was going to “do more

and move faster” in such cases, and that companies can maximize cooperation credit by self-disclosing individual misconduct in a timely, thorough, and transparent manner. While a company’s initial instinct may be to resist disclosing information about potentially-culpable employees, contractors or clients, the new guidance is clear that any undue or intentional delays in producing information will result in a reduction or denial of cooperation credit—especially if the delayed or undisclosed information reflects individual culpability.

Another subtle but important shift involves the timing of criminal prosecutions. Producing all relevant information in a timely manner is even more critical now, because prosecutors will strive to complete investigations and seek criminal charges against individuals prior to or at the same time as entering into a resolution with the company. When a prosecutor seeks to resolve the corporate case first, a robust investigative plan must be presented regarding the consideration of individual charges, including a timeline for completing the remaining work. This new requirement, alone, will likely result in increased individual prosecutions in coming years.

Notwithstanding these pronouncements, prosecutions against individuals will always be tougher to bring than corporate prosecutions. Corporations are vicariously liable for the actions of their employees, whose actions and intentions can be aggregated in a corporate case. In an individual prosecution, of course, the prosecutor must prove that the individual not only committed a crime, but did so with the requisite level of intent—always the biggest challenge in any individual enforcement action, particularly against a highly-placed, above-the-fray executive. Moreover, individuals are less likely to resolve a case prior to trial than a corporation. Thus, while the new policy may result in additional individual prosecutions, obtaining convictions will always be challenging.

2. Prior-Corporate Misconduct

While the October 2021 memorandum required prosecutors to consider a corporation’s full criminal, civil and regulatory record when resolving matters, the DOJ has now provided additional guidance on how they will evaluate historical misconduct. In particular, the DOJ will afford the most significance to criminal resolutions concerning conduct involving the same personnel or management as the current matter, with less emphasis on dated conduct (criminal matters more than 10 years old; civil or regulatory more than 5 years old) which may no longer accurately reflect a company’s current culture or commitment to compliance and therefore should be given less weight. The DOJ will further evaluate (i) the nature and circumstances of the prior misconduct and whether it shares the same root causes as the present misconduct, (ii) how long ago the prior misconduct occurred, (iii) whether the conduct under investigation occurred under the same management team or executive leadership, (iv) whether the company’s current culture shows a commitment to compliance, and (v) for companies operating in highly regulated industries, how a company’s history compares to its peers. Notably, in the case of acquisitions, misconduct of acquired entities should be accorded less weight where the acquiring company integrated its new business into an effective compliance program, and remediation of those issues are addressed “promptly and properly” following the transaction. While the new guidance will be problematic for certain repeat offenders, it is encouraging that the DOJ will carefully evaluate if prior resolutions are truly relevant to a current investigation.

3. Voluntary Self-Disclosure

According to DAG Monaco, the easiest way for a company to avoid a guilty plea or indictment is through voluntary self-disclosure, cooperation and timely remediated misconduct (unless there are aggravating factors). The DOJ has historically attempted to incentivize companies to come forward and voluntarily disclose misconduct. However, for the first time, DAG Monaco announced that every component of the DOJ that prosecutes corporate crime must institute a formal, written policy that incentivizes voluntary self-disclosure. In addition, and importantly, if a company voluntarily self-discloses misconduct and has “implemented and tested an effective compliance program,” the DOJ will not require an independent compliance monitor as part of a final resolution. This is an important development, as a compliance monitor is an expensive and difficult feature of an increasingly large number of resolutions for corporations.

4. Compensation Incentives

Defense lawyers were particularly struck by the DOJ's focus on corporate compensation in the new guidance. In the memo and her remarks, DAG Monaco emphasized the need to both adequately fund a compliance department and develop a compliance-oriented corporate culture where systems are designed to reward compliance and penalize individuals whose actions or omissions contributed to criminal conduct. In so doing, the DOJ will now examine whether a company's compensation system includes appropriate deterrence measures, such as clawback provisions or escrowed compensation, as well as incentive measures such as affirmative metrics and benchmarks to reward pro-compliance behavior. In recent years, some life sciences and medical device companies have already shifted compensation models away from volume-based pay for sales representatives and managers, recognizing that the DOJ carefully scrutinizes this traditional compensation model. The new guidance goes even further in specifically recognizing that companies that reward employees who report misconduct internally will receive enhanced cooperation credit. Moreover, by emphasizing financial sanctions for individuals, DOJ appears to be trying to shift the burden of corporate financial penalties away from shareholders and onto those who are more directly responsible for the wrongdoing.

5. Independent Compliance Monitors

Finally, DAG Monaco previewed the release of new guidance for prosecutors on how to identify the need for an independent compliance monitor, how to select a monitor, and how to oversee monitors to ensure that the scope of every monitorship is tailored to the misconduct and to the company's related compliance deficiencies. This can be accomplished, in part, by receiving regular updates to verify that the monitor stays on task and budget. While these comments may signal more frequent imposition of monitors in connection with resolutions, specific criteria surrounding the monitor process is a welcome development for defendants and defense counsel.

Implications/Things To Do

The "Monaco Memo" is not a high-minded statement of vague principles. To the contrary, it provides a thoughtful, granular roadmap to the DOJ's current corporate crime priorities. While it provides some helpful guidance to potential defendants and counsel, the practical impact of some of the announcements (such as the focus on compensation incentives) may take years to determine. Above all, the DOJ continues to emphasize that a strong compliance program is essential to avoiding DOJ enforcement. In light of these developments, companies should implement overlapping, demonstrably effective systems to establish and enhance a culture of compliance which incentivizes good behavior and penalizes misconduct while also instilling an effective corporate compliance program which addresses a self-disclosure mechanism and an ability to quickly provide information that shows individual culpability.

Given this "combination of carrots and sticks" being promoted by the DOJ, companies faced with an enforcement action should consult with experienced counsel as early as possible to navigate the DOJ's evolving guidance in this area of enforcement.

[1] ["Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group"](#)

[2] ["Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies "](#)

[3] ["Individual Accountability for Corporate Wrongdoing"](#)

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