DOJ Issues Revised Guidance on Key Corporate Enforcement Requirements

International Alert
10.29.2021

On October 28, 2021, following her speech to the American Bar Association's National Institute on White Collar Crime, Deputy Attorney General Lisa Monaco issued a memorandum on "initial revisions" to the Department of Justice's (DOJ) corporate criminal enforcement policies (Corporate Crime Advisory Group and Initial Revisions to Corporate Crime Enforcement Policies). The memorandum is the first in what likely will be a series of changes in approach by the Biden administration to white collar criminal enforcement, including investigations under the Foreign Corrupt Practices Act (FCPA).

The memorandum announces changes, with immediate effect for future and pending cases, in three areas:

- Consideration of a company's entire history of past misconduct when making decisions on charging and dispositions of investigations
- Requirements for corporations under investigation again to provide " ***all*** relevant facts relating to the individuals responsible for the misconduct" in order to gain full credit for cooperation (emphasis added)
- Guidance on the DOJ's use of corporate monitors

The memorandum also announces the formation of a "Corporate Crime Advisory Group" within the DOJ with a "broad mandate" to update the Department's approach to various issues. The group will examine "cooperation credit, corporate recidivism, and the factors bearing on the determination of whether a corporate case should be resolved through a deferred prosecution agreement (DPA), non-prosecution agreement (NPA), or plea agreement," among other topics. The memorandum further states that the group "will solicit input from the business community, academia, and the defense bar" when considering updates to policies and practices, such as the use of new technology.

Consideration of *All* Past Misconduct

In language dating back to 2008, the current Justice Manual states that "[p]rosecutors may consider a corporation's history of ***similar conduct***" when making charging and disposition decisions (emphasis added). The new memorandum states that "prosecutors are [now] directed to consider ***all*** [prior] misconduct by the corporation" in making these determinations. Prosecutors must take a "holistic approach" – as Deputy Attorney General Monaco stated in her speech:

> A prosecutor in the FCPA unit needs to take a department-wide view of misconduct: Has this company run afoul of the Tax Division, the Environment and Natural Resources Division, the money laundering sections, the U.S. Attorney's Offices, and so on? He or she also needs to weigh what has happened outside the department — whether this company was prosecuted by another country or state, or whether this company has a history of running afoul of regulators.

Part of the DOJ's justification for this approach is that "[a] corporation's record of past misconduct … may be indicative of whether the company lacks the appropriate internal controls and corporate culture to disincentivize criminal activity, and whether any

proposed remediation or compliance programs, if implemented, will succeed." Deputy Attorney General Monaco cited to DOJ statistics that between 10 and 20 percent of recent significant corporate resolutions were entered into by companies that had previously resolved other matters with the DOJ. These statements are the latest indication of the DOJ's view, which has evolved over time, that a company's culture is critical to deterrence and compliance – a view that is shared by many compliance professionals.

The inclusion of ***foreign*** "criminal, civil, or regulatory enforcement actions" against the company or any of its affiliates could make a significant impact. At least in theory, this language substantially expands the universe of a company's "record" of behavior under consideration to include actions taken by foreign governments related to laws different in substance from those in the United States or under legal systems that do not grant the same due process or other considerations to companies that are the subjects of those actions.

How these assessments of all misconduct will work in actual cases remains to be seen but warrants close scrutiny. Even recent cases, such as the Credit Suisse DPA and related dispositions, might have looked different with this policy fully in place. In addition to an FCPA-related NPA in 2018, Credit Suisse also entered a large settlement with the DOJ in 2016 related to "false and irresponsible representations about residential mortgage-backed securities." In late 2020, Swiss authorities issued criminal charges against the bank for failing to prevent money laundering in transactions related to Bulgaria.

In her speech, Deputy Attorney General Monaco stated that the DOJ will be looking further at the problem of corporate recidivism, including companies with repeated violations or dispositions across different parts of the Department. She hinted that some recidivists may not be eligible for certain types of "pre-trial diversion" (such as DPAs and NPAs) in the future. She noted that the current focus on DPA and NPA compliance is also part of this assessment.

Provision of All Relevant Information on Individuals to Gain Cooperation Credit

Over the past several weeks, various DOJ officials, including Attorney General Merrick Garland, have emphasized that they are refocusing on the prosecution of individual wrongdoers as a "top priority." Deputy Attorney General Monaco emphasized this, as well, and the new memorandum asserts that "[o]ne of the most effective ways to combat corporate misconduct is to hold accountable the individuals who perpetrated the wrongdoing."

The memorandum reinstates the requirement from the 2015 " Yates Memorandum" that, "to qualify for any cooperation credit, corporations must provide to the Department ***all relevant facts*** relating to ***[all of] the individuals*** responsible for the misconduct" (emphasis added). This requirement had been somewhat relaxed by the previous administration – the current Justice Manual language (dating from November 2018) focuses on information related to "all individuals ***substantially involved*** in" potential wrongdoing (emphasis added). The new memorandum states that companies must provide such information on "individuals inside and outside of the company."

The reimposition of this requirement likely will significantly increase the financial costs of cooperation for companies under investigation, opening up large amounts of non-privileged information to potential disclosure and attendant review and analysis. This requirement also will likely increase the already difficult challenges facing companies under investigation raised by, for example, data privacy and national security laws in other countries. The provision of information related to "individuals with a peripheral involvement in misconduct" to the DOJ will heighten potential exposure of companies to claims related to data privacy or other issues by a larger universe of persons than was the case under the now-superseded standards.

Shift Toward Monitorships

The new memorandum revises or supersedes parts of the 2018 " Benczkowski Memorandum," which established a higher standard for the imposition of corporate monitorships than had been used in the past (stating, for example, that "the imposition of a monitor will not be necessary in many corporate criminal resolutions"). In her speech, Deputy Attorney General Monaco stated,

> To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance. Instead, I am making clear that 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.

The new memorandum establishes that monitors should be used in cases of "demonstrated need" and where there will be "a clear benefit." Such a need could exist where a company's program or related controls are "deficient" or "are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution." If the opposite is true – the program is "tested, effective, adequately resourced, and fully implemented at the time of a resolution, a monitor may not be necessary." The new memorandum also emphasizes that any monitorship be "appropriately tailored" – which is generally consistent with DOJ policy over time.

Deputy Attorney General Monaco stated in her speech that the Corporate Crime Advisory Group will continue to examine other aspects of corporate monitorships, such as "how we select corporate monitors, including whether to standardize our selection process across the divisions and offices."

While this policy revision likely presages more monitors in future cases, it does not change the best protection a company can have against the imposition of a monitor – having in place a risk-based, fully implemented, rigorously monitored, and regularly tested compliance program and related controls, as well as a supportive corporate culture and tone at the top.

Miller & Chevalier will continue to monitor these changes, including by analyzing the implementing changes to the Justice Manual.

For more information, please contact:

John E. Davis, jdavis@milchev.com, 202-626-5913
