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DOJ's New Sheriff in Town Raises the Bar on Corporate Compliance

DEPUTY AG COMMENTS MARK SEA CHANGE IN DOJ CRIMINAL PROSECUTIONS

In remarks given yesterday to the American Bar Association's 2021 White Collar Crime National Institute, Deputy Attorney General Lisa Monaco made clear that the Department of Justice (DOJ) is changing its approach to the enforcement of corporate crime. Recalling the DOJ's takedowns of executives at WorldCom, Qwest Communications, Adelphia, Tyco, and Enron at the beginning of her career, Monaco commented, "I've experienced how—when given the right resources and support including dedicated agents—prosecutors can uncover and prosecute the most sophisticated corporate criminals."

This served as Monaco's introduction to three new initiatives—with the promise of additional changes in the works—that will significantly impact the way U.S. businesses view regulatory compliance and handle government criminal enforcement actions. Behind these initiatives is a loud and strong message to federal prosecutors that they can count on a surge of Department funding to prosecute white collar cases and that they should not fear losing cases or consuming Department resources in prosecuting cases, particularly against wealthy defendants whose considerable resources might have deterred prosecutorial efforts in the past.

Significantly, Monaco also highlighted a philosophical shift within the federal government. Since 9/11, the Federal Bureau of Investigation (FBI) had increasingly redirected resources from white collar to anti-terrorism. By embedding an FBI squad in the Fraud Section of the DOJ Criminal Division, white collar prosecutions have been reprioritized. Monaco's comments make

clear that national security remains a priority by stating that many white-collar crimes – such as data incursions – are national security threats.

Overall, Monaco's comments reinforce individual prosecutions as a Department priority, but there will be a renewed focus on corporate liability. Monaco emphasized the importance of preventative compliance programs and strong compliance culture, “a corporate culture that fails to hold individuals accountable, or fails to invest in compliance—or worse, that thumbs its nose at compliance—leads to bad results.” While she did not refer explicitly to an Environmental, Social and Governance (ESG) framework, Monaco effectively summed up the governance component of ESG, commenting that “companies serve their shareholders when they proactively put in place compliance functions and spend resources anticipating problems.”

Announced Changes to DOJ Enforcement Policy

First, Monaco stated that going forward **corporations must name ALL the individuals involved in or responsible for misconduct** in order to receive credit for cooperating with investigations. This recalls the substance of the Yates memo, issued in 2015; however, Monaco's comments expand upon this guidance, stating that *every* person involved must be named, not just those “substantially involved”.

Second, Monaco next announced an initiative that likely represents the most wide-ranging change. Monaco commented that DOJ will direct its prosecutors to **consider all prior misconduct at a corporation—no matter whether the misconduct was civil, regulatory, criminal and/or unrelated in any way to the situation under investigation—in evaluating resolutions related to current misconduct**. Essentially, Monaco is directing prosecutors to judge whether a corporation is a bad actor, stating that “prosecutors will be directed to consider the full criminal, civil and regulatory record of any company when deciding what resolution is appropriate for a company that is the subject or target of a criminal investigation.”

Third, Monaco **rescinded any guidance (to the extent it exists) that corporate monitors are disfavored**. Indeed, implicit in her remarks is that monitors are favored, or at least an important part of DOJ's enforcement toolkit. This means prosecutors are once again free to compel corporations to pay to be watched, evaluated, and reported on for years after resolution with the government.

What This Means for You

Monaco's remarks could not be clearer in signaling to U.S. businesses a change in DOJ's approach to the enforcement of corporate compliance. First and foremost, the implementation of these initiatives will necessarily change the parameters of corporate compliance programs, as well as corporate

strategy for resolving disputes with the government. Monaco underscored this point, stating that “companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct—or else it’s going to cost them down the line.”

These changing directives affect every phase of compliance. During the investigatory phase, a corporation’s entire criminal, civil and regulatory record is now open to scrutiny. Additionally, the definition of “cooperation” will be harder to satisfy, or, as Monaco commented, corporations “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.” Finally, during the dispute resolution phase, the seeming presumption against corporate monitors has been eliminated. For some corporations, this final component will have knock-on effects for compliance teams that long survive the enforcement action itself. As if these measures were not cause enough to revisit the scope of existing compliance programs, Monaco ended her presentation forebodingly, remarking that “this is a start—and not the end—of this administration’s actions to better combat corporate crime.”

Contact Us

If you have any questions about this update, how it might affect your business, or questions related to corporate compliance and government investigations, contact Catherine Hanaway, Jeff Jensen, Gregg Sofer, Scott Glabe, Tim Garrison, Steve Holtshouser, Matt Diehr, Robert Peabody, Michael Martinich-Sauter, or your Husch Blackwell attorney.