

LEGAL UPDATES

PUBLISHED: SEPTEMBER 22, 2022

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DOJ's New Policies Encourage Voluntary Self-Disclosure, Compensation Tied to Compliance

In a speech given at NYU on September 15, 2022, Deputy Attorney General Lisa Monaco reviewed new and enhanced Department of Justice (DOJ) policies regarding criminal enforcement related to corporate entities. Assistant Attorney General Kenneth Polite gave a similar speech in Texas the next day. Monaco recalled her comments from October 2021, where she emphasized, among other things, DOJ's focus on holding individuals accountable as part of corporate white-collar investigations, as well as a renewed focus on corporate recidivism and the use of compliance monitors. Monaco's most recent comments appear to signal that DOJ will be taking a significantly more aggressive posture in corporate investigations. Monaco discussed five points of emphasis.

First, individual accountability remains DOJ's top priority in corporate investigations. Importantly, however, Monaco emphasized that DOJ will penalize companies that seem to be slow-walking or delaying their disclosures of information related to misconduct and potentially culpable individuals. She stated that "in individual prosecutions, speed is of the essence" and that "undue or intentional delay in producing information or documents" related to individual culpability will "result in the reduction or denial of cooperation credit."

Second, as she noted in October 2021, a company's history of misconduct is to be considered as part of any resolution. Monaco clarified that DOJ will be most interested in prior misconduct that occurred in the United States, that involves the same personnel or management, or that involves the same types

of root causes. Older transgressions, i.e., criminal resolutions that are more than 10 years old or civil resolutions more than five years old, will be given “less weight.”

Third, voluntary self-disclosure of misconduct is a new DOJ point of emphasis. Monaco stated that companies should expect “concrete and positive consequences” to flow from voluntary and timely disclosures. She compared this new policy to the Antitrust Division’s long-standing Leniency Program and DOJ’s disclosure program for Foreign Corrupt Practices Act violations. Monaco announced that these programs will be expanded to be “Department-wide.” Every DOJ component will be required to develop programs that emphasize voluntary self-disclosure. Importantly, Monaco announced common principles that will apply across DOJ with respect to self-disclosures: absent aggravating factors, if a company voluntarily self-discloses and cooperates, DOJ will **not** seek a guilty plea from the company and will **not** require the imposition of a compliance monitor.

Fourth, independent compliance monitors remain a key part of enforcement. Monaco is now directing prosecutors to “monitor the monitors,” with guidance to ensure that the monitors stay on task and on budget. Monitor selections will be made “pursuant to a documented selection process.”

Fifth, DOJ will also be scrutinizing a company’s compensation packages to evaluate whether compliance is rewarded and non-compliant misconduct is penalized. Monaco described this as way to measure a company’s compliance culture. She stated that prosecutors will evaluate whether, after learning of misconduct, a company “actually claws back compensation or otherwise imposes financial penalties” on culpable employees. Monaco has instructed DOJ’s Criminal Division to develop further guidance by the end of the year as to how DOJ will reward corporations that use clawback measures or similar arrangements in the compensation packages and how to shift the burden of corporate financial penalties away from shareholders and onto the individuals who are directly responsible.

What this means for you

DOJ appears to be flexing its muscles in the compliance and corporate enforcement space, especially as it relates to self-disclosures and compliance aspects of compensation packages. We will watch these areas carefully over the coming months and issue further alerts when necessary.

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If you have any questions about this update, how it might affect your business, or questions related to corporate compliance and government investigations, contact Cormac Connor or your Husch Blackwell attorney.