On September 15, 2022, Deputy Attorney General Lisa O. Monaco delivered public remarks, coupled with publication of an internal memorandum, expanding upon her October 2021 memorandum detailing changes to the Department of Justice’s (“DOJ”) corporate enforcement policies. While Monaco’s remarks did answer some outstanding questions created by last year’s address, it also announced further changes that companies must consider when implementing its compliance program and conducting internal investigations.

Any perceived delay in identifying “critical” evidence may result in the denial of cooperation credit

In her memorandum last year, Monaco directed the DOJ to “reinstate” the prior guidance that would, again, require the disclosure of “all nonprivileged information relevant to all individuals involved in the misconduct,” regardless of their position, status, or seniority.

Monaco’s new statements outline additional policy changes that would empower DOJ prosecutors to further expedite investigations of individuals. Monaco remarked that companies have often historically delayed the disclosure of “hot” documents or evidence while determining how to mitigate the damage of this evidence. Under the new DOJ policy, any “undue or intentional delay” in the production of critical documents or information will result in the reduction or denial of cooperation credit. The first reaction of a cooperating company that discovers critical evidence, according to Monaco, should be to notify prosecutors. In conjunction with this new policy, Monaco also announced that criminal charges against individuals would now be expected to be brought in parallel with any resolution with the company or, at the very least, a plan or timeline for completing the investigation of individuals must be adopted at the time of resolution.

Priorities in the disclosures of past misconduct are identified, but there is still no limit to extraterritorial reach

Monaco’s remarks and her internal memorandum to DOJ enforcement components clarified outstanding questions about the relevancy of a company’s past misconduct. Previously, Monaco announced that the DOJ intended to substantially broaden its consideration of a company’s past misconduct to include all past transgressions. This
language not only extended to cover misconduct discovered during foreign enforcement actions, but also encompassed actions against entities within the company’s corporate family, without any identified limitations for time period, industry, or geography.

In her recent communications, Monaco made it clear that the DOJ will prioritize certain misconduct. Monaco identified “most significant types of prior misconduct” as “criminal resolutions here in the United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct.” Further, “dated conduct will generally be accorded less weight.” In considering the nature and circumstances of the prior conduct, the DOJ will consider whether the misconduct shares the same cause as the present misconduct and whether the company is an “outlier” within its industry. Nonetheless, Monaco emphasized that companies with proven track records of compliance that acquire companies with less than stellar records will not be treated as recidivists.

Emphasis of voluntary disclosure

Monaco emphasized that the DOJ will expand its voluntary self-disclosure programs. Recognizing the success of disclosure programs for the DOJ’s Antitrust, FCPA, and National Security sectors, she posited that every enforcement component that prosecutes corporate crime will be expected to adopt a formal documented disclosure policy. She also further clarified the voluntary disclosure’s benefit stating “[a]bsent the presence of aggravating factors, the Department will not seek a guilty plea where a corporation has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct.”

New monitor guidance to come

Monaco also announced new transparent guidance for monitorships. Monaco announced that the DOJ will be releasing parameters to guide prosecutors to “identify the need for a monitor, how to select a monitor, and how to oversee the monitor’s work,” in addition to documenting a monitor selection process. Notably, voluntary disclosure of relevant information, coupled with an effective compliance program, will not require the appointment of an independent compliance monitor for cooperating organizations.

Adopting the proper compensation incentives to deter individual misconduct

Emphasizing the importance of corporate culture, Monaco encouraged companies to consider whether its compensation system deters misconduct. Monaco specifically identified that companies should consider adopting claw back provisions and other measures to hold culpable individuals financially accountable.

Key Takeaways

Given the renewed emphasis this new policy places on voluntary disclosures and the repercussions from any delay in identifying “hot” evidence, any company and its counsel must expedite any decision to disclose and consider the benefits and costs from doing so. The quick development of relevant information through an efficient investigation will allow an organization to identify critical evidence, along with any helpful context. This will often require the collection and review of an organization’s historical conduct, as it may be relevant in the DOJ’s ultimate decision on how to resolve their investigation.

For these reasons, the new changes to the DOJ’s corporate enforcement policy reinforce the need for a robust global
compliance program. Any compliance program must incorporate the incentives that discourage financial windfalls to wrongdoers and properly divests such individuals of any wrongfully obtained profits. And not only should such programs track resolutions with both domestic and foreign authorities, but it should also have some process for following enforcement actions within its industry to determine if a company is an “outlier,” so that this information is readily available and can be promptly disclosed, if need be. Such a program will not only help a company avoid costly enforcement actions but better position it for future growth through acquisitions.

These changes also emphasize the importance of implementing a dynamic internal investigation function or a protocol for engaging outside counsel early and promptly. The repercussions of delaying evidence related to individual accountability stresses the importance of a robust function that can deploy investigation counsel early to quickly evaluate any evidence prior to disclosure and then efficiently conduct an investigation. The DOJ is likely to vigorously enforce this policy, given that this approach has bolstered the policy first announced in the Yates Memorandum wherein it attempts to persuade the organization that its interests are not aligned with individuals that are responsible for the violative conduct.

Nonetheless, while Monaco’s remarks clarify the DOJ’s new corporate enforcement policy, they fail to address outstanding questions as to the DOJ’s limitations. Although the DOJ’s emphasis on recent, domestic conduct is clear, it still appears that the DOJ will require companies to disclose misconduct identified in the resolution of enforcement actions with foreign authorities.

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