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Deputy Attorney General Monaco Reiterates DOJ's Focus on Prosecuting Individuals and Announces New Guidelines for Prosecuting Corporate Crime

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On September 15, Deputy Attorney General (DAG) Lisa O. Monaco announced changes to the Department of Justice's (DOJ) Corporate Criminal Enforcement program. In her speech, DAG Monaco emphasized DOJ's commitment to prosecuting corporate crime and outlined five key points for how DOJ will better "square [its enforcement program] with [the] realities of [a] modern economy:"

1. **Continued Focus on Individual Prosecutions.** Continuing a theme stretching back to her 2021 speech reinstating the Yates Memo, DAG Monaco made clear that DOJ's top priority is prosecuting individuals. In order to facilitate that, DAG Monaco announced (i) further restrictions on the ability of entities to receive cooperation credit if they do not "timely" produce "all relevant, non-privileged facts and evidence about individual misconduct;" and (ii) instructed prosecutors to "strive" to "seek" individual criminal charges "prior to or simultaneously with" a corporate resolution. Under DAG Monaco's new guidance, a prosecutor can only avoid bringing individual charges at the time a corporate resolution is reached if they receive written permission from their supervising US Attorney or Assistant Attorney General.

2. **Greater Punishment for Corporate "Recidivism."** Despite passionate arguments from the legal and business communities over the last year, DAG Monaco re-emphasized that DOJ would continue to consider the "full criminal, civil, and regulatory record of any company" when reaching a resolution. In particular, DAG Monaco directed prosecutors to give the most weight to any criminal resolutions (US or foreign, though US are the "most significant") reached in the 10 years before the conduct under investigation and any civil or regulatory resolutions reached in the 5 years before the conduct under investigation. However, DAG Monaco's new guidance does not completely dismiss the "dated" conduct — it just directs prosecutors to accord that misconduct "less" weight. Finally, DAG Monaco made clear that DOJ will disfavor companies that have multiple successive non-prosecution or deferred prosecution agreements — "companies can no longer assume that they are entitled to a non-prosecution or deferred prosecution agreement because they are frequent fliers." Under this administration, gone are the days when companies can price the costs of an enforcement action into their businesses as a business risk.

3. **Greater Emphasis on Voluntary Self-Disclosure.** Expanding on DOJ's efforts over the last six years (Foreign Corrupt Practices Act of 1977 (FCPA) self-disclosure, Antitrust Leniency, etc.), DAG Monaco announced that all DOJ "components" that prosecute corporate crime will be required to have a written self-disclosure program incentivizing companies to come forward. While the specifics will vary across the various DOJ components, DAG Monaco emphasized that "predictability is critical" and announced some key common principles:

a. "Absent aggravating factors," DOJ will ***not*** "seek a guilty plea when a company has voluntarily self-disclosed, cooperate, and remediated misconduct;" and

b. DOJ will ***not*** "require an independent compliance monitor" for such a company if, by the settlement, it has "implemented and tested an effective compliance program."

DAG Monaco closed this portion of her speech by making a not particularly veiled threat — she expects "resolutions over the next few months will reaffirm how much better companies fare when they come forward and self-disclose."

4. **Greater Clarity Around Monitors.** DAG Monaco also announced the release of new guidance on the selection and direction of independent monitors. In particular, she announced:

   a. new guidance for prosecutors on when monitors are appropriate, how they should be selected, and how they should be overseen;

   b. all new monitors will be selected "pursuant to a documented selection process that operates transparently and consistently" with the process "readily available to the public;" and

   c. all new monitorships must be "tailored to the misconduct and related compliance deficiencies" of the settling company with the monitor's responsibilities and authority "well-defined" in writing and a "clear workplan" agreed upon in advance between the settling company and the monitor. In addition, the prosecutor is now responsible for ensuring they receive "regular updates" from the monitor to ensure the monitor "stays on task and on budget."

5. **Incentivizing a Corporate Culture of Compliance.** Finally, DAG Monaco also announced that DOJ's evaluation of the effectiveness of a company's compliance program would expand beyond how well it was resourced to include:

   a. **Employee & Executive Carrots.** That is, what incentives, if any, is the company offering for compliant behavior? For instance, was the company using "affirmative metrics and benchmarks to reward compliance-promoting behavior?"

   b. **Employee & Executive Sticks.** That is, what clearly delineated financial penalties was the company actually exercising for non-compliant behavior? In particular, DAG Monaco emphasized that DOJ will look favorably on companies that "actually claw[] back compensation" or "otherwise impose[] financial penalties."

When combined with DOJ's request for $250 million in funding for corporate crime enforcement programs, DAG Monaco's speech makes it clear that DOJ's leadership no longer wants to accept business as usual and wants to make a business case for what they view as responsible corporate behavior.

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