

**Davis Polk**

# **Recent Developments in DOJ Policy on Corporate Criminal Enforcement**

# DAG's October 2021 speech

- Individual accountability
  - Reversion to the Yates Memo
  - Timely disclosure of all facts and evidence
- Prior misconduct
  - Consider all prior misconduct (civil/criminal, foreign/domestic)
  - Questioned whether a company should ever be permitted to get successive NPAs or DPAs, suggesting that second-time offenders would be forced to plead guilty
- Monitors – no presumption against monitors
- Corporate Crime Advisory Group to review and propose additional guidance

# Corporate Crime Advisory Group and meetings with stakeholders

## Corporate Crime Advisory Group

- Internal DOJ working group
- Representatives from DOJ that have experience with corporate enforcement

## Spoke to stakeholders

- Public interest groups
- Consumer advocacy organizations
- Experts in corporate ethics and compliance
- Representatives from the academic community
- Audit committee members
- In-house attorneys
- Previous corporate monitors
- Members of the business community
- Members of the defense bar

# Individual accountability

- Individual prosecutions prior to or contemporaneous with corporate resolution
  - Potential to slow down investigations and corporate resolutions
  - Risk that individual prosecutions will be rushed
- Immediate production of “hot” documents?



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Despite those steps forward, we cannot ignore the data showing overall decline in corporate criminal prosecutions over the last decade. We need to do more and move faster. So, starting today, we will take steps to empower our prosecutors, to clear impediments in their way, and to expedite our investigations of individuals.

# Voluntary disclosures

- Instructed all DOJ components to have a voluntary disclosure policy, citing as examples:
  - FCPA corporate enforcement policy
  - Antitrust Division leniency policy
  - NSD export controls disclosure policy
- Two requirements for these policies:
  - Presumption against guilty plea, absent aggravating circumstances, if company voluntarily self-discloses, fully cooperates, and remediates
  - No independent compliance monitor if, at the time of resolution, company has implemented and tested an effective compliance program
- Not a particularly large carrot – a weaker promise than examples cited

# Prior misconduct

- More nuanced than October 2021 speech
- Not all prior misconduct created equal
  - Domestic or foreign?
  - Same individuals?
  - Same controls/root cause?
  - Aged?
  - Compare to other companies in same industry
- Favorable treatment of compliant companies that acquire and clean up non-compliant companies, so long as they clean up misconduct “promptly”
- “Disfavor” successive NPAs and DPAs
- Particular risk for large, global companies

# Monitors

- No presumption against monitors, but no presumption in favor of monitors
- Guidance on selection
  - 10 factors prosecutors will consider
    - Many relate to effectiveness and testing of compliance program
    - Other factors: interim changes to risk profile, unique risk challenges, oversight by foreign regulators or existing monitor
  - Driving principle is whether compliance program is implemented, effective, and tested
- “Monitor the monitor”: prosecutors empowered to oversee monitors, receive reports
  - Scope of monitor’s work
  - Budget

# Compliance programs

- Cites favorably to Criminal Division's Evaluation of Corporate Compliance Programs
- Three new factors
  - Financial incentives, including clawbacks
  - Non-disparagement provisions
  - Personal devices and messaging apps
- More guidance yet to come
- New hires demonstrate DOJ's seriousness



**Glenn Leon**  
-Chief, Fraud Section  
-Fmr. Chief Ethics and  
Compliance Officer,  
(Hewlett-Packard Enterprise)



**Matt Galvin**  
-Counsel, Compliance and  
Data Analytics, Fraud  
Section  
-Fmr. Heads of Ethics and  
Compliance (AB InBev)



# Recommendations

- Companies should seriously weigh the risks before deciding to voluntarily self-disclose misconduct, including:
  - Heightened cooperation requirements
  - Heightened remediation/compliance requirements
  - The fact that benefits for disclosing under the policy are not as significant as under the FCPA corporate enforcement policy, Antitrust leniency policy, and NSD disclosure policy
  - Additional consequences of disclosure (potential civil and administrative actions, both here and abroad)
- Cooperation requires frequent communications with prosecutors
- Compliance enhancements
  - Personal devices and messaging apps
  - Financial incentives, including claw backs
  - Non-disparagement provisions in employment agreements