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Deputy Attorney General Lisa Monaco announces new guidance on DOJ corporate enforcement

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On September 15, 2022, Deputy Attorney General Lisa Monaco provided additional guidance around DOJ's corporate criminal enforcement. In a speech and accompanying memorandum, the DAG reiterated DOJ's commitment to corporate criminal enforcement and addressed topics such as individual accountability, corporate cooperation, recidivism, voluntary self-disclosures, independent compliance monitors, off-systems communications and the promotion of compliance through financial incentives.

On Thursday, September 15, 2022, Deputy Attorney General Lisa Monaco made good on her pledge to provide additional guidance around DOJ's corporate criminal enforcement. During a speech and in an accompanying memorandum, the Deputy Attorney General reiterated DOJ's commitment to corporate criminal enforcement—including through a request to Congress for $250 million for corporate criminal enforcement initiatives—and addressed topics such as individual accountability, corporate cooperation, recidivism, voluntary self-disclosures, independent compliance monitors, off-systems communications and the promotion of compliance through financial incentives, including compensation clawbacks. In crafting the new guidance, the DAG noted that the Department collected a broad range of perspectives from outside experts, including public interest groups, ethicists, academics, audit committee members, in-house attorneys, former corporate monitors, and members of the business community and defense bar, and incorporated the insights collected. These varying perspectives appear to have impacted the new guidance and approach by the DAG, which continued to strike an exacting tone but, unlike her speech in October 2021, included some carrots in addition to the sticks.

Although the speech and memorandum include specific details, the ultimate impact of the new guidance is not yet clear, including because the guidance still leaves prosecutors considerable discretion and because additional guidance is yet to come. Nonetheless, there are several key aspects that clients should review closely and we will continue to monitor whether these changes will be a significant "game changer."

1. Individual accountability and speed of investigations

The DAG reiterated that DOJ's number one priority is individual accountability, and emphasized its intention to prosecute individuals who commit and profit from corporate crime. This priority is of course not new, and dates back at least a decade. To "empower" prosecutors, the DAG announced that prosecutors will have the ability to reduce or eliminate cooperation credit "[w]here prosecutors identify undue or intentional delay in the production of information or documents—particularly with respect to documents that impact the government's ability to assess individual culpability." Although "timeliness" is also not an entirely new focus of DOJ in evaluating cooperation credit, what does appear new is an implied timeline for the disclosure of evidence discovered during the course of an investigation. According to the DAG, "if a company discovers hot documents or evidence, its first reaction should be to notify the prosecutors." This may embolden prosecutors to claim that companies are delaying when in fact they are carrying out their fiduciary duties to shareholders and attempting to understand evidence before they provide it to DOJ.

Additionally, the DAG stated that prosecutors should aim to bring individual prosecutions prior to or at the same time as a corporate resolution in order to efficiently resolve individual prosecutions. In instances where it is beneficial to resolve a corporate case prior to an individual prosecution, prosecutors must have an investigative plan detailing any outstanding work and a timeline to complete that work. The presumption in favor of individual prosecutions prior to or contemporaneous with a corporate resolution will likely slow down corporate enforcement because preparing a case for an indictment most often takes more time than resolving a negotiated resolution (for both individuals or corporations).

2. Corporate recidivism

The DAG announced additional helpful guidance for evaluating corporate recidivism, and in so doing clarified the comments in her October 28, 2021 speech, in which she stated that the Department would consider the full criminal, civil, and regulatory record of any company when deciding the appropriate resolution. The DAG acknowledged that this aspect of her October 2021 speech received the most criticism from the defense bar and companies, and on Thursday, the DAG acknowledged that "not all instances of prior misconduct are created equal." This is a step forward.

When considering prior misconduct in connection with a corporate resolution, the DAG explained that DOJ would give more weight to prior misconduct in the United States, as well as prior misconduct involving the same personnel or with the same root cause as the current misconduct under investigation. On the flip side, the DAG explained that "dated" prior misconduct, which she defined as criminal misconduct that occurred more than 10 years earlier or civil/regulatory misconduct that occurred more than five years earlier, would not be viewed as negatively as misconduct closer in time. Addressing the fact that almost all companies in highly regulated industries have some instances of prior misconduct, the DAG stated that in evaluating corporate recidivism, the Department would compare companies in highly regulated industries with other companies in those industries. Likewise, the memorandum instructs prosecutors to examine the "factual admissions" in prior resolutions, which appears to address a criticism of her October 2021 speech that a no-admit-no-deny resolution should carry less weight than a resolution with factual admissions.

The DAG also made clear the Department's desire to encourage companies to reform and improve the compliance structure of less-compliant companies that have been acquired, echoing a sentiment from the FCPA corporate enforcement policy. The DAG noted that an acquiring company with a strong record of compliance would not be treated as a recidivist company as long as it promptly addressed compliance issues in the acquired company.

Nevertheless, the DAG reiterated her skepticism from her October 2021 speech in which she questioned whether companies should get the benefit of successive non-prosecution agreements or deferred prosecution agreements. On Thursday, the DAG stated that DOJ would "disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company," and, in order to ensure consistency, the Department will scrutinize any such proposal and notice must be given to the Office of the DAG.

3. Voluntary self-disclosures

Attempting to build in more carrots for good corporate behavior, the DAG described the Department's new policy on voluntary self-disclosures. Here, the DAG instructed that "every component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure," and any components lacking a formal policy will be required to draft one. She expressed the Department's interest in expanding Department-wide programs like the Antitrust Division's Leniency Program, the Criminal Division's voluntary disclosure program for FCPA violations, and the National Security Division's program for export control and sanctions violations.

In an effort to increase predictability and provide clearer expectations for disclosure, the DAG announced common principles applicable across all such voluntary self-disclosures policies. In particular, "[a]bsent aggravating factors, the Department will not seek a guilty plea when a company voluntarily self-disclosed, fully cooperated, and remediated misconduct." Although the DAG emphasized that the Department will not implement a compliance monitor where a company has already implemented and tested an effective compliance program, that statement already reflects current DOJ policy even absent a voluntary disclosure.

This new DOJ-wide policy of not seeking a guilty plea absent aggravating circumstances where the company voluntary self-discloses, fully cooperates, and fully remediates, is nonetheless harsher than the three programs cited as exemplars by the DAG—the Antitrust leniency program, the FCPA corporate enforcement policy, and the NSD voluntary disclosure program, which in such circumstances provide for immunity, a presumption of a declination, and a presumption of a non-prosecution agreement, respectively. Whether these new policies will lead to more voluntary self-disclosures will depend on how they are constructed and implemented, and how they interface with the other guidance announced by the DAG. For example, if there is a heightened expectation that companies must turn over all "hot documents" immediately or risk losing all cooperation credit, companies could be less likely to self-disclose.

4. Compliance monitors

In another clarification from the DAG's October 2021 speech, the new guidance memorandum makes clear that although there will not be a "presumption against requiring an independent compliance monitor" as part of a corporate resolution, there also will not be a "presumption in favor of imposing one." In the memorandum, the DAG announced new guidance on the selection and oversight of monitors in order to increase transparency and consistency, including about when a monitor is needed, how a monitor is selected,

and the oversight necessary for a monitor to succeed. Specifically, the Department provided a non-exhaustive list of 10 factors to evaluate the necessity and potential benefits of a monitor, and stated that "[m]onitor selection should be performed pursuant to a documented selection process that is readily available to the public." These factors are similar to, but expand upon, the guidance released by DOJ's Criminal Division in 2018 on the Selection of Monitors in Criminal Division Matters.

In a welcome development, the DAG recognized the importance of tailoring the scope of the monitor to the company's misconduct and acknowledged DOJ's obligation to "monitor the monitor." Specifically, "for the term of the monitorship, Department prosecutors must remain apprised of the ongoing work conducted by the monitor" and "[p]rosecutors should receive regular updates from the monitor about the status of the monitorship and any issues presented," including updates to "verify that the monitor stays on task and on budget." The decision to review "issues relating to the cost of the monitor's work" is a departure from how DOJ has historically dealt with such matters.

5. Compliance programs and additional guidance underway

One theme that has been consistent across DOJ speeches and policies over the past year has been the importance of compliance programs. Earlier this year, DOJ's Criminal Division announced a new compliance certification that CEOs and CCOs would be required to sign in connection with corporate resolutions. Likewise, the Fraud Section—a key component of DOJ that prosecutes corporate crime—just last week onboarded their new Chief, Glenn Leon, who previously served as the Chief Compliance Officer for HP Enterprise, as well as a new Compliance Counsel, Matt Galvin, who previously was the Chief Compliance Officer for AB InBev. These new hires will compliment DOJ's understanding of the complexity of companies' compliance programs.

The DAG continued beating this drum, announcing a plan to encourage companies to shape financial compensation in order to promote compliance. Specifically, the DAG said that companies would be rewarded for clawing back compensation, escrowing compensation, imposing other financial penalties for those employees who contributed to misconduct, and for creating a compensation system that uses affirmative incentives for "compliance-promoting behavior," such as compliance metrics and benchmarks and performance reviews. The DAG stated that DOJ's Criminal Division will develop guidance by the end of the year for DOJ to apply these principles.

Similarly, the DAG also announced that the Criminal Division would study and develop guidance for the use of personal devices and ephemeral messaging apps to assist prosecutors in evaluating a company's compliance program as it relates to these issues. The memorandum recognizes the ubiquity of these messaging apps and the use of personal devices by employees, an area to which the U.S. Securities and Exchange Commission and Commodity Futures Trading Commission have likewise paid particular attention recently, levying fines in the hundreds of millions of dollars. According to the new guidance, "[a]s a general rule, all corporations with robust compliance programs should have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, should provide clear training to employees about such policies, and should enforce such policies when violations are identified."

Lastly, the DAG instructed that "prosecutors should consider whether a corporation uses or has used non-disclosure or non-disparagement provisions in compensation agreements, severance agreements, or other financial arrangements so as to inhibit the public disclosure of criminal misconduct by the corporation or its employees." Although these provisions are fairly common in such agreements, companies should consider including language that makes clear the provisions do not prohibit the disclosure of information to regulatory or enforcement authorities, for example the way that publicly traded companies do in order to comply with Securities Exchange Act Rule 21F-17(a).

6. Takeaways

Overall, the new guidance may not significantly alter existing corporate enforcement guidance, or at least, how that landscape will change may depend on promised forthcoming guidance. Of note, the DAG's policy pronouncements are premised on the notion that corporate criminal enforcement needs "greater emphasis," a proposition that is not borne out by DOJ's recent efforts, and may overlook the possibility that companies are improving their compliance programs and becoming more compliant as a general matter. Additionally, the DAG announced efforts to address debarment issues, in recognition of Senator Elizabeth Warren and Ben Ray Lujan's August 11, 2022 letter to the Department urging it "to pursue more robust use of its suspension and debarment authority," by committing to "enhancing the effectiveness of the federal government's system for debarment and suspension," notwithstanding the fact that the Department plays no statutory role in the debarment process.

Importantly, the DAG clarified many of the positions outlined in her October 2021 speech,

reflecting greater nuance and a better understanding of some of the key issues implicated by corporate criminal enforcement.

One certain takeaway is the continued emphasis on compliance, an area where companies can be proactive. Given the new policies, companies should continue to assess ways to improve their compliance programs, including by considering implementation of policies relating to financial penalties or rewards to incentivize compliance, and policies addressing the use of personal devices and messaging apps.

This is likely even more true for companies that have prior resolutions for misconduct and which might fall into a category likely to elicit harsher treatment by DOJ.

And companies that are facing a DOJ investigation and have made the decision to cooperate should ensure that they are communicating frequently and clearly with the prosecutors to ensure that they are meeting DOJ's expectations for cooperation.

DAG Monaco's speech can be found here and the memorandum can be found here.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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THE UNITED STATES DEPARTMENT of JUSTICE
STICE NEWS

Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement

New York City, NY ~ Thursday, September 15, 2022

Remarks as Prepared for Delivery

Photo credit NYU Program on Corporate Compliance and Enforcement

Good afternoon. Thank you, Dean McKenzie, for the introduction and for hosting us today. I'm happy to be back at NYU, and to see so many friends and former colleagues in the room.

Let me start by acknowledging some of my DOJ colleagues who are here. That includes the U.S. Attorneys for the Southern and Eastern Districts of New York, New Jersey, and Connecticut.

But just as importantly, we're joined in person and on the livestream by line prosecutors, agents, and investigative analysts—the career men and women who do the hard work, day in and day out, to make great cases and hold wrongdoers accountable.

I also want to recognize our federal and state partners who play a critical role in corporate enforcement. And of course, let me also thank Professor Arlen and the NYU Program on Corporate Compliance and Enforcement for arranging this event and for serving as a bridge between the worlds of policymaking and academia.

Addressing corporate crime is not a new subject for the Justice Department. In the aftermath of Watergate, Attorney General Edward Levi was tasked not only with restoring the Department's institutional credibility, but also with rebuilding its corporate enforcement program.

In a 1975 speech, he told prosecutors that there was great demand to be more aggressive against, what he called, "white collared crime." He explained his distaste for that term, saying that it suggested a distinction in law enforcement

based upon social class. But, nonetheless, he acknowledged that it was an area that needed to be given "greater emphasis." These words are as true today as they were then.

But Attorney General Levi also said that efforts to fight corporate crime were hampered by a lack of resources, specially trained investigators, and other issues. He answered those complaints as all great Attorneys General do—he said his Deputy Attorney General would take care of it. For at least a half-century, therefore, it has been the responsibility of my predecessors to set corporate criminal policy for the Department, and I follow in their footsteps.

Last October, I announced immediate steps the Justice Department would take to tackle corporate crime.

I also formed the Corporate Crime Advisory Group, a group of DOJ experts tasked with a top-to-bottom review of our corporate enforcement efforts.

To get a wide range of perspectives, we met with a broad group of outside experts, including public interest groups, ethicists, academics, audit committee members, in-house attorneys, former corporate monitors, and members of the business community and defense bar. Many of these people are here today.

Our meetings sparked discussions on individual accountability and corporate responsibility; on predictability and transparency; and on the ways enforcement policies must square with the realities of the modern economy. Every meeting resulted in some idea or insight that was helpful and that we sought to incorporate into our work. Today, you will hear how these new policies reflect this diverse input.

Let me turn now to substance—and the changes the Department is implementing to further strengthen how we prioritize and prosecute corporate crime.

First, I'll reiterate that the Department's number one priority is individual accountability—something the Attorney General and I have made clear since we came back into government. Whether wrongdoers are on the trading floor or in the C-suite, we will hold those who break the law accountable, regardless of their position, status, or seniority.

Second, I'll discuss our approach to companies with a history of misconduct. I previously announced that prosecutors must consider the full range of a company's prior misconduct when determining the appropriate resolution. Today, I will outline additional guidance for evaluating corporate recidivism.

Third, I'll highlight new Department policy on voluntary self-disclosures, including the concrete and positive consequences that will flow from self-disclosure. We expect good companies to step up and own up to misconduct. Voluntary self-disclosure is an indicator of a working compliance program and a healthy corporate culture. Those companies who own up will be appropriately rewarded in the Department's approach to corporate crime.

Fourth, I'll detail when compliance monitors are appropriate and how we can select them equitably and transparently. Today, I am also directing Department prosecutors to monitor those monitors: to ensure they remain on the job, on task, and on budget.

Finally, I'll discuss how the Department will encourage companies to shape financial compensation around promoting compliance and avoiding improperly risky behavior. These steps include rewarding companies that claw back compensation from employees, managers, and executives when misconduct happens. No one should have a financial interest to look the other way or ignore red flags. Corporate wrongdoers—rather than shareholders—should bear the consequences of misconduct.

Taken together, the policies we're announcing today make clear that we won't accept business as usual. With a combination of carrots and sticks—with a mix of incentives and deterrence—we're giving general counsels and chief compliance officers the tools they need to make a business case for responsible corporate behavior. In short, we're empowering companies to do the right thing—and empowering our prosecutors to hold accountable those that don't.

Photo credit NYU Program on Corporate Compliance and Enforcement

Individual Accountability

Let me start with our top priority for corporate criminal enforcement: going after individuals who commit and profit from corporate crime.

In the last year, the Department of Justice has secured notable trial victories, including convictions of the founder and chief operating officer of Theranos; convictions of J.P. Morgan traders for commodities manipulation; the conviction of a managing director at Goldman Sachs for bribery; and the first-ever conviction of a pharmaceutical CEO for unlawful distribution of controlled substances.

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.

To do that, we will require cooperating companies to come forward with important evidence more quickly.

Sometimes we see companies and counsel elect—for strategic reasons—to delay the disclosure of critical documents or information while they consider how to mitigate the damage or investigate on their own. Delayed disclosure undermines efforts to hold individuals accountable. It limits the Department's ability to proactively pursue leads and preserve evidence before it disappears. As time goes on, the lapse of statutes of limitations, dissipation of evidence, and the fading of memories can all undermine a successful prosecution.

In individual prosecutions, speed is of the essence.

Going forward, undue or intentional delay in producing information or documents—particularly those that show individual culpability—will result in the reduction or denial of cooperation credit. Gamesmanship with disclosures and productions will not be tolerated.

If a cooperating company discovers hot documents or evidence, its first reaction should be to notify the prosecutors. This requirement is in addition to prior guidance that corporations must provide all relevant, non-privileged facts about individual misconduct to receive any cooperation credit.

Separately, Department prosecutors will work to complete investigations and seek warranted criminal charges against individuals prior to or at the same time as entering a resolution against a corporation. Sometimes the back-and-forth of resolving with a company can bog down individual prosecutions, since our prosecutors have finite resources.

In cases where it makes sense to resolve a corporate case first, there must be a full investigative plan outlining the remaining work to do on the individual cases and a timeline for completing that work.

Collectively, this new guidance should push prosecutors and corporate counsel alike to feel they are "on the clock" to expedite investigations, particularly as to culpable individuals. While many companies and prosecutors follow these principles now, this guidance sets new expectations about the sequencing of investigations and clarifies the Department's priorities.

History of Misconduct

Now, it's safe to say that no issue garnered more commentary in our discussions than the commitment we made last year to consider the full criminal, civil, and regulatory record of any company when deciding the appropriate resolution.

That decision was driven by the fact that between 10% and 20% of large corporate criminal resolutions have involved repeat offenders.

We received many recommendations about how to contextualize historical misconduct, to develop a full and fair picture of the misconduct and corporate culture under review. We heard about the need to evaluate the regulatory environment that companies operate in, as well as the need to consider the age of the misconduct and subsequent reforms to the company's compliance culture.

In response to that feedback, today, we are releasing additional guidance about how such histories will be evaluated. Now let me emphasize a few points.

First, not all instances of prior misconduct are created equal. For these purposes, the most significant types of prior misconduct will be criminal resolutions here in the United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct. But past actions may not always reflect a company's current culture and commitment to compliance. So, dated conduct will generally be accorded less weight.

And what do we mean by dated? Criminal resolutions that occurred more than 10 years before the conduct currently under investigation, and civil or regulatory resolutions that took place more than five years before the current conduct.

We will also consider the nature and circumstances of the prior misconduct, including whether it shared the same root causes as the present misconduct. Some facts might indicate broader weaknesses in the compliance culture or practices, such as wrongdoing that occurred under the same management team or executive leadership. Other facts might provide important mitigating context.

For example, if a corporation operates in a highly regulated industry, its history should be compared to others similarly situated, to determine if the company is an outlier.

Separately, we do not want to discourage acquisitions that result in reformed and improved compliance structures. We will not treat as recidivists companies with a proven track record of compliance that acquire companies with a history of compliance problems, so long as those problems are promptly and properly addressed post-acquisition.

Finally, I want to be clear that this Department will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company. Before a prosecution team extends an offer for a successive NPA or DPA, Department leadership will scrutinize the proposal. That will ensure greater consistency across the Department and a more holistic approach to corporate recidivism.

Companies cannot assume that they are entitled to an NPA or a DPA, particularly when they are frequent flyers. We will not shy away from bringing charges or requiring guilty pleas where facts and circumstances require. If any corporation still thinks criminal resolutions can be priced in as the cost of doing business, we have a message—times have changed.

Voluntary Self-Disclosure

That said, the clearest path for a company to avoid a guilty plea or an indictment is voluntary self-disclosure. The Department is committed to providing incentives to companies that voluntarily self-disclose misconduct to the

government. In many cases, voluntary self-disclosure is a sign that the company has developed a compliance program and has fostered a culture to detect misconduct and bring it forward.

Our goal is simple: to reward those companies whose historical investments in compliance enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward.

Voluntary self-disclosure programs, in various Department components, have already been successful. Take, for example, the Antitrust Division's Leniency Program, the Criminal Division's voluntary disclosure program for FCPA violations, and the National Security Division's program for export control and sanctions violations. We now want to expand those policies Department-wide.

We also want to clarify the benefits of promptly coming forward to self-report, so that chief compliance officers, general counsels, and others can make the case in the boardroom that voluntary self-disclosure is a good business decision.

So, for the first time ever, every Department component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure. If a component currently lacks a formal, documented policy, it must draft one.

Predictability is critical. These policies must provide clear expectations of what self-disclosure entails. And they must identify the concrete benefits that a self-disclosing company can expect.

I am also announcing common principles that will apply across these voluntary self-disclosure policies. Absent aggravating factors, the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct. In addition, the Department will not require an independent compliance monitor for such a corporation if, at the time of resolution, it also has implemented and tested an effective compliance program.

Simply put, the math is easy: voluntary self-disclosure can save a company hundreds of millions of dollars in fines, penalties, and costs. It can avoid reputational harms that arise from pleading guilty. And it can reduce the risk of collateral consequences like suspension and debarment in relevant industries.

If you look at recent cases, you can see the value proposition. Voluntary self-disclosure cases have resulted in declinations and non-prosecution agreements with no significant criminal penalties. By contrast, recent cases that did not involve self-disclosure have resulted in guilty pleas and billions of dollars in criminal penalties, this year alone. I expect that resolutions over the next few months will reaffirm how much better companies fare when they come forward and self-disclose.

Independent Compliance Monitors

Let me turn to monitors. Over the past year of discussions, we heard a call for more transparency to reduce suspicion and confusion about monitors. Today, we're addressing those concerns.

First, we are releasing new guidance for prosecutors about how to identify the need for a monitor, how to select a monitor, and how to oversee the monitor's work to increase the likelihood of success.

Second, going forward, all monitor selections will be made pursuant to a documented selection process that operates transparently and consistently.

Finally, Department prosecutors will ensure that the scope of every monitorship is tailored to the misconduct and related compliance deficiencies of the resolving company. They will receive regular updates to verify that the monitor stays on task and on budget. We at the Department of Justice are not regulators, nor do we aspire to be. But where we impose a monitor, we recognize our obligations to stay involved and monitor the monitor.

Corporate Culture

As everyone here knows, it all comes back to corporate culture. Having served as both outside counsel and a board member in the past, I know the difficult decisions and trade-offs companies face about how to invest corporate resources, structure compliance programs, and foster the right corporate culture.

In our discussions leading to this announcement, we identified encouraging trends and new ways in which compliance departments are being strengthened and sharpened. But resourcing a compliance department is not enough; it must also be backed by, and integrated into, a corporate culture that rejects wrongdoing for the sake of profit. And companies can foster that culture through their leadership and the choices they make.

To promote that culture, an increasing number of companies are choosing to reflect corporate values in their compensation systems.

On the deterrence side, those companies employ clawback provisions, the escrowing of compensation, and other ways to hold financially accountable individuals who contribute to criminal misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance.

On the incentive side, companies are building compensation systems that use affirmative metrics and benchmarks to reward compliance-promoting behavior.

Going forward, when prosecutors evaluate the strength of a company's compliance program, they will consider whether its compensation systems reward compliance and impose financial sanctions on employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. They will evaluate what companies say and what they do, including whether, after learning of misconduct, a company actually claws back compensation or otherwise imposes financial penalties.

I have asked the Criminal Division to develop further guidance by the end of the year on how to reward corporations that employ clawback or similar arrangements. This will include how to help shift the burden of corporate financial penalties away from shareholders—who frequently play no role in misconduct—onto those more directly responsible.

Conclusion

But we're not done.

We will continue to engage and protect victims—workers, consumers, investors, and others.

We will continue to find ways to improve our approach to corporate crime, such as by enhancing the effectiveness of the federal government's system for debarment and suspension.

We will continue to seek targeted resources for corporate criminal enforcement, including the $250 million we are requesting from Congress for corporate crime initiatives next year.

Today's announcements are fundamentally about individual accountability and corporate responsibility. But they are also about ownership and choice.

Companies should feel empowered to do the right thing—to invest in compliance and culture, and to step up and own up when misconduct occurs. Companies that do so will welcome the announcements today. For those who don't, however, our Department prosecutors will be empowered, too—to hold accountable those who don't follow the law.

Thank you again for having me here today. I look forward to taking some questions.

Speaker:
Lisa O. Monaco, Deputy Attorney General

Attachment(s):
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Office of the Deputy Attorney General

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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 15, 2022

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION
ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL Lisa Monaco

SUBJECT: Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group

By combating corporate crime, the Department of Justice protects the public, strengthens our markets, discourages unlawful business practices, and upholds the rule of law. Strong corporate criminal enforcement also assures the public that there are not two sets of rules in this country—one for corporations and executives, and another for the rest of America. Corporate criminal enforcement will therefore always be a core priority for the Department.

In October 2021, the Department announced three steps to strengthen our corporate criminal enforcement policies and practices with respect to individual accountability, the treatment of a corporation's prior misconduct, and the use of corporate monitors. *See* Memorandum from Deputy Attorney General Lisa O. Monaco, "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies," Oct. 28, 2021 ("October 2021 Memorandum"). Simultaneously, we established the Corporate Crime Advisory Group ("CCAG")[1] within the Department to evaluate and recommend further guidance and consider

[1] CCAG members included leaders and experienced prosecutors from all components of the Department that handle corporate criminal matters: the Criminal Division; the Antitrust Division; the Executive Office of United States

revisions and reforms to enhance our approach to corporate crime, provide additional clarity on what constitutes cooperation by a corporation, and strengthen the tools our attorneys have to prosecute responsible individuals and companies.[2] This review considered and incorporated helpful input from a broad cross-section of individuals and entities with relevant expertise and representing diverse perspectives, including public interest groups, consumer advocacy organizations, experts in corporate ethics and compliance, representatives from the academic community, audit committee members, in-house attorneys, and individuals who previously served as corporate monitors, as well as members of the business community and defense bar.

With the benefit of this input, this memorandum announces additional revisions to the Department's existing corporate criminal enforcement policies and practices. This memorandum provides guidance on how prosecutors should ensure individual and corporate accountability, including through evaluation of: a corporation's history of misconduct; self-disclosure and cooperation provided by a corporation; the strength of a corporation's existing compliance program; and the use of monitors, including their selection and the appropriate scope of a monitor's work. Finally, this memorandum emphasizes the importance of transparency in corporate criminal enforcement.

In order to promote consistency across the Department, these policy revisions apply Department-wide. Some announcements herein establish the first-ever Department-wide policies on certain areas of corporate crime, such as guidance on evaluating a corporation's compensation plans; others supplement and clarify existing guidance. The policies set forth in this Memorandum, as well as additional guidance on subjects like cooperation, will be incorporated into the Justice Manual through forthcoming revisions, including new sections on independent corporate monitors.[3]

I. Guidance on Individual Accountability

The Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime. Such accountability deters future illegal activity, incentivizes changes in individual and corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system. *See* Memorandum from Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," Sept. 9, 2015. Many existing Department policies promote the identification and investigation of the individuals responsible for corporate crimes. The following policies reinforce this priority.

Attorneys; multiple United States Attorneys' Offices; the Civil Division; the National Security Division; the Environment and Natural Resources Division; the Tax Division; and the Federal Bureau of Investigation.

[2] While this Memorandum refers to corporations and companies, the terms apply to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations. *See* Justice Manual ("JM") § 9-28.200.

[3] Department prosecutors will continue to employ the Principles of Federal Prosecution of Business Organizations—as amended by the October 2021 Memorandum and this memorandum—to guide investigations and prosecutions of corporate crime, including with respect to prosecutors' assessment and evaluation of just and efficient resolutions in corporate criminal cases. *See* JM §§ 9-28.000 *et seq.* ("Principles of Federal Prosecution of Business Organizations").

A. Timely Disclosures and Prioritization of Individual Investigations

To be eligible for any cooperation credit, corporations must disclose to the Department all relevant, non-privileged facts about individual misconduct. *See* October 2021 Memorandum, at 3. The mere disclosure of records, however, is not enough. If disclosures come too long after the misconduct in question, they reduce the likelihood that the government may be able to adequately investigate the matter in time to seek appropriate criminal charges against individuals. The expiration of statutes of limitations, the dissipation of corroborating evidence, and other factors can inhibit individual accountability when the disclosure of facts about individual misconduct is delayed.

In particular, it is imperative that Department prosecutors gain access to all relevant, non-privileged facts about individual misconduct swiftly and without delay. Therefore, to receive full cooperation credit, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals. Companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit. Companies seeking cooperation credit ultimately bear the burden of ensuring that documents are produced in a timely manner to prosecutors.

Likewise, production of evidence to the government that is most relevant for assessing individual culpability should be prioritized. Such priority evidence includes information and communications associated with relevant individuals during the period of misconduct. Department prosecutors will frequently identify the priority evidence they are seeking from a cooperating corporation, but in the absence of specific requests from prosecutors, cooperating corporations should understand that information pertaining to individual misconduct will be most significant.

Going forward, in connection with every corporate resolution, Department prosecutors must specifically assess whether the corporation provided cooperation in a timely fashion. Prosecutors will consider, for example, whether a company promptly notified prosecutors of particularly relevant information once it was discovered, or if the company instead delayed disclosure in a manner that inhibited the government's investigation. Where prosecutors identify undue or intentional delay in the production of information or documents—particularly with respect to documents that impact the government's ability to assess individual culpability—cooperation credit will be reduced or eliminated.

Finally, prosecutors must strive to complete investigations into individuals—and seek any warranted individual criminal charges—prior to or simultaneously with the entry of a resolution against the corporation. If prosecutors seek to resolve a corporate case prior to completing an investigation into responsible individuals, the prosecution or corporate resolution authorization memorandum must be accompanied by a memorandum that includes a discussion of all potentially culpable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. *See* JM § 9-28.210. In such cases,

prosecutors must obtain the approval of the supervising United States Attorney or Assistant Attorney General of both the corporate resolution and the memorandum addressing responsible individuals.

B. Foreign Prosecutions of Individuals Responsible for Corporate Crime

The prosecution by foreign counterparts of individuals responsible for cross-border corporate crime plays an increasingly important role in holding individuals accountable and deterring future criminal conduct. Cooperation with foreign law enforcement partners—both in terms of evidence-sharing and capacity-building—has become a significant part of the Department's overall efforts to fight corporate crime. At the same time, the Department must continue to pursue forcefully its own individual prosecutions, as U.S. federal prosecution serves as a particularly significant instrument for accountability and deterrence.

At times, Department criminal investigations take place in parallel to criminal investigations by foreign jurisdictions into the same or related conduct. In such situations, the Department may learn that a foreign jurisdiction intends to bring criminal charges against an individual whom the Department is also investigating. The Principles of Federal Prosecution recognize that effective prosecution in another jurisdiction may be grounds to forego federal prosecution. JM § 9-27.220. Going forward, before declining to commence a prosecution in the United States on that basis, prosecutors must make a case-specific determination as to whether there is a significant likelihood that the individual will be subject to effective prosecution in the other jurisdiction. To determine whether an individual is subject to effective prosecution in another jurisdiction, prosecutors should consider, *inter alia*: (1) the strength of the other jurisdiction's interest in the prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction. JM § 9-27.240.

When appropriate, Department prosecutors may wait to initiate a federal prosecution in order to better understand the scope and effectiveness of a prosecution in another jurisdiction. However, prosecutors should not delay commencing federal prosecution to the extent that delay could prevent the government from pursuing certain charges (*e.g.*, on statute of limitations grounds), reduce the chance of arresting the individual, or otherwise undermine the strength of the federal case.

Similarly, prosecutors should not be deterred from pursuing appropriate charges just because an individual liable for corporate crime is located outside the United States.

II. Guidance on Corporate Accountability

A. Evaluating a Corporation's History of Misconduct

As discussed in the October 2021 Memorandum, in determining how best to resolve an investigation of corporate criminal activity, prosecutors should, among other factors, consider the corporation's record of past misconduct, including prior criminal, civil, and regulatory resolutions,

both domestically and internationally.[4] Consideration of a company's historical misconduct harmonizes the way the Department treats corporate and individual criminal histories, and ensures that prosecutors give due weight to an important factor in evaluating the proper form of resolution.

Not all instances of prior misconduct, however, are equally relevant or probative. To that end, prosecutors should consider the form of prior resolution and the associated sanctions or penalties, as well as the elapsed time between the instant misconduct, the prior resolution, and the conduct underlying the prior resolution. In general, prosecutors weighing these factors should assign the greatest significance to recent U.S. criminal resolutions, and to prior misconduct involving the same personnel or management. Dated conduct addressed by prior criminal resolutions entered into more than ten years before the conduct currently under investigation, and civil or regulatory resolutions that were finalized more than five years before the conduct currently under investigation, should generally be accorded less weight as such conduct may be generally less reflective of the corporation's current compliance culture, program, and risk tolerance.[5] However, depending on the facts of the particular case, even if it falls outside these time periods, repeated misconduct may be indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards.

In addition to its form, Department prosecutors should consider the facts and circumstances underlying a corporation's prior resolution, including any factual admissions by the corporation. Prosecutors should consider the seriousness and pervasiveness of the misconduct underlying each prior resolution and whether that conduct was similar in nature to the instant misconduct under investigation, even if it was prosecuted under different statutes. Prosecutors should also consider whether at the time of the misconduct under review, the corporation was serving a term of probation or was subject to supervision, monitorship, or other obligation imposed by the prior resolution.

Corporations operate in varying regulatory and other environments, and prosecutors should be mindful when comparing corporate track records to ensure that any comparison is apt. For example, if a corporation operates in a highly regulated industry, a corporation's history of regulatory compliance or shortcomings should likely be compared to that of similarly situated companies in the industry. Prior resolutions that involved entities that do not have common management or share compliance resources with the entity under investigation, or that involved conduct that is not chargeable as a criminal violation under U.S. federal law, should also generally receive less weight. Prior misconduct committed by an acquired entity should receive less weight if the acquired entity has been integrated into an effective, well-designed compliance program at the acquiring corporation and if the acquiring corporation addressed the root cause of the prior

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[4] The term "resolution" covers both post-trial adjudications and stipulated non-trial resolutions, such as plea agreements, non-prosecution agreements, deferred prosecution agreements, civil consent decrees and stipulated orders, and pre-trial regulatory enforcement actions.

[5] Corporations should be prepared to produce a list and summary of all prior criminal resolutions within the last ten years and all civil or regulatory resolutions within the last five years, as well as any known pending investigations by U.S. (federal and state) and foreign government authorities. Attorneys for the government may tailor (or expand) this request to obtain the information that would be most relevant to the Department's analysis.

misconduct before the conduct currently under investigation occurred, and full and timely remediation occurred within the acquired entity before the conduct currently under investigation.

Department prosecutors should also evaluate whether the conduct at issue in the prior and current matters reflects broader weaknesses in a corporation's compliance culture or practices. One consideration is whether the conduct occurred under the same management team and executive leadership. Overlap in involved personnel—at any level—could indicate a lack of commitment to compliance or insufficient oversight of compliance risk at the management or board level. Beyond personnel, prosecutors should consider whether the present and prior instances of misconduct share the same root causes. Prosecutors should also consider what remediation was taken to address the root causes of prior misconduct, including employee discipline, compensation clawbacks, restitution, management restructuring, and compliance program upgrades.

Multiple non-prosecution or deferred prosecution agreements are generally disfavored, especially where the matters at issue involve similar types of misconduct; the same personnel, officers, or executives; or the same entities. Before making a corporate resolution offer that would result in multiple non-prosecution or deferred prosecution agreements for a corporation (including its affiliated entities), Department prosecutors must secure the written approval of the responsible U.S. Attorney or Assistant Attorney General and provide notice to the Office of the Deputy Attorney General (ODAG) in the manner set forth in JM § 1-14.000. Notice provided to ODAG pursuant to JM § 1-14.000 must be made at least 10 business days prior to the issuance of an offer to the corporation, except in extraordinary circumstances.

While multiple deferred or non-prosecution agreements are generally disfavored, nothing in this memorandum should disincentivize corporations that have been the subject of prior resolutions from voluntarily disclosing misconduct to the Department. Department prosecutors must weigh and appropriately credit voluntary and timely self-disclosures of current or prior conduct. Indeed, timely voluntary disclosures do not simply reveal misconduct at a corporation; they can also reflect that a corporation is appropriately working to detect misconduct and takes seriously its responsibility to instill and act upon a culture of compliance. As set forth in the next section of this Memorandum, when determining the appropriate form and substance of a corporate criminal resolution for any corporation, including one with a prior resolution, prosecutors should consider whether the criminal conduct at issue came to light as a result of the corporation's timely, voluntary self-disclosure and credit such disclosure appropriately.

B. Voluntary Self-Disclosure by Corporations

In many circumstances, a corporation becomes aware of misconduct by employees or agents before that misconduct is publicly reported or otherwise known to the Department. In those cases, corporations may come to the Department and disclose this misconduct, enabling the government to investigate and hold wrongdoers accountable more quickly than would otherwise be the case. Department policies and procedures must ensure that a corporation benefits from its decision to come forward to the Department and voluntarily self-disclose misconduct, through resolution under more favorable terms than if the government had learned of the misconduct

through other means. And Department policies and procedures should be sufficiently transparent such that the benefits of voluntary self-disclosure are clear and predictable.

Many Department components that prosecute corporate criminal misconduct have already adopted policies regarding the treatment of corporations who voluntarily disclose their misconduct. *See, e.g.*, Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division); Export Control and Sanctions Enforcement Policy for Business Organizations (National Security Division); and Factors in Decisions on Criminal Prosecutions (Environment & Natural Resources Division). Of course, voluntary self-disclosure only occurs when companies disclose misconduct promptly and voluntarily (*i.e.*, where they have no preexisting obligation to disclose, such as pursuant to regulation, contract, or prior Department resolution) and when they do so prior to an imminent threat of disclosure or government investigation.[6]

Through this memorandum, I am directing each Department of Justice component that prosecutes corporate crime to review its policies on corporate voluntary self-disclosure, and if the component lacks a formal, written policy to incentivize such self-disclosure, it must draft and publicly share such a policy. Any such policy should set forth the component's expectations of what constitutes a voluntary self-disclosure, including with regard to the timing of the disclosure, the need for the disclosure to be accompanied by timely preservation, collection, and production of relevant documents and/or information, and a description of the types of information and facts that should be provided as part of the disclosure process.[7] The policies should also lay out the benefits that corporations can expect to receive if they meet the standards for voluntary self-disclosure under that component's policy.

All Department components must adhere to the following core principles regarding voluntary self-disclosure. First, absent 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. Each component will, as part of its written guidance on voluntary self-disclosure, provide guidance on what circumstances would constitute such aggravating factors, but examples may include misconduct that poses a grave threat to national security or is deeply pervasive throughout the company. Second, the Department will not require the imposition of an independent compliance monitor for a cooperating corporation that voluntarily self-discloses the relevant conduct if, at the time of resolution, it also demonstrates that it has implemented and tested an effective compliance program. Such decisions about the

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[6] Voluntary self-disclosure of misconduct is distinct from cooperation with the government's investigation, and prosecutors should thus consider these factors separately. *See, e.g.*, JM § 9-28.900 (addressing voluntary disclosures generally); JM § 9-47.120 (describing credit for voluntary self-disclosure in FCPA matters).

[7] For example, the FCPA Corporate Enforcement policy sets forth the following requirements for a corporation to receive credit for voluntary self-disclosure of wrongdoing: the disclosure must qualify under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation"; the corporation must disclose the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden on the corporation to demonstrate timeliness; and the corporation must disclose all relevant facts known to it, "including as to any individuals substantially involved in or responsible for the misconduct at issue." JM § 9-47.120.

imposition of a monitor will continue to be made on a case-by-case basis and at the sole discretion of the Department.

C. Evaluation of Cooperation by Corporations

Cooperation can be a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that is appropriate for indictment and prosecution. JM § 9-28.700. Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. JM § 9-28.720.[8]

Credit for cooperation takes many forms and is calculated differently based on the degree to which a corporation cooperates with the government's investigation and the commitment that the corporation demonstrates in doing so. The level of a corporation's cooperation can affect the form of the resolution, the applicable fine range, and the undertakings involved in the resolution.

Many existing Department policies discuss the Department's expectations for full and effective cooperation. *See, e.g.*, JM § 9-28.720 (Cooperation: Disclosing the Relevant Facts); JM § 9-47.120, ¶ 1.3(b) (Full Cooperation in FCPA Matters). The Department will update the Justice Manual to ensure greater consistency across components as to the steps that a corporation will need to take to receive maximum credit for full cooperation.

Companies seeking credit for cooperation must timely preserve, collect, and disclose relevant documents located both within the United States and overseas. In some cases, data privacy laws, blocking statutes, or other restrictions imposed by foreign law may complicate the method of production of documents located overseas. In such cases, the cooperating corporation bears the burden of establishing the existence of any restriction on production and of identifying reasonable alternatives to provide the requested facts and evidence, and is expected to work diligently to identify all available legal bases to preserve, collect, and produce such documents, data, and other evidence expeditiously.[9]

Department prosecutors should provide credit to corporations that find ways to navigate such issues of foreign law and produce such records. Conversely, where a corporation actively seeks to capitalize on data privacy laws and similar statutes to shield misconduct inappropriately from detection and investigation by U.S. law enforcement, an adverse inference as to the corporation's cooperation may be applicable if such a corporation subsequently fails to produce foreign evidence.

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[8] Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and the individual's attorneys. *Id.*

[9] This requirement now applies to all corporations under investigation that are seeking to cooperate. The requirement already applies to investigations involving potential violations of the FCPA. *See* JM § 9-47.120.

D. Evaluation of a Corporation's Compliance Program

Although an effective compliance program and ethical corporate culture do not constitute a defense to prosecution of corporate misconduct, they can have a direct and significant impact on the terms of a corporation's potential resolution with the Department. Prosecutors should evaluate a corporation's compliance program as a factor in determining the appropriate terms for a corporate resolution, including whether an independent compliance monitor is warranted.[10] Prosecutors should assess the adequacy and effectiveness of the corporation's compliance program at two points in time: (1) the time of the offense; and (2) the time of a charging decision. The same criteria should be used in each instance.

Prosecutors should evaluate the corporation's commitment to fostering a strong culture of compliance at all levels of the corporation—not just within its compliance department. For example, as part of this evaluation, prosecutors should consider how the corporation has incentivized or sanctioned employee, executive, and director behavior, including through compensation plans, as part of its efforts to create a culture of compliance.

There are many factors that prosecutors should consider when evaluating a corporate compliance program. The Criminal Division has developed resources to assist prosecutors in assessing the effectiveness of a corporation's compliance program. *See* Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020). Additional guidance has been provided by other Department components as to specialized areas of corporate compliance. *See, e.g.*, Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019). Prosecutors should consider, among other factors, whether the corporation's compliance program is well designed, adequately resourced, empowered to function effectively, and working in practice. Prior guidance has identified numerous considerations for this evaluation, including, *inter alia*, how corporations measure and identify compliance risk; how they monitor payment and vendor systems for suspicious transactions; how they make disciplinary decisions within the human resources process; and how senior leaders have, through their words and actions, encouraged or discouraged compliance.

In addition to those factors, this Memorandum identifies additional metrics relevant to prosecutors' evaluation of a corporation's compliance program and culture.

1. Compensation Structures that Promote Compliance

Corporations can help to deter criminal activity if they reward compliant behavior and penalize individuals who engage in misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can incentivize compliant conduct, deter risky behavior, and instill a corporate culture in which employees follow the law and avoid legal "gray areas." When conducting this evaluation, prosecutors should consider how the corporation

[10] At the same time, the mere existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. *See* JM 9-28.800.

has incentivized employee behavior as part of its efforts to create a culture of ethics and compliance within its organization.

Corporations can best deter misconduct if they make clear that all individuals who engage in or contribute to criminal misconduct will be held personally accountable. In assessing a compliance program, prosecutors should consider whether the corporation's compensation agreements, arrangements, and packages (the "compensation systems") incorporate elements—such as compensation clawback provisions—that enable penalties to be levied against current or former employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. Since misconduct is often discovered after it has occurred, prosecutors should examine whether compensation systems are crafted in a way that allows for retroactive discipline, including through the use of clawback measures, partial escrowing of compensation, or equivalent arrangements.

Similarly, corporations can promote an ethical corporate culture by rewarding those executives and employees who promote compliance within the organization. Prosecutors should therefore also consider whether a corporation's compensation systems provide affirmative incentives for compliance-promoting behavior. Affirmative incentives include, for example, the use of compliance metrics and benchmarks in compensation calculations and the use of performance reviews that measure and reward compliance-promoting behavior, both as to the employee and any subordinates whom they supervise. When effectively implemented, such provisions incentivize executives and employees to engage in and promote compliant behavior and emphasize the corporation's commitment to its compliance programs and its culture.

Prosecutors should look to what has happened in practice at a corporation—not just what is written down. As part of their evaluation of a corporation's compliance program, prosecutors should review a corporation's policies and practices regarding compensation and determine whether they are followed in practice. If a corporation has included clawback provisions in its compensation agreements, prosecutors should consider whether, following the corporation's discovery of misconduct, a corporation has, to the extent possible, taken affirmative steps to execute on such agreements and clawback compensation previously paid to current or former executives whose actions or omissions resulted in, or contributed to, the criminal conduct at issue.

Finally, prosecutors should consider whether a corporation uses or has used non-disclosure or non-disparagement provisions in compensation agreements, severance agreements, or other financial arrangements so as to inhibit the public disclosure of criminal misconduct by the corporation or its employees.

The use of financial incentives to align the interests of the C-suite with the interests of the compliance department can greatly amplify a corporation's overall level of compliance. To that end, I have asked the Criminal Division to develop further guidance by the end of the year on how to reward corporations that develop and apply compensation clawback policies, including how to shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a role in misconduct—onto those more directly responsible.

2. Use of Personal Devices and Third-Party Applications

The ubiquity of personal smartphones, tablets, laptops, and other devices poses significant corporate compliance risks, particularly as to the ability of companies to monitor the use of such devices for misconduct and to recover relevant data from them during a subsequent investigation. The rise in use of third-party messaging platforms, including the use of ephemeral and encrypted messaging applications, poses a similar challenge.

Many companies require all work to be conducted on corporate devices; others permit the use of personal devices but limit their use for business purposes to authorized applications and platforms that preserve data and communications for compliance review. How companies address the use of personal devices and third-party messaging platforms can impact a prosecutor's evaluation of the effectiveness of a corporation's compliance program, as well as the assessment of a corporation's cooperation during a criminal investigation.

As part of evaluating a corporation's policies and mechanisms for identifying, reporting, investigating, and remediating potential violations of law, prosecutors should consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved. To assist prosecutors in this evaluation, I have asked the Criminal Division to further study best corporate practices regarding use of personal devices and third-party messaging platforms and incorporate the product of that effort into the next edition of its Evaluation of Corporate Compliance Programs, so that the Department can address these issues thoughtfully and consistently.

As a general rule, all corporations with robust compliance programs should have effective policies governing the use of personal devices and third-party messaging platforms for corporate communications, should provide clear training to employees about such policies, and should enforce such policies when violations are identified. Prosecutors should also consider whether a corporation seeking cooperation credit in connection with an investigation has instituted policies to ensure that it will be able to collect and provide to the government all non-privileged responsive documents relevant to the investigation, including work-related communications (*e.g.*, texts, e-messages, or chats), and data contained on phones, tablets, or other devices that are used by its employees for business purposes.

III. Independent Compliance Monitorships[11]

As set forth in the October 2021 Memorandum, Department prosecutors will not apply any general presumption against requiring an independent compliance monitor ("monitor") as part of a corporate criminal resolution, nor will they apply any presumption in favor of imposing one.

[11] In September 2021, the Associate Attorney General issued a memorandum concerning the use of monitorships in civil settlements involving state and local governmental entities. Memorandum from Associate Attorney General Vanita Gupta, "Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Government Entities," Sept. 13, 2021. That memorandum continues to govern the use of monitors in those cases.

Rather, the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case.

A. Factors to Consider When Evaluating Whether a Monitor is Appropriate

Independent compliance monitors can be an effective means of reducing the risk of further corporate misconduct and rectifying compliance lapses identified during a corporate criminal investigation. Prosecutors should analyze and carefully assess the need for a monitor on a case-by-case basis, using the following non-exhaustive list of factors when evaluating the necessity and potential benefits of a monitor:[12]

1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy;

2. Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;

3. Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;

4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns);

5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;

6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;

7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;

8. Whether, at the time of the resolution, the corporation's risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;

[12] For components or U.S. Attorney's Offices that do not have extensive corporate resolution experience, consultation with DOJ components that more routinely assess such compliance programs, internal controls, and remedial measures is recommended.

9. Whether the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates or the nature of the corporation's customers; and

10. Whether and to what extent the corporation is subject to oversight from industry regulators or a monitor imposed by another domestic or foreign enforcement authority or regulator.

The factors listed above are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Department attorneys should determine whether a monitor is required based on the facts and circumstances presented in each case.

B. Selection of Monitors

In selecting a monitor, prosecutors should employ consistent and transparent procedures. Monitor selection should be performed pursuant to a documented selection process that is readily available to the public. *See, e.g.,* Memorandum of Assistant Attorney General Brian A. Benczkowski, Selection of Monitors in Criminal Division Matters, Oct. 11, 2018, Section E ("The Selection Process"); Environment and Natural Resources Division, Environmental Crimes Section, Corporate Monitors: Selection Best Practices (Mar. 2018); Antitrust Division, Selection of Monitors in Criminal Cases (July 2019).[13] Every component involved in corporate criminal resolutions that does not currently have a public monitor selection process must adopt an already existing Department process, or develop and publish its own selection process before December 31, 2022.[14] All new selection processes must be approved by ODAG and made public before their implementation as part of any corporate criminal resolution. The appropriate United States Attorney or Department Component Head shall also provide a copy of the process to the Assistant Attorney General for the Criminal Division, who shall maintain a record of such processes.

Any selection process must incorporate elements that promote consistency, predictability, and transparency. First, per existing policy, the consideration of monitor candidates shall be done by a standing or *ad hoc* committee within the office or component where the case originated. To the extent that such committees did not previously do so, every monitorship committee must now include as a member an ethics official or professional responsibility officer from that office or component, who shall ensure that the other members of the committee do not have any conflicts of interest in selection of the monitor. There shall be a written memorandum to file confirming that no conflicts exist in the committee prior to the selection process or as to the monitor prior to the commencement of the monitor's work. Second, monitor selection processes shall be conducted in keeping with the Department's commitment to diversity and inclusion. Third, prosecutors shall

[13] This requirement does not apply to cases involving court-appointed monitors, where prosecutors must give due regard to the appropriate role and procedures of the court.

[14] Unless they adopt and publish their own processes pursuant to the principles set forth herein, U.S. Attorney's Offices should follow the selection process developed by the Criminal Division, unless partnering with a Department component that has its own preexisting selection process.

notify the appropriate United States Attorney or Department Component Head of their decision regarding whether to require an independent compliance monitor. In order to promote greater transparency, any agreement imposing a monitorship should describe the reasoning for requiring a monitor.[15] ODAG must approve the monitor selection for all cases in which a monitor is recommended, unless the monitor is court-appointed.[16]

C. Continued Review of Monitorships

In matters where an independent corporate monitor is imposed pursuant to a resolution with the Department, prosecutors should ensure that the monitor's responsibilities and scope of authority are well-defined and recorded in writing, and that a clear workplan is agreed upon between the monitor and the corporation—all to ensure agreement among the corporation, monitor, and Department as to the proper scope of review.

For the term of the monitorship, Department prosecutors must remain apprised of the ongoing work conducted by the monitor.[17] Continued review of the monitorship requires ongoing communication with both the monitor and the corporation.[18]

Prosecutors should receive regular updates from the monitor about the status of the monitorship and any issues presented. Monitors should promptly alert prosecutors if they are being denied access to information, resources, or corporate employees or agents necessary to execute their charge. Prosecutors should also regularly receive information about the work the monitor is doing to ensure that it remains tailored to the workplan and scope of the monitorship. In reviewing information relating to the monitor's work, prosecutors should consider the reasonableness of the monitor's review, including, where appropriate, issues relating to the cost of the monitor's work. In certain cases, prosecutors may determine that the initial term of the monitorship is longer than necessary to address the concerns that created the need for the monitor, or that the scope of the monitorship is broader than necessary to accomplish the goals of the monitorship. For example, a corporation may demonstrate significant and faster-than-anticipated improvements to its compliance program, and this could reduce the need for continued monitoring. Conversely, prosecutors may determine that newly identified concerns require lengthening the term or amending the scope of the monitorship.

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[15] The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

[16] *See* Morford Memorandum, at p. 3 (requiring, for cases involving the use of monitors in DPAs and NPAs, that "the Office of the Deputy Attorney General must approve the monitor").

[17] In cases of court-appointed monitors, the court may elect to oversee this inquiry.

[18] Per existing policy, any agreement requiring a monitor should also explain what role the Department could play in resolving disputes that may arise between the monitor and the corporation, given the facts and circumstances of the case. *See* Acting Deputy Attorney General Gary C. Grindler, "Additional Guidance on the Use of Monitors in Deferred Prosecutions and Non-Prosecution Agreements with Corporation," May 25, 2010.

IV. Commitment to Transparency in Corporate Criminal Enforcement

Transparency regarding the Department's corporate criminal enforcement priorities and processes—including its expectations as to corporate cooperation and compliance, and the consequences of meeting or failing to meet those expectations—can encourage companies to adopt robust compliance programs, voluntarily disclose misconduct, and cooperate fully with the Department's investigations. Transparency can also instill public confidence in the Department's work.

When the Department elects to enter into an agreement to resolve corporate criminal liability, the agreement should, to the greatest extent possible, include: (1) an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement; and (2) a statement of relevant considerations that explains the Department's reasons for entering into the agreement. Relevant considerations may, for example, include the corporation's voluntary self-disclosure, cooperation, and remedial efforts (or lack thereof); the cooperation credit, if any, that the corporation is receiving; the seriousness and pervasiveness of the criminal conduct; the corporation's history of misconduct; the state of the corporation's compliance program at the time of the underlying criminal conduct and the time of the resolution; the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable; other applicable factors listed in JM § 9-28.300; and any other key considerations related to the Department's decision regarding the resolution.

Absent exceptional circumstances, corporate criminal resolution agreements will be published on the Department's public website.

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Robust corporate criminal enforcement remains central to preserving the rule of law—ensuring the same accountability for all, regardless of station or privilege. Thank you for the work you do every day to fulfill the Department's mission.