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NO&T Compliance Legal Update
危機管理・コンプライアンス ニュースレター

October, 2022 No.3

New policy guidance from the US DOJ to enhance corporate crime enforcement

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1. Introduction

On September 15, 2022, the U.S. Department of Justice's (DOJ) second-highest ranking official, Deputy Attorney General (DAG) 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. The guidance provides insights into how DOJ will reward and punish corporate behavior, and includes important lessons for companies and defense attorneys alike.

2. Background

On Thursday, September 15, 2022, DAG Monaco made good on her pledge to provide additional guidance around DOJ's corporate criminal enforcement, which she committed to do during a speech in October 2021. In her October 2021 speech, the DAG expressed that DOJ would take significant steps to combat corporate crime, and laid out a series of areas where the DOJ would treat companies more harshly, including through heightened cooperation requirements, harsher treatment of companies who have engaged in prior misconduct, and the increased use of monitors. She also announced the creation of a Corporate Crime Advisory Group, an internal DOJ working group, to study corporate enforcement policies and make recommendations for revisions to these policies.

Approximately one year later, in her September 2022 speech[1] and in an accompanying memorandum[2], the DAG 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[3], included some carrots in addition to the sticks.

The most significant aspects of the DAG's speech and memorandum are outlined below.

[1] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement
[2] https://www.justice.gov/dag/page/file/1535286/download
[3] https://www.davispolk.com/insights/client-update/deputy-attorney-general-lisa-monaco-announces-significant-doj-corporate

3. Individual accountability and speed of investigations

Similar to past administrations, 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. 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." During her speech, the DAG made clear that "[g]amesmanship with disclosures and productions will not be tolerated." 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 could have a significant impact on companies' ability to secure cooperation credit, particularly those companies from countries with strict data privacy and blocking statutes, like those in certain parts of Asia. In such legal regimes, it would not be possible for a company's first reaction to be a call to U.S. prosecutors. Although it is hopeful that prosecutors will exercise their discretion and not reduce or eliminate a company's cooperation credit for attempting to meet legal obligations in a foreign country, the guidance vests significant discretionary authority with the U.S. prosecutors, who may not be compassionate to such an assertion.

In fact, the DAG's memorandum specifically addresses blocking statutes and data privacy restrictions in foreign countries, instructing prosecutors to "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." Because these issues are not always straightforward, it is likely that prosecutors will judge companies against other companies who produce evidence from the same countries. Thus, if one company is less risk averse, or does not face the same consequences from violating foreign law, this could be used against a company that may not be able to risk violating foreign law.

More broadly, prosecutors will likely scrutinize a company's cooperation for any "gamesmanship," including, for example, if the prosecutors believe that the company took steps to make certain employees unavailable to DOJ. For this reason, companies that are seeking full cooperation credit should consider alerting DOJ about any personnel actions that could be interpreted as frustrating the investigation, such as relocating employees from the United States to foreign countries, or terminating the employment of employees, who may have been involved in the alleged misconduct.

In addition to providing guidance for companies to receive cooperation credit, the DAG also provided guidance to the way in which prosecutors investigate and charge companies and individuals, instructing 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).

4. Corporate recidivism

The DAG announced additional helpful guidance for evaluating corporate recidivism, and in so doing clarified the comments in her October 2021 speech[4], in which she stated that the DOJ 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 acknowledged that "not all instances of prior misconduct are created equal." This is a positive step forward from

[4] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute#:~:text=Deputy%20Attorney%20General%20Lisa%20O.%20Monaco%20Gives%20Keynote,and%20thank%20you%20all%20for%20having%20me%20today

the prior speech.

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. Conversely, 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 DOJ 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[5]. 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. In her September 2022 speech, 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 DOJ will scrutinize any such proposal and notice must be given to the Office of the DAG.

5. Voluntary self-disclosures

Attempting to build in more carrots for good corporate behavior, 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 cited favorably to, and recognized the DOJ's interest in, expanding voluntary disclosure 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. Thus, whether the new policies by other components 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 (and voluntary disclosure credit along with it), companies could be less likely to self-disclose, particularly if they operate in jurisdictions with strict data privacy laws or blocking statutes that preclude the ability to turn over evidence quickly (or sometimes at all). Similarly, if a company has had a prior resolution with DOJ, and therefore is more likely to have to plead guilty in the event of another resolution, this

[5] https://www.justice.gov/criminal-fraud/file/838416/download

likewise may persuade a company not to disclose.

However, this announcement does not seem to impact the already existing and favorable disclosure programs in the Antitrust Division, Criminal Division, and National Security Division, so companies should expect the same treatment under these policies moving forward.

6. Compliance monitors

In another clarification from the DAG's October 2021 speech, in which the DAG seemed to suggest that there would be an increase in the imposition of independent compliance monitors, 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." This is significant because monitors can be extremely burdensome and costly to companies, generally having access to all aspects of the company's business, interviewing employees, performing audits of various sites and subsidiaries, and examining the company's controls and compliance.

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 DOJ 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[6].

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 but could be very important.

7. 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[7] 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—recently 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 and executives 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. One important consideration for this new guidance is that certain countries may have stricter employment laws that do not permit clawing back compensation. In such circumstances, companies should examine other ways in which they can incentivize compliance through positive financial rewards for compliant behavior or negative financial penalties for violations of policy or the failure to effectively supervise those employees engaged in such violations.

Similarly, the DAG also announced that the Criminal Division would study and develop guidance for the use of

[6] https://www.justice.gov/opa/speech/file/1100531/download
[7] https://www.davispolk.com/insights/client-update/doj-announces-compliance-certifications-be-considered-part-corporate

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).

It is important to remember that this new guidance on compliance programs does not create a requirement for companies to implement such policies. Rather, DOJ will reward or penalize companies for the presence or absence of such policies, which could take the form of a lower or higher monetary penalty, a more lenient or harsher resolution (e.g., a non-prosecution agreement as compared to a guilty plea), and whether or not a monitor is imposed.

8. Takeaways

There are several key takeaways from the new DOJ guidance. First, there is still more to come. Some of the DAG's announcements called for more guidance—written voluntary disclosure policies from components that do not already have one, new guidance on the use of personal devices and messaging apps, and new guidance on financial incentives for compliance such as claw backs.

Second, 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, which have been fairly robust over the last decade, and may overlook the possibility that companies are improving their compliance programs and becoming more compliant as a general matter.

Third, companies would do well to take cues from the DAG that compliance remains a critical component of DOJ's evaluation of appropriate resolutions, and therefore is an area where companies can and should 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.

Fourth, although this new guidance is more nuanced than the DAG's pronouncements from a year ago, there are still more sticks than carrots and harsher treatment of companies, including harsher treatment of repeat offenders, heightened requirements for a company to receive cooperation credit, and increased expectations around compliance. As a result, despite the DAG's announcement regarding a DOJ-wide voluntary disclosure policy, companies should carefully weigh the risks and benefits to bringing misconduct to DOJ's attention. This is particularly true for companies operating in parts of Asia where they may be less likely to get the benefit of cooperation credit (and therefore voluntary disclosure credit) due to local laws and regulations around the sharing of evidence with U.S. authorities.

Finally, where a company is facing a DOJ investigation and has made the decision to cooperate, the company and its counsel should ensure that they are communicating frequently and clearly with the U.S. prosecutors to ensure that they are meeting DOJ's expectations for cooperation and building up credibility so that if and when an issue arises relating to foreign law that precludes the sharing of evidence, the company will be starting from a stronger footing.

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Daniel Kahn is a partner in Davis Polk's White Collar Defense and Investigations group, where he represents clients in criminal and regulatory investigations and compliance matters. From 2010-2021, Dan was a prosecutor at the U.S. Department of Justice and served in a number of senior positions, including acting Deputy Assistant Attorney General of the Criminal Division and Chief of the Criminal Division, Fraud Section, and Chief of the Foreign Corrupt Practices Act Unit. From 2016 to 2021, Dan oversaw all FCPA investigations and resolutions for the DOJ, including coordinated resolutions with authorities in Europe, Asia, and Latin America. Dan also played a central role in developing enforcement policies on the FCPA, corporate investigations and resolutions, evaluation of corporate compliance programs, and monitorships. Dan served as DOJ's delegate to the OECD Working Group on Bribery, conducted trainings for dozens of authorities from around the world, and was DOJ's liaison to the ABA task force on monitors. Dan teaches Corporate Criminal Investigations at Harvard Law School and Global Anti-Corruption at Georgetown Law Center, and co-authored a treatise on corporate criminal investigations.

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【Related Seminar】

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4th White Collar Crime Workshop 2022

■**Date/Time：**October 28, 2022 (Fri)

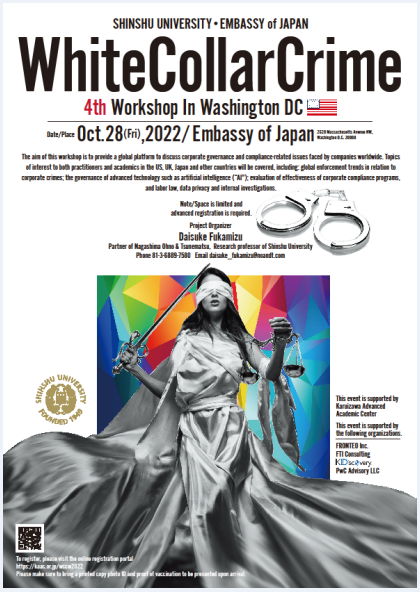
■**Venue：**Embassy of Japan, Washington, D.C. / Online (*Advanced registration is required.)

■**Program：**

10:30 – 11:45 (EST)
(JST：October 28, 2022 23:30 – 24:45) :
"The Use of DPAs – Incentive Structure to Encourage Companies to Prevent and Detect Corporate Crimes"
Daisuke Fukamizu (Moderator) (Nagashima Ohno & Tsunematsu Partner)

14:45 – 16:00 (EST)
(JST：October 29, 2022 03:45 – 05:00) :
"How to Deal with Cybersecurity Risks"
Takeshi Hayakawa (Panelist) (Nagashima Ohno & Tsunematsu Partner)

■**Reference：**
https://www.noandt.com/en/seminars/seminar20221028/



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