DOJ's Revised Corporate Prosecutions Policy: Deputy Attorney General Lisa Monaco's September 2022 Memorandum Ups the Ante

Although Deputy Attorney General Lisa Monaco's new Memo — as is true of all DAG memos governing an Administration's corporate prosecutions policy — is ostensibly intended as guidance to the attorneys at DOJ and the various United States Attorney's Offices around the country, it is helpful as a guide to the defense community in advising corporate clients.

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On Sept. 15, 2022, Deputy Attorney General Lisa Monaco released Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group ("Monaco Memo 2" or "Memo"), expanding on her Oct. 28, 2021 memorandum, Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies ("Monaco Memo"). Although the Memo — as is true of all DAG memos governing an Administration's corporate prosecutions policy — is ostensibly intended as guidance to the attorneys at DOJ and the various United States Attorney's Offices around the country, it is helpful as a guide to the defense community in advising corporate clients. This most recent version, among other things: 1) focuses on what, how, and when evidence regarding an employee's misdeeds must be provided to DOJ in order for a company to get cooperation credit; 2) directs each DOJ unit or division that has not already done so to draft its own voluntary disclosure policy "such that the benefits … are clear and predictable"; and 3) provides guidance on how to treat corporate compliance programs, including compensation structures, as an element of compliance for purposes of determining the appropriate resolution of the case, including whether a monitor should be installed. The Memo also clarifies previous pronouncements made in the Monaco Memo regarding a company's prior misconduct — what is included and what isn't when deciding a resolution. Finally, in the interests of transparency and consistency, the DAG directs the Criminal Division, as well as other units, to develop guidances regarding compensation metrics in compliance programs and the public monitor selection process, respectively, by year-end.

Prosecution of Individuals

Harking back to the Yates Memo, the DAG memo governing DOJ's corporate prosecutions policy under the Obama Administration, the Memo reaffirms that individual accountability is one of the Department's first priorities; companies must disclose wrongdoing by individuals to receive any kind of cooperation credit. The Memo adds that this disclosure must be timely, defined as "swiftly and without delay." The Memo discusses factors for a prosecutor to consider, such as the expiration of the statute of limitations and the risk of destruction of evidence.

The Memo further makes a point that DOJ wants to receive communications among the relevant employees first when a cooperating company is in the process of providing documents. Historically, corporate defense counsel seeking to cooperate would provide organization charts and other corporate documents first because: 1) they tend to be the first requests on a grand jury subpoena; 2) if the company is a multinational and some of the conduct took place overseas, obtaining communications involving overseas employees is not a quick and easy process; and 3) unlike communications, business records do not require a significant review to cull nonresponsive and privileged information. Nevertheless, the Memo makes clear that those emails and texts that generally should get the most careful review are precisely the documents the government wants first.

The combination of requiring "swift" production of information and the type of information that is being requested first creates a potentially toxic mix. At the early stages of an investigation, one can find numerous emails and texts that initially appear problematic, but as one learns about the case, an explanation surfaces that makes the entire communication completely innocent. Under the Rules of Professional Conduct, counsel "shall not intentionally (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or (2) prejudice or damage the client

during the course of the representation except as permitted or required by these Rules." Is providing email communications at a very early stage of counsel's investigation meeting that rule?

Furthermore, it is equally important to be sensitive to the employees. An excessively rushed investigation can lead to panic in the workforce — not good for the business and not good for quietly gathering evidence before people get a chance to align their stories.

The Memo ensures that prosecutors will indeed push for early production of communications implicating individuals because a line prosecutor will now have to jump through hoops in order to resolve the case with the corporation before resolving with the individuals. DOJ will now require a prosecutor to submit two memos when seeking to resolve a case with a corporation without a prior or contemporaneous prosecution of the individuals: the traditional one supporting the corporate resolution, and one setting forth the names of the culpable individuals, the status of the investigation as to them, what work still needs to be done, and an investigative plan to resolve the potential cases against them. The prosecutor will then have to obtain approval from the U.S. Attorney or the Assistant Attorney General prior to resolving anything.

Delays in getting information about specific individuals to the DOJ are inevitable when employees stationed overseas are the potential targets. In former Deputy Attorney General Rod Rosenstein's memo under the Trump Administration, Policy on Coordination of Corporate Resolution Penalties, the DOJ recognized that other countries investigate and prosecute corporate wrongdoing and a cooperating company should not be subject to duplicating penalties. In the current Principles of Federal Prosecution, there is a recognition that if another country is investigating, that may be grounds for the DOJ to stand down. Indeed, over the years, the DOJ has made an effort to divide up penalties among the affected countries. E.g., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History | OPA | Department of Justice. Also, many of these countries have blocking statutes preventing a company from providing employee emails to the DOJ without violating that country's criminal laws.

The Monaco Memo 2 appears to take a different approach for employees under investigation by more than one sovereign nation. It directs a prosecutor to ask whether there is a "significant likelihood" that there will be an "effective" prosecution in the other jurisdiction, considering, 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." And it has shifted the burden to the cooperating company to get overseas communications to DOJ, and if it cannot do so due to blocking statutes and other criminal statutes protecting data privacy overseas, the cooperating company must provide DOJ with "an alternative." This shifting already exists for FCPA investigations; now it covers all investigations where evidence is located overseas.

Most U.S. prosecutors consider the DOJ more effective than other countries' prosecuting bodies — and it may indeed be so if a company cannot get cooperation credit without providing documents from overseas in violation of other sovereign countries' laws — so one wonders whether individuals operating overseas can now expect to be subject to multiple prosecutions for the same conduct.

Corporations' History of Misconduct

The Monaco Memo directed prosecutors to consider corporations' past history of misconduct, including criminal, civil, and regulatory resolutions, domestic and international. The Monaco Memo 2 clarifies what was otherwise a very big net. The greatest weight is to be given to recent U.S. criminal resolutions — including pleas and non- and deferred prosecution agreements — and prior misconduct involving either the same personnel or management. The date of the misconduct is relevant as well. Cooperating companies will now be expected to provide a list of all criminal resolutions within the past 10 years, all civil or regulatory resolutions within the past five years, and any known pending investigations by any federal, state, or foreign authority.

The Memo also suggests that a corporation should be aware of where it sits in its respective industry in terms of prior history of misconduct. The Memo directs prosecutors to compare apples to apples; that is, the prior misconduct of a company in a highly regulated industry should be viewed in light of the prior record of others in that industry — not in the light of all companies engaged in similar misconduct, including those in unregulated industries.

Voluntary Self-Disclosure

The Memo, like prior DAG memos, puts an emphasis on voluntary self-disclosure. But rather than being one-size-fits-all, the Memo directs each Department component that prosecutes corporate crime to review its policies on voluntary self-disclosure, and if a formal, written policy does not exist — as it does for the FCPA Unit and the Antitrust Division – that component must draft and publicly share that policy. Further, the DAG directs the components to adhere to two core principles: "(1) absent aggravating factors, to not seek a guilty plea where there has been voluntary self-disclosure, full cooperation, and timely and appropriate remediation, and (2) to not require an independent compliance monitor for a corporation that is voluntarily self-disclosing relevant conduct, cooperates, and demonstrates it has implemented an effective compliance program."

Evaluation of a Corporation's Compliance and Compensation Programs

The Memo goes beyond discussing how to evaluate a company's compliance program but, for the first time, implements a DOJ-wide policy requiring a compensation metric to establish a robust compliance program. In other words, compliance is expected to be a factor in calculating compensation, and compensation clawback policies are suggested as disciplinary measures. The DAG has also directed the Criminal Division to develop further guidance before year-end on how to treat cooperating companies that have developed and implemented compensation clawback policies.

The Memo also focuses on how robust a compliance program's internal controls are over employees' use of personal devices and encrypted third-party applications for business communications. Indeed, the DAG has directed the Criminal Division to survey corporations' best practices in order to incorporate such practices into the next public memo, wherein DOJ will discuss how it evaluates corporate compliance programs. This ties into DOJ's first priority: investigating and prosecuting employees.

Independent Compliance Monitorships

The Memo directs every Department unit involved in corporate criminal resolutions that does not have a public monitor selection process to adopt the existing Department process or develop and publish its own process — based on the listed considerations in the Memo — before the end of the year.

Conclusion

There is plenty for companies to think about in the Memo: compensation metrics in compliance programs, how to get overseas communications stateside, best practices in ensuring employees do not use personal devices or encrypted applications to conduct business and putting an investigative plan or protocol in place before there is even a need for an investigation such that the company can move with speed without causing chaos should the need arise. And there is more coming before the end of the year. Stay tuned.

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