

Carrots and Sticks: DAG Lisa Monaco Puts Her Stamp on DOJ'S Corporate Criminal Enforcement Policies

By Harry Sandick and Hilarie Meyers

Going back many decades, each Deputy Attorney General (DAG) has promulgated revisions to the Department of Justice's corporate criminal enforcement policies, leaving behind eponymous policy memos that were carefully studied by defense attorneys (e.g., the "Holder Memo" and the "Thompson Memo"). Finding an approach that deters corporate wrongdoing and incentivizes corporations to participate in investigations but avoids punishing entire corporations (including their shareholders and employees) for the conduct of a few bad actors has proven to be a perennial challenge. On the one hand, overly lenient policies may fail to incentivize companies to cooperate with investigations and identify wrongdoers. On the other hand, policies that are overly focused on collecting headline-making settlement amounts from corporations may do little to deter wrongdoing by employees, while indictment can amount to a death sentence for a

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corporation that may ultimately be innocent of the charged crime. This was the case with Arthur Andersen in the early 2000s, an auditing firm unwisely charged by the Enron Task Force with obstruction of justice, a crime that it did not commit. By the time the Supreme Court unanimously reversed the conviction, the scandal had effectively put the firm out of business. See, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (reversing trial conviction).

Like her predecessors, Deputy Attorney General Lisa Monaco has been quick to put her stamp on the issue, and on Sept. 15, 2022, she announced a series of revisions to DOJ's corporate criminal enforcement policies and practices. DAG Lisa O. Monaco, *U.S. Dep't of Justice, Remarks on Corporate Criminal Enforcement*, (Sept. 15, 2022) (September 2022 Remarks) (<https://bit.ly/3sdAJpt>); Memorandum, Dep't of Justice, *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group* (Sept. 15, 2022) (September 2022 DOJ Memo) (<https://bit.ly/3De4U6q>). The revised corporate criminal enforcement policies focus on four priorities: 1) individual accountability; 2) corporate accountability; 3) independent compliance monitorships; and 4) transparency in corporate criminal enforcement. These revisions expand upon Monaco's 2021 speech and memo in which she announced initial changes to DOJ's corporate criminal en-

forcement policies and emphasized that there would be more to come. Memorandum, Dep't of Justice, *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* (Oct. 28, 2021) (October 2021 DOJ Memo) (<https://bit.ly/3HpMWxV>); DAG Lisa O. Monaco, U.S. Dep't of Justice, *Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021) (October 2021 Remarks) (<https://bit.ly/3So41wp>). Deputy Attorney General Monaco described her latest policy revisions as "a combination of carrots and sticks," and "a mix of incentives and deterrence," designed to "empower[] companies to do the right thing — and empower[] [DOJ] prosecutors to hold accountable those that don't." September 2022 Remarks.

Notably, these revisions come at a time when white-collar prosecutions are at an historic decades-low. See, *White-Collar Crime Prosecutions for 2021 Continue Long Term Decline*, Transactional Records Access Clearinghouse (Aug. 9, 2021) (<https://bit.ly/3SnER0K>). Whether this trend is due to decreased enforcement, meaningful changes in corporate culture, or some combination is an open question. Fighting against this downward trend, Monaco reiterated again that white-collar enforcement is a top DOJ priority and that the new policy was intended to "make clear that [DOJ] won't accept business as usual." September 2022 Remarks. In this article, we review

the policy revisions and ask whether and how they will change current DOJ practices in white-collar enforcement.

INDIVIDUAL ACCOUNTABILITY

Both the 2021 and 2022 revisions emphasize that DOJ's "first priority in corporate criminal matters is to hold accountable individuals who commit and profit from corporate crime." September 2022 DOJ Memo at 2. According to the 2022 Monaco Memo, focusing on individual accountability "deters future illegal activities, incentivizes changes in individual and corporate behavior, ensures the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system." *Id.*

The Monaco Memo outlines several policies to reinforce this long-standing priority. First, to be eligible for any cooperation credit, corporations must promptly disclose "all relevant, non-privileged facts about individual misconduct," especially priority evidence such as "information and communications associated with relevant individuals." *Id.* at 3. To some extent this is a perpetuation of existing policy, which requires corporations to report such information to be eligible for cooperation credit. However, the 2022 revisions clarify that DOJ expects to receive relevant materials "swiftly and without delay" to prevent the expiration of statutes of limitations and dissipation of evidence from hindering individual prosecutions. The timeliness of disclosures will help determine how much credit a corporation receives. In what we hope is more than an aspirational statement, prosecutors in turn "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." *Id.*

The Monaco Memo provides further guidance on the prosecution of foreign individuals. Before declining to prosecute an individual based on the likelihood of a foreign prosecution, "prosecutors must make a case-specific determination as to whether there is a significant likelihood that the indi-

vidual will be subject to effective prosecution in the other jurisdiction." *Id.* at 4. Additionally, the revised policies provide that "prosecutors should not be deterred from pursuing appropriate charges just because an individual ... is located outside the United States." *Id.*

CORPORATE ACCOUNTABILITY

The policy revisions also offer additional guidance on issues related to corporate accountability. First, building on the October 2021 policy revisions, which emphasized the need to consider the corporation's record of misconduct, the September 2022 Memo clarifies that "[n]ot all instances of prior misconduct ... are equally relevant or probative." September 2022 DOJ Memo at 5. Prosecutors should give particular weight to recent misconduct — occurring within the last five years — and to prior misconduct involving the same personnel. *See, id.* Multiple non-prosecution or deferred prosecution agreements for repeat offenders are disfavored and require written approval from the Deputy Attorney General.

Second, the revised policies reinforce DOJ's desire to incentivize corporations to voluntarily self-disclose misconduct. Noting that the benefits of voluntary self-disclosure should be clear and predictable, all DOJ components that prosecute corporate crime must promulgate a formal and publicly-available policy on voluntary self-disclosure. Such policies should adhere to two core principles: 1) "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;" and 2) "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." September 2022 DOJ Memo at 7.

Third, companies seeking cooperation credit must "timely preserve, collect, and disclose relevant docu-

ments located both within the United States and overseas." *Id.* at 8. Recognizing that foreign laws may hinder prosecutors' ability to gain access to documents located abroad, the 2022 Monaco Memo instructs prosecutors to "provide credit to corporations that find ways to navigate such issues of foreign law and produce such records." *Id.* In contrast, "an adverse inference as to the corporation's cooperation may be applicable" if a corporation seeks to capitalize on data privacy laws to shield misconduct. *Id.*

Finally, the revised policies identify two additional factors for prosecutors to consider when evaluating a corporate compliance program. First, the corporation's compensation structure should promote compliance by penalizing individuals who engage in criminal conduct with clawback measures and rewarding compliance-promoting behavior by employees. September 2022 DOJ Memo at 10. Second, the corporation should have effective policies governing the use of personal devices and third-party messaging platforms "to ensure that business-related electronic data and communications are preserved." *Id.* at 11.

COMPLIANCE MONITORSHIPS

The 2022 Monaco Memo stakes out a neutral position on monitors, with neither a presumption in favor of nor against requiring an independent compliance monitor; rather, determining whether a monitor is needed "must depend on the facts and circumstances of the particular case." September 2022 DOJ Memo at 11. DOJ prosecutors can consider a variety of factors in deciding whether to impose a monitorship, including but not limited to the facts of the case, the compliance program already in place, and the corporation's response to the criminal activity. *Id.* at 12.

With regards to selecting a monitor, the revised policies require every DOJ component involved in corporate criminal resolutions to have a publicly available monitor selection process by the end of the year. Once a monitor is appointed, prosecutors must review

the monitor's work "to ensure that it remains tailored to the workplan and scope of the monitorship." *Id.* at 13-14.

TRANSPARENCY

The 2022 Monaco Memo concludes by emphasizing DOJ's commitment to transparency regarding 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." September 2022 DOJ Memo at 15. To further this goal, the 2022 Monaco Memo provides that agreements to resolve corporate criminal liability, such as deferred prosecution agreements and non-prosecution agreements, should include an agreed-upon statement of facts outlining the criminal conduct at issue and a statement of considerations that explains DOJ's reasons for entering into the agreement. *Id.*

CONCLUDING THOUGHTS

Much of the 2022 Monaco Memo reinforces DOJ's existing corporate criminal enforcement policies and practices. The focus on individual accountability tracks with the October 2021 revisions and the 2015 Yates Memo issued by then-DAG Sally Yates. *See, e.g.,* Memorandum, Dep't of Just., *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015) (<https://bit.ly/3xVzYCY>). DOJ's emphasis on individual accountability makes sense — after all, prosecuting a corporation (as opposed to the individual bad actors) has far-reaching consequences and often harms people who had nothing to do with the purported misconduct.

DAG Monaco's revisions also clarify certain previously-announced policies. For example, while the 2021 Monaco Memo instructed prosecutors to consider a corporation's record of past misconduct, including prior criminal, civil, and regulatory actions, the 2022 Monaco Memo offers guidance on *how* prosecutors should weigh a corporation's history of misconduct. *Compare* October 2021 DOJ Memo at 3, *with* September 2022 DOJ Memo at 5-6. The additional clarity around what types of

prior misconduct will be given more or less weight is welcome guidance.

Although DOJ has long sought to incentivize voluntary self-disclosure, the 2022 policy revisions place new emphasis on the timing of disclosures, particularly in the context of allocating cooperation credit, by urging speedy disclosure (perhaps before a company has fully assessed the extent of the possible wrongdoing). As a general matter, DOJ arguably has been too dependent on voluntary disclosures at the expense of other investigative techniques. DOJ should be prepared to investigate misconduct for itself. An outsized focus on self-disclosure is unlikely to enhance DOJ's ability to target the worst actors who may be disinclined to disclose, and runs the risk of punishing those who come forward while overlooking those who hide more serious violations. In addition, DOJ's focus on speed may be to the detriment of companies' ability to conduct thorough internal investigations before making a voluntary disclosure. DOJ should give corporations enough space to determine whether there is any actual misconduct to disclose in the first place, rather than encouraging corporations to "cry wolf" when nothing may have happened out of fear that their disclosure will be viewed as untimely.

DOJ's continued interest in aggressively pursuing international prosecutions is also consistent with recent trends. Too often, DOJ has seemed overly eager to punish foreign nationals and corporations, even in cases involving purported misconduct that has very little connection to the United States or is in tension with recent court rulings that limit the reach of U.S. law. *See, e.g., United States v. Hoskins*, 902 F.3d 69, 98 (2d Cir. 2018); Harry Sandick & Jeff Kinkle, "The Global Reach of U.S. Law Enforcement," N.Y.L.J. (Dec. 10, 2018) (<https://bit.ly/3gwaV3d>). DOJ should reflect on whether such prosecutions vindicate U.S. interests or impose U.S. law on foreign nationals who engage in conduct with little or no nexus to the United States. The 2022 Monaco Memo's treatment of foreign laws, particularly

those that govern data privacy, also raises concerns. While companies should not use foreign law to hide misconduct, overseas entities should not be punished when compliance with DOJ's policies (such as a requirement of speedy disclosure) would force them to violate local laws. To be sure, DOJ would look dimly on a company that violated U.S. law at the behest of regulators in Europe or elsewhere.

Ultimately, while the 2022 policy revisions offer some new carrots and sticks, as a whole, there is more continuity than discontinuity, at least when it comes to DOJ's stated policies under the Obama Administration. Nevertheless, the revisions will certainly impact how corporations think about the timing of disclosure decisions and how lawyers engage with DOJ. The new policies may also shape how prosecutors approach corporate criminal enforcement and charging decisions, further pushing prosecutors to ask whether individuals have committed crimes, and to consider not pressing for corporate settlements if no individuals have committed crimes. If not pathbreaking based on its substance, the 2022 Monaco Memo is significant if for no other reason than it signals DOJ's desire to ramp up corporate criminal enforcement to where it was at some point in the past, prior to the last administration's deemphasis of this area, or even earlier than that. Regular and consistent enforcement of white-collar crime is perhaps the greatest stick of all.

