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U.S. Department of Justice Renews Focus on Individual Accountability in Revisions to Corporate Criminal Enforcement Policies

Client Alert

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The U.S. Department of Justice (“DOJ”) under the Biden Administration signaled last fall that it intended to prioritize prosecuting individuals responsible for corporate crimes and to reward corporations that provide as quick and complete of a voluntary disclosure as possible. On September 15, 2022, Deputy Attorney General Lisa Monaco clarified those intentions in a memorandum to federal law enforcement officials with the subject line: “Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group.” (hereinafter “the Monaco Memo”). The Monaco Memo clearly states that “[t]he Department’s first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime.”

It is common for the DOJ, under each new administration to announce revisions to the DOJ’s Corporate Criminal Enforcement Policies. Indeed, the Monaco Memo cites to a memorandum on the same topic that was penned by predecessor Deputy AG, Sally Yates dated September 9, 2015. Where the Monaco Memo differs from prior policy memos is in the way that it provides both a carrot and stick approach to incentivize corporations to cooperate in investigations and identify the individuals involved in the suspect conduct.

Here are the highlights:

- **Timely Disclosures:** Disclosure of all relevant, non-privileged facts about individual misconduct must be made on a “timely” basis in order for corporations to receive full cooperation credit. Whether such a disclosure will be deemed “timely” will depend on the particular facts and circumstances of the matter. However, the Monaco Memo provides some guidance in stating that prosecutors should consider “whether a company promptly notified prosecutors

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of particularly relevant information once it was discovered, or if the company instead delayed disclosure in a manner that inhibited the government's investigation."

- **Past Misconduct:** In determining how to resolve an investigation of a corporation's criminal conduct, prosecutors are directed to consider the corporation's record of past misconduct, including prior criminal, civil and regulatory investigations. Instances of past corporate misconduct that occurred more than 10 years prior for criminal resolutions, or more than 5 years ago for civil resolutions will be given less weight.
- **Prosecutors are also directed to consider the corporation's regulatory environment,** such that corporations that operate in more heavily regulated industries may have their past misconduct reviewed with a less jaundiced eye. Lastly, the DOJ will look to whether the prior misconduct involved the same personnel and/or executive leadership as the current investigation.
- **Data Privacy Laws:** Corporations may not be able to hide behind foreign data privacy laws in responding to an investigation by U.S. law enforcement. The Monaco Memo warns that "an adverse inference as to the corporation's cooperation may be applicable if such a corporation subsequently fails to produce foreign evidence."
- **Compensation Structures:** The DOJ will specifically look at a corporation's compensation structures and may provide greater cooperation credit to those corporation's whose compensation structures "reward compliant behavior and penalize individuals who engage in misconduct." The Monaco Memo specifically asks prosecutors to consider whether a corporation's compensation structure includes "clawback" provisions that enable penalties to be levied against current and former employees, executives or directors involved in criminal conduct.
- **Personal Devices and Messaging Apps:** The Monaco Memo notes the "ubiquity" of personal communication devices such as smartphones and tablets and the significant compliance risks they pose, particularly when combined with third-party messaging platforms that are often encrypted and not stored locally. Prosecutors are directed to consider whether a corporation that is seeking cooperation credit in an investigation of misconduct has policies designed to ensure the collection of such communications.
- **Independent Monitorships:** The Monaco Memo makes clear that there is no presumption in favor of imposing an independent compliance monitor and lays out a list of ten non-exhaustive factors prosecutors should consider as part of a case-by-case analysis in deciding whether a monitor should be imposed as part of a corporate criminal resolution.

As always, the decision on whether, how, and when to make a voluntary self-disclosure of corporate misconduct to federal law enforcement officials is a difficult one that will depend heavily on the particular facts and circumstances involved in each case. Butzel has a robust white collar defense practice group of experienced counsel that should be consulted at the earliest detection of potential corporate misconduct in order to fully investigate the matter, and to guide the corporation, its executives and/or its directors through this complicated and sensitive process.

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