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ENFORCEMENT TRENDS

The Accountability Message: What DOJ's Policy Updates on Corporate Crime Mean for Compliance Officers

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When DOJ speaks, it usually does so to send a message. Then, in articles like this, listeners debate and examine the intended audience and objectives, as well as the impacts on corporations and their counsel, as everyone asks, "What does it mean for me?"

Deputy Attorney General Lisa Monaco's keynote address at the recent ABA White Collar event in Miami (Address) is no exception, but the points delivered by DOJ are notably clear cut and direct. The intended audiences were called out by name: "counselors and voices in the C-Suite and Boardroom;" "prosecutors;" and "the Department." And "what this all means" was made clear in Deputy Monaco's five conclusory points:

1. Companies must proactively review their compliance programs, or it could cost them.
2. A company's whole criminal record is relevant to DOJ's prosecutorial decisions.
3. Companies must identify all involved individuals and all non-privileged evidence in order to receive full cooperation credit.
4. There is no presumption against monitors.
5. Watch this space, as there will be more policy changes to come.

There is an additional audience for these messages that is inferred but left unnamed, an audience on whom these messages may have the most significant impact, and an objective not listed in the five takeaways that is present throughout the Address. That unnamed audience is the corporate compliance officer, and the objective repeated over 14 times, but that did not make the takeaway list, is "accountability."

In this article, we summarize the direct DOJ messages about what the Department is seeing, changing and watching, as encompassed in Deputy Monaco's Address, and the related DOJ memorandum entitled "Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies" (the Monaco Memo). Then, rather than debate the pros and cons and potential unintended consequences of the new policies (as there always are), this article focuses on what these messages will mean for compliance officers in practice, and offers five ideas on how to use the accountability message to empower compliance programs and help both protect and grow stakeholder trust.

See "Effective Compliance in the Spotlight: Roles, Reality and Real Life Suggestions" (Nov. 13, 2019).

What DOJ is Seeing, Changing and Watching

Three Trends DOJ Is Seeing

Deputy Monaco set the scene by addressing three enforcement priorities that while currently trending, she noted ultimately represent "changes of degree and not of kind." The three trends highlighted are:

- the growing national security dimension to corporate crime as it may touch upon matters related to sanctions and export control, as well as continually evolving cyber threats from abroad;
- the increasing importance of data analytics – whether they are used to uncover fraud, insider trading or market manipulation as part of corporate criminal investigations; and
- the use of emerging technological and financial industries by bad actors in attempts to defraud the investing public.

See "Private Equity FCPA Enforcement: High Risk or Hype?" (Feb. 18, 2015).

Three Policies DOJ Is Changing

To strengthen the Department's response to corporate crime, Deputy Monaco affirmed three key new policies that can be expected to have significant immediate and longer-term effects on corporate compliance practice:

- First, highlighting DOJ's continued focus on individual accountability, Deputy Monaco affirmed the restoration of prior guidance (released in 2015, by then-Deputy Attorney General Sally Yates (the Yates Memo)), such that to be eligible for any cooperation credit, a company must identify all individuals involved in any aspect of misconduct at issue, regardless of the individual's position, status or seniority.
- Second, targeting corporate recidivism, prosecutors are directed to take a much broader spectrum of relevant historical misconduct into account when evaluating resolution options for a company. Prosecutors should look beyond "similar" misconduct in the more discrete realms of, for example, FCPA, tax or environmental matters, to a fulsome and complete consideration of all prior corporate misconduct irrespective of type.
- Third, definitively correcting any misapprehension that corporate monitorships may only apply in exceptional cases, Monaco signaled the Department's intent to increase the use of an enforcement mechanism that had waned in recent years.

See the Anti-Corruption Report's two-part series on the DOJ's "new" monitor policy: "An Announcement of the Obvious" (Dec. 12, 2018), and "Carefully Selected Monitors, Thoughtfully Scoped Monitorships" (Jan. 9, 2019).

Three Areas DOJ Is Watching

Monaco emphasized more than once that additional changes will be forthcoming. She announced the creation of a Corporate Crime Advisory Group (CCAG) within the DOJ that, according to the Monaco Memo, "will consider and, where necessary, recommend additional guidance concerning the three revisions set forth herein." Further, the "group will also consider additional revisions and reforms that will strengthen our approach to corporate crime and equip our attorneys with the tools necessary to prosecute it when it occurs."

Additionally, Deputy Monaco identified three key areas of study for the Department going forward, consistent with the policy changes noted above:

- First, DOJ will review how it selects corporate monitors, including options for further standardization across divisions and offices.
- Second, DOJ will use data on corporate resolutions to inform its responses to recidivist companies with a history of repeated corporate wrongdoing, including how that may impact consideration of pretrial diversion.
- Third, DOJ is paying close attention to whether companies bound by the terms of an NPA or DPA are accountable to and complying with the conditions of those agreements.

Five Ways Compliance Officers Can Use These Messages

The DOJ describes its mandate as to "hold those that break the law accountable." The policy changes and areas of study for the new CCAG are very focused on increasing individual and corporate accountability. But what does this message mean for those working within companies, who have an even larger mandate that includes the design of frameworks to prevent improper conduct, to promote a culture of integrity and encourage step-up reporting?

Here we refer to the multiple everyday roles of the compliance officer. Compliance officers need to be not just internal enforcers, but guides, problem solvers and gatekeepers, often all at the same time. It would be easy to lose heart, and compliance officers can be forgiven for feeling overwhelmed, or even a little cynical in reflecting on the note that DOJ "recognizes the resources and the effort it takes to manage a large organization and to put in place the right culture."

However, no compliance officer has the time or luxury to throw a pity party; not when there is work to be done and in compliance, there is always work to be done! Below we set out five practical ways that compliance officers can consider making the most of these messages as their additional, and unnamed, audience.

1) Elevate the Importance, Budget and Seat-at-the-Table for Compliance

Every DOJ statement, especially the multiple policy statements over the last few years – from voluntary disclosure benefits to effective compliance program guidance updates – presents an opportunity to educate the board, senior management and constituents at all levels in companies about the need for and importance of compliance programs. The Monaco Address and Memo give compliance officers the opportunity to say "I, the compliance officer, am not crazy, nor is my budget request punching at ghosts. Rather, this is what DOJ expects."

As Deputy Monaco reminded the audience, "Department guidance strengthens the case for these measures because it makes clear why taking steps to root out misconduct, and avoid the 'edge case,' often can be the most valuable guidance." Here, she was focusing on the guidance "a general counsel or trusted

legal advisor can provide." Many compliance officers may recognize themselves in that description of the trusted legal advisor, particularly so in the context of Deputy Monaco's highlight of her private sector board service and the "difficult conversations that arise surrounding compliance and measures designed to proactively stop misconduct, and the tradeoffs that may need to be considered when making investment decisions." Monaco's message can be interpreted as DOJ aligning on the side of compliance officers and calling for other leaders to come to their support for the compliance cause.

Deputy Monaco's statements, especially the one calling on prosecutors to bring more individual enforcement actions (and not allow fear of losing to deter them) as well as requiring the production of evidence related to all involved executives, present fresh opportunities for compliance officers to make their value-add case. As the Deputy noted, "companies service their shareholders when they proactively put in place compliance functions and spend resources anticipating problems."

These messages present helpful and timely reminders in support of compliance officers' regulatory and commercial case for elevation, budget and senior-level involvement.

2) Time for Holistic Risk Approaches: Un-Pillar the Program

When announcing the policy update to the Federal Prosecution of Business Organizations directing prosecutors to consider the full range of past corporate misconduct across subject matters, agencies and even jurisdictions, Deputy Monaco noted that, "a company might have an anti-trust investigation one year, a tax investigation the next, and a sanctions investigation two years after that."

This new policy follows a broader stakeholder trend of calling on corporations to see risk more holistically. The practical messaging to compliance officers is that the time is now to embrace holistic risk approaches to compliance, and to "un-pillar" their programs.

In response, compliance officers should proactively evaluate mandates and ways of working between sub-groups or different corporate functions that own distinct but overlapping compliance frameworks. Some related questions may include:

- Do anti-corruption and sanctions mandates reside with ethics and compliance, but anti-trust and tax with the Legal Function?
- The ethics hotline may sit with HR, but are investigations distributed between legal, compliance and audit?
- Are insider trading and SEC disclosures only managed by the lawyers in the corporate secretary's office?
- Is data privacy compliance and cyber only visible to IT and a subset of lawyers?

If the answer to any of these questions is yes, the company's risk and control functions might be pillared. Pillared programs may not only find themselves missing areas for leverage and efficiency but, as the Deputy's address makes clear, they could even be creating unintended collateral risks for each other.

Therefore, it is time to ask whether a company's subject matter systems, people

and processes are appropriately connected and whether there are opportunities to map, align and leverage across risk and compliance subjects.

By way of example to emulate, DOJ's newly minted CCAG will address multiple subject matters, with a "broad mandate and will consult broadly." The question for compliance officers is whether their companies are doing the same. With DOJ announcing concrete moves towards holistic enforcement, companies will need to expedite their own evolution to holistic risk compliance in order to keep pace.

See "Klaus Moosmayer of Novartis Explains Why Holistic Risk Assurance Is the Future of Compliance" (Jun. 23, 2021).

3) Use Metrics to Find Trends

In one of the three key trends discussed, DOJ recognizes the larger and larger role played by data analytics in corporate criminal investigations. The Department is also now studying the "the data on corporate resolutions" and, as described, doing somewhat of an organizational root cause analysis as to why it is "between 10% and 20% of all significant corporate criminal resolutions involved companies who have previously entered into a resolution with the department." At the same time, they are also critically assessing whether NPA and DPA terms are achieving the goals and intended results.

Compliance officers can see this as a call to use similar tools, examine trends and organizational causes and, as part of continuous improvement, ask whether the designed controls are achieving the current goals and having the intended results within their programs.

If the DOJ is itself pursuing a dynamic state of continuous improvement in enforcement, what better motivation to seek the same in a corporate program? Either internally, or with expert outside assistance, companies should proactively look at their past resolutions, hotline reports, audits, investigations, training tests, discipline, remediation actions and employee perception surveys, across risk subject matters. Creating trend analyses and heat maps will help to identify the patterns and correlations. Any changes in the company's business model present clear opportunities to examine for potential compliance framework mismatch. Companies should test for effectiveness and probe potential organizational causes because what once worked, or was an aligned metric to track, may no longer be targeting its largest risks or achieving its goals.

Companies should also look to the trends in and outside their industry and jurisdictions – where DOJ is proactively reviewing resolutions and looking for trends, compliance officers should be doing the same thing.

See the Anti-Corruption Report's four-part series on measuring compliance: "Getting Started" (Aug. 2, 2017); "Seven Areas of Compliance to Measure" (Aug. 16, 2017); "How to Measure Quality" (Sep. 6, 2017); and "Gathering and Analyzing Data" (Sep. 20, 2017).

4) Put Internal Investigation Protocols in Place

Another area to consider revising in light of DOJ's updates is a company's internal investigation protocols. As noted above, DOJ's first new policy states that to be eligible for cooperation credit companies must "identify all individuals involved in misconduct, regardless of their position, status or seniority,"

and provide "all non-privileged information about individual wrongdoing."

This means it is a good time for compliance officers to review ethics hotline triage procedures, escalation and severity matrixes, and internal investigation protocols to credibly scope internal investigations and ensure processes for identifying all potentially involved individuals while preserving evidence all the way up the chain. Relatedly, companies should critically examine whether discipline and remediation outcomes (another trend to review) are consistent and delivering that individual accountability that DOJ is looking for and, if not, what needs to change.

See the Anti-Corruption Report's three-part series on employee discipline for anti-corruption issues: "Predictability and Consistency in the Face of Inconsistent Laws" (Nov. 1, 2017); "Investigation and Documentation to Smooth the Discipline Process" (Nov. 15, 2017); and "Due Process for a Just and Effective System" (Nov. 29, 2017).

5) If DOJ Does Not Trust a Program, the Monitors Are Coming

Trust and credibility are a currency and in this recent policy announcement Deputy Monaco confirmed what those practicing white collar have long known: U.S. enforcement will not resolve with a company until they can trust that the company will not be back in front of them with the same issue. The message for compliance officers is to review their program, and make sure it is credible before and during any investigation. Compliance officers should take this opportunity to get ahead of the issue by bringing in outside divergent thinking and expertise on the company's own terms, to build a program and the currency of trust. Otherwise, as Deputy Monaco made clear, the monitors will be coming.

Relatedly, if a company finds itself likely to receive a monitor, it should start proactively thinking about how a monitor can help build or improve a sustainable program as early as possible. A company's approach to a monitorship – from who is chosen as a monitor, to negotiating the scope of the monitorship, and the role of outside counsel in the process – all influence the ability of the monitorship to have positive and sustainable impact.

However, the number-one factor in determining whether the process is a value-add is the attitude and view of the company toward the monitorship. If, as Deputy Monaco notes, monitors are imposed in part because the government does not trust a company to build a strong compliance program without assistance, then compliance officers should work with the company to structure and approach any monitorship in a way that allows for the building of that trust. Changing the attitude of all involved from one of investigation, enforcement and advocacy to an aligned goal of supporting a credible, resourced, empowered and effective compliance program will be a value-add to protect and grow the company, and it will grow trust and turn a challenge into a springboard.

See "Achieving Spiritual Compliance Through a Monitorship" (Aug. 5, 2020).

Accountability: For Risk, Conduct and Outcomes

Reflecting on the totality of the messages in Deputy Monaco's Address, one theme that clearly emerges is the importance of accountability both at a corporate and individual level. As compliance officers engage with these policy changes and the potential impacts for their companies, it is also time for a broader accountability check. Companies should ask:

- Does accountability for risk created in the business sits with the right level of senior business risk owners?
- Are the appropriate risk owners accountable for related controls, including training attendance?
- Is the board of directors accountable for, involved and actively engaged in compliance governance?
- Does the compliance team have the requisite empowerment, including both people and resources, to truly be accountable for an effective compliance framework that matches the company's business model?
- Has the compliance structure and resourcing created a potential for "outsourcing" of ethics, where the business outsources ethical decision-making responsibility to compliance processes alone?

These are examples of the kinds of broader questions that compliance officers may contend with as they anticipate the further developments and policy announcements from DOJ foreshadowed in Deputy Monaco's address.

See Mayer Brown's two-part guest series on FCPA Evolution through an M&A lens: "How M&A Impacted FCPA Enforcement and Guidance" (Jan. 20, 2021); "The Compliance Value-Add" (Mar. 3, 2021).

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