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Corporate Crime? DOJ Says Not on My Dime.

In the keynote speech at the American Bar Association's National Institute on White Collar Crime in late October, Deputy Attorney General Lisa O. Monaco announced significant steps the Department of Justice (DOJ) will take in tackling corporate wrongdoing. In particular, Monaco announced changes in three areas: (i) requiring corporations to provide the DOJ with information on *all* individuals involved in the wrongdoing to qualify for cooperation credit; (ii) reviewing *all* of a company's past criminal and related records in charging decisions; and (iii) clarifying that corporate monitors may well be an appropriate part of resolving cases. These changes will have significant impacts on investigations involving healthcare organizations and providers, as discussed below.

Monaco focused first on individual accountability. She directed the DOJ to restore guidance, first issued during the Obama administration, "making clear that to be eligible for any cooperation credit, companies must provide the department with all non-privileged information about individuals involved in or responsible for the misconduct at issue." Monaco then underscored this: "[A] company must identify all individuals involved in the misconduct, regardless of their position, status or seniority." In so doing, Monaco announced a return to the standards on individual accountability previously articulated by then-Deputy Attorney General Sally Yates, before the standards were modified during the Trump administration.

Next, Monaco addressed how prior misconduct by a company may impact DOJ decisions on appropriate corporate resolutions. "Going forward," she explained, "prosecutors will be directed to consider the full criminal, civil and regulatory record of any company when deciding what resolution is appropriate" in resolving a criminal investigation. While previously prosecutors had focused on a more discrete subset of "similar misconduct," they will now take a much broader view, indeed starting from the premise that "all prior misconduct is potentially relevant." For healthcare entities, this will include billing issues, tax-exempt considerations such as unrelated business income, physician ownership issues under Stark, and relationships with referral entities under state and federal anti-kickback laws.

Finally, Monaco addressed the use of corporate monitors to verify that companies are living up to their obligations in deferred prosecution or nonprosecution agreements, under which the government defers or abstains from prosecution assuming the company fulfills various conditions and obligations. "In recent years," Monaco explained, "some have suggested that monitors would be the exception and not the rule." She disagreed, rescinding any prior DOJ guidance that suggested that monitorships are disfavored. The takeaway for healthcare entities: One trade-off for the benefits of a deferred or nonprosecution agreement will likely be the acceptance of a monitor.

The tough stance reflected in the DOJ's new guidance will plainly impact companies already under investigation and seeking resolutions with the DOJ. But it also represents a shot across the bow for many others. Monaco herself may have put it best: Companies need to review their compliance programs now so they monitor for and remediate misconduct, "or else it's going to cost them down the line." This is a bold warning for healthcare organizations, which should review their corporate compliance programs and make sure their boards are appropriately educated on the DOJ's current positions, particularly its focus on individual culpability and an organization's past misconduct.

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