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Preview of Coming Attractions on Corporate Criminal Enforcement

Almost like a trailer for a movie, Deputy Attorney General Lisa Monaco delivered remarks earlier this fall on the Department of Justice's (DOJ) priorities in combating corporate crime, detailing what the DOJ is already doing and also, importantly, what may be on the horizon. The speech—accompanied by a memorandum outlining the Department's positions and goals—was delivered to a packed house at the NYU School of Law.

Of the DOJ's priorities, number one is individual accountability. As Monaco made clear, "Whether wrongdoers are on the trading floor or in the C-Suite, we will hold those who break the law accountable, regardless of their position, status, or seniority." In terms of timing, the DOJ may focus on completing investigations and seeking criminal charges against individuals prior to or concurrently with entering into a resolution with the company. As a result, any undue or intentional delay in producing information or documents, particularly those that show individual culpability, may result in the reduction or denial of cooperation credit.

Monaco's guidance next focused on companies with a history of misconduct. Prosecutors have been asked to approach corporate recidivism with renewed scrutiny, specifically taking into consideration the nature of the past misconduct and related circumstances, such as compliance programs and changes in corporate leadership. The DOJ will disfavor successive non-prosecution or deferred prosecution agreements with the same company. Indeed, Monaco delivered a warning: "If any corporation still thinks criminal resolutions can be priced in as the cost of doing business, we have a message—times have changed."

Another DOJ focus, unsurprisingly, is the encouragement of voluntary self-disclosure. Noting the success of existing leniency programs for self-disclosure, including the Antitrust Division's Leniency Program, the voluntary disclosure program for FCPA violations, and the National Security Division's program for export control and sanctions violations, Monaco affirmed that it was the DOJ's goal to expand such programs across all of its divisions. She also reiterated the rewards: Absent aggravating factors, the DOJ "will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct." In addition, it will not require an independent compliance monitor "if, at the time of resolution, it also has implemented and tested an effective compliance program." Of course, how these policies and incentives are applied in particular cases is always challenging.

Monaco finally addressed a fourth area of importance: greater uniformity and greater transparency in the selection of independent compliance monitors in appropriate cases, as well as prosecutors "monitoring the monitors" once in place. In connection with the speech, the DOJ released new guidance on initially identifying the need for a monitor, then selecting a monitor, and finally overseeing the monitor's work.

These pronouncements, including the emphasis on individual responsibility, are certainly important in better understanding where the DOJ is likely to devote its time, attention, and considerable leverage.

This article was first published in Day Pitney's White Collar Roundup in October. It is being republished here to highlight the implications for healthcare providers facing investigations involving, among other things, allegations of anti-kickback violations, Stark violations, and false claims. Gone are the days of the government focusing only on a settlement at the corporate level. The message is clear—individuals will be held personally accountable. Another takeaway is to err on the side of self-disclosure, particularly if an organization has had compliance issues in the past.

Day Pitney's healthcare and white collar lawyers combine their experience to effectively assist clients with proactive compliance guidance, government investigations, internal investigations, settlement and corporate integrity negotiations with state and federal agencies, and service as independent compliance monitors. We are available to assist healthcare providers with any of their compliance issues.

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