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The Corporate Crime Advisory Group Has Spoken: DOJ Revises Corporate Criminal Enforcement Policies

SEPTEMBER 19, 2022

On September 15, 2022, the Department of Justice (Department) released a memorandum revising several key aspects of its corporate criminal enforcement policies.[1] The new policy, titled *Further Revisions to Corporate Criminal Enforcement Policies Following Discussions With Corporate Crime Advisory Group* (the September 2022 Revised Policy) prioritizes four areas: (1) individual accountability, (2) corporate accountability, (3) independent compliance monitors and (4) a commitment to transparency. The new policy builds on the foundation laid in the October 2021 *Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* (October 2021 Memorandum) and its contours were informed in part by a series of meetings between the Corporate Crime Advisory Group (CCAG)[2] and civil society groups, criminal law experts, in-house counsel and business leaders, among other stakeholders, to discuss corporate enforcement. Deputy Attorney General Lisa Monaco previewed the key themes of the new policy in a speech at NYU School of Law's Corporate Compliance Enforcement Program on September 15, 2022.[3]

According to the Department, the September 2022 Revised Policy, developed in consultation with this diverse set of stakeholders, is intended to provide general counsels and chief compliance

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[1] Lisa O. Monaco, Deputy Attorney General, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, at 3 (Sept. 15, 2022) (hereinafter September 2022 Revised Policy).

[2] The CCAG's creation was announced in the October 2021 Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies. See Lisa O. Monaco, Deputy Attorney General, DOJ, Memorandum on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies, at 4 (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download (hereinafter October 2021 Memorandum).

[3] The text of the full speech can be found here: https://www.justice.gov/opa/speech/file/1535301/download.

officers the tools needed to make the business case for compliance, to further incentivize robust self-disclosure, and to provide prosecutors additional guidance and resources to pursue Department priorities in the four key areas noted above.

I. Guidance on Individual Accountability

A. Timely Disclosure and Prioritization of Individual Investigations

The September 2022 Revised Policy reinforces the October 2021 Memorandum's focus on the prosecution of individuals and makes clear that individual accountability is the "first priority" in corporate enforcement.

Companies hoping to obtain cooperation credit at the time of resolution are already obliged to report all relevant, non-privileged facts about individual misconduct to the Department. The September 2022 Revised Policy now requires companies to produce this material "swiftly and without delay" to minimize challenges to individual prosecutions that might arise as statutes of limitation expire, evidence dissipates and memories fade.[4] Department prosecutors will likewise now consider the timeliness of the production of information about relevant individuals (and not just the production of materials alone) when determining whether and how much cooperation credit to allocate at the time of resolution.

The September 2022 Revised Policy gives priority to "information and communications associated with relevant individuals during the period of misconduct,"[5] which companies should proactively identify and produce to the Department whether or not it is requested. Companies that identify relevant information but delay its production for any reason, including to complete an internal investigation or to minimize collateral damage, risk losing cooperation credit. For their part, Department prosecutors must "strive" under the September 2022 Revised Policy to complete the investigation into individuals, and seek any warranted criminal charges, prior to or at the same time as entering into a resolution with a corporation. If prosecutors seek to enter into a corporate resolution prior to completing an investigation into responsible individuals, prosecutors must submit a memorandum detailing the status of the investigation of all potentially culpable individuals and a detailed plan to "bring the matter to resolution"[6] prior to the end of the statute of limitations period.

B. Foreign Prosecutions of Individuals Responsible for Corporate Crime

The September 2022 Revised Policy recognizes the increasingly global nature of corporate prosecutions, including prosecutions of the individuals through which those corporations act.[7] While

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[4] September 2022 Revised Policy, at 3.

[5] Id. at 3.

[6] *Id.*

[7] *Id.* at 4.

acknowledging that the Principles of Federal Prosecution "recognize that effective prosecution in another jurisdiction may be grounds to forego federal prosecution,"[8] the September 2022 Revised Policy also keeps central the Department's desire to vindicate U.S. justice interests and requires prosecutors to make a "case-specific determination" as to the efficacy of prosecution against an individual in another jurisdiction based on "(1) the strength of the other jurisdiction's interest in the prosecution; (2) the other jurisdiction's ability and willingness to prosecute effectively; and (3) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction."[9]

II. Guidance on Corporate Accountability

A. Evaluating a Corporation's History of Misconduct

Prior Department Guidance had emphasized the need to consider a corporation's history of prior misconduct.[10] The September 2022 Revised Policy further refines the Department's policies on recidivism. While 10% to 20% of corporate resolutions involve recidivists, the September 2022 Revised Policy makes clear that "not all instances of prior misconduct … are equally relevant or probative."[11] The most relevant prior misconduct will generally be that involving U.S. enforcement agencies or that involving the same individuals as those implicated in the case under investigation. Importantly, the Department will give quantitative consideration to the age of the prior misconduct, giving prior criminal misconduct less weight after ten years, and civil and regulatory misconduct less weight after five, with the caveat that repeated misconduct even outside of these time parameters may be indicative of a corporation that operates without an appropriate compliance culture or institutional safeguards and thus may result in prosecution and/or more severe charges. The September 2022 Revised Policy requires prosecutors to consider other factors, including the facts and circumstances underlying a corporation's prior resolution; factual admissions by the corporation; the seriousness and pervasiveness of the misconduct underlying each prior resolution; whether that conduct was similar in nature to the instant misconduct under investigation; and whether at the time of the misconduct under review, the corporation was serving a term of probation or was subject to supervision, monitorship or other obligation imposed by the prior resolution.

Going forward, companies will be viewed in the context of their peers in terms of misconduct—those in highly regulated environments will be evaluated differently than those not subject to those

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[8] *Id.*; JM § 9-27.220.

[9] *Id.*; JM § 9-27.240. The September 2022 Revised Policy allows prosecutors time to determine whether to bring a prosecution against an individual prosecution in foreign jurisdiction(s) for the same conduct but warns against waiting until statute of limitations concerns arise. Finally, the Department does not restrict itself to individuals located in the United States.

[10] October 2021 Memorandum, at 3.

[11] September 2022 Revised Policy, at 5.

same requirements. Finally, the Department underlined its desire not to impede acquisitions and noted that it would not penalize misconduct found at an acquired entity if the successor company promptly addressed any compliance concerns in the post-acquisition period. These considerations reflect concerns raised by the defense bar during meetings with the DAG's office as it was formulating the September 2022 Revised Policy.

On the other hand, the September 2022 Revised Policy still requires companies and prosecutors to seriously consider whether any overlap between the prior and present misconduct—in terms of type of misconduct or personnel—reflects broader and as yet unresolved weaknesses in the company's compliance program. The September 2022 Revised Policy disfavors multiple, successive non-prosecution or deferred prosecution agreements with the same company and the same leadership,[12] while simultaneously encouraging companies to voluntarily self-disclose potential misconduct.[13]

B. Voluntary Self-Disclosure by Corporations

The September 2022 Revised Policy preserves existing voluntary disclosure initiatives[14] and expands to all DOJ divisions prosecuting corporate crime the principle that companies that promptly and voluntarily self-disclose potential misconduct may be eligible for leniency at the point of resolution. Speaking at NYU, the DAG said she hoped to incentivize companies to "step up and own up to misconduct," and noted that, in her view, "voluntary self-disclosure is an indicator of a working compliance program and a healthy corporate culture."[15]

The September 2022 Revised Policy directs each Department division to develop[16] and publish a formal, written policy to incentivize self-disclosure that incorporates the following principles: 1) corporations that have voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated will not receive a guilty plea absent aggravating circumstances; and 2) the Department will not impose an independent compliance monitor for a cooperating corporation that voluntarily self-discloses if that company can show at the time of resolution that it implemented and tested an

[12] *Id.* at 6 (The September 2022 Revised Policy requires any proposed offers of an NPA or DPA to repeat offenders to be scrutinized by the Department to ensure greater consistency across the Department and a more holistic approach to corporate recidivism).

[13] *Id.*

[14] The Department cited the Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division); Export Control and Sanctions Enforcement Policy for Business Organizations (National Security Division); and Factors in Decisions on Criminal Prosecutions (Environment & Natural Resources Division).

[15] Lisa A. Monaco, Deputy Attorney General, Remarks on Corporate Criminal Enforcement, New York University (Sept. 15, 2022) (hereinafter September 15, 2022 NYU Remarks).

[16] September 2022 Revised Policy, at 7 (The policies must detail the division's expectations of what constitutes a voluntary self-disclosure and lay out the benefits that corporations can expect to receive if they meet the standards for voluntary self-disclosure under that division's policy).

effective compliance program.[17] While these requirements were previously reflected in the FCPA Corporate Enforcement Policy, they are new for other DOJ divisions. In addition, under the prior version of the FCPA Corporate Enforcement Policy, voluntary self-disclosure opened the door to a declination absent aggravating factor, while the September 2022 Revised Policy makes—for all DOJ divisions—voluntary self-disclosure a prerequisite for anything but a guilty plea at the time of resolution.

C. Evaluation of Cooperation by Corporations

The September 2022 Revised Policy reiterates that cooperation credit takes many forms and is calculated differently based on the degree to which a company cooperates with the Department and its demonstrated commitment moving forward. Citing Department precedent on the contours of corporate cooperation and its benefits,[18] the September 2022 Revised Policy focuses on cooperation in the context of cross-border investigations. Under existing guidance, companies seeking credit for cooperation must timely preserve, collect and disclose relevant documents located both within the United States and overseas. Where these efforts may be limited or made more challenging by data privacy laws, blocking statutes or other restrictions imposed by foreign law, the company must show how the limitation applies to it and must also present alternatives. Prosecutors are instructed to provide cooperation credit to companies that actively engage in navigating issues of foreign law to produce records, and are less likely to provide credit to companies that inappropriately stymie the production of foreign evidence. The Department will update its Justice Manual to ensure greater consistency across components concerning steps a company needs to take to receive maximum credit for full cooperation.[19]

D. Evaluation of a Corporation's Compliance Program

The September 2022 Revised Policy builds on existing Department guidance that outlines factors prosecutors must consider when evaluating the strength of a corporate compliance program at the time of the misconduct and at the point of resolution,[20] adding compliance-related compensation and the use of personal devices as new data points for prosecutors' consideration.

1. Compensation Structures That Support Compliance

The September 2022 Revised Policy asks prosecutors to consider whether company compensation systems "clearly and effectively impose financial penalties for misconduct" that "incentivize compliant conduct, deter risky behavior, and instill a corporate culture in which employees follow

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[17] *Id.*

[18] *Id.*.

[19] *Id.*

[20] *See e.g.,* Criminal Division, Evaluation of Corporate Compliance Programs (updated June 2020); Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations (July 2019).

the law and avoid legal 'gray areas.'"[21] Employees must understand that they will be held personally accountable for misconduct, backed up by corporate policies—like compensation clawback provisions—that tie employee misdeeds to financial disincentives.

At the same time, companies should use the carrot as well as the stick, rewarding and calling out employees that contribute to a culture of compliance within the organization through the use of compliance metrics and benchmarks in compensation calculations, as well as performance reviews that measure and reward compliance-promoting behavior.[22]

Prosecutors should evaluate how these compensation mechanisms work in practice at the company. To this end, the September 2022 Revised Policy requires the Criminal Division to develop further guidance by the end of the year, focused in particular on how to reward corporations that develop and apply compensation clawback policies. The DAG focused on these measures because they reward compliance, promote good behavior and in part shift the burden of financial penalties from shareholders to those who may have caused them through misconduct.

2. Use of Personal Devices and Third-Party Applications

The September 2022 Revised Policy recognizes that the increased use of third-party messaging platforms and personal devices to conduct business poses significant corporate compliance risk. The Department will consider in evaluating a company's compliance policies, cooperation and remedial efforts whether a company has implemented effective policies and procedures governing its employees' use of personal devices and third-party messaging platforms to ensure that business-related communications and electronic data are preserved, can be collected and will be provided to the Department in an investigation. The Department's Criminal Division will continue to assess the best corporate practices on this issue, and plans to incorporate its findings in the next edition of its Evaluation of Corporate Compliance Programs guidance.

III. Independent Compliance Monitorships

A. Factors to Consider When Evaluating Whether a Monitor Is Appropriate

In the October 2021 Memorandum, DAG Monaco made clear that the DOJ was "committed to imposing monitors where appropriate in corporate criminal matters" and that prosecutors "should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship."[23] In her remarks on September 15, 2022, DAG Monaco noted that, in the year since her clarification of the Department's stance on corporate monitorships, the

[21] September 2022 Revised Policy, at 9.

[22] *Id.* at 10.

[23] October 2021 Memorandum, at 4.

Department has "heard a call for more transparency to reduce suspicion and confusion about monitors,"[24] and pledged to address those concerns.

As an initial matter, the September 2022 Revised Policy clarifies that there is no *presumption* with respect to a monitor and slightly recasts the statement that the Department should "favor" the imposition of a monitor, stating that: "Department prosecutors will not apply any general presumption against requiring an independent compliance monitor . . . as part of a corporate criminal resolution, nor will they apply any presumption in favor of imposing one."[25] Instead, the September 2022 Revised Policy repeatedly emphasizes that the selection of a monitor "must depend on the facts and circumstances of the particular case" and that prosecutors' assessments of the need for a monitor must occur on a "case-by-case basis." The emphasis on the need for "case-by-case" assessment notwithstanding, DAG Monaco's remarks and the September 2022 Revised Policy do not in any way suggest a decreased use in compliance monitors as part of corporate criminal resolutions; to the contrary, it is clear that the potential imposition of a monitor will continue to be an important consideration for companies navigating a resolution with the Department.

Next, the September 2022 Revised Policy reiterates familiar factors to consider when evaluating the need for a monitor, including whether:

- At the time of resolution, the corporation has implemented an effective compliance program, and whether the corporation has tested that program and related internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;
- The underlying misconduct was long-lasting, pervasive across the organization or approved, facilitated or ignored by senior management; and
- The corporation took adequate remedial measures—such as employee discipline or terminating business relationships—to address the underlying criminal conduct.

Notably, the September 2022 Revised Policy formally introduces new factors for prosecutors to consider in evaluating the imposition of a monitor. While these new factors were previously considered by the Department in practice, Department guidance on the imposition of corporate monitors did not formally lay them out. The new considerations include whether:

- The corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies DOJ self-disclosure policy;[26]

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[24] September 15, 2022 NYU Remarks.

[25] September 2022 Revised Policy, at 11.

[26] This factor was included for consideration in the FCPA Corporate Enforcement Policy, but may be new for other DOJ divisions.

- The underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;
- The corporation faces any unique risks or compliance challenges, such as with respect to a particular region or business sector; and
- The corporation is subject to oversight from industry regulators or the imposition of a monitor by another domestic or foreign enforcement authority or regulator.

With certain of these new considerations, DOJ appears to be further expanding the factors for prosecutors to consider in evaluating the imposition of a monitor beyond the "four corners" of a company's compliance program.

B. Selection of Monitors

The Department has long recognized that a key consideration in the monitor selection process should be to instill public confidence in the process.[27] In her October 2021 remarks, DAG Monaco emphasized that the process for considering monitor candidates should eliminate "even the perception of favoritism" and that the Department would be studying the selection process and whether to further standardize monitor selection.[28] In line with these considerations, DAG Monaco noted in her September 15, 2022 remarks that "going forward, all monitor selections will be made pursuant to a documented selection process that operates transparently and consistently."[29]

To that end, the September 2022 Revised Policy mandates that every unit in the Department that is "involved in corporate criminal resolutions that does not currently have a public monitor selection process must adopt an already existing Department process, or develop and publish its own selection process before December 31, 2022." While this modification—in providing an option for individual units to create an individualized process—does not fully standardize the monitor selection process across the Department, it does ensure that any such process will be formalized and more transparent. If a unit of the Department chooses to develop its own process, that process cannot be implemented in relation to a corporate criminal resolution until it has been approved by the Office of the Deputy Attorney General (ODAG) and then formally made public. Going forward, a record of each of these relevant selection processes will be maintained by the Assistant Attorney General for the Criminal Division.

The September 2022 Revised Policy also outlines certain elements that any monitor selection process must incorporate as a means of further promoting "consistency, predictability, and

[27] Brian A. Benczkowski, Assistant Attorney General, Memorandum on Selections of Monitors in Criminal Division Matters, Section E, at 4 (Oct. 11, 2018).

[28] Lisa A. Monaco, Deputy Attorney General, Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021).

[29] September 15, 2022 NYU Remarks.

transparency." Certain of these elements have been used by particular offices or units (the FCPA unit most notably) or in certain resolutions, but have not previously been uniformly required across the Department. These updated provisions include the following:

- All relevant offices or units must form either a standing or ad hoc committee to review and consider monitor candidates;
- Each of these monitorship selection committees must include an ethics officer or professional responsibility officer to confirm that no members of the committee have a conflict of interest in considering and selecting a monitor, and documentation confirming the absence of conflicts must be recorded in a written memo;
- Committees' consideration and selection of a monitor must be conducted in accordance with the Department's established commitment to diversity and inclusion;
- Prosecutors must communicate their decision as to whether to impose an independent compliance monitor to the appropriate U.S. Attorney or unit head in the Department;
- Any resolution agreement that requires a monitorship must include a description of the rationale for imposing a monitor; and
- With the exception of court-appointed monitors, ODAG must approve the final monitor selection in all cases.

C. Continued Review of Monitorships

Perhaps reacting to concerns or questions regarding recent monitorship extensions, as well as feedback from meeting with the white collar criminal defense bar, the September 2022 Revised Policy emphasizes the need for monitorships to be properly scoped and for monitors themselves to stay in communication with the Department. To ensure that the Department, monitor and corporation are aligned on the scope of review, the September 2022 Revised Policy requires prosecutors to prepare a written and well-defined description of the monitor's responsibilities and scope of authority and to ensure that a clear work plan is in place. As DAG Monaco noted in her remarks, prosecutors will proactively confirm that "the scope of every monitorship is tailored to the misconduct and related compliance deficiencies…"[30]

In the same regard, the September 2022 Revised Policy also clarifies the Department's ongoing role during a monitorship. Prosecutors should be regularly updated about the status of the monitorship and the monitor's work, in order to evaluate whether (1) the work adheres to the workplan and anticipated scope, and (2) the monitor's review is reasonable, including issues related to cost. Monitors should also inform prosecutors if there are obstacles to the information, resources or personnel necessary to perform their responsibilities. Of note, the September 2022

[30] *Id.*

Revised Policy appears to provide for the possibility of shortening the monitorship if the initial term is longer than needed to address the relevant concerns, and prosecutors may consider whether the scope of review is broader than needed to successfully accomplish the monitorship's objectives. DAG Monaco stated in her recent remarks that, "where we impose a monitor, we have an obligation to stay involved and monitor the monitor,"[31] which likely signals more involvement and an increase in ongoing oversight of a monitor's activities throughout the monitorship.

IV. Commitment to Transparency in Corporate Criminal Enforcement

Finally, the September 2022 Revised Policy emphasizes the importance of transparency in the Department's corporate criminal enforcement processes and expectations, and consequences for meeting or failing to meet those expectations. The September 2022 Revised Policy and preceding remarks by DAG Monaco make clear the Department's stance that transparency from all components of the DOJ can motivate companies to adopt robust compliance programs, voluntarily disclose misconduct and cooperate with the Department's investigations, as well as instill public confidence in its work. To this end, the September 2022 Revised Policy makes clear that corporate criminal resolutions should include an agreed-upon statement of facts outlining the criminal conduct that forms the basis of an agreement, and a statement of relevant considerations[32] that explains the Department's reasoning for entering into the agreement. All corporate criminal resolutions, "absent exceptional circumstances," will continue to be published on the Department's website.[33]

V. Key Considerations for Companies in Light of the September 2022 Revisions

The September 2022 Revised Policy builds in significant ways on the changes announced in the October 2021 Memorandum, clearly heralding a reinvigorated focus on individual accountability, reshaping the impact of voluntary self-disclosure on corporate resolutions, and formalizing an approach to independent compliance monitors across the various DOJ units. It revisits key elements of effective compliance programs, formally expands the policy of voluntary disclosure to all divisions dealing with corporate enforcement and generally pushes for a more codified and harmonized approach to corporate enforcement. While some of the policy initiatives announced by the Department are still in development and their impact is as yet uncertain, companies should

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[31] *Id.*

[32] September 2022 Revised Policy, at 15 (examples of "relevant considerations": (i) voluntary self-disclosure, cooperation and remedial efforts (or lack thereof); (ii) any cooperation credit the company is receiving; (iii) the seriousness and pervasiveness of the criminal conduct; (iv) the corporation's history of misconduct; (v) the state of the corporation's compliance program at the time of the underlying criminal conduct and at the time of the resolution; (vi) the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable; (vii) other applicable factors listed in the Department's Justice Manual (JM § 9-28.300); and (viii) any other "key considerations" related to the Department's decision regarding the corporate resolution).

[33] *Id.*

consider the following issues as they review and right-size their corporate compliance programs in response to the September 2022 Revised Policy:

- Companies, their directors and officers, and their internal and external legal counsel should understand that the focus is squarely on individual accountability, and they should have systems in place to identify relevant information about individuals involved in corporate misconduct as a routine part of any investigation process.
- The Department has now provided additional guidance on the relevance of prior corporate misconduct and recidivism in any DOJ charging decision. Even before the September 2022 Revised Policy, it was clear that companies must ensure that their compliance programs and controls are adequately attuned to areas and issues implicated in prior misconduct. Now, however, this need is particularly acute with respect to areas that were the subject of recent criminal prosecutions in the United States. In addition, with the Department's commitment to comparing similarly situated companies in the evaluation of their compliance successes and failures, corporations should invest in benchmarking and understand how comparable peer companies organize, review and adjust their controls.
- Companies and their counsel should understand that the September 2022 Revised Policy represents a sea change in the approach to voluntary disclosure. While the FCPA Corporate Enforcement Policy previously made voluntary self-disclosure a requirement for receiving a declination, it is now a requirement for a resolution short of a guilty plea. This places a significantly greater weight on voluntary self-disclosure, and companies should carefully consider the timing of decisions about voluntary self-disclosure at the start of every investigation.
- Relatedly, with certain of the new considerations regarding the imposition of a monitor, it is clear the Department is tying the imposition of a monitor to the enforcement objectives surrounding voluntary disclosure when, arguably, voluntary disclosure should be of little relevance to the monitorship question. If a company has a well-designed, effective and tested compliance program at the time of resolution, no monitor should be necessary, regardless of whether the company voluntarily disclosed the misconduct.
- Companies and their counsel should evaluate the benefits of voluntary self-disclosure when misconduct is identified against the costs and pitfalls of inviting a potential government investigation. Close attention should be paid to the new policies that are developed and announced in response to the September 2022 Revised Policy's call for each DOJ component that prosecutes corporate crime to draft and publicize a voluntary self-disclosure policy. Companies should also monitor the relevant DOJ component's willingness and approach to determining that a company has "fully cooperated, and timely and appropriately remediated" in corporate resolutions—including in light of the enhanced expectations regarding the "timely" production of information and documents that are outlined in the September 2022 Revised Policy—as cooperation and remediation will be key prerequisites to obtaining any benefit for voluntary self-disclosure.

- Relatedly, although the September 2022 Revised Policy's changes related to monitor selection and oversight are still in development and must be implemented in practice, companies already under an existing monitorship and their counsel should track prosecutorial involvement in the monitorship process, assess how engaged they remain, and observe how Departmental involvement in the scope of and costs related to monitorships develops in relation to the independent role of the monitor.
- Companies that come under investigation by the Department should implement and test remediation steps early to avoid the imposition of a monitor by the Department. Even though a company will still have limited options at the time of resolution if it does not self-disclose, a well-designed, effective and tested compliance program at the time of resolution will bolster arguments for full cooperation credit.
- Many companies have discussed, and some may have started to implement, policies to encourage compliance-focused compensation programs. DAG Monaco emphasized the importance of compensation-related (dis)incentives for corporate compliance, and specially called out measures like clawback and compliance-linked compensation. Now is the time to revisit and build out these programs to incentivize a robust corporate compliance culture, including benchmarking with industry peers.
- Companies should have or develop policies governing the use of personal devices and third-party messaging platforms for business communications, provide training to their employees on the policies and enforce the policies when violated. Companies should also ensure that their policies permit preservation, collection and production of relevant data contained on employees' devices that are used for business purposes, whether they are company-issued or personal. Even those companies that have policies and training in this area may wish to seek assistance in updating their programs to accommodate these new requirements, as a recent sweep of text-messaging practices in the brokerage industry has revealed that programs that appear strong on their face may not be effective in practice. Companies should also pay close attention to the next iteration of the "Evaluation of Corporate Compliance Programs," in which the DOJ is expected to provide further guidance to prosecutors about how best to evaluate corporate practices regarding the use of personal devices and third-party messaging platforms.

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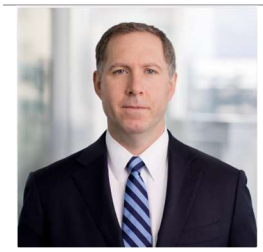

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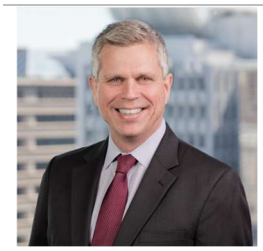

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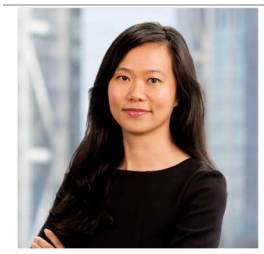

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