SEC and DOJ Signal Aggressive Stance to Corporate America

Less than 10 months since inauguration day, the Biden Administration's civil and criminal enforcement arms are signaling a more aggressive stance, looking squarely at corporate America. Recent speeches from senior officials at the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") show that both entities plan to take a hard-line approach toward corporate wrongdoing, with a similar set of priorities. To navigate these waters, corporations should think carefully about how to proactively bolster their compliance and corporate governance programs to mitigate the risk of DOJ and SEC inquiries. But in the event of an investigation, corporations and their counsel need to consider whether the "juice is worth the squeeze" when it comes to the traditional approach of self-reporting and cooperation, since the risks of cooperation and the consequences of wrongdoing appear to be rising.

The DOJ was the first mover. On October 28, 2021, during an address to the American Bar Association's 36th National Institute on White Collar Crime, Deputy Attorney General Lisa Monaco announced three changes to the department's policies on corporate criminal enforcement.

1. **Cooperation Credit – A Return to the Yates Memo:** To be eligible for cooperation credit, companies must identify *all* individuals involved in or responsible for alleged misconduct and provide *all* non-privileged information about their involvement. This approach rescinds some Trump-era tweaks to Department policy, which softened the requirements outlined in the Yates Memo and vested corporations with the discretion to determine who was "substantially" involved and to limit disclosures accordingly. No more: to get cooperation credit, corporations must provide sweeping disclosure to the DOJ, increasing the potential scope of any DOJ action and the costs of cooperation.

2. **DOJ Decisions – All Conduct Counts:** In deciding how to charge and resolve corporate wrong-doing, the DOJ will now review a company's entire criminal, civil, and regulatory record, including past missteps that are not similar to the conduct at issue. So, for example, if a company embroiled in an FCPA investigation was previously sanctioned for its revenue recognition practices, then that unrelated earlier misconduct will be taken into account by the DOJ. Previously, prosecutors were directed by the Justice Manual to consider a "corporation's history of *similar* misconduct" when making decisions. No more: DAG Monaco made clear that, going forward, "all prior misconduct needs to be evaluated . . . , whether or not that misconduct is similar to the conduct at issue in a particular investigation," and "prosecutors need to start by assuming all prior misconduct is potentially relevant." Along these same lines, DAG Monaco explained that the DOJ is examining whether deferred- or non-prosecution agreements will even be offered for repeat offender companies. All of this increases the potential for harsher corporate charges and resolutions.

3. **Corporate Resolutions – Monitors When Appropriate:** DAG Monaco also made clear that the DOJ will impose a corporate monitorship "whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and

disclosure obligations," and that such sanctions are no longer to be viewed as disfavored or exceptional. The prospect of increased imposition of monitorships – an expensive and burdensome proposition for most corporations – further signals the department's desire to add teeth to pre-trial resolutions.

Big picture, these changes reflect a stronger stance on corporate wrongdoing by the DOJ, underscoring the importance of companies putting in place robust front-end compliance programs, but also introducing new costs into the cost-benefit analysis of self-reporting and cooperating with the DOJ, in light of the heightened consequences of a DOJ conclusion of corporate wrong-doing.

The SEC followed quickly in the DOJ's wake. On November 4, 2021, in his prepared remarks at the Securities Enforcement Forum, Chair Gary Gensler announced that the SEC would take a similarly strong approach to policing capital markets and corporate wrongdoing. Chair Gensler opened his remarks with a 1934 quote from Joseph Kennedy, the first Chairman of the Commission: "The Commission will make war without quarter on any who sell securities by fraud or misrepresentation." That quote set the tone, as Chair Gensler explained that the Commission will enforce its mandate by holding individuals and corporations accountable for their financial misdeeds, promoting deterrence and respect for the law through both prosecuting routine matters and "high-impact" cases designed to grab headlines. Chair Gensler expressly cited DAG Monaco's speech, summarizing her revisions to the DOJ's approach to corporate crime, and making clear that the SEC shares her views: "While [the SEC and DOJ] are independent, and our enforcement tools, authorities, and missions are distinct, these changes [announced by the DOJ] are broadly consistent with my view of how to handle corporate offenders." Significantly, Chair Gensler observed that "cooperation" with the SEC means more than "meeting . . . legal requirements, such as responding to lawful subpoenas or making witnesses available for lawfully-compelled testimony," or "conducting a self-serving, independent investigation." Rather, it is likely that the Commission will follow the DOJ's articulated approach of requiring full self-reporting of the individuals and information relevant to the misconduct. In addition, with regard to remedies, the Commission is likely to view repeat offenders, even those with distant or unrelated misconduct, harshly.

In the wake of these pronouncements, corporations have much to consider. ***First***, corporations – particularly those in highly-regulated industries like finance and healthcare – should promptly take stock of their affairs and consult with counsel to determine if updates to reporting and compliance programs are in order, across their organization. Getting *ahead* of regulatory concerns with robust systems and a culture of compliance is critically important, not only to better the odds of avoiding regulatory concerns in the first place, but also to mitigate the severity of resolutions if and when issues come to light. ***Second***, corporations and their counsel should conduct a holistic assessment of their regulatory compliance record – that way, if and when the SEC or DOJ come knocking, the corporation will be ready to address questions about those past issues, potentially diffusing the government's concerns at the outset. ***Third***, corporations and their counsel would do well to get ahead of possible SEC or DOJ inquiries by doing strategic thinking *now* about the costs and benefits of cooperation in this new world – keeping in mind the reality that cooperation, more than ever, is an "all in" affair.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to us.

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