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BLOG

The Impact of DOJ's Corporate Enforcement Policy Changes on Antitrust Investigations

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As discussed in a prior briefing, Deputy Attorney General (DAG) Lisa Monaco recently announced that the Department of Justice (DOJ) has adopted major changes to its policies regarding corporate criminal investigations and resolutions. Overall, the changes show a heightened interest by the DOJ in holding individuals and companies responsible for criminal wrongdoing. This more aggressive stance of the DOJ corresponds to our expectations that we will see an uptick in cartel investigations and prosecutions under the Biden administration. DAG Monaco's remarks also highlight the importance of implementing effective corporate compliance programs.

This post explores the implications of these new policies for the DOJ's antitrust investigations and outlines steps companies can take to minimize criminal antitrust risk.

Cooperation Credit

The first announced change is a return to an Obama-era policy requiring companies seeking "cooperation credit" from the DOJ to provide information about *all* individuals involved in the relevant misconduct rather than only those who were *substantially* involved. The DOJ's stated goal is to ensure accountability by prosecuting the individuals who commit and profit from corporate malfeasance.

This change harkens back to the DOJ's policy outlined by former DAG Sally Yates in 2015 in the so-called Yates Memo, which required any company seeking cooperation credit to "completely disclose to the Department all relevant facts about individual misconduct," and "identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority." In 2018, then-DAG Rod Rosenstein walked back the disclosure requirements, announcing that corporate defendants could receive cooperation credit if they identified "every individual who was *substantially involved in or responsible for* the criminal conduct." In her remarks, DAG Monaco criticized the approach taken by the previous administration, explaining that distinctions between employees who were substantially involved in misconduct versus only tangentially involved are "confusing in practice and afford companies too much discretion in deciding who should and should not be disclosed to the government."

The heightened focus at the DOJ on individual accountability is not a significant departure from the Antitrust Division's standard practice. The Antitrust Division has long insisted on prosecuting individuals who commit cartel offenses, although resource restraints and the need for cooperating witnesses mean that the Division cannot pursue charges against every employee involved in a price-fixing conspiracy. However, to the extent this policy shift imposes additional burdens on companies cooperating with Antitrust Division investigations, the change may discourage cooperation altogether. Companies that lose the race to leniency may instead decide to defend against Division allegations even as they comply with subpoena requests where the burdens of cooperation—including the requirement "to provide the government with *all* non-privileged information about individual wrongdoing"—outweigh the advantages to be obtained from cooperating.

Consideration of All Prior Misconduct

The second shift is an expansion of the prior conduct that the DOJ will consider in evaluating appropriate resolutions of criminal investigations. DOJ policy has long been to consider a corporation's history of "similar conduct" in determining whether to prosecute and/or recommend a harsher sentence against a company involved in a new antitrust investigation. DAG Monaco announced that going forward, "*all* prior misconduct needs to be evaluated when it comes to decisions about the proper resolution with a company, *whether or not that misconduct is similar to the conduct at issue in a particular investigation*." Prosecutors will now be directed to consider "the full criminal, civil and regulatory record" of a company under investigation, including any conduct unrelated to DOJ investigations, such as prosecutions or regulatory actions by other agencies, like the SEC, as well as by other countries or states.

This policy shift could have a significant impact on Antitrust Division settlements, particularly with large multinational companies which tend to have numerous unrelated business divisions or affiliated companies. For example, if the Antitrust Division is investigating one business unit of a multinational company for its participation in a price-fixing cartel, prosecutors deciding on whether to bring charges or what fine to impose may now consider a different business unit's violation of the Foreign Corrupt Practices Act (FCPA) several years ago, despite that FCPA infringement having nothing to do with the anticompetitive conduct currently under investigation. This expansion of prior conduct relevant to the DOJ's decision-making could also potentially tip the scales against cooperation.

Corporate Monitors

The third change relates to the use of independent corporate monitors. When a company has been convicted of a criminal antitrust offense, courts are authorized to impose a term of probation in addition to fines. In connection with that probation, a court may require a company to hire, at its own expense, an independent monitor to ensure that the company develops and implements an effective compliance program.

Prior DOJ guidance suggested that the DOJ disfavors monitorships. In an apparent policy shift, DAG Monaco announced that the DOJ is "free to require the imposition of independent monitors *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" under a deferred prosecution agreement or non-prosecution agreement. In a related memo, DAG Monaco explained that DOJ prosecutors should favor imposing a monitor when a company's "compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented" at the time that it resolves a criminal investigation.

The Antitrust Division has traditionally sought to impose corporate monitors in limited circumstances, including after a conviction at trial or for recidivist antitrust violators. Under its "Penalty Plus" policy, the Division will seek an enhanced sentence—potentially including a term of probation and imposition of a corporate monitor—where a company previously pleaded guilty to an antitrust crime but failed to disclose its involvement in one or more other antitrust crimes at the time of its guilty plea.

Corporate monitors are burdensome and expensive, and make compliance all the more important.

Takeaways

DAG Monaco's announcement signals heightened enforcement efforts by the DOJ. Indeed, she ended her remarks with a caution that looking forward, "this is a start — and not the end — of this administration's actions to better combat corporate crime." With Jonathan Kanter newly confirmed as head of the DOJ's Antitrust Division, companies should expect these efforts to lead to aggressive enforcement of the antitrust laws. Now more than ever, companies should ensure that they have implemented effective antitrust compliance programs that take into account recent policy shifts. The DOJ, as well as the Antitrust Division specifically, have published useful guidance for companies seeking to create or enhance compliance programs. We discuss best practices for effective antitrust compliance programs here.

As explained in a prior podcast episode, "the goals of a compliance program are threefold: (1) to prevent potential violations, of course; (2) to detect any illegal activity that has occurred already; and (3) to mitigate the financial harm that the company would face in the event of an investigation." Where a compliance program fails to prevent unlawful conduct, early detection increases a company's chances to secure leniency protection or fine reductions if it reports the violation quickly. But stricter DOJ policies may tip the scales against cooperation even in those circumstances, particularly for companies that lose the race to leniency.

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Eva Cole

Sofia Arguello

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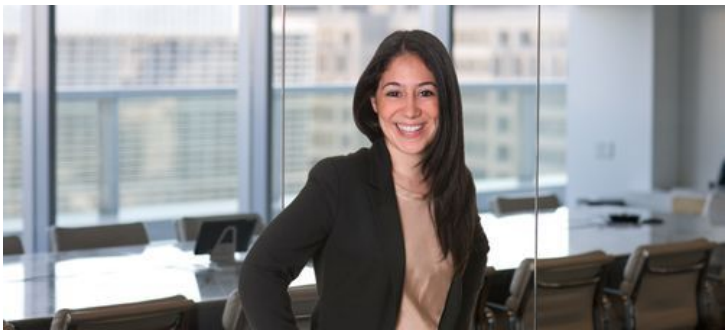

Sofia Arguello

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