COVINGTON

DOJ Toughens Its Stance on Corporate Criminal Enforcement in a New Round of Policy Changes and Updates

司法部在新一轮政策变化和更新中加强对企业刑事执法的立场

September 23, 2022
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White Collar Defense and Investigations
白领犯罪辩护和调查

What You Need to Know:
您需要了解的：

- On September 15, U.S. Deputy Attorney General Lisa Monaco provided new and expanded policy guidance (the "DAG Memo") on corporate criminal enforcement. The guidance portends harsher treatment for companies that do not voluntarily self-report misconduct or meet expanding notions of "full" cooperation and effective remediation, with the harshest treatment likely in store for certain kinds of "recidivist" companies.

  9 月 15 日，美国副司法部长 Lisa Monaco 就企业刑事执法提供了最新的进一步政策指引（下称"DAG 备忘录"）。该指南预示着，那些不自愿自我报告不当行为或不能满足含义不断扩大 的"充分"配合和有效补救要求的公司将受到更严厉的对待，某些类型的"累犯"公司可能会受到最严厉的对待。

- Specifically, as gating issues around voluntary disclosure, the DAG Memo makes clear that the Department:

  具体而言，作为有关自愿披露的一些关键问题，DAG 备忘录明确指出，

  - Will not seek a guilty plea where a company has self-disclosed, cooperated, and remediated misconduct, "[a]bsent aggravating factors"; and

    如果公司自我披露、配合和补救不当行为，且"无加重情节"，则美国司法部不会要求公司签订认罪协议；且

- Will not impose independent compliance monitors on cooperating companies that voluntarily disclose, provided they have implemented and tested "an effective compliance program."

  美国司法部不会针对自愿披露且配合的公司设立合规监察员，前提是他们已经实施并测试了"有效的合规计划"。

- The DAG Memo forcefully clarifies that "fully" cooperating in Department investigations includes producing all relevant, non-privileged facts about individual misconduct "swiftly and without delay"—*e.g.*, upon discovery of "hot documents or evidence," a company's "first reaction" should be to notify DOJ prosecutors.

  DAG 备忘录明确澄清，"充分"配合美国司法部调查包括"迅速和毫不拖延地"提供有关个人不当行为的所有相关的、不受保密特权保护的事实——例如，一旦发现"重要文件或证据"，公司的"第一反应"应该是通知美国司法部检察官。

- The DAG Memo highlights new areas of emphasis for the Department in evaluating remediation and the effectiveness of corporate compliance programs:

  DAG 备忘录强调了美国司法部在评估补救和企业合规体系有效性时新的关注重点：

  - DOJ prosecutors will consider whether corporations have implemented compensation systems that are designed to deter and penalize misconduct and reward compliance, with a particular focus on compensation clawback mechanisms; and

    美国司法部检察官将考虑公司是否实施了旨在阻止和惩罚不当行为并奖励合规行为的薪酬制度，尤其关注薪酬索回机制；和

  - DOJ will consider whether companies have developed and effectively implemented policies governing the use of personal devices and third-party messaging platforms, including ephemeral and encrypted messaging applications, for corporate communications.

    美国司法部将考虑公司是否已经制定并有效实施了管理用于企业通信的个人设备和第三方消息传递平台（包括临时和加密消息传递应用程序）使用的政策。

- For recidivist companies, the Department clarified that:

  对于累犯的公司，美国司法部澄清，

  - Of greatest significance will be recent U.S. criminal resolutions and prior misconduct connected to the enforcement action at hand through similarity of the conduct, shared root causes, overlapping management, or overlapping compliance failures, as well as whether a company was subject to probation, supervision, monitorship, or another obligation imposed by a prior resolution at the time of the conduct under investigation;

    重中之重是近期的美国刑事和解及与当前执法行动相关的以往不当行为，该等相关性体现为具有相似的行为、共同的根本原因、重叠的管理层，或者重叠的合规失误，以及公司在当前被调查的行为发生时是否正受到暂缓执行、监督、监察、或以往和解方案规定的其他义务约束；

- Less weight will be given to "dated" criminal resolutions (10 or more years before the conduct under investigation) and civil or regulatory resolutions (five or more years before the conduct under investigation); and

  对"时间久远的"刑事和解（在被调查行为之前 10 年或更长时间）和民事或监管和解（在被调查行为之前的五年或更长时间）将给予较小的权重；和

- Successive non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs") are "generally disfavored," particularly when successive resolutions involved overlapping conduct, personnel, and entities, but the Department will still "weigh and appropriately credit voluntary and timely self-disclosures of current or prior conduct," even for repeat offenders.

  "通常情况下不鼓励使用"连续的不起诉协议（NPA）和暂缓起诉协议（DPA），特别是当连续的和解协议涉及重叠的行为、人员和实体，但美国司法部仍将"权衡并适当认可自愿和及时自行披露当前或以往行为的情况"，即使对累犯亦是如此。

- And on the imposition of an independent compliance monitor, the DAG Memo provides a non-exhaustive list of 10 factors that prosecutors should consider, with a focus on allowing companies that voluntarily disclose, fully cooperate, effectively remediate, and make meaningful investments in enhancing compliance programs and corporate culture to avoid monitorships.

  关于设立独立的合规监察员，DAG 备忘录提供了一份非详尽的、包括 10 个检察官应考虑的因素的清单，重点是允许自我披露、充分配合、实施有效补救并在加强合规计划和企业文化方面进行有意义投资的公司避免实施监察员制度。

- With these changes and clarifications, the Department is going to great lengths to make the benefits of compliance investment clear while strongly messaging its commitment to robust white collar enforcement. And the Department has signaled even more changes and updates to come. Thus, companies should prepare for increased scrutiny and would be wise to conduct a close review of existing compliance programs and culture to ensure alignment with Department expectations.

  通过这些变化和澄清，美国司法部竭尽全力明确投资于合规事务的好处，同时强烈表明其对强有力的白领犯罪执法的承诺。同时，美国司法部暗示接下来会有更多变化和更新。因此，公司应为更严格的审查做好准备，并且对现有的合规体系和文化进行仔细审查，以确保与美国司法部的期望保持一致会是明智之举。

New DOJ Policies Signal Harsher Treatment for Companies That Do Not Voluntarily Disclose, Fully Cooperate, and Effectively Remediate
美国司法部的新政策表明，不进行自愿披露、充分配合和有效补救的公司将受到更严厉的对待

Last October, the Department of Justice announced and released policy changes and updates designed to provide prosecutors with additional tools to combat corporate crime, along with promises of more changes and updates to come, which we covered in a previous alert. Building on that foundation, in a speech made and a memorandum issued last week, Deputy Attorney General Lisa Monaco reaffirmed the Department's commitment to holding individuals and companies accountable for white collar crimes and promoting better corporate conduct through investment in compliance programs and corporate cultures. The Deputy Attorney General made clear that the "combination of carrots and sticks" are meant to empower in-house lawyers and chief compliance officers to make the business case for responsible corporate behavior. The policy changes and clarifications were also designed to promote transparency and predictability so that companies could better understand the benefits available under Department policy. These same policy updates were reinforced the following day in a speech given by Assistant Attorney General for the Criminal Division Kenneth Polite, with a particular emphasis on deterring misconduct and promoting "responsible corporate citizenship" through compliance initiatives, and earlier this week in a speech by Principal Associate Deputy Attorney General Marshall Miller.

去年十月，美国司法部宣布并发布了政策变化和更新，旨在为检察官打击企业犯罪提供额外工具，并承诺将实施更多变化和更新，我们在之前的客户期刊中对此进行了介绍。在此基础上，副司法部长 Lisa Monaco 在上周发表的演讲和一份备忘录中重申了美国司法部的承诺，即追究个人和公司对白领犯罪的责任，并通过投资合规体系和企业文化来促进更好的企业行为。副司法部长明确表示，“胡萝卜加大棒的结合”旨在使公司法务和首席合规官能够为负责任的公司行为提供商业依据。政策变化和澄清还旨在促进透明度和可预测性，以便各公司能够更好地了解美国司法部政策下可享有的好处。刑事司助理司法部长 Kenneth Polite 在第二天的一次演讲中强调了这些相同的政策更新，特别强调通过合规举措阻止不当行为并鼓励公司成为“负责任的企业公民”，首席助理副司法部长 Marshall Miller 在本周早些时候的演讲中也强调了这些政策更新。

The DAG Memo represents the newest phase of DOJ's ongoing campaign to incentivize companies to self-police and voluntarily disclose misconduct by purportedly sweetening the benefits of disclosure and raising the costs of non-disclosure. But only time will tell whether the baseline benefits of voluntary disclosure set out in the memo will be enough to persuade companies to more routinely voluntarily disclose misconduct. The announcement also arms prosecutors with additional tools to detect and prosecute corporate *and* individual misconduct and to demand prompt, proactive, and far-reaching cooperation from corporations under investigation. The policies also establish more demanding expectations that companies will need to satisfy before being viewed as having effective compliance programs. Altogether, these changes and clarifications signal harsher treatment for companies that do not voluntarily self-report misconduct and meet expanding notions of "full" cooperation and effective remediation.

DAG 备忘录代表了最新阶段的美国司法部行动，该行动旨在通过所谓增加披露的好处和提高不披露的成本来激励公司自我监管并自愿披露不当行为。但只有时间才能证明该备忘录中规定的自愿披露的基本好处是否足以说服公司更经常地自愿披露不当行为。该公告还为检察官提供了其他工具，以发现和起诉企业*和*个人的不当行为，并要求被调查公司提供及时、主动和广泛的配合。这些政策还提出了更苛刻的期望，公司需要满足这些期望才会被视为拥有有效的合规体系。总而言之，这些变化和澄清表明，那些未自愿自我报告不当行为且不满足含义不断扩大的“充分”配合和有效补救的公司将受到更严厉的对待。

The DAG Memo also clarifies changes announced last October that were intended to deter corporate recidivism by evaluating a corporation's history of misconduct and removing any presumption against imposing an independent compliance monitor. These clarifications provide welcome limiting guidance regarding the scope of prior misconduct that may result in a harsher resolution outcome. But they also put companies on notice that certain kinds of recidivists are likely to receive harsh penalties, regardless of whether they meet the Department's voluntary disclosure, full cooperation, and effective remediation framework. With respect to independent compliance monitors, the DAG Memo may make the path to avoiding the imposition of a monitor more difficult, in the sense that the 10 non-exhaustive factors DOJ indicated it will consider when deciding when to impose a monitor may be read to de-emphasize consideration of the costs and burdens associated with a monitorship. At the same time, the DAG Memo also provides the potential for more control over a monitor once one is imposed, with emphasis on the need for close oversight of the monitorship by prosecutors during the monitorship's term.

DAG 备忘录还澄清了去年 10 月宣布的政策变更，其旨在通过评估公司的不当行为历史并消除任何反对实施独立合规监察员的推定来阻止公司累犯。这些澄清为可能导致更严厉和解结果的先前不当行为的范围提供了受欢迎的限制性指导。但他们也让公司注意到，某些类型的累犯可能会受到严厉的惩罚，无论他们是否符合司法部的自愿披露、充分配合和有效补救框架。关于独立的合规监察员，DAG 备忘录可能会使避免实施监察员制度的途径更加困难，因为美国司法部表示在决定何时设立监测员时将考虑的 10 个非穷尽因素可以被解读为与监察员相关的成本和负担的考虑将相对弱化。同时，DAG 备忘录还提供了在设立监察员后对监察员制度实施更多控制的可能性，并强调检察官在实施监察员制度期间需要密切监督该制度。

With these changes and clarifications, DOJ clearly is looking to eradicate any perception that corporate criminal resolutions are a cost of doing business or that it will not pursue individual wrongdoers. Instead, through a combination of incentives and disincentives, the Department is going to great lengths to make the benefits of compliance investments clear, and strongly messaging its commitment to robust white collar enforcement. Thus, companies should prepare for increased scrutiny and should conduct a close review of existing compliance programs and culture to ensure alignment with Department expectations. Finally, as in last October's announcement, the Deputy Attorney General foreshadowed that more changes and updates are coming. Looking ahead, we expect that this announcement is just one of several that will continue to shift the landscape for white collar enforcement and compliance program expectations.

通过这些变化和澄清，美国司法部显然希望消除任何认为企业刑事和解是业务成本或其不会追究个人违法者责任的看法。相反，通过激励措施和抑制措施的结合，美国司法部正在不遗余力地明确投资于合规事务的好处，并强烈表明其对强有力的白领犯罪执法的承诺。因此，公司应为加强审查做好准备，并应对现有的合规体系和文化进行仔细审查，以确保与美国司法半吊子的期望保持一致。最后，正如去年十月的公告一样，副司法部长预示，更多的变化和更新即将到来。展望未来，我们预计，除了该公告以外，还会有更多继续改变白领犯罪执法格局和合规体系预期的类似公告会陆续出台。

We discuss below the key changes and updates that were announced last week.

我们将在下面讨论上周宣布的一此关键变化和更新。

Incentivizing Voluntary Disclosure, but Will It Be Enough to Move the Needle for Companies?
鼓励自愿披露，但这足以对公司产生重大的影响吗？

Key Policy Statements
关键政策声明

- The DAG Memo makes clear that the Department:

  DAG 备忘录明确：

  - Will not seek a guilty plea where a company has self-disclosed, cooperated, and remediated misconduct, "[a]bsent aggravating factors"; and

    如果公司自我披露、配合和补救不当行为，且"如无加重情节"，则美国司法部不会要求公司签署认罪协议；和

  - Will not impose independent compliance monitors on cooperating companies that voluntarily disclose, provided they have implemented and tested "an effective compliance program."

    美国司法部不会对自愿披露且配合的公司设立合规监察员，前提是他们已经实施并测试了"有效的合规计划"。

- The DAG Memo also directed all DOJ criminal components, which have not already done so, to publish written policies on voluntary self-disclosure that must, at a minimum, adopt the two principles above, clarify the component's expectations regarding what constitutes self-disclosure, and detail what benefits self-disclosure yields.

  DAG 备忘录还指示所有尚未发布关于自愿自我披露的书面政策的美国司法部刑事部门应发布此类政策，这些政策必须至少采用上述两项原则，澄清该部门关于什么构成自我披露的期望，并详细说明自我披露会带来哪些好处。

Analysis
分析

Running throughout the DAG Memo are incentives and disincentives—in the form of carrots that can be received and sticks that can be avoided—encouraging companies to voluntarily "step up and own up" to misconduct within their organizations. In her speech, the Deputy Attorney General did not mince words about how companies should think about voluntary disclosure: "Simply put, the math is easy: voluntary self-disclosure can save a company hundreds of millions of dollars in fines, penalties, and costs. It can avoid reputational harms that arise from pleading guilty. And it can reduce the risk of collateral consequences like suspension and debarment in relevant industries."

贯穿整个 DAG 备忘录的是激励和抑制措施（采取可以获得的胡萝卜和可以避免的大棒的形式），鼓励公司自愿"站出来并承认"组织内的不当行为。副司法部长在讲话中毫不含糊地谈到公司应该如何看待自愿披露："道理很简单：自愿自我披露可以为公司节省数亿美元的罚款、处罚和成本。它可以避免因认罪而引起的声誉损害。它可以降低在相关行业中业务资格被暂停和取消等连带后果的风险。

It remains to be seen whether the baseline benefits announced in the DAG Memo will prove enough to push companies to self-disclose, but existing frameworks suggest that DOJ's efforts could fall short. As a comparator, the Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy (covered in a previous alert), which has been used as informal guidance within the Criminal Division since 2018, establishes a presumption of a *declination* for a company that voluntarily self-discloses misconduct, fully cooperates in the Department's investigation, and timely and appropriately remediates, absent aggravating circumstances. Meanwhile, the floor established by the DAG Memo is not to require a *guilty plea* in similar circumstances or impose a monitor where a company also has implemented and tested an effective compliance program. While the DAG Memo may lead to increased transparency and predictability around the benefits of voluntary disclosure as DOJ criminal components adopt their own policies, only time will tell whether the more modest commitments established in the DAG Memo, if the components do not go further, will convince companies to self-disclose. Even under the more generous regime of the FCPA Corporate Enforcement Policy, decisions around voluntary disclosure remain extraordinarily difficult for companies as they weigh the relatively unpredictable and uncertain potential benefits and much more certain costs associated with disclosure. And it is unclear why a company that is deemed to have an effective compliance program, even if it did not self-disclose, ever should be subject to a monitorship, which is not intended to be punitive.

DAG 备忘录中宣布的基本好处是否足以推动公司自我披露还有待观察，但现有框架表明，美国司法部的努力可能不足。作为比较，自 2018 年以来一直在刑事司被用作非正式指导的《反海外腐败法（“FCPA”）企业执法政策》（在之前一份客户期刊中讨论过），在没有加重处罚情节的情况下，为自愿自我披露不当行为、充分配合美国司法部的调查、及时和适当地进行补救的公司创设了不予起诉的推定。相较而言，DAG 备忘录规定的底线是，在类似情况下不要求公司签署认罪协议，也不要求在公司同时实施并测试了有效的合规体系的情况下设立监察员。虽然随着司法部刑事各部门采用自己的政策，DAG 备忘录可能会提高自愿披露的好处的透明度和可预测性，但只有时间才能证明，如果这些部门没有进一步行动，DAG 备忘录中规定的更适中的承诺是否会说服公司进行自我披露。即使在更慷慨的《FCPA 企业执法政策》制度下，围绕自愿披露的决定对公司来说仍然非常困难，因为他们需要权衡相对不可预测和不确定的潜在收益以及与披露相关的更加确定的成本。而且，目前尚不清楚为什么一家被认为拥有有效合规体系的公司（即使它没有自我披露）也应该实施监察员制度，因为该制度并非惩罚性质。

Upping the Ante on What “Full” Cooperation Means (and Related Obligations for Prosecutors), Framed in Terms of Pursuing Individual Wrongdoers
针对“充分”配合意味着什么（以及检察官的相关义务）提高要求，从追究个人不法行为者的角度来制定

Key Policy Statements
关键政策声明

- The DAG Memo forcefully clarifies that “fully” cooperating in Department investigations includes producing all relevant, non-privileged facts about individual misconduct “swiftly and without delay”—*e.g.*, upon discovery of “hot documents or evidence,” a company’s “first reaction” should be to notify DOJ prosecutors.

  DAG 备忘录明确澄清，“充分”配合美国司法部调查包括“迅速和毫不拖延地”提供有关个人不当行为的所有相关的、不受保密特权保护的事实—— 例如，一旦发现“重要文件或证据”，公司的“第一反应”应该是通知司法部检察官。

- The DAG Memo also places new obligations on prosecutors to speed up investigations into individuals and seek any warranted criminal charges prior to or simultaneously with the entry of a corporate resolution.

  DAG 备忘录还规定了检察官的新的义务，在作出企业和解决定之前或同时加快对个人的调查，并寻求任何有根据的刑事指控。

Analysis
分析

The Deputy Attorney General’s announcement raised expectations for corporations seeking to obtain full cooperation credit during government investigations, and linked these new expectations to the Department’s “number one priority” of “individual accountability.” Acknowledging the difficulty of pursuing individual prosecutions without timely provision of key information from corporations, the DAG Memo notes that “[t]he mere disclosure of records” is not sufficient for companies to receive full cooperation credit. Even if what the Department suggests here would have been ordinary practice for certain defense counsel seeking to best position their clients in the past, it is now official policy to require companies to do more to meet Department cooperation expectations.

副司法部长的声明提高了对于公司在政府调查期间设法获得充分配合认可的期望，并将这些新期望与该部门“个人问责制”的“头等大事”联系起来。DAG 备忘录认同，如果不及时掌握公司提供的关键信息，就难以对个人进行起诉，并指出，“仅仅披露记录”并不足以使公司获得充分配合的认可。即使美国司法部在这里建议的内容本来就是某些为客户寻求最大利益的辩护律师过往的常规做法，但现在要求公司采取更多措施来满足美国司法部的配合期望已成为官方政策。

Looking to turn up the heat on the other side of the table as well, if individual and corporate resolutions cannot come together on the same timetable, prosecutors must provide a plan for resolving individual prosecutions to supervisors alongside their request for authorization for a corporate resolution. The Deputy Attorney General noted in her speech that both prosecutors and corporate counsel should “feel like they are ‘on the clock’” to expedite investigations. Perhaps by marrying enhanced expectations imposed on companies with enhanced obligations imposed on prosecutors, DOJ leadership expects to see a more significant uptick in prioritization of individual prosecutions, even as that oft-stated goal has been a familiar refrain for years.

为了让谈判桌的另一头也齐头并进，如果个人和公司的和解不能按同一时间表达成，检察官在请求其主管批准公司和解时，必须向主管提供一份解决个人起诉的计划。副司法部长在讲话中指出，检察官和企业法律顾问都应该“感觉他们在被‘掐表计时’”，从而加快调查。也许，通过将对公司的期望与对检察官规定的更多义务结合起来，美国司法部领导层希望看到个人起诉的优先级有更显著的提升，即使这个常说的目标多年来一直是一个老生常谈的话题。

Increased Emphasis on Certain Areas in Evaluating Remediation and Compliance Program Effectiveness, with Effective Programs Having a Substantial Impact on Resolution Terms
在评估补救和合规体系的有效性时更加重视某些领域，且有效的计划对和解条款有重大影响

Key Policy Statements
关键政策声明

- DOJ prosecutors will consider whether corporations have implemented compensation systems that are designed to deter and penalize misconduct and reward compliance, with a particular focus on compensation clawback mechanisms; and

  美国司法部检察官将考虑公司是否实施了旨在阻止和惩罚不当行为并奖励合规行为的补偿制度，其中尤其关注补偿追回制度；同时

- DOJ will consider whether companies have developed and effectively implemented policies governing the use of personal devices and third-party messaging platforms, including ephemeral and encrypted messaging applications, for corporate communications.

  美国司法部将考虑公司是否制定并有效实施了关于使用个人设备和第三方消息传递平台（包括即时的和加密的消息传递应用程序）进行公司通信的政策。

Analysis
分析

DOJ has previously considered a company's incentives for compliance and disincentives for non-compliance as part of its evaluation of a compliance program, including as part of its *Evaluation of Corporate Compliance Programs* guidance. Building on that guidance, the DAG Memo places particular emphasis on whether corporations have implemented compensation systems that are designed to deter and penalize misconduct and reward compliance. Notably, the DAG Memo specifically highlights compensation clawback provisions, which enable companies to levy penalties against current and former employees who contributed to criminal conduct, including retroactively, as effective tools to deter and punish misconduct. In a speech this week, Principal Associate Deputy Attorney General Miller reinforced that the Department envisions "robust and regularly deployed clawback programs," not paper policies to be dusted off only when the government comes knocking. On the other hand, the DAG Memo and the Principal Associate Deputy Attorney General both noted that companies can promote compliance by introducing affirmative financial incentives—such as incorporating compliance metrics into compensation and bonus calculations—that reward employees who embody and promote compliance.

美国司法部此前已经将公司实施的合规激励措施和不合规抑制措施作为其评估合规体系的一部分，包括作为其《企业合规体系评估》指引的一部分。在该指引的基础上，DAG 备忘录尤其强调公司是否实施了旨在阻止和惩罚不当行为并奖励合规行为的补偿制度。值得注意的是，DAG 备忘录特别强调了补偿追回条款，该等条款使公司能够对参与犯罪行为的在职员工和离职员工进行处罚，包括溯及既往，以此作为阻止和惩罚不当行为的有效手段。在本周的一次讲话中，美国司法部首席助理副部长 Miller 重申，美国司法部设想的是"强劲且常规部署的追回计划"，而非纯粹为了应付政府部门调查才搬出来的纸面政策。另一方面，DAG 备忘录和美国司法部首席助理副部长均指出，公司可以通过引入积极的财务激励措施来促进合规——例如将合规情况纳入薪酬和奖金计算，从而奖励落实和推进合规的员工。

In addition, with respect to evaluating policies governing the use of personal devices and third-party messaging platforms, DOJ also has previously addressed this topic, as we covered in an alert, but it is expanding on that guidance and elaborating on how it will consider such controls in its evaluation of a company's compliance program. In particular, the DAG Memo noted that policies in this area should promote a corporation's ability to preserve business communications and collect and produce to DOJ all non-privileged documents relevant to an investigation. The Deputy Attorney General tasked the Criminal Division with further studying corporate best practices regarding the use of personal devices and third-party messaging platforms and foreshadowed that the next edition of DOJ's *Evaluation of Corporate Compliance Programs* will provide companies with further guidance on this topic.

此外，对于个人设备和第三方消息传递平台的相关使用政策的评估，正如我们在之前的客户期刊中所描述的，美国司法部之前也曾讨论过这个问题，但美国司法部此次对该指引进行了扩展，并且详细说明了其在评估公司的合规体系时将如何考虑此类控制措施。DAG 备忘录特别指出，该领域的政策应当促进公司保存业务相关通信的能力以及收集并向美国司法部提供与调查相关的所有非特权保护文件的能力。副司法部长要求刑事司进一步研究企业在使用个人设备和第三方消息传递平台方面的最佳实践操作，并预示美国司法部下一版的《企业合规体系评估》将为企业提供有关该事项的进一步指引。

Companies have long struggled with operationalizing elements of compliance programs dealing with these issues, but DOJ surely is looking to raise the bar based on its experience with companies who have made strides in these areas. We will be watching to see how DOJ incorporates these topics into its compliance programs guidance. DOJ's recent hiring of Glenn Leon as head of the Fraud Section and Matt Galvin in the Corporate Enforcement, Compliance, & Policy Unit, both of whom have significant in-house compliance expertise, further suggests that DOJ will even more carefully (and practically) scrutinize compliance programs in connection with corporate criminal resolutions. The Deputy Attorney General made as much clear: The effectiveness of a company's compliance program will have a "significant impact on the terms of a corporation's potential resolution with the Department . . . including whether an independent compliance monitor is warranted." The Criminal Division Chief of the U.S. Attorney's Office for the Southern District of New York reaffirmed this point, saying that "[w]e expect platinum-level compliance from your platinum-level clients," and suggesting that a poor compliance program, paired with lack of self-reporting, could take a DPA (or NPA) off the table. As such, companies would be well served to invest in compliance, including through program and risk assessments to gain comfort that their compliance programs are appropriately tailored to key risks facing their businesses and benchmark well against peer companies and best practices.

长期以来公司在针对这些问题的合规体系要素的具体实施上遇到诸多困难，但美国司法部显然是在基于其与已经在这些领域取得进步的公司的往来经验以寻求提高标准。我们将关注美国司法部如何将这些话题纳入其合规体系指引。美国司法部最近聘请了 Glenn Leon 担任欺诈部门的负责人，并聘请 Matt Galvin 担任公司执法、合规和政策部门的负责人，他们两人都拥有丰富的企业合规专业知识，这进一步表明美国司法部将更加仔细（和切实地）审查与公司刑事和解相关的合规体系。副司法部长明确表示：公司合规体系的有效性将"对公司与美国司法部潜在达成的和解方案的条款产生重大影响……包括是否需要设置独立合规监察员。"美国纽约南区联邦检察官办公室刑事司司长重申了这一点，称"我们期望您的铂金级客户能够达到铂金级的合规标准"，并暗示如果合规体系欠佳，且缺乏自行报告，则可能无法获得暂缓起诉协议（或不起诉协议）。因此，公司将从对合规的投入中获益，包括通过体系和风险评估来确保他们的合规体系适合其业务面临的主要风险，并且能够很好地对标同行和最佳实践。

The DAG Memo Provides Welcome Clarification of Previously Announced Changes Aimed at Deterring Corporate Recidivism, but a Key Tension in DOJ Policy Remains
DAG 备忘录对以往宣布的旨在阻止企业累犯行为的变化进行了受欢迎的澄清，但美国司法部的政策仍存在一个关键的不一致之处

Key Policy Statements
关键政策声明

- For recidivist companies, the Department clarified that:

  对于累犯公司，美国司法部澄清：

  - Of greatest significance will be recent U.S. criminal resolutions and prior misconduct connected to the enforcement action at hand through similarity of the conduct, shared root causes, overlapping management, or overlapping compliance failures, as well as whether a company was subject to probation, supervision, monitorship, or another obligation imposed by a prior resolution at the time of the conduct under investigation;

    重中之重是，近期的美国刑事和解及与当前执法行动相关的以往不当行为，该等相关性体现为具有相似的行为、共同的根本原因、重叠的管理层，或者重叠的合规失误，

以及公司在当前被调查的行为发生时是否正受到暂缓执行、监督、监察、或以往和解方案规定的其他义务约束；

- Less weight will be given to "dated" criminal resolutions (10 or more years before the conduct under investigation) and civil or regulatory resolutions (five or more years before the conduct under investigation); and

  "时间久远的"刑事和解（被调查行为之前的 10 年或更长时间）和民事或监管和解（被调查行为之前的 5 年或更长时间）将被赋予较少的权重；和

- Successive NPAs and DPAs are "generally disfavored," particularly when successive resolutions involved overlapping conduct, personnel, and entities, but the Department will still "weigh and appropriately credit voluntary and timely self-disclosures of current or prior conduct," even for repeat offenders.

  "通常情况下不鼓励"连续的不起诉协议和暂缓起诉协议，特别是连续的和解协议涉及重叠的行为、人员和实体，但美国司法部仍将"权衡并适当认可自愿和及时自行披露当前或以往行为的情况"，即使对累犯亦是如此。

Analysis
分析

Last year, the Deputy Attorney General announced significant changes cracking down on recidivists—instructing prosecutors to consider a corporation's full (as opposed to similar) history of past misconduct, which we covered in a previous alert. Following that announcement, DOJ's FCPA Unit chief confirmed, in a panel moderated by Covington's Steven Fagell, that prosecutors would consider the recency, similarity, and pervasiveness of the past misconduct, as well as the involvement of senior management, in weighing the impact of prior misconduct on charging decisions. In a welcome move, the DAG Memo memorialized those factors, noting that "[n]ot all instances of prior misconduct . . . are equally relevant or probative."

去年，副司法部长宣布了打击累犯行为的重大变化——指示检察官考虑公司以往所有（而非类似）的不当行为（见我们之前的客户期刊）。该消息宣布后，美国司法部 FCPA 部门的负责人在由科文顿的 Steven Fagell 主持的小组讨论中证实，检察官将考虑以往不当行为是否新近发生、是否相似、是否具有普遍性，以及是否有高级管理层参与，从而权衡以往不当行为对指控决定的影响。DAG 备忘录对这些因素作出书面确认，指出"并非以往所有的不当行为……都具有同等的相关性或证明性"，这是受欢迎的进展。

From a big picture standpoint, the DAG Memo instructed prosecutors to evaluate whether the conduct at issue in prior and current matters reflects broader weaknesses in a company's compliance culture or practices. But the Department seems particularly focused on any lines connecting the historical misconduct to the enforcement action at hand. In short, DOJ seems to expect companies not to make a similar mistake twice. In addition, the DAG Memo instructs prosecutors to consider mitigating context, such as whether a company operates in a highly regulated industry or environment and therefore may have comparatively more historical regulatory misconduct, and allows for acquiring companies to avoid being tagged as recidivists simply because they acquired a company with a history of misconduct, provided that they have adequately integrated the acquired company into their compliance program.

总体来看，DAG 备忘录指示检察官评估以往及当前案件中的涉案行为是否反映了公司合规文化或实践中更加普遍存在的弱点。但美国司法部似乎特别关注将以往不当行为与当前执法行动联系起来的任何线索。简而言之，美国司法部似乎期望公司不要再犯类似的错误。此外，DAG 备忘录指

示检察官考虑减轻情节，例如公司运营的行业或环境受否受到高度监管，致使其过往可能存在相对较多的监管性质的不当行为，以及避免仅仅因为公司收购了一家有不当行为历史的公司而给收购方贴上累犯的标签，前提是该等收购方已将被收购方充分纳入其合规体系。

Even with these clarifications and the scope of the most significant prior misconduct being narrowed, the Deputy Attorney General followed up on a promise from her speech last October by stating that successive NPAs and DPAs would be "generally disfavored," particularly when successive resolutions involved overlapping conduct, personnel, or entities. Going forward, prosecutors will be required to seek the written approval of high-level supervisors before entering an NPA or DPA with a recidivist company. Although the DAG Memo acknowledged the tension between DOJ's new policy disfavoring multiple NPAs or DPAs and the Department's guidance that companies should voluntarily disclose misconduct, and indicates that prosecutors would still "weigh and appropriately credit voluntary and timely self-disclosures of current or prior conduct," companies are left to predict what that will mean in practice. As we pointed out in a previous alert, the uncertainty surrounding how the Department will treat recidivists could chill self-reports for fear that the self-report could lead to formal charges. That concern will be most acute for recidivist companies with recent prior misconduct involving similar management, countries, or business practices. But the potential consequence of not self-reporting could be a demand by the Department for a guilty plea, making the voluntary disclosure decision all the more difficult for this group of companies.

尽管有这些澄清，且最重要的过往不当行为的范围也得以缩小，但副司法部长进一步跟进其去年10月一次讲话中的承诺，指出"通常情况下不鼓励"连续的不起诉协议和暂缓起诉协议，特别是连续的和解协议涉及重叠的行为、人员和实体。未来，检察官必须在与累犯公司签订不起诉协议或暂缓起诉协议之前寻求高级主管的书面批准。尽管 DAG 备忘录承认美国司法部实施的不鼓励多个不起诉协议或暂缓起诉协议的新政策与美国司法部关于公司应自愿披露不当行为的指引之间存在不一致，并指出检察官仍将"权衡并适当认可自愿和及时自行披露当前或以往行为的情况"，但公司只能自己预测这在实践中意味着什么。正如我们在之前的客户期刊中指出的，有关美国司法部将如何对待累犯的不确定性，可能会对自行报告产生阻碍，因为公司会担心自行报告可能会导致正式指控。对于最近发生过牵涉类似管理层、国家/地区或商业实践的不当行为的累犯公司来说，这种担忧最为严重。但是，如果不自行报告，潜在后果可能是美国司法部要求公司签署认罪协议，这使得此类公司的自愿披露决定更加困难。

Further Updates to Criteria to Consider to Impose an Independent Compliance Monitor, Making a Monitor More Likely for Some, Plus Welcome Checks on Monitors
进一步更新考虑实施独立合规监察员的标准，使得某些情况指定监察员的可能性增大，另外，对监察员实施受欢迎的监督措施

Key Policy Statements
关键政策声明

- The DAG Memo provides a non-exhaustive list of 10 factors that prosecutors should consider when deciding whether to impose an independent compliance monitor, with a focus on allowing companies that voluntarily disclose, fully cooperate, effectively remediate, and make meaningful investments in enhancing compliance programs and corporate culture to avoid monitorships.

  DAG 备忘录非详尽地列出了检察官在决定是否实施独立合规监察员时应考虑的 10 个因素，重点是，对于自愿披露、充分配合、有效补救且对加强合规体系和企业文化进行有意义的投入的公司，允许避免对该等公司设置监察员。

- In addition, the DAG Memo instructs prosecutors to continually review ongoing monitorships, including their cost, with an ability to deem a monitorship "broader than necessary."

  此外，DAG 备忘录指示检察官持续审查正在实施的监察员制度，包括其成本，并有能力判断监察员制度是否"超出必要范围"。

Analysis
分析

The Deputy Attorney General's announcement last October removed any presumption against imposing monitors. Building on that clarification, the DAG Memo's non-exhaustive factors that prosecutors should evaluate when considering *whether* to impose a monitor could be read to de-emphasize cost and burden considerations, even though the Deputy Attorney General's October announcement did retain previous DOJ guidance's focus on both the potential benefits *and* costs or burdens associated with imposing a monitor. Without focusing on costs or burdens, however, the DAG Memo's updated and clarified factors tend to reward companies that voluntarily disclose, fully cooperate, effectively remediate, and make meaningful investments in enhancing compliance programs and corporate culture. If prosecutors over-index an emphasis on voluntary disclosure in this analysis, it is theoretically possible under the DAG Memo for a company with a tested, effective, adequately resourced, and fully implemented compliance program and that effectively remediated the relevant misconduct to nonetheless receive a monitor—a result that likely is not intended. Time will tell how the DAG Memo is put into practice in this regard, but now companies that do not meet DOJ's disclosure, cooperation, and remediation rubric theoretically can be penalized multiple times—whether through the resolution vehicle, the severity of penalties, or the imposition of a monitor. This programmatic clarification, at a minimum, bolsters the case for companies to complete compliance program and risk assessments as part of broader efforts to enhance and appropriately tailor compliance programs to ensure that they benchmark well against peer companies and best practices.

副司法部长去年 10 月的声明取消了反对设置监察员的任何推定。在该项澄清的基础上，DAG 备忘录中列出的检察官在考虑是否设置监察员时应当评估的非详尽因素可以被解读为弱化对成本和负担因素的考虑，尽管副司法部长去年 10 月份的声明确实保留了美国司法部之前指引中对与设置监察员相关的潜在利益*和*成本或负担的关注。然而，在不关注成本或负担的情况下，DAG 备忘录更新和澄清的因素，倾向于奖励那些自愿披露、充分配合、有效补救并在加强合规体系和企业文化方面进行有意义投入的公司。如果检察官过度强调此分析中的自愿披露，则根据 DAG 备忘录，理论上，即使一家公司拥有经过测试的、有效、资源充足和全面实施的合规体系并且有效补救了相关不当行为，其仍然有可能被指定监察员——这可能并非预期的结果。时间会证明 DAG 备忘录在这方面将如何付诸实践，但是，目前看来，理论上而言，不符合美国司法部的披露、配合和补救要求的公司可能会受到多次处罚——无论是体现在和解方式、处罚的严重程度、还是设置监察员方面。这一澄清至少为公司完成合规体系和风险评估提供依据，以其作为加强和适当调整合规体系的更广泛努力的一部分，以确保它们能够很好地对标同行和最佳实践。

Separately, in a nod to concerns from corporations about the potential for monitors' efforts to sweep more broadly than their mandates, once a monitor *is* imposed, the DAG Memo puts in place some welcome checks and balances on monitors. In particular, the DAG Memo places responsibility on prosecutors to provide close oversight of the monitorship during the monitorship's term. In this way, the DAG Memo acknowledges that a monitor can introduce unintended administrative and financial burdens on a company, while simultaneously signaling that the Department intends to continue imposing monitorships when they are deemed justified under the circumstances.

另外，对于企业关于监察员的行为可能超出其职责范围的担忧，一旦设置监察员，DAG 备忘录对监察员实施了一些受欢迎的制衡措施。特别是，DAG 备忘录规定检察官有责任密切在监察期内监督监察工作。就此，DAG 备忘录认可，监察员可能会给公司带来意料之外的行政和财务负担，但同时表明美国司法部打算在其认为合理的情况下继续实施监察员制度。

Prepare for Close Scrutiny and Enhanced Expectations, with More Changes and Updates to Come
为密切审查和更高预期做好准备，更多变化和更新即将到来

The DAG Memo solidifies a new game plan for DOJ's approach to corporate criminal enforcement—harsher outcomes for companies that do not voluntarily disclose misconduct, meet DOJ's enhanced cooperation expectations, and invest in corporate compliance programs. Legal and compliance departments should take stock of their compliance programs and adjust their playbooks as necessary. Companies with prior resolutions, with the Department or otherwise, should be especially proactive.

DAG 备忘录就美国司法部的公司刑事执法做法固定了一项新的行动方案——对于不自愿披露不当行为、未满足美国司法部加强的关于配合的预期、以及未对公司合规体系进行投入的公司，将产生更严厉的后果。法务和合规部门应当评估他们的合规体系并根据需要调整他们的方案。之前与司法部或其他部门达成过和解的公司，尤其应当积极主动。

Exactly how certain aspects of the new playing field promised by the Deputy Attorney General will play out in practice—across the Department's numerous criminal components and in forthcoming policies—remains to be seen. But the Department's focus on continued prioritization of and a desire for an uptick in white collar and corporate criminal enforcement actions cannot be mistaken.

至于副司法部长承诺的新制度的某些方面将如何在司法部各刑事部门和即将出台的政策中付诸实践，仍有待观察。但是，可以肯定的是，司法部持续重点关注白领和企业刑事执法行动，且对白领和企业刑事执法行动将日趋频繁。

If you have any questions concerning the material discussed in this client alert, please contact the following members of our White Collar Defense and Investigations practice:

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