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Conducting Corporate Investigations in an Era of Individual Accountability: New Guidance on Corporate Criminal Enforcement

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As recently discussed [here](#), on September 15, Deputy Attorney General Lisa Monaco issued a [memorandum](#) outlining further revisions to the Department of Justice's (DOJ) criminal enforcement policies and practices. This latest memo continues to build on what have become the DOJ's two foundational expectations: prompt and transparent corporate self-disclosure and cooperation, and individual accountability.

It is increasingly critical for companies to launch thorough internal investigations when faced with allegations of misconduct, whether the allegation is raised internally, by a competitor, or by the government. Companies must work quickly to understand the facts, identify the scope and cause of the misconduct, and determine whether any laws were broken. These steps are essential for the company to weigh its options, including self-disclosure.

Failure to do so may ultimately drain valuable time and resources, as counsel scrambles to get ahead of the DOJ investigation and to regain credibility and cooperation credit.

The DOJ's focus on holding individuals — and not just companies — accountable can also put companies and their counsel in a difficult spot. Counsel is duty-bound to protect the company, but that may mean putting individual employees and executives in jeopardy. Indeed, the memo states that "to receive full cooperation, corporations must produce on a timely basis all relevant, non-privileged facts and evidence about individual misconduct such that prosecutors have the opportunity to effectively investigate and seek criminal charges against culpable individuals." (emphasis in original). This makes a thoughtful and thorough internal investigation all the more important, but also means that counsel must carefully consider if, and when, the company's interest is not aligned with an individual employee.

In-house counsel should therefore keep in mind the following:

- Take all allegations of wrongdoing seriously. Not every allegation warrants a scorched-earth investigation, but investigations must be deliberate and thorough based on the risk to the company if the allegations were true.
- Don't cut corners on *Upjohn* warnings. It is crucial that employees cooperate with internal investigations, but employees must also have a clear understanding of the scope of the attorney-client privilege, and the company's right to waive that privilege.
- Consider whether (and when) employees require individual counsel. Given the DOJ's expectations that companies disclose information that may lead to individual prosecutions, at the first indication of wrongdoing,

counsel must determine whether employees require individual representation.

- Ensure that there are clear policies and training in place for employees to understand the rules governing their use of personal electronic devices and third-party messaging applications, and the company's authority to access that data.
- Update non-implicated executives and the board on high-stakes investigations early and often. They may be forced to make difficult decisions — working collaboratively to reach the result that is in the best interest of the company will therefore be critical.

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