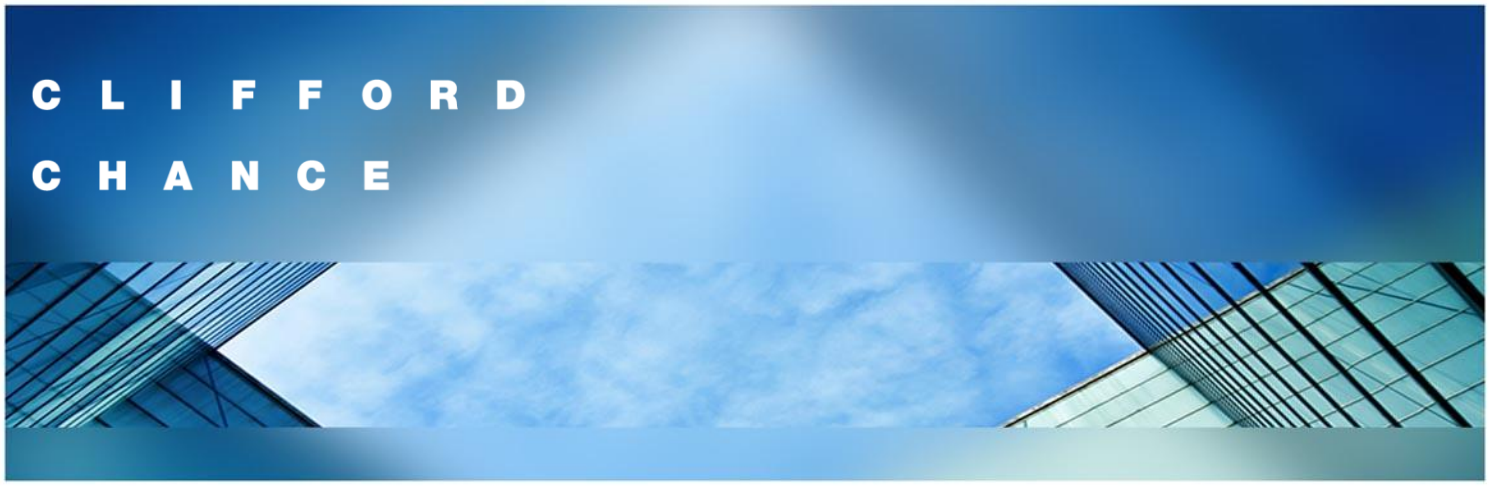

MORE "STICKS" THAN "CARROTS" IN DOJ'S NEW GUIDANCE

INTRODUCTION

On September 15th, Deputy Attorney General ("DAG") Lisa Monaco announced additional guidance regarding the Department of Justice's ("DOJ") policies for prosecuting and resolving corporate criminal cases.[1] This guidance, which builds on prior October 2021 DOJ guidance (the "First Monaco Memo"), reinforces the message that the DOJ is now taking a more aggressive enforcement approach focused on holding accountable individual bad actors and recidivist corporations, while rewarding strong corporate compliance culture and incentivizing voluntary disclosures. The guidance also suggests a significant increase in related enforcement.

Specifically, the simultaneously-released memorandum outlining and directing the DOJ's policy updates (the "Second Monaco Memo"): (1) imposes stronger individual misconduct disclosure requirements on corporations to receive cooperation credit; (2) prioritizes bringing individual charges either prior to or simultaneously with a corporate resolution; (3) directs prosecutors not to delay or decline a prosecution where foreign jurisdictions are conducting parallel investigations or the individual is located outside of the U.S.; (4) updates factors that prosecutors should consider when evaluating corporate history, self-disclosure, cooperation, and compliance programs; (5) amends guidance regarding corporate monitors; and (6) explains how the DOJ is working to increase transparency about its corporate criminal enforcement priorities.

INDIVIDUAL ACCOUNTABILITY

Consistent with prior DOJ guidance, in her remarks, DAG Monaco made clear that the DOJ's top priority for corporate criminal enforcement is to "go[] after individuals who commit and profit from corporate crime" regardless of the individual's position, status, or seniority within a corporation, in contrast to indirectly costing innocent shareholders who may also be victims of the individual's actions.[2]

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1 The additional guidance was announced in a speech at New York University ("NYU") in coordination with the NYU Program on Corporate Compliance and Enforcement. *See* Lisa O. Monaco, Deputy Attorney General, Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement. The same day, DAG Monaco released a memorandum outlining and directing the DOJ policy updates. *See* Memorandum from Deputy Attorney General Lisa O. Monaco, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download.

2 Speech from the Deputy Attorney General Lisa O. Monaco, *supra* note 1.

Timely Disclosures and Prioritization of Individual Investigations

DAG Monaco noted that companies and counsel sometimes delay disclosure of critical information to consider how to mitigate damage or investigate misconduct on their own, and suggested that these practices often undermine the DOJ's ability to bring individual charges.[3] She noted that sometimes this delay is intentionally done for strategic purposes. As a result, the guidance takes steps to encourage companies to make prompt disclosures to the government of all relevant, non-privileged facts about individual misconduct as they are identified and even before they may have been fully investigated by the company, by premising full cooperation credit on the "timely" production of "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."[4] The memorandum provides that "priority evidence" to be disclosed includes information and communications associated with relevant individuals during the period of misconduct.[5] If a company identifies significant information but does not disclose it to the government while they investigate the facts to obtain a more complete picture, the company risks its eligibility for cooperation credit.

The DOJ also advises prosecutors to complete investigations into individuals either prior to or simultaneously with the entry of a resolution against a corporation. If prosecutors resolve a case against a corporation before completing investigations into individual misconduct, prosecutors must provide a full investigative plan and timeline for the remaining investigative work, to be approved by the United States Attorney or Assistant Attorney General. The impact of this policy refinement may be significant on a company's ability to thoroughly investigate conduct, as individual employees directly under investigation by DOJ may well be less cooperative in the company's parallel investigation.

Foreign Investigations

While highlighting that a significant part of the DOJ's work to prosecute corporate crime includes coordinating with foreign law enforcement, the Second Monaco Memo also notes that "U.S. federal prosecution serves as a particularly significant instrument for accountability and deterrence."[6] In some circumstances, prosecutors may learn that certain corporate misconduct that they are investigating is also being investigated and prosecuted in a foreign jurisdiction. While "[t]he Principles of Federal Prosecution recognize that effective prosecution in another jurisdiction may be grounds to forego federal prosecution," the Second Monaco Memo clarifies factors that prosecutors should consider in determining whether a foreign prosecution will be effective, including an evaluation of the potential penalties in that other jurisdiction.[7] In addition, the guidance explicitly states that "prosecutors should not be deterred from pursuing appropriate charges

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3 *Id.*
4 Second Monaco Memo, *supra* note 1, at 3.
5 *Id.*
6 *Id*. at 4.
7 *Id*. Prosecutors should consider, among other things, the strength of the other jurisdiction's interest in the prosecution, the other jurisdiction's ability and willingness to prosecute effectively, and the probable sentence or other consequences if the individual is convicted in the other jurisdiction.

just because an individual liable for corporate crime is located outside the United States."[8] This policy refinement is particularly interesting in light of the stronger extraterritorial subpoena power granted under the Anti-Money Laundering Act of 2020, which permits DOJ to subpoena any bank that has a U.S. correspondent account for any records located abroad that are the subject of (1) a U.S. criminal investigation; (2) any investigation of AML violations; (3) a civil forfeiture action; or (4) an investigation related to special measures authorized under Section 311 of the PATRIOT Act (31 U.S.C. § 5318A) with respect to jurisdictions, financial institutions, or international transactions of primary money laundering concern (*see* our December 2020 and February 2021 briefings).

GUIDANCE ON CORPORATE ACCOUNTABILITY

Reflecting the review and recommendations of the Corporate Crime Advisory Group, the Second Monaco Memo provides detailed guidance for prosecutorial assessment of corporate culpability. Factors to be weighed by prosecutors include prior misconduct, voluntary self-disclosure, cooperation, and compliance programs.

Evaluating a Corporation's History of Misconduct

As we advised in November 2021, the First Monaco Memo instructed prosecutors to consider the full history of prior corporate violations in determining whether a resolution such as a non-prosecution agreement ("NPA") or deferred prosecution agreement ("DPA") is appropriate. The Second Monaco Memo outlines how such histories will be evaluated.

As a starting point, DAG Monaco makes clear that multiple NPAs and DPAs with the same corporation are disfavored and that the DAG's office will carefully scrutinize corporate settlement decisions of U.S. Attorney's offices.[9] Thus, moving forward, companies cannot and should not assume they are automatically entitled to an NPA or DPA.

However, the Second Monaco Memo also clarifies that not all prior settlements are "equally relevant or probative."[10] Therefore, prosecutors are advised to consider "the form of prior resolution and the associated sanctions or penalties, as well as the elapsed time between the instant misconduct, the prior resolution, and the conduct underlying the prior resolution."[11] Specifically the Second Monaco Memo directs prosecutors to:

- **Assign greater weight to recent actions**. The guidance states that dated past misconduct (including criminal resolutions over ten years old and civil or regulatory resolutions over five years old) should generally be assigned less weight.
- **Consider the facts and circumstances of prior actions**. The guidance states that prosecutors should consider the relevant facts and circumstances regarding the prior action, including: (1) the seriousness and pervasiveness of prior misconduct; (2) the similarities between the

8 *Id.*
9 Speech from the Deputy Attorney General Lisa O. Monaco, *supra* note 1.
10 Second Monaco Memo, *supra* note 1, at 5.
11 *Id.*

prior and instant misconduct; and (3) whether at the time of the misconduct under current review, the corporation was serving an obligation imposed by the prior resolution.[12]

- **Consider whether the prior and current misconduct is related**. The guidance states that prosecutors should consider whether the misconduct has "the same root causes" or "reflects broader weaknesses in a corporation's compliance culture or practices."[13]
- **Consider whether the same individuals are involved**. The guidance states that prosecutors should consider whether misconduct occurred under "the same management team and executive leadership" or whether there are other overlapping personnel indicating a lack of compliance or oversight.[14]
- **Compare similar companies**. The guidance instructs prosecutors to consider a corporation's regulatory environment when comparing "corporate track records."[15] Therefore, corporations in highly regulated industries should expect to be compared to those similarly situated.

VOLUNTARY SELF-DISCLOSURE BY CORPORATIONS

The Second Monaco Memo cements a DOJ policy against seeking guilty pleas from corporations that self-disclose. Therefore, absent aggravating factors, the DOJ will not seek a guilty plea where a corporation has "voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated the criminal conduct."[16] In addition, for such fully cooperating corporations, the guidance provides that DOJ will not impose an independent compliance monitor if, at the time of resolution, the company also demonstrates that it has implemented and tested an effective compliance program.[17] Full cooperation, as noted above, now expressly requires prompt disclosure of incriminating facts for individuals after they have been identified.

More generally, timely voluntary self-disclosure will result in a more favorable resolution. In order to further encourage self-disclosure, the Second Monaco Memo requires for the first time that every DOJ component that prosecutes corporate crime enact a policy incentivizing such voluntary self-disclosure.[18]

EVALUATION OF COOPERATION BY CORPORATIONS

Along with voluntary self-disclosure, the Second Monaco Memo emphasizes that cooperation by corporations is also a mitigating factor. However, in order to receive this credit, corporations must act quickly to "preserve, collect, and disclose relevant documents located both within the United States and overseas."[19] Particularly, companies able to navigate complex issues of foreign law will be credited for their cooperative efforts.

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12 *Id.*
13 *Id*. at 6.
14 *Id*
15 *Id*. at 5.
16 *Id*. at 7.
17 *Id*.; *see also* Speech from the Deputy Attorney General Lisa O. Monaco, *supra* note 1.
18 Second Monaco Memo, *supra* note 1, at 7.
19 *Id*. at 8.

EVALUATION OF A CORPORATION'S COMPLIANCE PROGRAM

As we advised in April 2022, the DOJ is increasingly focused on evaluating corporate compliance programs. Recently, the Department has taken further steps to bolster its capacity to evaluate these functions, including by restructuring a dedicated group within the Fraud Section—the Corporate Enforcement, Compliance and Policy Unit ("CECP Unit")—to include personnel holding public and private industry experience with corporate compliance and enforcement matters. This month, the DOJ onboarded Matt Galvin, the former global compliance chief of a multinational beverage and brewing company, as the CECP Unit's resident compliance and big data expert.[20] In public remarks, Assistant Attorney General Kenneth Polite pointed to Galvin's hiring as well as the buildout and training of a "team of multiple attorneys in the CECP Unit with significant compliance and monitorship experience," as steps that the DOJ has taken to strengthen its ability to assess companies' compliance programs as part of its enforcement program.[21]

These efforts will have important consequences for companies subject to investigation. The Second Monaco Memo notes that an effective compliance program can have a "direct and significant impact on the terms of a corporation's potential resolution with the Department."[22] Specifically, prosecutors are directed to assess compliance programs at two points in time: "(1) the time of the offense; and (2) the time of a charging decision."[23] Thus, companies should seek to continuously improve the effectiveness of their compliance programs.

The Second Monaco Memo outlines various guidance and factors to consider in evaluating compliance programs, including "whether the corporation's compliance program is well designed, adequately resourced, empowered to function effectively, and working in practice."[24] It also focuses on two additional metrics relevant to prosecutors' evaluation of a corporation's compliance program: (1) compensation structures that promote compliance; and (2) use of personal devices and third-party applications.

Compensation Structures that Promote Compliance

The DOJ emphasizes that corporations can deter criminal activity by implementing compensation systems that "clearly and effectively impose financial penalties for misconduct."[25] According to the Second Monaco Memo, companies can incentivize compliant conduct and deter risky behavior by ensuring that compensation systems—both written and in practice—encourage compliance. This includes evaluating how the corporation treats both historic (i.e., clawbacks) and current compensation.[26] DAG Monaco emphasized in her announcement that

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20 *See* Kenneth A. Polite, Assistant Attorney General, Assistant Attorney General Kenneth A. Polite Delivers Remarks at the University of Texas Law School (Sept. 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-delivers-remarks-university-texas-law-school.

21 *Id*.

22 Second Monaco Memo, *supra* note 1, at 9.

23 *Id*.

24 *Id*.

25 *Id*. at 9-10.

26 *Id*. at 10.

companies should both penalize and reward employees against compliance related performance criteria.

Use of Personal Devices and Third-Party Applications

As we noted in August 2022, electronic communications have become critical tools for the DOJ and are an area of focus for prosecutors and regulators. The Second Monaco Memo reinforces the DOJ view that the use of personal communication devices and third-party messaging apps "pose[] significant corporate compliance risks."[27] As a result, the Second Monaco Memo instructs prosecutors to consider how companies address these risks in evaluating both the compliance program and the corporation's cooperation.[28]

INDEPENDENT COMPLIANCE MONITORSHIPS

The Second Monaco Memo provides further guidance for prosecutors regarding whether an independent compliance monitor is necessary. While the guidance provides that prosecutors will not apply any general presumption in favor of or against imposing a monitor and instructs that "the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case," the Second Monaco Memo also clarifies that prosecutors should consider 10 "non-exhaustive" factors in making this decision.[29] These include: (i) "whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component's self-disclosure policy;" (ii) "whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;" (iii) whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;" and (iv) "whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct[.]"[30] While "decisions about the imposition of a monitor will continue to be made on a case-by-case basis" and at DOJ's "sole discretion," the standard policy conveyed in the Second Monaco Memo and echoed in DAG Monaco's remarks makes clear that DOJ will not require a monitor for companies that voluntarily disclose misconduct, fully cooperate, and at the time of resolution have implemented and tested an effective compliance program.[31]

Selection of Monitors

To provide for a consistent and transparent procedure in monitor selection, the DOJ requires that every component involved in corporate criminal resolutions either adopts or develops a documented selection process that is readily available to the public. Additionally, the DOJ requires that any selection process

27 *Id*. at 11.
28 *Id*.
29 *Id*. at 11-12.
30 *Id*. at 12-13.
31 *Id*. at 7-8; *see also* Speech from the Deputy Attorney General Lisa O. Monaco, *supra* note 1.

incorporates elements that promote consistency, predictability, and transparency, such as (1) having a standing or ad hoc committee decide whether a corporation needs a monitor; (2) conducting monitor selection processes in line with the DOJ's commitment to diversity and inclusion; and (3) having prosecutors notify the appropriate U.S. Attorney or Department Component Head on whether they have decided to impose an independent compliance monitor on a corporation.[32]

Continued Review of Monitorships

If prosecutors require an independent monitor on a corporation as part of a resolution with the DOJ, the DOJ requests that prosecutors clearly define the monitor's responsibilities and scope of authority in writing, and that the monitor and corporation agree upon a clear and appropriately targeted workplan for the monitorship. The DOJ also requires ongoing communication between itself, the monitor, and the corporation to ensure that the monitor's work is properly tailored to the agreed-upon workplan and that the monitor has appropriate access to company information, resources, and employees. The DOJ is also entitled to either lengthen or shorten the term of the monitorship depending on the monitor's progress with the corporation and the workplan.[33] According to DAG Monaco, DOJ intends to monitor the monitor.

COMMITMENT TO TRANSPARENCY IN CORPORATE CRIMINAL ENFORCEMENT

The DOJ lastly highlights the government's goal in remaining transparent with respect to corporate criminal enforcement priorities and processes is to encourage companies to implement stronger compliance culture and programs and to cooperate fully with the Department in investigations. The DOJ recommends that, where the DOJ enters into a corporate criminal resolution, such agreement should include "an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement" and "a statement of relevant considerations that explains the DOJ's reasons for entering into the agreement."[34] The DOJ also makes clear that all corporate criminal resolutions will be published on the DOJ's website, unless there is an exceptional circumstance or reason for not publicly posting the agreement.[35]

KEY TAKEAWAYS

The Second Monaco Memo highlights the DOJ's efforts to prosecute corporate crime cases more rigorously while simultaneously encouraging corporations to cooperate with ongoing investigations in exchange for cooperation credit. Specifically, the memorandum represents a welcome step forward in developing precise guidelines for prosecutors and corporations on individual accountability, corporate accountability, independent compliance monitoring, and transparency in corporate criminal enforcement. These new guidelines provide clarity on previously vague DOJ policies on prosecuting corporate criminal cases.

Under these new guidelines, first, corporations are encouraged to promptly provide evidence of individual misconduct to the government. If production of

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32 Second Monaco Memo, *supra* note 1, at 13.
33 *Id*. at 14.
34 *Id*. at 15.
35 *Id*.

such evidence is delayed, corporations risk losing cooperation credit. This places the onus on corporations to act swiftly and decisively, and perhaps before they ordinarily would be able to put the facts into context. The new guidelines state that this evidence must be produced "on a timely basis,"[36] and DAG Monaco indicated that DOJ would scrutinize the period from when the fact was discovered to when it was disclosed, and will consider the reasons for the delay. The implementation of this expectation will likely be developed in practice and on a consideration of all the circumstances. Second, corporations should feel incentivized to continuously improve their compliance culture and cooperate with the DOJ. Companies who do so may be punished less severely for prior misconduct. Notably, the new guidelines recognize, and encourage, the salutary effects that corporate acquisitions can have on corporate compliance by incentivizing parent corporations to effectively integrate their subsidiaries into their existing compliance structures. The flip side, of course, is that the DOJ is signaling that parent corporations have important responsibilities in ensuring compliance among its subsidiaries and affiliates. Additionally, corporations are encouraged to voluntarily self-disclose any potential misconduct to avoid additional fines, penalties, and reputational harm. Similarly, effective cooperation with the government and fostering a strong compliance culture can mitigate potential liability. Third, prosecutors are required to consider a series of factors in determining whether a corporation needs an independent monitor pursuant to a corporate criminal resolution. Such factors largely revolve around the corporation's interest in openly cooperating with the government and working to improve internal compliance measures. Fourth, prosecutors are encouraged to remain transparent with the public regarding corporate criminal resolutions and what facts led to such resolution.

[36] *Id*. at 3.

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