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Expert Analysis

Monaco Memorandum Updates DOJ Corporate Enforcement Policy

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For many years the Department of Justice (DOJ) has sought to encourage voluntary disclosure of wrongdoing by companies. This goal is reflected most clearly in DOJ's corporate leniency policy. Under that policy, companies can reasonably expect not to be prosecuted, absent specific aggravating circumstances, if they voluntarily report wrongdoing, cooperate with the government, and remediate misconduct. In light of that policy, companies often report misconduct to prosecutors and cooperate in the prosecution of employees.

Critics of corporate white-collar enforcement argue that prosecutors have not been sufficiently aggressive toward companies and senior executives. A particular concern has been that companies may be receiving leniency without doing enough to help the government. From this perspective, inadequate cooperation has impaired the government's investigation of individuals.

The adequacy of corporate disclosure and cooperation seems to be one of the concerns animating a memorandum from Deputy Attorney General Lisa Monaco, "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group," issued on Sept. 15, 2022 (the Monaco Memorandum). Above all, the Monaco Memorandum seeks to ensure that prosecutors insist on timely and complete disclosure from companies and then use that disclosure to prosecute culpable individuals.

Directed to a wide range of DOJ attorneys, the Monaco Memorandum responds to a perceived relaxation of enforcement during the Trump Administration. It reinforces principles articulated in the September 2015 memorandum of Deputy Attorney General Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing" (the Yates Memorandum), which emphasized the centrality of prosecuting culpable individuals for corporate misconduct. In the process, the Monaco Memorandum fine-tunes DOJ policy toward corporations.

Interestingly, the Monaco Memorandum was issued only weeks after the U.S. Sentencing Commission released an August 2022 report on corporate prosecution, "The Organizational Sentencing Guidelines: Thirty Years of Innovation and Influence" (the Sentencing Report). The Sentencing Report documents a decline in the number of corporate criminal prosecutions in recent years. Data in the Sentencing Report, together with the Monaco Memorandum, focus our attention on the persistent question of whether DOJ policy is achieving the right balance of "carrots and sticks" in investigating and prosecuting corporate misconduct.

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In this article, we begin by summarizing the Monaco Memorandum and consider its policy pronouncements in the context of earlier DOJ policy statements. We then discuss the Sentencing Report and suggest how it may shed light on the present status of corporate white-collar enforcement. We conclude with observations about alternatives to corporate prosecutions, notably deferred prosecution agreements (DPAs), which may help explain the relative decline in corporate prosecutions.

The Monaco Memorandum

The Monaco Memorandum covers a wide range of subjects, instructing prosecutors to "ensure individual and corporate accountability" by evaluating factors which include corporate entities' prior misconduct, corporate self-reporting and cooperation, the effectiveness of corporate compliance programs, and the appropriate use of monitors. We discuss several of these subjects below.

Emphasis on Voluntary Disclosure and Cooperation. The Monaco Memorandum emphasizes that to be eligible for leniency corporations must (1) voluntarily disclose all relevant information to prosecutors and (2) cooperate fully with the government's investigation. Corporations seeking cooperation credit must disclose "swiftly and without delay" all relevant, non-privileged information, and evidence relating to individual culpability should be a priority. Likewise, companies seeking cooperation credit must in a timely fashion preserve, collect, and produce relevant documents in the United States and abroad. Delayed disclosure of significant facts will jeopardize cooperation credit. DOJ prosecutors "must specifically assess" the timeliness of a corporation's cooperation for every corporate resolution.

To promote consistency, the Monaco Memorandum instructs each DOJ office responsible for prosecuting corporate crime to review and, if needed, draft policies on voluntary self-disclosure. These policies should describe (1) the qualifications for voluntary self-disclosure, including as to timing for the disclosure and the role of timely preservation, collection, and production of documents and information, and (2) the types of information and facts that should be disclosed as well as the rewards for meeting these standards. In this way, "the benefits of voluntary self-disclosure" will be "clear and predictable."

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Prosecution of Individuals. The Monaco Memorandum addresses not only what companies must do to qualify for leniency, but also what prosecutors should do with the information they receive pursuant to corporate cooperation. Prosecutors are instructed to use this information to investigate and, as warranted, prosecute individuals. The Monaco Memorandum directs prosecutors to aim to conclude investigations into individual misconduct either before or simultaneously with resolving allegations of corporate wrongdoing. Prosecutors who try to resolve corporate cases before concluding investigations of individuals will be required to submit a memorandum that identifies all potentially culpable individuals, details any remaining investigative steps, and describes a plan to resolve the matter within the applicable statute of limitations period.

The Monaco Memorandum is expressly framed as an effort to "reinforce" existing policies, articulated in the Yates Memorandum, to "promote the identification and investigation of the individuals responsible for corporate crimes." The Yates Memorandum set forth the requirement that, to qualify for cooperation credit, corporations must provide DOJ with "all relevant facts relating to the individuals responsible for the misconduct." This emphasis on giving prosecutors information on all culpable individuals was modified three years later when then-Deputy Attorney General Rod J. Rosenstein announced, in a November 2018 speech, that corporations seeking cooperation credit need only identify individuals who were "substantially

involved in or responsible for" illegal activity.

In this light, the Monaco Memorandum marks a return to the tone and approach expressed in the Yates Memorandum. This shift was signaled in Monaco's October 2021 address at the ABA's National Institute on White Collar Crime (the October 2021 Address); it is now formalized in the Monaco Memorandum's requirement that corporations seeking cooperation credit "identify all individuals" implicated in corporate misconduct, "regardless of their position, status, or seniority[.]"

Evaluation of Remedial Efforts and Compliance Programs. The Monaco Memorandum also focuses on remediation (the third requirement of corporate leniency) as well as voluntary disclosure and cooperation. Prosecutors must assess the sufficiency of compliance programs, including their design, resources, and functionality, both when the offense occurred and when the investigation is resolved. Compensation structures play a key role. The Monaco Memorandum directs prosecutors to consider whether compensation structures reward compliant behavior and incorporate mechanisms to claw back compensation from individuals responsible for corporate wrongdoing. See U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs, Justice.gov (June 2020) (instructing prosecutors to assess, among other factors, whether the company has "considered the implications of its incentives and rewards on compliance").

Monitorships. The Monaco Memorandum provides a "non-exhaustive list of factors" prosecutors should use to evaluate the need for an independent compliance monitor on a case-by-case basis. Prosecutors are instructed to consider, among other factors, whether the corporation voluntarily self-reported in accordance with the established DOJ policy; implemented an effective compliance program and adequate internal controls and has conducted testing on both; and took sufficient investigative or remedial measures to address the underlying misconduct, including terminating business relationships and practices and disciplining personnel.

The Monaco Memorandum modifies the approach to monitorships reflected in then-Assistant Attorney General Brian A. Benczkowski's Memorandum, "Selection of Monitors in Criminal Division Matters," dated Oct. 11, 2018 (the Benczkowski Memorandum). The Benczkowski Memorandum contemplated that compliance monitors "will not be necessary in many corporate criminal resolutions" and discouraged prosecutors from imposing monitors absent "demonstrated need" and "clear benefit[s]" relative to estimated expenses and burdens. In the October 2021 Address, Monaco rescinded prior DOJ guidance suggesting "that monitorships are disfavored or are the exception." By directing prosecutors not to "apply any general presumption against" monitors and articulating factors relevant to deciding when a monitorship should be imposed, the Monaco Memorandum highlights DOJ's shift toward the use of monitorships.

Evaluation of Prior Corporate Misconduct. The Monaco Memorandum also provides guidance for assessing prior corporate malfeasance, building on comments made by Monaco in her October 2021 Address. In resolving corporate investigations, prosecutors should consider, among other factors, the entity's record, placing the most weight on any earlier misconduct implicating the same management or personnel and the circumstances surrounding any recent resolutions within the United States—specifically, criminal resolutions within 10 years and civil or regulatory resolutions within five years. Other relevant factors include the nature of the prior resolution and penalties, the underlying facts and severity of the prior misconduct, and the time elapsed between the current allegations and the earlier misconduct and resolution.

The Monaco Memorandum highlights the importance of identifying signs of broader weaknesses in corporate compliance culture and practices, stressing the significance of repeated misconduct regardless of timing. Prosecutors are instructed to consider whether the current misconduct was committed while the

company was under probation, supervision, or a monitorship in connection with a prior resolution. Additional considerations include any overlap in personnel involved in repeated misconduct, similarities in root causes, and remedial steps taken to address sources of earlier wrongdoing.

Foreign Prosecutions. The Monaco Memorandum takes account of parallel foreign criminal investigations. Prosecutors may decline to initiate an individual prosecution in the United States if they determine that a "significant likelihood" exists that the individual will be subjected to effective prosecution abroad, as measured by (1) the strength of the other jurisdiction's interest in prosecuting the case; (2) the ability and willingness of the other jurisdiction to prosecute effectively; and (3) the likely sentence or other consequences stemming from conviction in the foreign jurisdiction. Though prosecutors may postpone initiating a federal prosecution to assess the scope and effectiveness of a foreign proceeding, any delay must not undermine the strength of the case, prevent DOJ from pursuing certain charges, or reduce the likelihood of arresting suspects.

The Sentencing Report

The Monaco Memorandum was issued shortly after the Sentencing Report published data on organizational prosecution and sentencing. This data seems to have had some impact on DOJ. In prepared remarks given the day the Monaco Memorandum was issued, Monaco referred to "data showing overall decline in corporate criminal prosecutions over the last decade," adding that new DOJ guidance calls for corporations to disclose information quickly "to expedite" DOJ investigations of individuals.

Whatever the connection between the Sentencing Report and new DOJ guidance, a decline in corporate criminal prosecutions does not necessarily indicate a relaxation of white-collar corporate enforcement. The Sentencing Report addresses criminal prosecutions that led to a sentencing, which the Sentencing Commission acknowledges "cannot fully measure the prevalence of corporate crime." The Sentencing Report notes, for example, that the total number of corporate entities convicted and sentenced for a criminal offense declined from a peak of 304 offenders in 2000 to fewer than 100 in 2020 and 2021. These numbers do not include non-prosecution agreements (NPAs) or DPAs. In a DPA, prosecutors file criminal charges against a company but then defer prosecution and ultimately seek dismissal when the company satisfies agreed-upon remedial measures.

Notably, the Sentencing Report data shows that only 1.5% of organizational offenders received the five-point reduction contemplated by the Sentencing Guidelines for voluntarily self-reporting misconduct. This fact is subject to different interpretations. It may suggest that not enough companies are voluntarily reporting misconduct to the government. An alternative interpretation is that DOJ's leniency policy has induced many companies to cooperate, thereby converting would-be convictions into DPAs, and limiting prosecutions chiefly to companies that do not report misconduct. In short, the Sentencing Report may simply reflect how DOJ's incentive structure has worked out over time.

Conclusion

In her remarks concerning the Monaco Memorandum, Monaco spoke directly about offering companies "a combination of carrots and sticks," i.e., "a mix of incentives and deterrence" to encourage cooperation in DOJ investigations. These incentives have been central to DOJ policy for many years. The substance and wording of the policy have evolved over time, but often on the margin. What has varied more substantially is the tone and approach taken by particular DOJ leadership. One thing remains certain: Companies and their executives will continue to face scrutiny for possible criminal wrongdoing.