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United States: Latest Monaco Memo addresses key areas of the Department of Justice policy on Corporate Criminal Enforcement

Introduction

On 15 September 2022, Deputy Attorney General Lisa Monaco issued a memorandum to Department of Justice ("**Department**" or "**DOJ**") prosecutors entitled "Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group" ("**Second Monaco Memo**" or "**Memo**").[i] As has become common in recent years (with a brief intermission under Deputy Attorney General Rod Rosenstein who objected to the practice), such memoranda and other Department pronouncements have come to herald key developments in DOJ policy on corporate criminal enforcement and related practice. These memoranda are therefore closely watched by the defense bar and corporate counsel alike. Indeed, this is the second such memorandum issued by Monaco in the past year. Monaco's first memorandum issued in October 2021 ("**First Monaco Memo**")[ii], announced, among other initiatives, the establishment of a Corporate Crime Advisory Group, to review the Department's approach to corporate criminal enforcement. The Second Monaco Memo presents the findings of that advisory group and the changes to DOJ policy regarding corporate criminal responsibility and individual accountability that are to be introduced as a result.

Key Takeaways from the Second Monaco Memo

While the Second Monaco Memo covers a lot of ground, many of the topics addressed either reiterate, reinforce or supplement existing DOJ policy and practice. There are however a number of areas where the Second Monaco Memo introduces important new policies or initiatives which are worthy of particular attention. We consider the most significant of these to be:

- An increased emphasis on **timely document production by cooperating companies**, to enable prosecutors to promptly initiate related proceedings against implicated individual defendants. What qualifies as "timely" in this context is likely to be an issue of significant discussion and potential disagreement between Department prosecutors and cooperating companies.
- A commitment to the continued use of independent compliance monitors in connection with the resolution of corporate criminal cases, together with initiatives designed to **increase transparency in the appointment, terms of reference and oversight of those monitors**.
- Directing companies to implement executive compensation models which reward good compliance governance and, potentially more radically, require companies to **clawback compensation from executives found to have participated in, or contributed to, corporate criminal offenses**. The implementation, and particularly the execution, of such clawback models, is likely to be challenging.

Detailed Analysis of the Second Monaco Memo

The Second Monaco memo is divided into three sections: I. Individual Accountability, II. Corporate Accountability, and III. Independent Compliance Monitorships, we will consider each in turn:

I. Individual Accountability

The interplay between the resolution of corporate criminal cases and the prosecution of the individuals involved in the underlying conduct has been a focus the Department policy in recent years. The Department is committed to ensuring effective prosecutions of individuals responsible for corporate misconduct. Most significantly, a 2015 memorandum by then Deputy Attorney General Sally Yates, first set out the Department's policy that to gain full cooperation credit, companies are expected to cooperate and provide

relevant evidence implicating individuals, including the company's own employees, involved in the underlying criminal conduct ("**Yates Memo**"). Since the Yates Memo, the Department has continued to navigate the complexities of simultaneously prosecuting corporations and individuals.

The Second Monaco Memo reiterates the principles of the Yates Memo, stating that "the Department's first priority in corporate criminal matters is to hold accountable the individuals who commit and profit from corporate crime". The Second Monaco Memo goes further though, by suggesting that the practices of some corporate defendants and their counsel, continue to frustrate the efforts of the Department to bring individual prosecutions effectively and within the applicable statute of limitations.

Accordingly, the Department will now require companies to produce documents in a "timely fashion" as a condition of obtaining cooperation credit. Companies have always been expected to disclose relevant, non-privileged facts about individual misconduct, but the Memo states that it is "imperative" that such disclosures be made swiftly and without delay. This will apparently include the production of documents to the Department as soon as they are identified by the company. In particular, the Memo notes that production of evidence related to individual culpability should be prioritized for production. To ensure defendant companies are complying with this requirement, in every corporate resolution going forward, DOJ prosecutors will specifically assess whether the corporation provided cooperation in a timely fashion.

This may cause challenges for companies and their counsel conducting internal investigations in cooperation with the DOJ. For example, the significance of individual documents may only become clear later on in an internal investigation once their context is illuminated by a comprehensive document review or following their explanation by witnesses (interviews usually being undertaken once the review of documents has been completed). Similarly, many companies often decide, prudently, to wait for the completion of their own internal investigation, so as to understand the full extent of the implicated conduct, before initiating any voluntary disclosure to the Department. Whether or not individual prosecutors will consider the production of documents in circumstances such as these to be "timely" remains to be seen.

Lastly, while less relevant to corporations, but which will be of interest to individual defendants, the Second Monaco Memo sets out guidance for prosecutors in determining the circumstances in which it may be appropriate for DOJ prosecutors to defer on individual prosecution to a foreign jurisdiction, and when it would instead be appropriate to pursue a prosecution in the US, notwithstanding the concurrent interest of a foreign prosecution.

II. Corporate Accountability

There are a number of sub-topics addressed in the Corporate Accountability section of the Second Monaco Memo. The first several of which we can deal with in relatively short order.

Evaluating a Corporation's History of Misconduct. The First Monaco Memo established the requirement for prosecutors to consider the entirety of a company's prior misconduct in determining the appropriate resolution in the case at instance. The Second Monaco Memo provides some important nuance to that principle, including that the Department will consider the regulatory burden on the defendant's industry and the steps that any acquiring company had taken to implement their own compliance program in any acquired company tainted by prior misconduct. This second point is potentially significant. The Memo stresses that the department does not want to deter companies with good compliance programs from acquiring companies with histories of misconduct, and will not treat as recidivist any company with a proven track record of compliance that acquires a company with a history of compliance problems, so long as those problems are promptly and properly addressed in the context of the acquisition.

Voluntary Disclosure. The Second Monaco Memo describes the importance of ensuring that companies have some certainty in what to expect in the benefit derived from making a voluntary disclosure to the Department. In the context of cases resolved under the Foreign Corrupt Practices Act (FCPA), US antitrust laws and in national security cases involving export controls and sanctions, this is nothing new. The FCPA Corporate Enforcement Policy[iii] as well as the Antitrust Division's Leniency Policy and Procedures[iv], for example seek to provide companies with clear guidance on the benefits in penalty reduction and the structure of a resolution, to be gained by making a genuine voluntary disclosure and fully cooperating with the DOJ. Some other divisions within the Department have less formal policies in this regard, and the Second Monaco Memo instructs them to develop and publish such policies. We should expect the promulgation of more such policies from the Department in other subject matter areas in due course.

Again in the acquisition context, Department prosecutors have, in the past, declined to take enforcement action against companies that have promptly and voluntarily self-disclosed misconduct uncovered in the mergers and acquisitions context and then remediated and cooperated with the Department in prosecuting culpable individuals. In light of the language in the Memo such practice is likely to continue.

Evaluation of Cooperation. What a company needs to do in order to obtain cooperation credit in connection with its resolution of a criminal case is a frequent topic of debate and DOJ guidance. The most significant pronouncement in the Second Monaco Memo in this regard is set out in the "Individual Accountability" section above. The Second Monaco Memo also cautions companies against using foreign laws (most usually data protection and blocking statutes), as a reason not to produce relevant documents to the

Department. The Memo indicates that the Department will provide additional credit to companies who "find ways to navigate such issues of foreign law and produce such records".

Evaluation of Corporate Compliance Programs. This topic has been the subject of a number of dedicated pronouncements by the Justice Department in recent years. Most recently, the 2020 re-issue of the Department's Guidance on Evaluation of Corporate Compliance Programs ("**Guidance**"),[v] which provides direction to Department prosecutors in assessing a company's compliance program, both at the time of the relevant misconduct, and at the time of the resolution. Among many other topics, this Guidance addresses appropriate incentives (including financial) for company executives to ensure good governance and compliance, and expectations about the consistent application of discipline to those employees found to be involved in misconduct.

The Second Monaco Memo goes much further in this regard, indicating that companies should design executive compensation structures not only to incentivize and reward good compliance practices, but also to financially penalize executives found to have been engaged in misconduct, by clawing back compensation. The Department's objective being to encourage companies to redistribute some of the cost and penalty associated with the executives' conduct from the company (and its shareholders) onto the executives themselves. The concept of executive compensation clawback has some precedent, at least in the public company financial statement context, in the Sarbanes-Oxley Act and the and the Dodd-Frank Act, but the DOJ now suggests a much broader adoption as a compliance program best practice (rather than any statutory requirement) for all companies. Specifically, the Memo directs Department prosecutors to consider whether the defendant corporation's compensation agreements, arrangements, and packages incorporate elements that enable penalties, such as compensation escrow and clawback provisions, against current or former employees, executives, or directors whose actions contributed to misconduct. Because misconduct is often discovered after the fact, measures that enable retroactive discipline appear to be of particular interest to DOJ. The design, and particularly the enforcement of such clawbacks, and the Department's expectations with respect to the exercise of those clawbacks in the midst of an investigation same is likely to prove to be challenging. On the one hand, a company faced with criminal enforcement may be incentivized to attribute blame to certain executives from which clawback could be sought, in order to gain full cooperation credit with the Department. On the other hand, there will likely also be challenges related to balancing the defense rights and interests of individual executives who may be simultaneously defending themselves against the company's claim for clawback and criminal charges brought against them.

Use of Personal Devices and Third-Party Applications. This is also a topic on which the Department's Criminal and Antitrust Divisions have opined previously. Originally, the Department had suggested that companies not allow employees to use third party applications and ephemeral messaging to conduct company business, because of the challenges in collecting those for disclosure to the Department. However, more recent guidance, including the Second Monaco Memo, recognize that personal devices and third party applications such as ephemeral messaging are likely to be used by employees, but that companies need to tailor their data retention and ediscovery protocols to take account of that in order to allow for sufficient cooperation with any Department inquiry. Further guidance on this topic is to be introduced in the next version of the Department's Guidance on Evaluation of Corporate Compliance Programs.

III. Independent Compliance Monitorships

The use of independent compliance monitorships in connection with corporate criminal resolutions has been the subject of several recent Department memoranda. In October 2018, then Assistant Attorney General Brian Benczkowski issued a memorandum suggesting that such monitors might be used less frequently.[vi] The First Monaco Memo, as well as recent corporate resolutions entered into by the Department, have subsequently made it clear that the current administration supports the imposition of compliance monitors in many cases. The Second Monaco Memo sets out ten illustrative factors that prosecutors should take into account in deciding whether to impose a monitor. These include consideration of the pervasiveness of the misconduct, the state of the company's compliance program and the existence, or not, of other regulatory oversight over the company.

The Second Monaco Memo also reinforces DOJ's commitment to increasing the transparency around corporate monitorship selection, appointment and execution. The perceived lack of transparency in the current processes is something that the Department has been criticized for in the past. As a result, the Second Monaco Memo states that monitor selection should be performed pursuant to a documented selection process that is readily available to the public. In addition, the committee that considers candidates for the role of the monitor must now include an ethics official or professional responsibility officer from the relevant DOJ office or component. Finally, the Second Monaco Memo states that any DOJ agreement imposing a monitor must also describe the reasoning for requiring a monitor.

While the Second Monaco Memo suggests that monitors will continue to be used often, it does give some hope to companies seeking to avoid a monitor that they can still do so by disclosing the conduct, fully remediating the issue during the course of an investigation, and ensuring that their compliance programs are well designed and implemented. In addition, since prosecutors will be more closely involved throughout the term of the monitorship, there may be opportunities for companies to cut short terms of the monitorship or

more narrowly tailor the scope of the monitorships if they are able to demonstrate sufficient investment and development in their compliance program.

Conclusion

The Second Monaco Memo adds to the annals of DOJ guidance on corporate criminal enforcement and related compliance program expectations. As such, it provides companies with another important reference point in considering their own compliance programs, weighing up the potential benefits of making a voluntary disclosure of criminal conduct to the DOJ, and anticipating the expectations and process for investigating and resolving such cases together with the Department.

As highlighted above, there are several areas in this latest Memo which may prove controversial and be a source of conflict between the Department and counsel for both corporate and individual defendants.

More is to come, the Second Monaco Memo notes for example that by the end of 2022, the Criminal Division will develop guidance on how to reward corporations that develop and apply the compensation clawback policies. The Memo also anticipates several upcoming updates to existing documentation, to take into account the principles set out in the Memo. In particular, the Criminal Division will release another edition of its Evaluation of Corporate Compliance Programs guidance, and the Justice Manual will need to be updated to incorporate several of the policy changes discussed above (including on monitorship). The Second Monaco Memo closes by highlighting the Department's commitment to transparency regarding its corporate criminal enforcement priorities and processes, through the continued issuance of memoranda and other pronouncements. We will await the promised additional guidance and it remains to be seen how these policies will play out in practice and be navigated in corporate criminal cases over the coming years.

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[i] Further Revisions to Corporate Criminal Enforcement Policies, September 15, 2022 https://www.justice.gov/opa/speech/file/1535301/download.
[ii] Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies https://www.justice.gov/dag/page/file/1445106/download
[iii] Enshrined in the Principles of Federal Prosecution of Business Organizations section of the Justice Manual, a publicly available compendium of DOJ policies and procedures used as a reference by Department prosecutors (formally known as the US Attorney's Manual). See here.
[iv] Antitrust Division's Leniency Policy and Procedures (https://www.justice.gov/atr/page/file/1490246/download), also incorporated into the Justice Manual.
[v] Evaluation of Corporate Compliance Programs (https://www.justice.gov/criminal-fraud/page/file/937501/download).
[vi] Selection of Monitors in Criminal Division Matters (https://www.justice.gov/opa/speech/file/1100531/download).