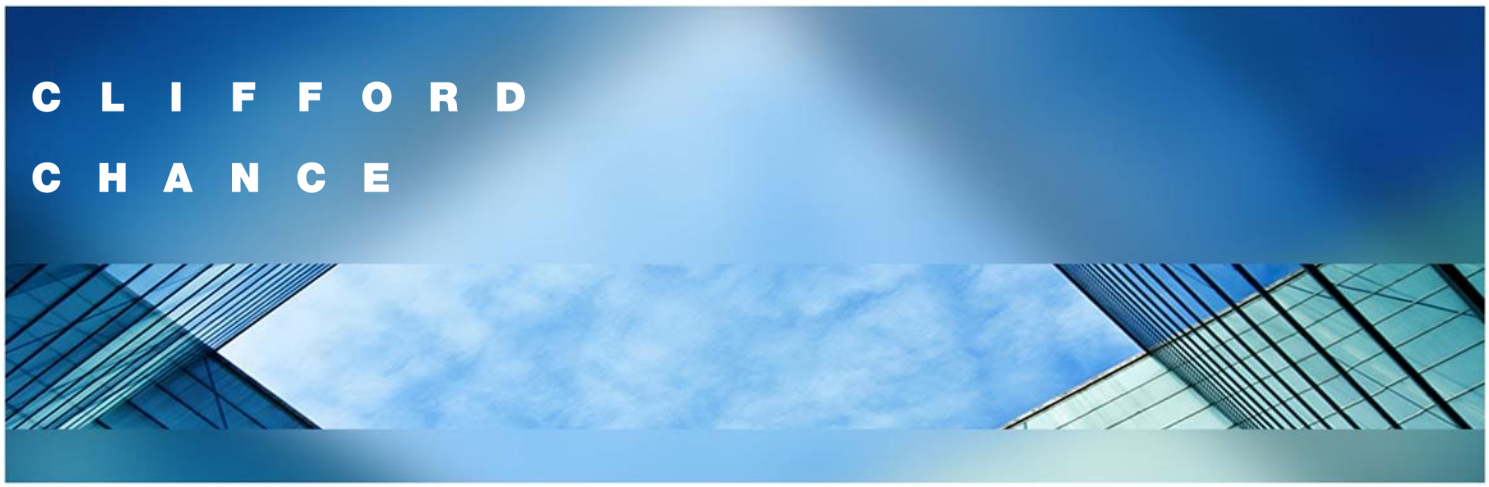

BACK TO THE FUTURE: DOJ ANNOUNCES SIGNIFICANT CHANGES TO CORPORATE ENFORCEMENT POLICY

On October 28th, Deputy Attorney General ("DAG") Lisa Monaco announced significant changes to the Department of Justice's ("DOJ") policies for prosecuting and resolving corporate criminal cases.[1] The policy changes, which take immediate effect, revoke certain Trump administration revisions and revert to Obama-era policies.[2] In keeping with the current administration's emphasis on rigorous enforcement and individual accountability, the changes announced in DAG Monaco's memo (the "Monaco Memo") represent a major shift from the prior administration's policies.

The Monaco Memo incorporates three primary updates. First, the Monaco Memo requires prosecutors to consider the full history of prior violations by corporations in deciding whether a resolution short of a guilty plea is appropriate. Second, the Monaco Memo requires corporations seeking cooperation credit to report to the DOJ "all" individuals involved in misconduct. Third, the Monaco Memo encourages the use of monitorships in resolutions of corporate misconduct.

These changes will have a profound impact on corporate conduct, responsibility, culture and leadership, as prosecutors demand heightened accountability from c-suite executives and senior managers and require corporate compliance programs not only to exist on paper, but far more importantly to have teeth in practice. Finally, the Monaco Memo will give whistleblowers additional leverage and embolden them to shine a light on potentially problematic corporate practices.

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1 The changes were announced in a speech at the American Bar Association's National Institute on White Collar Crime, *see* Lisa O. Monaco, Deputy Attorney General, Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute. The speech was accompanied by a memorandum (the "Monaco Memo") issued the same day. *See* Memorandum from Deputy Attorney General Lisa O. Monaco, Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download.

2 While the DOJ's Justice Manual has not yet been updated to reflect these changes, the Monaco Memo states that "modifications [to the Justice Manual] will be forthcoming. . . ." Monaco Memo at 3, 4.

Background: A Brief History of the DOJ's Corporate Enforcement Policy

Over the past 25 years, the DOJ's corporate prosecution policies have evolved substantially, trending overall towards a more aggressive approach to corporate investigations and prosecutions.

In 1999, then-DAG Eric Holder issued a memorandum entitled "Bringing Criminal Charges Against Corporations" (the "Holder Memo"),[3] which laid out the factors that prosecutors should consider when deciding whether to charge a corporation. These principles evolved in subsequent memoranda from DAG Thompson in 2003 (the "Thompson Memo")[4], and DAG McNulty in 2006 (the "McNulty Memo").[5] In the McNulty Memo, DOJ made clear that companies seeking cooperation credit are not required to waive attorney-client privilege or to cut off the payment of legal fees for employees under investigation or indictment.

In 2008, then-DAG Mark Filip announced further changes to the corporate prosecution policy.[6] Those changes, commonly referred to as the "Filip Factors" and codified in the U.S. Attorney's manual as the Principles of Federal Prosecution of Business Organizations (USAM § 9-28.000) (now known as the DOJ Manual), instructed prosecutors making corporate charging decisions to focus on: the corporation's conduct; any similar prior wrongdoing; the corporation's cooperation with the investigation; the corporation's compliance program; efforts to remediate the misdeeds; and the collateral consequences to others. As to compliance programs, the Filip Factors look both at the compliance program in place when the misconduct occurred and at any remedial efforts to improve the compliance program.

Late in the Obama Administration, in 2015, then-DAG Sally Yates issued a memorandum (the "Yates Memo") that made significant changes to the Filip Factors. Most notably, the Yates Memo required corporations seeking cooperation credit to provide the DOJ with "all relevant facts about the individuals involved in corporate misconduct."[7] In implementing this policy, DOJ took an "all-or-nothing" approach, requiring corporations to identify "*all* individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority," to receive *any* cooperation credit. Furthering its focus on individual responsibility for corporate crime, the Yates Memo identified individuals as the focus of corporate criminal investigations at their outset, and emphasized that the DOJ would not generally release individuals from liability when settling a matter with the corporation that employed those individuals, and that investigations of corporations should not be resolved without consideration of how corresponding individual cases would be resolved.

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3 Memorandum from the Deputy Attorney General, Bringing Criminal Charges Against Corporations (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

4 Memorandum from Deputy Attorney General Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (January 20, 2003), https://www.hbsslaw.com/sites/default/files/whistleblower/whistleblowerpdfs/2003jan20_privwaiv_dojthomp.authcheckdam.pdf

5 Memorandum from Deputy Attorney General Paul J. McNulty, Principles of Federal Prosecution of Business Organizations, https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

6 Memorandum from Deputy Attorney General Mark Filip, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf.

7 Memorandum from Deputy Attorney General Sally Quillian Yates, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

Midway through the Trump Administration, in November 2019, then-DAG Rod Rosenstein implemented significant changes to the Yates Memo and prior DOJ guidance, while maintaining the focus on individual prosecutions in the context of corporate misconduct.[8] These changes included revising the "all-or-nothing" approach of the Yates Memo to allow cooperation credit in civil and criminal investigations if a corporation identifies to the DOJ those individuals who were "substantially involved in or responsible for" the misconduct. Rosenstein's objectives in making these changes were (1) to streamline the DOJ's focus on individuals to increase the pace and efficiency of corporate investigations and resolutions, and (2) to provide greater discretion to the Department's civil litigators and prosecutors as to the scope of investigations with respect to individual conduct and the decision to award partial cooperation credit to companies that make reasonable efforts to cooperate with DOJ investigations. Moreover, the changes included permitting DOJ attorneys to negotiate releases for individuals from civil liability in suits brought by the government.

Changes to DOJ Policy in the Monaco Memo

The Monaco Memo announced three changes to DOJ policy, including reversing course on the "substantial involvement" principle from the Rosenstein Memo and two additional updates that will make obtaining cooperation credit more onerous for corporations.

First, the Monaco Memo heralds a return to the "all-or-nothing" approach of the Yates Memo whereby corporations seeking *any* cooperation credit in civil or criminal investigations must "provide all information concerning all persons involved in corporate misconduct,"[9] rescinding the Rosenstein guidance. Corporations must identify all participants in the illegal activity "regardless of their position, status, or seniority, and provide to the Department all nonprivileged information relating to that misconduct."[10] This also applies to both current and former employees and third parties.

Second, the Monaco Memo instructs prosecutors to consider the full history of corporations in deciding whether a resolution short of a guilty plea, such as a non-prosecution agreement or a deferred prosecution agreement, is appropriate. This will include conduct in front of other regulators, state authorities, and foreign authorities. Moreover, prosecutors have been directed to consider the conduct of parent companies, affiliates, subsidiaries, or other entities within the company's corporate structure. Monaco emphasized that this would provide prosecutors increased visibility into a corporation's commitment to compliance. In practice, this may create significant issues for large, multi-national corporations and companies that practice in highly regulated sectors, since they will likely have more frequent interaction with regulators.

Third, the Monaco Memo signals that the DOJ will make greater use of monitorships in reviewing and enforcing its resolutions with corporations. Monaco

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8 Rod J. Rosenstein, Deputy Attorney General, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

9 Memorandum from Deputy Attorney General Lisa O. Monaco, *supra* note 2, at 1.

10 *Id.* at 3.

made clear in her speech that, to the extent that prior guidance suggested that monitorships are disfavored, that guidance is rescinded.

Key Takeaways

The Monaco Memo marks a move away from the more flexible approach to enforcement announced by former DAG Rosenstein and back to the "all-or-nothing" approach of the Yates era. This will require corporations, as a precondition to receiving any cooperation credit, to identify every employee potentially involved in the issues under investigation. These changes will make internal investigations more onerous, may hinder cooperation by employees with corporate counsel, and may make resolution a slower, less efficient process. Moreover, and significantly, the Monaco Memo reiterates that the Justice Department intends to prosecute individuals when reaching a resolution with the corporate entity. If history is a guide, these prosecutions will include executives at the highest levels, including Chief Executive Officers, Chief Financial Officers and Chief Compliance Officers.

Finally, the DOJ also announced the formation of the Corporate Crime Advisory Group, composed of various individuals from within the Department who are involved in corporate criminal enforcement. The Advisory Group's mandate will include updating the DOJ's approach to "traditional considerations embodied in the Principles of Federal Prosecution of Business Organizations, such as cooperation credit, corporate recidivism, and the factors bearing on the determination of whether a corporate case should be resolved through a deferred prosecution agreement, non-prosecution agreement, or plea agreement." Based on this mandate, further updates to the DOJ's policies will likely be forthcoming.

Our prior briefings on these topics can be found here and here.

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