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The Monaco Memo: Unanswered Questions and Unintended Consequences

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The Monaco Memo's policies lessen enforcement transparency, are insufficiently developed and do not appear to be supported by data, and are likely to have significant unintended consequences.

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Introduction

Following several years of a corporate criminal enforcement "transparency initiative" by the U.S. Department of Justice's (DOJ) Criminal Division, Deputy Attorney General Lisa Monaco on October 28, 2021, announced a sweeping new set of corporate enforcement policies for DOJ prosecutors. These changes raise the bar for corporate cooperation, take a more expansive view of companies' past misconduct, and signal a greater appetite for imposing independent compliance monitors and a reduced willingness to agree to deferred- and non-prosecution agreements.

Tough in content and tone, these new policies are plagued by numerous unanswered questions and threaten to undermine the thoughtfully calibrated approach to corporate enforcement that provided substantial transparency, consistency, and predictability in recent years. They also are likely to lead to a number of unintended and undesirable consequences, including reducing companies' willingness to self-report misconduct and cooperate with DOJ investigations, disincentivizing compliance investments, and potentially overwhelming DOJ's investigative bandwidth with superfluous and unhelpful information.

Much remains to be seen about how the DOJ will implement these new policies, but as announced, they have significant potential to slow corporate criminal investigations and reduce the public's understanding of and trust in DOJ processes. As prosecutors align their practice with these new policies, companies and their legal counsel will need to work hard to ensure the considerable gains in corporate criminal enforcement transparency and consistency achieved in recent years are not lost entirely.

The "Monaco Memo" and Other Biden Administration Corporate Enforcement Policy Pronouncements

In her October 2021 address to the American Bar Association's White Collar Crime National Institute, Deputy Attorney General (DAG) Lisa Monaco announced the issuance of what has become known as the "Monaco Memo."[1] It revised several aspects of DOJ corporate enforcement policy in order to "aid Department attorneys immediately in [their] ongoing efforts to combat corporate crime and ensure consistency in [their] efforts to prevent corporate criminal conduct from occurring in the first instance; hold accountable individuals responsible for corporate crimes; and ensure that corporations take steps to prevent the recurrence of criminal conduct."[2]

The Monaco Memo

The Monaco Memo purports to signal a renewed DOJ emphasis on white collar criminal enforcement and a desire to increase individual accountability for corporate misconduct. Most prominently, it directs a return to a more exacting standard for companies seeking cooperation credit from the DOJ: such companies henceforth will be required to provide all non-privileged information about all individuals involved in or responsible for the misconduct at issue.[3] This change returns DOJ to the approach it first articulated in the 2015 "Yates Memo," which the DOJ modified in 2018 to require the identification only of individuals who were substantially involved in or responsible for the criminal conduct.[4]

In addition to raising the bar for cooperation credit, the Monaco Memo directs DOJ prosecutors, when determining the appropriate outcome of a corporate criminal investigation, to evaluate "all prior misconduct" by the subject company, including "the full criminal, civil and

regulatory record."[5] This includes "all misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family."[6]

Moreover, prosecutors are directed to consider such misconduct "whether or not [it] is similar to the conduct at issue in a particular investigation," and whether or not it was the subject of a DOJ investigation.[7] This sweeping directive is given no limiting principle in the memo beyond the statement that "[s]ome prior instances of misconduct may ultimately prove less significant."[8] It is also accompanied by the DAG's evident skepticism regarding the suitability of deferred- and non-prosecution agreements (DPAs and NPAs, respectively) for "recidivist companies," and her suggestion that companies that have entered into DPAs or NPAs may not be "tak[ing] those obligations seriously enough."[9]

The Monaco Memo also expressed a commitment "to imposing monitors where appropriate in corporate criminal matters,"[10] which, alongside the DAG's explicit rejection of the idea that the DOJ would disfavor the imposition of independent compliance monitors,[11] clearly signals a greater DOJ appetite for corporate compliance monitorships.

Finally, the Monaco Memo announced the DAG's creation of the "Corporate Crime Advisory Group ... tasked with reviewing [the DOJ's] approach to prosecuting criminal conduct by corporations and their executives, management, and employees."[12] Among the topics reportedly to be considered by the Corporate Crime Advisory Group (CCAG) are "cooperation credit, corporate recidivism, and the factors bearing on the determination of whether a corporate case should be resolved through a [DPA, NPA], or plea agreement."[13] The Monaco Memo promised that "[m]ore information about the creation of this group will soon be issued" by the DAG's office.[14]

Additional DOJ Commentary

In the weeks following the DAG's speech, senior DOJ officials were asked at several public events to clarify certain of the Monaco Memo's sweeping new obligations, but as yet, such clarity has remained elusive. For example, with respect to the Monaco Memo's directive to consider all—even unrelated—prior misconduct, Criminal Division Assistant Attorney General (AAG) Kenneth Polite merely explained that "not everything is going to be weighted the same" when it comes to prior corporate misconduct, and that "[DOJ's] trial attorneys have the discretion to

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evaluate them accordingly, based on factors such as the involvement of leadership."[15] He offered no specific guidance for companies as to how the requirement would be implemented or how prior misconduct would be evaluated. This suggestion that prosecutorial discretion—a wholly subjective concept—should provide reassurance was echoed by DOJ Criminal Fraud Section Foreign Corrupt Practices Act (FCPA) Unit Chief David Last, who in separate remarks stated that "not every prior instance of misconduct is going to be afforded equal weight."[16]

Similarly, senior DOJ officials have provided little in the way of specifics regarding the DOJ's return to the Yates Memo standard for corporate cooperation. For example, FCPA Unit Chief Last stated that "companies and their counsel are not in a position to assess relevance and culpability of individuals" and that DOJ will "decide based on looking at the evidence who was substantially involved or who might have less involvement."[17] AAG Polite, in turn, has commented that companies and their counsel "are not in the best position to evaluate who's substantially involved or not."[18] These statements and others like them reflect a concerning absence of meaningful guidance from the DOJ regarding how it intends to interpret and implement these new policies.

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A Solution in Search of a Problem?

This tough talk from the DOJ regarding corporate enforcement likely comes at least in part as a response to public reporting claiming that there has been a decline in white collar criminal enforcement in recent years.[19] Interestingly, this narrative finds little support in an analysis of both public statements by relevant DOJ officials and data from the flagship corporate criminal enforcement office within the DOJ, leaving one to wonder whether the DOJ's new policies are a solution in search of a problem.

Prior DOJ Statements

Current DOJ leadership may believe that the Monaco Memo is a necessary response to what they view as unduly permissive or ambiguous DOJ corporate criminal enforcement messaging and policy prior to 2021. But a review of past statements by DOJ officials reveals that such a concern is completely misplaced. In recent years, several prominent DOJ officials have repeatedly emphasized the central importance of the DOJ's corporate criminal enforcement efforts.

For example, in 2018 then-DAG Rod Rosenstein stated that "[f]ighting white collar crime is a top priority for the Department," and noted that "[t]hanks to a series of initiatives and policy enhancements, we are making white collar enforcement more effective and more efficient."[20] Likewise in 2019, then-AAG Brian Benczkowski reminded audiences that "[w]hite-collar criminal enforcement and health care fraud continue to be a top priority for the Department of Justice and the Criminal Division,"[21] that "corporate criminal enforcement remains a top priority for the Department … [and] we are intensely focused on holding both culpable individuals and corporations accountable,"[22] and that the DOJ had a "continued dedication to holding individual wrongdoers accountable across the board."[23] Far from signaling a permissive approach to corporate misconduct, senior DOJ officials in recent years have consistently and prominently emphasized the DOJ's commitment to robust corporate criminal enforcement.

Corporate Enforcement Activity

Examination of relevant data also calls into question the extent to which the DOJ's corporate criminal enforcement efforts require the sort of sweeping policy shifts set forth in the Monaco Memo.[24] In recent years, the DOJ's Criminal Fraud Section has been at the forefront of those efforts, and available data on corporate fraud and corruption cases—the heartland of corporate criminal matters—reveal that it significantly outpaces other DOJ offices prosecuting such cases.[25] Accordingly, a review of DOJ Criminal Fraud Section data provides a key barometer for the DOJ's corporate criminal enforcement activity and trends.

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How, then, has the DOJ's Criminal Fraud Section performed in recent years? Have its enforcement efforts trended downward, necessitating a stark shift of approach in order to "get tough" on corporate criminal wrongdoing? The data suggest not. Rather, it appears that over the seven years prior to 2022—a period which dates back to the issuance of the Yates Memo and covers some or all of three different presidential administrations—white collar criminal enforcement by the DOJ's Criminal Fraud Section has been roughly consistent and unmistakably robust, whether measured in terms of the number of corporate criminal resolutions, the monetary amounts associated with those resolutions, or the number of charges brought against individuals.[26]

Criminal Fraud Section Corporate Enforcement Actions, 2015 - 2021

Category	2015	2016	2017	2018	2019	2020	2021
Corporate Enforcement Actions	11	15	10	10	15	13	8
Associated U.S. Criminal Monetary Amounts[46]	$3.9bn	$1.51bn	$4.6bn	$1bn	$1.9bn	$2.9bn	$2.9bn
Individuals Publicly Charged[47]	280	300	301	406	478	326	333

Far from suggesting a decline in corporate criminal enforcement prior to the Biden administration, these figures reflect a consistently strong and active corporate criminal enforcement program at the DOJ during the six years prior to the Biden administration, and they include record-setting totals for certain varieties of corporate criminal enforcement during that period. Of particular interest in light of the DAG's pronouncement (citing AG Merrick Garland) that "it is unambiguously this department's first priority in corporate criminal matters to prosecute the individuals who commit and profit from corporate malfeasance,"[27] is the fact that the total number of individuals charged by the DOJ's Criminal Fraud Section in 2018 and 2019 far exceed comparable totals in the three previous years or the two subsequent years, including the first year of the Biden administration. Similarly, the data above show that with only one exception, the total number of corporate criminal resolutions brought by the DOJ's Criminal Fraud Section in 2019 and 2020 exceed comparable totals in any of the other four years prior to the Biden administration. Moreover, each of the six years prior to the Biden administration saw a total number of corporate criminal resolutions that exceeded by at least 20 percent the comparable total in the first year of the Biden administration.

As then-Acting AAG Brian Rabbitt noted in a speech in December 2020, "the canard that white-collar enforcement ... [was] lackluster"[28] in the years prior to the Biden administration simply is not borne out by the data. Rather, examination of the activity of the DOJ's Criminal Fraud Section reveals a historic level of corporate criminal enforcement during that period, which, when considered alongside the clear and unmistakable policy directives and messaging from DOJ's then-leaders regarding the prioritization of corporate criminal enforcement, leaves one to wonder at what "problem" the Monaco Memo can be said to be aimed.

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Unanswered Questions

In addition to lacking a factual basis for its broad policy changes—as there clearly has not been a dearth or decline of corporate criminal enforcement prior to the Biden administration—the Monaco Memo also leaves several key questions related to its implementation unanswered:

- What, if any, limits will be placed on the obligation to provide "all nonprivileged information relevant to all individuals involved in the misconduct?"
- What, if any, limits will be placed on prosecutors' consideration of "all [prior] misconduct by the corporation?"
- Why more monitors, and what specific criteria will guide the DOJ's imposition of them?
- How will the Corporate Crime Advisory Group be constituted, and what (specifically) is it expected to accomplish?

What Limits on Information About Individuals?

As noted above, senior DOJ officials have been pressed on this question and have offered little in the way of additional guidance. This lack of clarity risks encouraging companies facing DOJ scrutiny to engage in precisely the sort of "ocean-boiling" against which prior DOJ leadership has cautioned.[29] In addition, the DOJ should be careful what it wishes for, given the likely substantial increase in information companies will feel obligated to provide to the DOJ under this new policy. Will the DOJ have the resources to effectively digest and make use of this information, or will it simply flood and overwhelm prosecutors and investigators, slowing investigations and delaying closure and certainty for companies and shareholders?

What Limits on Considering Past Company Conduct?

As noted above, early indications and comments from DOJ officials offer little in the way of reassurance beyond a promise that prosecutorial discretion will be exercised in a way that fairly assesses the relevance of prior misconduct and gives it appropriate weight in fashioning a

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"This seemingly indiscriminate approach to 'prior instances of misconduct' leaves companies to fear that wholly unrelated conduct, no matter how distant in time, will be cited by the DOJ as a basis for more punitive action. It also leaves companies to fear that even where they have explicitly denied any allegations of wrongdoing as part of a settlement, the DOJ may consider that settlement as being tantamount to a criminal guilty plea."

just and proportionate corporate resolution. But this explanation—which is little more than a request to "trust us"—can hardly be reassuring to companies. Moreover, in one of the only two corporate criminal enforcement actions brought by the DOJ since the issuance of the Monaco Memo, the DOJ explicitly based its decision to demand a guilty plea from NatWest Markets PLC in part on two civil settlements in which NatWest Markets PLC and its parent company did not admit any wrongdoing, characterizing both settlements as parts of NatWest's "substantial prior history of other criminal conduct and civil and regulatory actions," and categorizing them in the same way as a matter in which a NatWest affiliate entered a guilty plea.

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Why More Monitors, and When?

The Monaco Memo, and in particular the DAG's remarks announcing it, reflect the current DOJ leadership's view that monitors were imposed too infrequently during the prior administration, with the Monaco Memo declaring that the DOJ "is committed to imposing monitors where appropriate in corporate criminal matters,"[30] and the DAG stating that:

> In recent years, some have suggested that monitors would be the exception and not the rule. To the extent that prior Justice Department guidance suggested that monitorships are disfavored or are the exception, I am rescinding that guidance. Instead, I am making clear that the department is free to require the imposition of independent monitors whenever it is appropriate to do so in order to satisfy our prosecutors that a company is living up to its compliance and disclosure obligations under the DPA or NPA.[31]

Yet the "prior Justice Department guidance" to which the DAG alluded

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did not "suggest[] that monitorships are disfavored or are the exception."[32] Rather, it simply stated that the DOJ's Criminal Division would "favor" the imposition of a monitor "only where there is a demonstrated need for, and a clear benefit to be derived from, a monitorship relative to the projected costs and burdens."[33] DOJ officials have not referenced or released any data suggesting that an insufficient fear of the imposition of independent compliance monitors has led to inadequate corporate compliance investments or remedial measures. Nor have DOJ officials cited specific examples of cases in which an independent compliance monitor would have precluded a company from engaging in further wrongdoing. Accordingly, one must wonder what motivates the DOJ's appetite for more monitors, other than a categorical belief that irrespective of how many monitors were imposed in prior years and for what reasons, the total number must have been too low. It is similarly unclear what, if any, specific guidance the DOJ has provided to its prosecutors regarding how to fulfill this greater desire for monitors, which creates a substantial risk that in order simply to show a higher number of monitorships, prosecutors will impose them irrespective of whether their potential benefits outweigh their significant costs.[34]

How Will the CCAG Work?

The Monaco Memo touts the establishment of a Corporate Crime Advisory Group, through which the DOJ intends "to consider various topics that are central to the goal of updating [its] approach to corporate criminal enforcement."[35] The Monaco Memo claims the CCAG "will solicit input from the business community, academia, and the defense bar to make sure that any changes to Department policy take into account multiple perspectives."[36]

Yet beyond this aspirational language, the Monaco Memo offers little regarding the CCAG. For example, who will lead it? How will it operate? What specific deliverables will it provide, and when? How will it "solicit input" from key external stakeholders, such as the business community? Given the significant reliance the DAG is placing on the CCAG, and the CCAG's apparently critical relevance for the future of corporate enforcement at the DOJ, the absence of any meaningful detail on its composition and processes is of great concern.

The Monaco Memo's Infirmities

In sum, while the Monaco Memo clearly is intended as a landmark change in DOJ corporate enforcement policy, its policy pronouncements suffer from at least three significant infirmities.

Not Supported by Data

The Monaco Memo's policy changes do not appear to be the result of any sort of data-driven analysis of enforcement gaps, unmet goals, or other enforcement needs. If the DOJ has data suggesting that its corporate criminal enforcement efforts have been inadequate in recent years, that data has not been shared, or even referenced in connection with the Monaco Memo's rollout. In order to maximize credibility and buy-in for the rhetorical escalation and major policy changes, facts and statistics demonstrating a need for them should have been presented by the DOJ; such facts and statistics might have included an analysis of the extent to which provably guilty entities and/or individuals were not investigated and prosecuted, the extent to which desirable compliance investments and improvements were not made by corporations, and/or examples of corporate recidivism that would not have occurred in the presence of an independent compliance monitor. Yet none of this sort of information was provided as justification for the DOJ's new policies.

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Insufficiently Developed

The policies themselves seem insufficiently developed. It is of course possible that this is driven in part by the lack of factual justification discussed above, but quite simply, the policies appear to have been splashily announced well before critically important details regarding their implementation were ready. For example, in contrast to similar policy changes that have occurred in the past, no amendments to the DOJ's Justice Manual[37] were promulgated in connection with these new policies; the public is simply assured that "[r]evisions to the Justice Manual to reflect the changes described herein are forthcoming."[38]

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Moreover, the CCAG, which is the group given a "broad mandate" to further evaluate and suggest modifications to the DOJ's corporate enforcement policies, is cloaked in ambiguity and uncertainty, leaving the business community to wonder how (or if) companies' "multiple perspectives" will be taken into account by the DOJ as it embarks on this ambitious review. Also, better policy likely would have been produced if the DOJ had first established the CCAG and taken input from those outside the government, then made changes to enforcement policy based on that input, rather than announcing the creation of the CCAG as part of those changes to enforcement policy.

Source of Unintended Consequences

The Monaco Memo's changes seem likely to result in significant unintended and undesirable consequences for the DOJ itself. For example:

Less voluntary self-reporting and cooperation by companies

The increased cost of conducting a much broader internal investigation (the need to "boil the ocean"), the greater possibility of more punitive and severe corporate criminal resolutions, and the greater difficulty of obtaining full cooperation credit, coupled with the considerable uncertainty regarding how the DOJ will apply the Monaco Memo's new policies on corporate recidivism and monitorships, will leave companies less willing to self-report and subject themselves to the slower timetable, greater demands, and opaque processes of a DOJ corporate criminal investigation.[39]

Slower DOJ investigations

The increased volume of information DOJ prosecutors must sift through as a result of the Monaco Memo's return to the "all information regarding all individuals" standard of the Yates Memo and the requirement to evaluate all prior, including unrelated, misconduct by the company are likely to slow and potentially decrease the total number of DOJ corporate investigations, as prosecutors are asked to do more work on every investigation with the same or only slightly augmented resources.

Less of a case for compliance investments

Despite stern warnings about the need to make compliance investments and the DAG's explicit promise of a punitive response to a failure to do so,[40] the Monaco Memo may well be unlikely to incentivize such investments, given the at-best-uncertain return

companies can expect on them as a result of the Monaco Memo's policy changes. For example, in a recent survey of nearly 250 chief ethics and compliance officers, chief compliance officers, and chief ethics officers by the Ethics & Compliance Initiative, the respondents "overwhelmingly agree[d] that … reforms demonstrative of a cooperative rather than a punitive approach by DOJ would incentivize improved corporate compliance programs in organizations."[41] Without greater clarity as to how—if at all—a company can hope to avoid the imposition of an independent compliance monitor, and with no reassurance that even significant investments in compliance will be sufficient to do so,[42] the Monaco Memo could well result in a lower number of improvements to organizational compliance than would have occurred under prior DOJ guidance.[43]

Conclusion

The Monaco Memo's policy changes reflect a troubling lack of appreciation for the importance of certainty, predictability, and transparency in corporate decision-making; they row back to a concerning and unfortunate degree from the concerted effort by prior DOJ leadership to decrease DOJ opacity so that companies could make investments, improvements, and other key decisions according to a predictable, transparent set of rules.[44] Worse yet, this rowing-back comes at a time when more, not less, transparency would seem paramount: in the same survey of chief ethics and compliance officers referenced above, the majority stated they are unsure about key aspects of the DOJ's corporate enforcement policies and practices, including the extent to which the DOJ is consistently crediting cooperation and remediation.[45]

It is unclear what motivates this backtracking, but absent (1) any evidence or empirical data—such as that analyzed above—showing that the DOJ in recent years was insufficiently committed to or successful in prosecuting corporate criminality, or (2) any apparent grounding in or review by the CCAG, it may be that these new policies are driven by a desire simply to sound "tough on crime," rather than by a thoughtful and deliberate analysis of enforcement gaps and the impact and practicalities of the policy changes. As such, the Monaco Memo's policies will require vigilance on the part of the public, and particularly on the part of companies and their legal counsel, so that the transparency gains, consistency, and predictability demonstrated by prior DOJ leadership are not lost.

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Endnotes

[1] Deputy Attorney General Lisa O. Monaco, *Keynote Address at ABA's 36th National Institute on White Collar Crime* (Oct. 28, 2021) (available at https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute) [hereinafter "Monaco ABA Speech"].

[2] Memorandum from Lisa Monaco, Deputy Attorney General, *Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies* (Oct. 28, 2021) (available at https://www.justice.gov/dag/page/file/1445106/download) [hereinafter "Monaco Memo"].

[3] Monaco Memo, *supra* note 2, at 3.

[4] Deputy Attorney General Rod J. Rosenstein, *Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018) (noting "concerns raised about the inefficiency of requiring companies to identify every employee involved regardless of relative culpability") (available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0) [hereinafter "Rosenstein ACI Speech"].

[5] Monaco ABA Speech, *supra* note 1.

[6] Monaco Memo, *supra* note 2, at 3.

[7] Monaco ABA Speech, *supra* note 1.

[8] Monaco Memo, *supra* note 2, at 3.

[9] Monaco ABA Speech, *supra* note 1.

[10] Monaco Memo, *supra* note 2, at 4.

[11] Monaco ABA Speech, *supra* note 1.

[12] Monaco Memo, *supra* note 2, at 4.

[13] *Id*.

[14] *Id*.

[15] Jack Queen, *New DOJ Crime Chief Talks 'Carrot And Stick' Enforcement*, Law360 (Dec. 8, 2021, 4:57 PM) (available at https://www.law360.com/articles/1447069/new-doj-crime-chief-talks-carrot-and-stick-enforcement).

[16] Ines Kagubare, *FCPA chief: Companies shouldn't determine employee culpability in our cases*, Global Investigations Review (Dec. 1, 2021) (available at https://globalinvestigationsreview.com/just-anti-corruption/enforcement-policy/fcpa-chief-companies-shouldnt-determine-employee-culpability-in-our-cases).

[17] *Id*.

[18] Queen, *supra* note 15.

[19] *See, e.g.*, Aruna Viswanatha and Dave Michaels, *Flaws Emerge in Justice Department Strategy for Prosecuting Wall Street*, Wall Street Journal (July 5, 2021, 1:37 PM) (available at https://www.wsj.com/articles/flaws-emerge-in-justice-department-strategy-for-prosecuting-wall-street-11625506658); Debra Cassens Weiss, *Federal white-collar prosecutions continue a long-term decline*, ABA Journal (Aug. 20, 2021, 9:00 AM) (available at https://www.abajournal.com/news/article/federal-white-collar-crime-prosecutions-continue-a-long-term-decline); *Corporate and White-Collar Prosecutions At All-Time Lows*, TRAC Reports (Mar. 3, 2020) (available at https://trac.syr.edu/tracreports/crim/597/).

[20] Rosenstein ACI Speech, *supra* note 4.

[21] Assistant Attorney General Brian A. Benczkowski, *Remarks at the 20th Annual Pharmaceutical and Medical Device Compliance Congress* (Nov. 6, 2019) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-20th-annual-pharmaceutical) [hereinafter "Benczkowski PMDCC Speech"].

[22] Assistant Attorney General Brian A. Benczkowski, *Remarks at the Global Investigations Review Live New York* (Oct. 8, 2019) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-global-investigations) [hereinafter "Benczkowski GIR Speech"].

[23] Assistant Attorney General Brian A. Benczkowski, *Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act* (Dec. 4, 2019) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference).

[24] As a threshold matter, it is important to clarify the scope of the term "white-collar enforcement," which can capture concepts and conduct well beyond the realm of that which the Monaco Memo appears aimed. What the Monaco Memo addresses is a specific type of "white-collar enforcement," namely, corporate criminal enforcement, such as prosecution of complex fraud and corruption by large financial institutions and other significant players in corporate America and the global business community.

[25] Data & Documents, Corporate Prosecution Registry, Duke University School of Law and the Legal Data Lab at the University of Virginia Arthur J. Morris Law Library (last visited Jan. 26, 2022) (available at https://corporate-prosecution-registry.com/browse/).

[26] Fraud Section Year in Review, U.S. Dep't of Just., *Crim. Div., Fraud Section* (2015) (available at https://www.justice.gov/criminal-fraud/file/833301/download); Fraud Section Year in Review, U.S. Dep't of Just., *Crim. Div., Fraud Section* (2016) (available at https://www.justice.gov/criminal-fraud/page/file/929741/download); Fraud Section Year in Review, U.S. Dep't of Just., *Crim. Div., Fraud Section* (2017) (available at https://www.justice.gov/criminal-fraud/file/1026996/download); Fraud Section Year in Review, U.S. Dep't of Just., *Crim. Div., Fraud Section* (2018) (available at https://www.justice.gov/criminal-fraud/file/1123566/download); Fraud Section Year in Review, U.S. Dep't of Just., *Crim. Div., Fraud Section* (2019) (available at https://www.justice.gov/criminal-fraud/file/1245236/download); Fraud Section Year in Review, U.S. Dep't of Just., *Crim. Div., Fraud Section* (2020) (available at https://www.justice.gov/criminal-fraud/file/1370171/download); Fraud Section Year in Review, U.S. Dep't of Just., *Crim. Div., Fraud Section* (2021) (available at https://www.justice.gov/criminal-fraud/file/1472076/download).

[27] Monaco ABA Speech, *supra* note 1.

[28] Acting Assistant Attorney General Brian C. Rabbitt, *Remarks at the ACI 37th Annual Conference on the FCPA* (Dec. 3, 2020) (available at https://www.justice.gov/opa/speech/remarks-acting-assistant-attorney-general-brian-c-rabbitt-aci-37th-annual-conference-fcpa).

[29] *See, e.g.*, Assistant Attorney General Leslie Caldwell, *Remarks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act* (Nov. 19, 2014) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st).

[30] Monaco Memo, *supra* note 2, at 4.

[31] Monaco ABA Speech, *supra* note 1.

[32] Indeed, that guidance explicitly noted that "[i]ndependent corporate monitors can be a helpful resource and beneficial means of assessing a business organization's compliance with the terms of a corporate criminal resolution" as well as "an effective means of reducing the risk of a recurrence of the misconduct and compliance lapses that gave rise to the underlying corporate criminal resolution." Memorandum from Brian Benczkowski, Assistant Attorney General, *Selection of Monitors in Criminal Division Matters* (Oct. 11, 2018) (available at https://www.justice.gov/opa/speech/file/1100531/download) [hereinafter "Benczkowski Memo"].

[33] *Id*. at 2.

[34] While reiterating most of the Benczkowski Memo standard for when the imposition of a monitor should be "favor[ed]," the Monaco Memo notably eliminates the requirement that the "demonstrated need for, and clear benefit to be derived from, a monitorship" should be considered "relative to the projected costs and burdens." *Compare* Monaco Memo, *supra* note 1, at 4, *with* Benczkowski Memo, *supra* note 32, at 2.

[35] Monaco Memo, *supra* note 2, at 2.

[36] *Id*.

[37] The Justice Manual (available at https://www.justice.gov/jm/justice-manual) is the DOJ's compilation of its publicly available policies and procedures and provides binding internal guidance to DOJ personnel.

[38] Monaco Memo, *supra* note 2, at 5.

[39] As such, the Monaco Memo appears at odds with the recently issued OECD Council Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which among other things recommends that OECD member countries incentivize and reward "good corporate behaviour," including "fulsome, timely, and voluntary disclosures to law enforcement authorities of misconduct" and "full cooperation with law enforcement authorities." OECD Legal Instruments, www.legalinstruments.oecd.org, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (amended Nov. 25, 2021) (available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378) [hereinafter "OECD Recommendation"].

[40] Monaco ABA Speech, *supra* note 1 ("Companies need to actively review their compliance programs to ensure they adequately monitor for and remediate misconduct — or else it's going to cost them down the line.").

[41] *Corporate Compliance Programs and U.S. Department of Justice Enforcement Policies*, Ethics & Compliance Initiative 21 (Dec. 2021) (available at https://www.ethics.org/wp-content/uploads/2021-ECI-WP-Corp-Compliance-Progs-DOJ-Enforcement-Policies-.pdf) [hereinafter "ECI Survey"].

[42] *See, e.g.*, Plea Agreement, *United States v. NatWest Mkts. PLC*, No. 3:21-cr-187 (OAW) (D. Conn. Dec. 21, 2021), ECF No. 9, wherein despite acknowledging having "made a number of improvements to its compliance program and internal controls" and "voluntarily retain[ed] an outside compliance consultant to support" its continued enhancement of its compliance program and internal controls, the bank nevertheless was subjected to a three-year independent compliance monitorship.

[43] Here again, the Monaco Memo appears at odds with the OECD Recommendation (*supra* note 41).

[44] Benczkowski PMDCC Speech, *supra* note 21. ("Over the last few years, including before I arrived, the Criminal Division has worked to be more transparent about how it approaches its evaluation of compliance programs, including developing new policies and guidance designed to help encourage responsible companies to fully invest in compliance, but also to invest wisely and efficiently."). *See also* Benczkowski GIR Speech, *supra* note 22; Acting Assistant Attorney General Brian C. Rabbitt, *Remarks at the Practicing Law Institute's White Collar Conference* (Sept. 23, 2020) (available at https://www.justice.gov/opa/speech/acting-assistant-attorney-

general-brian-c-rabbitt-delivers-remarks-practicing-law) ("In recent years, the Criminal Division has been a leader in ensuring fairness and consistency in our approach to white-collar enforcement through the creation of policies and guidance that clarify process, methodology, and expectations.... [T]he Criminal Division has demonstrated in concrete, tangible ways its commitment to consistency and transparency in its enforcement efforts.").

[45] ECI Survey, *supra* note 41, at 10.

[46] This category includes sums tied directly to the U.S. criminal matter, i.e., criminal fines, criminal monetary penalties, criminal forfeiture, criminal disgorgement, restitution, and other compensation payments.

[47] This row refers to individuals "publicly" charged each year, which (1) excludes individuals charged under seal, and (2) includes individuals previously charged under seal whose cases were unsealed and announced in that year.

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