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When Past Is Prologue: Why the Justice Department's Revised Corporate Enforcement Policies May Create More Problems Than They Solve

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We are all familiar with the aphorism that those who forget history are condemned to repeat it. The Department of Justice's ("DOJ" or the "Department") recent amendments to its corporate criminal enforcement policies, contained in two successive memoranda issued by Deputy Attorney General ("DAG") Lisa Monaco in October 2021 ("Monaco I") and September 2022 ("Monaco II") (together, the "Monaco Memos"),[2] suggest that the Department has forgotten history.

With the issuance of the Monaco Memos, the Department has unmistakably signaled a new chapter of more aggressive corporate criminal enforcement policies. It is an era in which corporations not only will be expected to scramble to report their employees at the first whiff of wrongdoing but also one that has the government ghostwriting corporate compensation policies.

The Department's policies are no doubt well-intentioned and appear to be a reaction to a reduction in corporate criminal prosecutions.[3] Whether that is a problem that needs solving can be debated. The real problem is that we have seen this movie before, where well-intentioned aggressive corporate policies issued to fill a perceived enforcement hole have caused the Department to step over the thin line between policies that prevent corporations from serving as a sanctuary to rogue employees and policies that turn corporations into agents of the government, violating individual employees' constitutional rights. In the authors' opinion, it is not a question of if, but rather of when, the Monaco Memos' policies will cross that line.

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[2] Memorandum from Lisa Monaco, Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and United States Attorneys (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download [hereinafter *Monaco I*]; Memorandum from Lisa Monaco, Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and United States Attorneys (Sep. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download [hereinafter *Monaco II*].

[3] *See* Deputy Attorney Gen. Lisa Monaco's Remarks at *NYU Program on Corporate Compliance and Enforcement*, Dep't of Justice News (Sep. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement. ("Despite those steps forward, we cannot ignore the data showing overall decline in corporate criminal prosecutions over the last decade.")

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Part One of this article briefly recounts the recent history of the Department's policies toward corporate criminal enforcement, together with some of the mistakes made along the way. Part Two describes the Monaco Memo's new, more aggressive, approach to corporate criminal enforcement together with the pitfalls that the authors foresee from this new approach.

The Department's Complicated History of Corporate Enforcement Policies

The road leading to the Monaco Memos has been a bumpy one, with some hard lessons along the way in terms of balancing the goal of holding individual corporate wrongdoers accountable with respecting the constitutional rights of individuals. This has required some course corrections over the years by the DOJ, with waxing and waning pressure exerted on corporations to ferret out suspected corporate wrongdoers.

Since 1999, when they were introduced in a memorandum from then-Deputy Attorney General Eric Holder (the "Holder Memo"), the Department's corporate enforcement policies have been codified in what are known as the "Principles of Federal Prosecution of Business Organizations" (the "Principles"). The Principles have been amended several times over the years, typically in the form of memoranda from the then-serving Deputy Attorney General.

The most notorious example of the DOJ's overreach in its approach to corporate enforcement occurred in *U.S. v. Stein*, which involved a prosecution conducted by the Southern District of New York into abusive tax shelters promoted by accounting giant KPMG. At the time of *Stein*, the Department's corporate enforcement policy was reflected in the "Thompson Memo," issued by then-Deputy Attorney General Larry D. Thompson. Issued in response to a series of high-profile corporate scandals in the early 2000s, such as those involving Enron, Tyco, and Adelphia Communications, the Thompson Memo expressly directed prosecutors to scrutinize the "authenticity of a corporation's cooperation," with actions such as the "advancing of legal fees" offered as an example of "protecting . . . culpable employees" that "may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation."[4] Following the Thompson Memo's instructions, federal prosecutors in *Stein* placed enormous pressure on KPMG to cut off the legal fees of employees suspected of wrongdoing as well as any employees who would not cooperate with the government, indicating that KPMG's adherence to

[4] Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), https://michellawyers.com/wp-content/uploads/2010/10/Principles-of-Federal-Prosecution-of-Business-Organizations.pdf (hereinafter *Thompson Memo*).

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its longtime practice of paying such fees would count as a strike against it in the prosecutor's ultimate decision whether to charge the company.[5] At one point, in a closed-door meeting, prosecutors told KPMG counsel that they would view its exercise of discretion regarding the payment of legal fees "under a microscope."[6] KPMG acquiesced to the government's demands, threatening to cut off the legal fees of any employee who refused to fully cooperate with federal prosecutors and informing those who did cooperate that their legal fees would be cut off if and when they were indicted. Ultimately, several KPMG employees were charged, at which time KPMG cut off their legal fees to the extent it had not done so already.

In a scathing opinion, Judge Lewis A. Kaplan dismissed the indictments of the KPMG defendants, finding that the government's pressure on KPMG to stop paying its employees' legal fees amounted to coercion and violated the defendants' Sixth Amendment right to counsel, as well as their Fifth Amendment Due Process rights.[7] Judge Kaplan relied heavily on KPMG's long-standing practice of advancing legal fees to its employees in concluding that "but for the Thompson Memorandum and the prosecutors' conduct, KPMG would have paid defendants' legal fees and expenses without consideration of costs."[8] He found that the government's conduct in pressuring KPMG to cut off its employee's legal fees with the threat of indictment "independently shocks the conscience" and constituted a clear violation of the employees' right to counsel. The Second Circuit affirmed, finding that "[t]he government's threat of indictment [of KPMG] was easily sufficient to convert its adversary into its agent."[9]

Over a decade after *Stein*, the Department once again was taken to task for effectively deputizing a large corporation, in this case Deutsche Bank, as its agent in *United States v. Connolly*.[10] *Connolly* involved an investigation into manipulation of the London Interbank Offered Rate ("LIBOR") by various banks and their employees. The Court ultimately found that close coordination between Deutsche Bank's lawyers and the prosecutors was so extensive that the Government "outsourced the important developmental stage of its investigation to Deutsche Bank."[11] As a result of that outsourcing, the Court held that statements made by defendants during interviews by Deutsche Bank's attorneys under the threat of termination were tantamount

[5] United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), aff'd, 541 F.3d 130 (2d Cir. 2008).

[6] *Id.* at 344.

[7] *Id.* at 356-373.

[8] *Id.* at 352-353.

[9] United States v. Stein, 541 F.3d 130, 141 (2d Cir. 2008).

[10] United States v. Connolly, No. 16 CR. 0370 (CM), 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

[11] *Id.* at *10.

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to statements compelled by the government, in violation of the defendants' Fifth Amendment rights.[12]

While the Department revised the Principles to remove any proscriptions on advancing legal fees or waiving privilege, the Department continued to adopt a hard line in conditioning cooperation credit on a corporation's proactive assistance in exposing individuals engaged in corporate wrongdoing. For instance, in 2019, then-Deputy Assistant Attorney General Yates issued a new iteration of the Principles (the "Yates Memo"), which emphasized that "to receive any consideration for cooperation under [the Principles], the company must completely disclose to the Department all relevant facts about individual misconduct."[13] The Yates Memo warned that companies who "decline[] to learn of such facts or provide the Department with complete factual information about individual wrongdoers" would receive no cooperation credit. The Department subsequently relaxed this policy to require that corporations identify only those who were "substantially involved" in the wrongdoing.[14]

The Monaco Memos: History Repeating Itself

It is against this background that the Monaco Memos were released in 2021 and 2022. The latest iteration of the Department's corporate enforcement policies, the Monaco Memos represent one of the most extensive revisions to the Principles since the Holder Memo. Some of the initiatives announced by the Monaco Memos include: (i) directing all DOJ Divisions to adopt uniform corporate voluntary disclosure policies; (ii) revising the standards by which the Department will assess corporate voluntary disclosures; (iii) providing new guidance on how the Department will evaluate prior corporate misconduct; and (iv) creating new policies to incentivize greater corporate compliance measures, including through a pilot program that provides fine reductions for corporations who claw back compensation from alleged wrongdoers.[15]

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[12] Garrity v. State of N.J., 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) (statements made by government employees under threat of termination of employment are coerced by the government for Fifth Amendment purposes). Ultimately, the *Connolly* Court refused to dismiss the case because the prosecution did not seek to introduce the compelled witness statements.

[13] Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Sep. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

[14] Deputy Attorney Gen. Rod J. Rosenstein's Remarks at *American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act*, Dep't of Justice News (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

[15] Monaco I (2021); Monaco II (2022).

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From the outset, the Monaco Memos themselves and the public statements surrounding them made clear that the Department was embarking on a more aggressive corporate enforcement strategy with a strong emphasis on immediate self-reporting by corporations. The Department set the tone in Monaco I by expressly reinstating the Yates Memo's "all or nothing" approach to cooperation, noting that the existing policy of requiring corporations to identify those who are "substantially involved" in the alleged wrongdoing is "confusing in practice and afford[s] companies too much discretion in deciding who should and should not be disclosed to the government."[16] To the extent there was any ambiguity in her emphasis, DAG Monaco expressly "urge[d] prosecutors to be bold in holding accountable those who commit criminal conduct."[17]

Monaco II picked up where Monaco I left off. In her public statements accompanying Monaco II, DAG Monaco noted that **"[w]e need to do more and move faster.**" (emphasis in original).[18] It quickly became apparent that this meant the Department expected corporations to move faster: much faster.[19] While the Department's expectation of "timely" disclosure is not new, the Department has made it clear that "timely" disclosure now means virtually immediate disclosure. In her public statements, DAG Monaco has emphasized that, when it comes to disclosures, "speed is of the essence."[20] Other Justice Department officials have stated that "timely" disclosures mean "immediate," which the Department considers to be "within a few weeks."[21] The Department is also explicit about the price for failing to move swiftly, emphasizing in Monaco II that "companies that identify significant facts but delay their disclosure will place in jeopardy their eligibility for cooperation credit."[22]

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[16] Deputy Attorney Gen. Lisa Monaco's Remarks at *ABA's 36th National Institute on White Collar Crime*, Dep't of Justice News (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

[17] *Id.*

[18] Deputy Attorney Gen. Lisa Monaco, Remarks at *NYU Program on Corporate Compliance and Enforcement* (2022), supra note 2.

[19] Monaco II (using the word "timely" no less than 10 times.) *See also*, Monaco I ("it is imperative that Department prosecutors gain access to all relevant, non-privileged facts about individual misconduct swiftly and without delay.")

[20] Deputy Attorney Gen. Lisa Monaco, Remarks at *NYU Program on Corporate Compliance and Enforcement* (2022), supra note 2.

[21] Stewart Bishop, *DOJ Backs Clawbacks, Orders Comp Reform in Corp. Cases*, Law360 (Mar. 2, 2023), https://www.law360.com/articles/1581601/doj-backs-clawbacks-orders-comp-reform-in-corp-cases.

[22] Monaco II (2022) at 3.

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The message to corporations from these policies and statements is clear: when in doubt, disclose and disclose quickly and tell DOJ everything you know to date about everyone involved or face prosecution. But anyone familiar with internal corporate investigations knows that it can take months before a corporation may even have a sense of what happened and who may be responsible. A thorough investigation often consists of reviewing tens, if not hundreds, of thousands of emails, Bloomberg chats, text messages, Slack communications, or other forms of communications. Often, such communications contain industry jargon or slang making it very challenging to decipher what is being discussed. Hundreds of employees may need to be interviewed more than once as the investigation, and review of documents, progresses.[23] In these circumstances, requiring disclosure within "weeks" is tantamount to virtually instant disclosure.

What this means is that, in many cases, corporations who are fearful of being accused of delaying disclosure, and thereby losing cooperation credit with DOJ, undoubtedly will disclose to the government without truly understanding what happened or who is responsible. This will present both the corporation and the government with a dilemma. Once the corporation has disclosed to the government, it likely will be obligated to disclose the existence of the investigation to its shareholders, if it is a public company, and its board will require a full investigation to get to the bottom of the conduct. Based on the Monaco Memo's requirement of complete disclosure with respect to everyone involved, the corporation then will be obliged to regularly update the government on its findings, thereby conducting the investigation for the government. While the government may believe that it can avoid the mistakes of *Connolly* by refraining from micromanaging corporate internal investigations, that is easier said than done.[24] When regular lines of communication are established at the nascent stage of an investigation while both sides are still learning what is going on and with the corporation operating under an obligation to report what it learns in real time to the government, the lines between reporting and active, ongoing collaboration can easily become blurred.

Another by-product of this policy is that invariably it will result in over-disclosure of conduct that may have been handled internally, or the conduct may have been brought to other regulators had the corporation taken more time to learn more facts before disclosing to the DOJ. The government may not view this as a problem, determining that prosecutors will charge only

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[23] *See* Connolly at *7 (noting the Deutsche Bank's internal investigation involved reviewing 158 million electronic documents, listening to 850,000 audio files and conducting nearly 200 employee interviews).

[24] David B. Massey et al., *U.S. v. Connolly: "Outsourcing" a Government Investigation — And How to Avoid It*, NYU School of Law Program on Corporate Compliance and Enforcement (May 7, 2019). https://wp.nyu.edu/compliance_enforcement/2019/05/07/u-s-v-connolly-outsourcing-a-government-investigation-and-how-to-avoid-it/.

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truly deserving cases.[25] The reality is not so simple. A criminal investigation has serious consequences for everyone involved. At the government level, it means expenditure of resources that could be devoted to other matters. At the corporate level, it can mean, among other things, massive legal fees, shareholder lawsuits, and firings. But the most serious consequences typically are borne by the employees whose lives may be upended by a criminal investigation. Not only that, prosecutors are human beings, and the allure of a headline-grabbing case against a corporate entity can be very tantalizing, all the more so if the prosecutor, and the agents who have her ear, have expended significant time and energy investigating a case. Considering how frequently everyday corporate conduct is charged as wire fraud, the risk seems high that a significant number of corporate employees may be prosecuted under the new policy when such conduct could, and should, have been addressed through less drastic measures.

The Department's emphasis on speedy disclosure may also undermine the goals it is trying to achieve. Some of the most valuable information obtained by corporations during an internal investigation is derived from employee interviews. In addition to often containing valuable admissions, these interviews can vastly expedite an investigation by pointing the company's attorneys in the right direction by, for example, explaining what are often cryptic communications. Rushing to disclose at the first whiff of wrongdoing jeopardizes this important source of information. Once counsel for an employee learns that the employee has been identified as a wrongdoer, that counsel will be reluctant to have the client cooperate in an internal interview, since the contents of the interview likely will be fed to the DOJ. This may result in the termination of employees who ultimately will not be criminally charged but could have provided valuable information.

These types of scenarios are not pure conjecture. In *United States v. Tournant*, 22-cr-00276 (SDNY), the defendant moved to dismiss his indictment claiming that the Monaco Memo pressured his employer and their common counsel to provide the government with information in violation of his attorney-client privilege. In arguing that his former lawyers, who also represented his employer, unlawfully turned over privileged information to the government obtained while representing him during an internal and SEC investigation, the defendant claimed that the Monaco Memos' aggressive policies "left [his employer] in the desperate position of

[25] Deputy Attorney Gen. Lisa Monaco's Remarks at *ABA's 36th National Institute on White Collar Crime*, supra note 15 ("Like every case, prosecutors will make decisions about individuals implicated in corporate criminal matters based on the facts, the law and the Principles of Federal Prosecution.")

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needing to scapegoat [him] in an attempt to avoid indictment, and they coerced [the defendant's] former counsel to turn on one client to save another."[26]

Perhaps the most troubling aspect of the Department's new policy, however, is its approach to corporate compensation schemes. First announced in Monaco II, the policy encourages corporations to adopt and act upon compensation clawback regimes through a carrot and stick approach. As part of a pilot program, companies who adopt such measures may offset any fines by amounts clawed back from alleged wrongdoers.[27] In addition, prosecutors are directed to consider a corporation's adoption of clawback measures, and the degree to which it acts upon such measures, in their charging decisions.[28]

It is only a matter of time before the Department's new clawback policy is challenged as an indirect means of violating what Judge Kaplan in *Stein* described as a defendant's "fundamental" right to "obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference."[29] Admittedly, the Monaco Memo does not directly target a prospective defendant's access to legal fees in the way the Thompson Memo did. However, in most instances, a defendant's compensation is considered a resource that is otherwise "lawfully available" to fund his or her defense.[30] When that compensation is then subject to being clawed back under pressure from the government, it is hard not to see that as governmental interference with a defendant's ability to mount a defense, especially in cases where the defendant's legal fees are not being advanced by the corporation.

Significantly, according to the Monaco Memos, it is also not enough that a corporation adopts clawback measures in its compensation agreements. To maximally protect itself from prosecution, the corporation must *act* on those clawback provisions to the satisfaction of the

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[26] United States v. Tournant, 22-cr-00276, Docket Entry No. 54 at 3 (S.D.N.Y. 2022). *See also id.* at 24 (the lawyers' "betrayal of [the defendant] is attributable to the Government because of the coercive pressure the Government's corporate cooperation policies placed on [the defendants'] employer.").

[27] *See* Assistant Attorney Gen. Kenneth A. Polite, Jr.'s Remarks *ABA's 38th Annual National Institute on White Collar Crime*, Dep't of Justice News (Mar. 3, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national. ("the Criminal Division is launching a pilot program…to offer fine reductions for companies that seek to clawback compensation in appropriate cases.")

[28] *See* Monaco II at 9-10 (directing prosecutors to scrutinize a company's steps to act upon its claw back provisions).

[29] *Stein*, 435 F. Supp.2d at 351.

[30] Arguably, this may not be the case where the defendant's compensation would be subject to forfeiture. See Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 625 (1989) . (government's right to forfeitable property vests at the time of the offense such that defendants have no Sixth Amendment right to access such funds for their defense).

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prosecutors. Monaco II directs prosecutors to scrutinize the corporation's compliance programs, including its clawback measures, "at the time of a charging decision." It goes on to direct prosecutors to "consider whether, following the corporation's discovery of misconduct, a corporation has, to the extent possible, taken affirmative steps to execute on such agreements and clawback compensation . . ."[31] Thus, far from simply ensuring that a corporation is not providing sanctuary for the alleged wrongdoer, the Monaco Memos seek to turn corporations into their accused employee's adversary by effectively teaming up with the government against the employee, long before there has been any determination of the employee's guilt. Of course, commencing a clawback proceeding during the pendency of a criminal case also ensures that the employee will have to divert funds that would otherwise be available for his or her criminal defense to defending the clawback proceeding. As Judge Kaplan put it, "[t]he imposition of economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate governmental interest – it is an abuse of power."[32]

Much more can, and will, be said about the Department's clawback policies as we see how they are implemented and how they play out in real-world cases. Given the intense scrutiny the Monaco Memo directs prosecutors to exert over claw back arrangements and the encouragement to aggressively pursue cases against corporate wrongdoers, it is not hard to envision this ending poorly for the Department. It is just a matter of time before we see a case involving closed-door conversations, reminiscent of those deemed so offensive in *Stein*, where prosecutors pressure a corporation's attorneys, under the spoken or unspoken threat of indictment, to more aggressively pursue clawback proceedings against an employee alleged, but not proven, to be a wrongdoer, violating that employee's constitutional rights. History, after all, has a way of repeating itself.

CONCLUSION

As promised by DAG Monaco, the new corporate enforcement policies introduced by the Monaco Memos are, if nothing else, bold. These bold new policies seem destined to foster greater alignment between corporate policies and the enforcement goals of the DOJ while creating more antagonism between corporations and their employees suspected of wrongdoing. It remains to be seen whether the government has learned from history and can toe that thin line between policies designed to facilitate the prosecution of individual corporate wrongdoers and policies that violate individual rights.

[31] Monaco II (2022) at 9-10.

[32] *Stein*, 435 F.Supp.2d at 363.

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