

*Cartel*

**The Monaco Memo:  
What Could It Mean for Criminal  
Antitrust Enforcement?**

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# The Monaco Memo: What Could It Mean for Criminal Antitrust Enforcement?

By Ann O'Brien, Brent Snyder & Sean Sandoloski<sup>1</sup>

Deputy Attorney General (“DAG”) Lisa Monaco recently delivered remarks at the ABA’s National Institute on White Collar Crime. In those remarks, she announced important changes with respect to corporate criminal enforcement,<sup>2</sup> and shortly thereafter she followed up with a memorandum to federal prosecutors detailing those changes.<sup>3</sup> Both her speech and the memo discussed the formation of a Corporate Crime Advisory Group as well as three new policies the Department of Justice (DOJ) will be adopting. As white-collar practitioners and former longtime prosecutors and leaders of the DOJ Antitrust Division during previous administrations, our minds immediately went to whether the Monaco Memo is a return to the Yates Memo days – a “Yates 2.0,” if you will – and what that would mean for antitrust cartel enforcement. Here we will explore what the Monaco Memo, and the policies and priorities it discusses, might mean for criminal antitrust enforcement and cartel investigations conducted by the DOJ Antitrust Division.

## I. What the Monaco Memo Says

### A. Creation of the Corporate Crime Advisory Group

The October 28, 2021 Memorandum from Deputy Attorney General Lisa O. Monaco on the Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies (Monaco Memo) announced the creation of the Corporate Crime Advisory Group (the Group). The Group will be made up of

representatives from different components of the DOJ and will have a “broad mandate” to consider various topics and policies it deems necessary to update the Department’s approach to corporate criminal enforcement. The Group is tasked with looking both outward and inward; it includes an internal review to see how the Department can best support efforts to combat corporate criminal activity, including (as one example) with increased investments in new technologies.

We have not yet seen a list of the Group’s membership, but would expect the Antitrust Division to be represented. In recent years, the Division has been included as part of other Department Groups focusing on white collar crime including the Financial Fraud Enforcement Task Force, and the Individual Accountability Working Group which led to the Yates Memo.

### B. Policy Changes

The Monaco Memo also details three major Department policy changes relating to white collar crime.

#### 1. Considering a Corporation’s Full History of Misconduct

First, the Monaco Memo instructs prosecutors to consider a corporation’s full history of misconduct rather than only prior instances of *similar* misconduct. In taking a more “holistic approach,” it directs prosecutors to take into account misconduct by the corporation discovered during *any* prior domestic or foreign criminal, civil or regulatory enforcement actions against it. The memorandum stresses this as

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<sup>2</sup> Lisa O. Monaco, Deputy Attorney General, Dep't of Justice, 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>.

<sup>3</sup> Memorandum from Deputy Attorney General Lisa O. Monaco, Dep't of Justice, “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>.

important because any past violations “may be indicative of whether the company lacks the appropriate internal controls and corporate culture to disincentivize criminal activity, and whether any proposed remediation or compliance programs, if implemented, will succeed.”<sup>4</sup>

## **2. Individual Accountability as the Top Priority, and Requiring Corporations to Give Information About Individuals Involved in Corporate Misconduct**

Second, the Monaco Memo makes clear that the Department will again be hyperfocused on individual accountability, stating that the DOJ’s “first priority in corporate criminal matters [is] to prosecute the individuals who commit and profit from corporate malfeasance.”

The Monaco Memo specifically reinstates prior Department guidance provided in 2015 by Obama Administration DAG Sally Yates.<sup>5</sup> The Yates Memo, aptly titled “Individual Accountability for Corporate Wrongdoing,” outlined steps that should be taken in any investigation of corporate misconduct in order to ensure that all attorneys in the Department “are consistent in...best efforts to hold to account the individuals responsible for illegal corporate conduct.”<sup>6</sup> Among other policy reforms focused on increased prosecution of individuals, the Yates Memo required a company to identify *all* individuals involved in the misconduct in order to receive *any* credit for cooperation. Most prominently, the Monaco Memo reinstates that Yates Memo requirement, stating that “to qualify for *any* cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct.”<sup>7</sup> DAG Monaco adds that “[t]o be

clear, this means all nonprivileged information relevant to all individuals involved in the misconduct.”<sup>8</sup>

In 2018, then-DAG Rod Rosenstein reversed the Yates Memo’s “all or nothing approach,” permitting companies to receive cooperation credit if they identified individuals *significantly* involved in the issues.<sup>9</sup> In a complete renunciation of that policy reversal, DAG Monaco makes clear that the DOJ policy is again that “companies cannot limit disclosure to those individuals believed to be only substantially involved in the criminal conduct” if they hope to receive any cooperation credit.<sup>10</sup> Indeed, the Monaco Memo arguably goes even further than the Yates Memo, explicitly spelling out to prosecutors and companies that this requirement applies equally to individuals “inside and outside of the company.”<sup>11</sup>

In her speech to the National Institute on White Collar Crime, DAG Monaco also elaborated that allowing companies to make their own determinations regarding whom to put forth to the Department does not work, as “[s]uch distinctions are confusing in practice and afford companies too much discretion in making those determinations.”<sup>12</sup> According to DAG Monaco, leaving these determinations up to the company can harm investigations, since “individuals with a peripheral involvement in the misconduct may nonetheless have important information to provide.”<sup>13</sup>

The Monaco Memo also signals the Department’s willingness to bring cases, even difficult ones, against individuals when guided by “the facts, the law, and the Principles of

<sup>4</sup> Monaco Memo, *supra* note 3.

<sup>5</sup> Memorandum from Deputy Attorney General Sally Q. Yates, Dep’t of Justice, “Individual Accountability for Corporate Wrongdoing,” Sept. 9, 2015, available at <https://www.justice.gov/archives/dag/file/769036/download>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> Monaco Memo, *supra* note 3.

<sup>9</sup> Rod J. Rosenstein, Deputy Attorney General, Dep’t of Justice, American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act, Nov. 29, 2018, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.

<sup>10</sup> Monaco Memo, *supra* note 3.

<sup>11</sup> *Id.*

<sup>12</sup> Monaco Speech, *supra* note 2.

<sup>13</sup> *Id.*

Federal Prosecution.”<sup>14</sup> DAG Monaco went even further in her remarks introducing the new policies, urging prosecutors to “be bold in holding accountable those who commit criminal conduct.” She also echoed the themes of the popular book *The Chickenshit Club*, about post-financial crisis accountability, stating that she will continue to make clear to federal prosecutors that “the fear of losing should not deter them.”

### 3. Revisions to Monitorship Guidance

Finally, the Monaco Memo rescinded prior guidance that created a default presumption against the imposition of independent compliance monitors under corporate resolutions, including in deferred prosecution agreements, non-prosecution agreements and plea agreements. Rather, she suggested the somewhat standardless standard that “[i]n general, the Department should favor the imposition of a monitor where there is a demonstrated need for, and clear benefit to be derived from, a monitorship.”<sup>15</sup> In so doing, DAG Monaco stressed that monitors help ensure that a company is living up to its obligations. The decision about whether to impose a monitor will be made according to the facts of each case.

## II. What Do the Monaco Memo Policies and Priorities Mean for Criminal Antitrust Enforcement?

The Monaco Memo and DAG Monaco’s remarks make clear that (1) the DOJ will now be carefully considering corporations’ full history of prior misconduct, including criminal, civil or regulatory enforcement actions and domestic or foreign actions against it; (2) individual accountability is again a top priority for federal white collar prosecutors; (3) to get any cooperation credit, companies will have to tell DOJ all about individuals inside and outside the company responsible for the alleged misconduct; and (4) monitors are again favored in corporate resolutions.

Much of this sounds like a return to the Yates Memo era. Despite much concern that the Yates era would dramatically change criminal antitrust enforcement, we didn’t see broad, sweeping changes to Antitrust Division criminal enforcement practice during that era. Perhaps this was because the Yates Memo was only in place for a little over a year before the change in Administration in 2017, but it is also likely attributable to the fact that the Antitrust Division could point to a robust pre-Yates Memo history of emphasizing and bringing individual prosecutions. With DAG Monaco picking up where DAG Yates left off, it will be very interesting to see what each of these policy changes means for the future of criminal antitrust cartel enforcement. We offer a few questions and possibilities here.

### ***A. Will Consideration of Corporations’ Full Prior History Chill Antitrust Leniency Self-Reporting or Cooperation?***

Antitrust Division investigations often involve large international corporations with many lines of business. It is not unusual that corporations that are the subject of a criminal antitrust investigation have had prior dealings with the DOJ or other foreign or domestic law enforcement or regulators. It is also the case that compliance efforts or internal investigations relating to other conduct sometimes uncover antitrust violations.

Antitrust Division corporate leniency can provide a complete pass from prosecution to the first company to self-report and meet other leniency criteria and non-prosecution for its cooperating involved executives. There currently is no recidivist or prior history disqualification under the leniency program. It is possible that this could change after the Monaco Memo.

Similarly, the Division’s Corporate Leniency Program provides for non-prosecution only for federal antitrust crimes, and there has been tension for companies that may have uncovered both antitrust and non-antitrust federal crimes. The Monaco Memo’s focus on corporate

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<sup>14</sup> *Id.*

<sup>15</sup> Monaco Memo, *supra* note 3.

criminal history might add to these concerns when corporations are making the often-difficult decision whether to self-report what they uncover. The Antitrust Division's Leniency Program, however, is well established within the Department and has produced success and emulation from the Criminal Division in the form of its Corporate Enforcement Policy. Hopefully the Department and Division will make clear that these pronouncements will not impact leniency.

But what about a company that misses being first in line for leniency? It would typically still cooperate with the Antitrust Division in an effort to reach a resolution and receive the benefits of early cooperation, such as a plea agreement or a resolution short of a plea – for example, a Deferred Prosecution Agreement (DPA) – and a reduced fine. However, the Monaco Memo has the potential to negatively impact such cooperation benefits.

Under U.S. Sentencing Guidelines § 8C2.5, a corporation's Culpability Score, used to calculate its fine, is only increased for prior misconduct in the limited circumstance that the organization committed an offense within five or 10 years of a criminal adjudication based on similar misconduct. By contrast, the Monaco Memo appears to require consideration of a much broader range of prior misconduct than the Sentencing Guidelines do, including civil, administrative and foreign prior misconduct with no time limitations.

While the Department is not bound by the Sentencing Guidelines when considering what type of non-plea resolutions – such as DPAs – might be available to companies or how monetary penalties are calculated under them, they have previously provided helpful guidance. The Monaco Memo now supersedes that standard for corporate recidivism and seems destined to lead to harsher non-plea resolutions, if they are available at all, and to larger penalties for companies with prior misconduct of *any kind*. It remains to be seen, however, whether and how the Monaco Memo's definition of corporate recidivism will be incorporated into sentencing recommendations to the courts, and this uncertainty could end up tipping the balance

against self-reporting antitrust offenses for a corporation without leniency that has a prior history of non-antitrust misconduct that it fears might preclude it from the benefits of early self-disclosure and early cooperation.

Current Antitrust Division leadership would be wise to address this policy issue and allay these concerns for potential leniency applicants or cooperating companies.

### ***B. What Will the Individual Accountability Push Mean for Antitrust Division Leniency and Plea Practice?***

In criminal antitrust matters where a company makes the decision to self-report and seek leniency or cooperate toward a corporate resolution, the company's interests in cooperating are often aligned with key corporate executives involved in the alleged cartel conduct who may be involved in the decision to authorize corporate cooperation. Because the collusive agreement is the crime in antitrust criminal cases, and such agreements are often informal and unwritten, the cooperation of executives and employees involved in reaching and implementing those agreements is key to the Division's ability to prove criminal antitrust cases against others beyond a reasonable doubt. Therefore, unlike other white-collar crimes – like FCPA bribery, for instance – where it may be possible for the DOJ to bring purely “paper” or “follow the money” cases, a company involved in a criminal antitrust investigation may not be able to perfect a leniency marker or provide ample cooperation for the DOJ without the insider cooperation of employees involved in reaching or implementing collusive agreements not to compete with others.

This acknowledgment of the difficulty of building cases without insider cooperation is a bedrock of the Antitrust Division's Corporate Leniency Policy and plea agreement practices. The Antitrust Division has for decades effectively used the carrots of leniency and cooperation and the stick of criminal prosecution to hold both corporations and individuals criminally accountable. Importantly, those carrots have long included non-prosecution protections for culpable directors, officers and employees

under corporate leniency agreements or those who are “carved in” to non-prosecution provision of corporate plea agreements. This, again, makes sense given the nature of antitrust crimes compared to many other corporate white-collar crimes.

Unlike other federal corporate white-collar crimes, which usually involve single-firm misconduct, criminal antitrust cases are always corporate conspiracies. That being so, there are always other parties (corporate and individual) to the alleged illegal agreement that remain available for prosecution, even if one company (and its culpable individuals) receives leniency or some (but not all) culpable individuals are carved into a corporate plea agreement. Accordingly, a Division leniency applicant is not typically required to “cooperate” against its own corporate employees, who would be covered under the non-prosecution terms of the leniency letter in return for their cooperation, nor is a pleading company required to cooperate against cooperating employees who are carved into the non-prosecution coverage provided in the corporate plea agreement. The cooperation of a leniency applicant or a pleading company (and its cooperating employees) is directed to helping the Division build difficult-to-prove cases against other corporate and individual participants in the alleged antitrust conspiracy.

Nevertheless, there is clearly some tension between the Antitrust Division’s longtime practices and the Monaco Memo, and it remains to be seen whether the Monaco Memo will lead to significant changes in the Antitrust Division’s approach that could complicate incentives to seek leniency or cooperate. Such changes need not be inevitable, however.

For instance, it is fair to assume that when the Yates Memo was being formulated, the Antitrust Division was scrutinized for approaches, such as its leniency program and plea agreement practices, that were different from other prosecuting components, perceived by some as being too easy on individual wrongdoers and in

tension with the basic tenets of the Yates Memo. But the Antitrust Division could effectively address any such concerns within the Department and externally by demonstrating how, for decades, the cooperation of corporations and their culpable executives was critical in building criminal antitrust cases and holding large numbers of corporations and corporate executives criminally accountable for their participation in antitrust conspiracies.<sup>16</sup> The Antitrust Division’s track record of holding individuals (including very senior executives) accountable was certainly the equal of any other DOJ component.

Given the Antitrust Division’s recent emphasis on convergence with the policies and practices of other DOJ prosecuting components and the recent movement of former Criminal Division prosecutors to the Antitrust Division’s criminal leadership ranks, it will be interesting to see whether the Antitrust Division will face the same scrutiny this time around and how Antitrust Division policies and practices may change as a result.

Ultimately, there were only slight changes in the Antitrust Division policies and practices in the aftermath of the Yates Memo, which expressly reaffirmed the continuing vitality of the Corporate Leniency Policy. In particular, the Division tightened (but did not eliminate) the circumstances under which former employees would be included in leniency agreements or carved into corporate plea agreements, and it also reiterated the long-standing policy that even current officers, directors and employees are not guaranteed inclusion in Type B leniency agreements. As to this latter point, the Antitrust Division nonetheless went to some lengths to emphasize that it was merely reconfirming what had always been the express *policy* of the Antitrust Division, while also stating that there was no intention to change the *practice* of generally providing coverage for such individuals in Type B leniency agreements. Moreover, it did not indicate any intention to take

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<sup>16</sup> Brent Snyder, Deputy Assistant Attorney General, Dep’t of Justice, Antitrust Division, “Individual Accountability for Antitrust Crimes,” Remarks at the Yale School of Management Global Antitrust Enforcement Conference, Feb. 19, 2016, available at <https://www.justice.gov/opa/file/826721/download>.

a tougher position regarding individual accountability than it had in the past. Indeed, earlier during the Obama Administration, the Antitrust Division also changed its prior practice of publicly naming individuals “carved out” of corporate plea agreements (and thus exposed to individual prosecution) and began filing their names under seal, a move seemingly against the direction of being tougher on individual subjects.

So all in all, the Antitrust Division’s Leniency Program and charging policy and practice changed very little as a result of the Yates Memo. Most would say that was due to the unique nature of the *per se* antitrust conspiracies charged criminally under the Sherman Act and the need for insider cooperation to allow the Antitrust Division to prove difficult criminal antitrust cases beyond a reasonable doubt. Now that the Monaco Memo has returned the Department to this tough-on-individuals-in-corporate-crimes narrative, the policies and practices of the Antitrust Division will surely be explored again.

The Antitrust Division has not shied away from bringing individual cases in recent years. Acting Assistant Attorney General, and Criminal Deputy Richard Powers recently touted 17 indicted cases across 14 different investigations, against nine companies and 31 individuals.<sup>17</sup> This is a very large number of pending trials of individuals for the Antitrust Division. So, the Antitrust Division should be in a good position to tout its boldness bona fides within the Department. Three of these indicted matters involve never before criminally litigated allegations of no-poach agreements as violations of the Sherman Act. These matters are facing vigorously argued Motions to Dismiss, and the Antitrust Division can expect them to be equally as vigorously litigated should

they proceed to trial. Whether they can win these cases, including ones with and without leniency applicant witnesses, may also influence how the Department’s focus on individual accountability translates to Antitrust Division matters.

### **C. Will We See More Monitors in Antitrust Division Corporate Resolutions?**

Until recently, the Antitrust Division rarely entered into Deferred Prosecution Agreements in criminal antitrust matters. In 2019, the Antitrust Division shifted positions and announced the availability of DPAs in antitrust cases in recognition of gold-star compliance. Since 2019, the Antitrust Division has shown a penchant for DPAs, entering into eight DPAs in criminal antitrust matters for noncompliance-based reasons, but those Division DPAs have not contained monitor provisions.<sup>18</sup> Monitors in Antitrust Division plea agreements are very rare, and a monitor was imposed upon AU Optronics in the LCD price-fixing case only after conviction at trial.

Monitors can be burdensome and costly to companies and can decrease the value of a resolution like a DPA. This will be another area to watch, to see whether the Antitrust Division monitor practice adjusts based on the Monaco Memo and, more importantly, how that incentivizes or disincentivizes corporate reporting and cooperation in Antitrust Division investigations.

### **III. Conclusion**

Cartel practitioners and companies facing criminal antitrust investigations or uncovering cartel conduct will be watching the Antitrust Division closely to see how it responds to the Monaco Memo. There will likely once again be

<sup>17</sup> Richard A. Powers, Acting Assistant Attorney General, Dep’t of Justice, Remarks at the Symposium on Corporate Enforcement and Individual Accountability, July 21, 2021, available at <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-delivers-remarks-symposium-corporate>.

<sup>18</sup> See, e.g. Deferred Prosecution Agreement, Argos USA LLC (Jan. 4, 2021), available at <https://www.justice.gov/atr/case-document/file/1350996/download>; Deferred Prosecution Agreement, Berlitz Languages, Inc. (Jan. 19, 2021), available at <https://www.justice.gov/atr/case-document/file/1365841/download>; Deferred Prosecution Agreement, Apotex Corp. (May 7, 2020), <https://www.justice.gov/atr/case-document/file/1290921/download>; Deferred Prosecution Agreement, Sandoz Inc. (Mar. 2, 2020), available at <https://www.justice.gov/atr/case-document/file/1256306/download>; Deferred Prosecution Agreement, Florida Cancer Specialists & Research Institute, LLC (Apr. 30, 2020), available at <https://www.justice.gov/opa/press-release/file/1272561/download>.

keen focus within Main Justice on the policies and practices of the Antitrust Division to pressure test whether they do enough to hold individuals and corporations accountable. If the Yates Memo era is an indication, and the current Antitrust Division criminal leadership wants to stay the course, the Antitrust Division's enforcement record should substantiate the success of its practices, and the era of the Monaco Memo will most likely not lead to earth-

shattering changes for federal criminal antitrust enforcement. If, however, a recent emphasis by the Antitrust Division on convergence with the policies and practices of other prosecuting components continues, it is possible that the Antitrust Division will make more significant changes to its policies and practices in the name of the Monaco Memo.