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# THE MONACO MEMO AND EVALUATING THE BENEFITS AND RISKS OF VOLUNTARY SELF-DISCLOSURES

*The 39th International Conference on the Foreign Corrupt Practices Act ("FCPA") took place in Washington, DC from November 29 to December 1, 2022. Several weeks prior to the conference, Lisa Monaco, the Deputy Attorney General ("DAG") for the United States Department of Justice ("DOJ"), announced several major changes to DOJ's corporate enforcement policies that will impact the way DOJ will investigate and resolve FCPA cases and other types of criminal cases involving corporate misconduct. One policy change is that DOJ will no longer seek guilty pleas — absent aggravating factors — from companies that do the following: (1) voluntarily self-disclose corporate misconduct; (2) fully cooperate with the investigation; and (3) fully remediate the root cause of the criminal conduct through an effective compliance program. During the conference, several panels made up of government officials, compliance officers, general counsels, and legal practitioners discussed the history and implications of DOJ's voluntary self-disclosure policy and what it means moving forward. This article addresses these subjects.*

By Zane David Memeger *

## I. THE EVOLUTION OF DOJ'S CORPORATE ENFORCEMENT POLICY

For more than 30 years, DOJ has sought to emphasize the importance of voluntary disclosures when DOJ is evaluating corporate cooperation while making criminal charging and case-resolution decisions. Starting with the Holder Memo in 1999,[1] each subsequent DOJ administration has put forth important guidance about how it intends to prosecute corporate misconduct and credit cooperation. While the Holder Memo and subsequent Thompson Memo encouraged prosecutors to affirmatively weigh voluntary disclosures, corporate cooperation, and the willingness to share attorney-client-privileged information when deciding whether to bring criminal charges, the McNulty Memo — issued in 2006 in response to judicial and legislative criticism[2] — directed prosecutors, as a general rule, to not seek attorney-client-privileged materials without first

[1] Memorandum from Deputy Attorney General to All Component Heads and United States Attorneys, Subject: Bringing Criminal Charges Against Corporations (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

[2] *United States v. Stein*, 541 F.3d 130 (2nd Cir. 2008) (affirming dismissal of indictment against KPMG partners and employees because DOJ improperly interfered with the Sixth Amendment right to counsel through its efforts to cut off payment of legal fees by KPMG); Attorney Client Privilege Act of 2006, S. 30, 109th Cong. (2006).

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