CLEARY GOTTLIEB Alert Memo

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Manhattan District Attorney's Office Issues Guidelines Regarding the Prosecution of Businesses and Organizations

The District Attorney of the County of New York (the "DANY") has issued new guidelines describing the factors that its prosecutors must consider when deciding whether to bring criminal charges against businesses and other organizations. With these new guidelines, the DANY has not only provided important guidance to prosecutors making charging decisions (and the companies that are the subjects of those decisions), but it has signaled – just six months into the term of District Attorney Cyrus R. Vance, Jr. – its continued commitment to investigating and prosecuting corporate crimes.

The New Guidelines

The new guidelines (the "DANY Guidelines"), which are set out in a 10-page memorandum by Chief Assistant District Attorney Daniel R. Alonso, list ten factors that prosecutors must consider when deciding whether to prosecute all but the smallest business entities ("where an organization is essentially the alter ego of an individual"), as well as law firms, accounting firms, labor unions, political parties, and state or local governments.[1]

The DANY Guidelines instruct Manhattan prosecutors to consider the following factors when deciding whether to prosecute organizations:

(a) the organization's disclosure of the wrongdoing and cooperation in the investigation;

(b) the seriousness and circumstances of the wrongdoing (including the extent of the harm caused or intended by the wrongdoing);

(c) the pervasiveness of wrongdoing within the organization;

(d) the history of misconduct in the organization or by the organization;

[1] The subject of Chief Assistant District Attorney Alonso's memorandum, which is dated May 27, 2010, is "Considerations in Charging Organizations." It is available at: http://www.manhattanda.org/whatsnew/press/2010-06-01d.shtml. Like the DANY Guidelines, we refer to the entities covered by the guidelines as "organizations."

(e) the impact of prosecuting or not prosecuting on the public's confidence in the fairness and evenhandedness of the criminal justice system;

(f) the organization's compliance program and remedial actions in response to the wrongdoing;

(g) the collateral consequences on innocent persons (such as shareholders or employees) and the public that would arise from prosecuting the organization;

(h) the attitude and views of the victims of the wrongdoing;

(i) the adequacy and feasibility of prosecuting the individuals who were responsible for the wrongdoing; and

(j) the sufficiency of non-criminal proceedings (such as civil or regulatory enforcement actions) in addressing the wrongdoing.

The DANY Guidelines only apply where there is reasonable cause to believe that the organization could be criminally liable. All decisions about whether to prosecute (including decisions not to prosecute) in such cases require the approval of senior prosecutors; the seniority of the attorneys who must review the decision varies depending on the type of organization. The District Attorney or the Chief Assistant District Attorney must authorize the prosecution of financial institutions such as banks, insurance companies, hedge funds and private equity funds, as well as publicly traded corporations, law firms, accounting firms, labor unions, political parties and state or local governments.

Lessons Learned

- **The DANY Falls In Line With Federal Policy:** With the new guidelines, the DANY adopts many of the same considerations that the Department of Justice outlined for federal prosecutors in its Principles of Federal Prosecution of Business Organizations (the "Federal Principles").[2] In fact, eight of the ten factors in the DANY Guidelines cite analogous factors from the Federal Principles. While it is true that DANY prosecutors have informally considered the Federal Principles since they were promulgated in 1999, the DANY Guidelines give Manhattan prosecutors (and businesses facing potential criminal charges from the DANY) clear directions about the factors they **must** consider when making charging decisions.

- **. . . But Not Fully In Line:** As discussed below with respect to privilege waivers and advancement of legal fees, the DANY Guidelines include some significant departures from the Federal Principles.

[2] The Federal Principles are set forth in the United States Attorneys' Manual. They are available at: http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

- **Prosecutorial Discretion Has A Framework:** The guidelines would be superfluous if the DANY believed that every violation of law should result in criminal charges. To the contrary, the DANY Guidelines remind prosecutors that "it is a hallmark of the prosecutorial function and of the long history of [the DANY] that we exercise discretion in deciding which cases to file and which to decline to prosecute." The DANY Guidelines remind prosecutors of the unique collateral consequences that can follow from the prosecution of a business (as compared to the prosecution of an individual). In particular, factor (g) requires prosecutors to consider the potential harm that the mere filing of criminal charges – far less a conviction and penalty – may have on innocent investors and employees. Similarly, the two factors that do not find direct analogs in the Federal Principles – factors (e) and (h) – permit prosecutors to exercise particular discretion as they consider public perception and victims' views when deciding whether to prosecute.

- **Cooperation And Remediation Are Still Rewarded – If They Are Voluntary And Timely:** The DANY Guidelines describe how businesses' post-misconduct behavior can favorably (or unfavorably) influence charging decisions. Cooperation and remediation are familiar imperatives to companies looking for favorable treatment, but the DANY Guidelines should serve to remind companies that cooperation and remediation are most meaningful (in the eyes of the prosecutors) when they are proactive, voluntary and timely. Indeed, the DANY Guidelines explain that cooperation and remediation do not include "self-reporting" or investigative efforts that are compelled by subpoena, the grand jury process or otherwise by law. A company may forfeit its ability to receive full credit for cooperation and remediation if it waits too long to formulate a strategy to respond to wrongdoing.

- **A Waiver Of The Attorney-Client Privilege May Be Requested:** In what may be the most significant departure from the Federal Principles, the DANY Guidelines permit prosecutors to request that organizations waive the attorney-client privilege, attorney work product doctrine or other applicable privileges. Although the DANY Guidelines explain that such a request would require "compelling circumstances" and approval from the District Attorney or the Chief Assistant District Attorney, they do not further explain what "compelling circumstances" would support such an extraordinary request.[3] The latest iteration of the Federal Principles not only expressly bars prosecutors from making such requests, but also acknowledges that "a broad array of voices" had argued that the DOJ's earlier position – which (like the

[3] In addition (and without "compelling circumstances"), the DANY Guidelines would permit prosecutors to request an organization to waive applicable privileges if it (a) asserts that its actions were based on the advice of counsel or (b) has conducted an internal investigation in an attempt to obtain credit for cooperation, but the full recitation of the relevant facts would require the company to waive the privilege for some part of the internal investigation.

DANY Guidelines) permitted prosecutors to request privilege waivers – "promoted an environment in which [privilege] protections are being unfairly eroded to the detriment of all." It remains to be seen whether the DANY Guidelines will prompt a similar reaction – and how the DANY will respond.

- **Advancement Of Legal Expenses May Be Considered:** Unlike the Federal Principles, the DANY Guidelines permit prosecutors to take into account a company's decision about whether to provide for the legal expenses of its directors, officers or employees (including any of those individuals that are under indictment). The DANY Guidelines indicate that providing for such expenses would be considered unfavorably if it resulted in relevant information becoming unavailable to the investigation. In contrast, the Federal Principles – and federal law, according to the Second Circuit Court of Appeals[4] – prohibit federal prosecutors from taking into account an organization's decision to pay such expenses. Unless the conflicts are reconciled in the DOJ and DANY policies regarding privilege waiver and fee advancement, organizations subject to investigations from both entities will face difficult strategic decisions; actions (such as refusing to waive the privilege) that the federal prosecutors are prohibited from considering may weigh unfavorably in the DANY's cooperation assessment.

- **A Sign Of Things To Come?:** The issuance of the DANY Guidelines is the latest indication that the DANY will continue to take an active role in corporate investigations and prosecutions under District Attorney Vance. In his first six months in office, District Attorney Vance has formed a new unit – the Major Economic Crimes Bureau – and commenced investigations into various matters related to the causes of the recent financial crisis. Whether those investigations ultimately lead to prosecutions will be debated and decided under the new policies.

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For further information about the DANY Guidelines, the Federal Principles, or any other enforcement developments, please contact any of your regular contacts at the firm or any of our partners and counsel listed under "Securities Enforcement and White-Collar Defense" in the "Practices" section of our website (http://www.clearygottlieb.com).

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[4] See U.S. v. Stein, 541 F.3d 130 (2d Cir. 2008) (holding that prosecutors had violated indicted individuals' Sixth Amendment rights by, among other things, indicating that individuals' former employer would receive less favorable treatment if it advanced the indicted ex-employees' legal expenses).

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