

Manhattan District Attorney's Office First to Issue Guidelines for Criminal Charges Against Organizations

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by Martha B. Stolley

In a move that appears to be the first of its kind by any state prosecutor's office, on May 28, the Manhattan District Attorney's Office (the DA's Office) issued guidelines to prosecutors on the filing of criminal charges against businesses and other organizations. It has been just six months since Cyrus R. Vance, Jr. took office as District Attorney, replacing Robert M. Morgenthau, who served for 35 years. While the purported objective of the guidelines is to promote consistency and transparency in the prosecution of corporations, this represents a clear signal from the DA's Office that it will continue to scrutinize what is traditionally considered federal territory, and that it will go after "organizational malefactors" with renewed vigor.

Modeled after the federal guidelines put forth by the U.S. Department of Justice,¹ the "Considerations in Charging Organizations" are laid out in a 10-page memorandum that was circulated to all assistant district attorneys by Chief Assistant District Attorney Daniel R. Alonso.

According to the guidelines, the following factors must be considered by an assistant district attorney in determining whether to charge an organization:

- The organization's timely and voluntary disclosure of wrongdoing and the extent of the organization's cooperation with the investigation
- The seriousness and circumstances of the offense, including the extent of the harm caused or intended by the offense, both privately and to the public
- The pervasiveness of wrongdoing within the organization, including the complicity in, or the condoning of, the wrongdoing by management
- The history of misconduct by or within the organization, including prior criminal, civil, and regulatory enforcement actions against it or its principals
- The impact that the prosecution of the offense—or the decision not to prosecute—will have on the public's confidence in the fairness and evenhandedness of the criminal justice system²

¹ The federal guidelines are formally known as the "Principles of Federal Prosecution of Business Organizations."

² There is no direct analogue in the federal guidelines.

- The organization's previous efforts to address corruptive influences by means of compliance programs and the organization's remedial actions to address the present misconduct through (i) the implementation of a compliance program or the improvement of its present compliance program; (ii) the discipline, termination, and/or replacement of wrongdoers; (iii) the payment of restitution; and (iv) cooperation with relevant regulatory agencies
- The impact on and the harm and collateral consequences caused by prosecuting the organization to innocent persons who are or were part of the organization, such as shareholders, pension holders, employees, and others not personally culpable, as well as the impact on the public arising from prosecuting the organization
- The attitude and views of the victims of the misconduct
- The adequacy and feasibility of the prosecution of individuals responsible for the organization's malfeasance
- The sufficiency of remedies, such as civil or regulatory enforcement actions, in addressing the organizational malfeasance

The policy applies only where there is reasonable cause to believe that an organization could be criminally liable and subject to prosecution. Prosecution of certain types of organizations, such as financial institutions, publicly traded corporations, law firms, accounting firms, labor unions, political parties, and state or local governments, must be approved by Mr. Vance or Mr. Alonso.

Notwithstanding Mr. Alonso's comment that the guidelines do "not change what kind of crimes we will go after," the guidelines certainly indicate a renewed focus on and anticipated increase in criminal prosecutions of organizations—something Mr. Morgenthau began when he took office and carried out throughout his long tenure as District Attorney. The guidelines also reflect the influence of Mr. Alonso, a former federal prosecutor, on the DA's Office.

The Alonso memorandum signals that organizations and individuals within those organizations can expect intensified scrutiny into their business practices by the DA's Office. On the other hand, the guidelines demand, and if followed, should ensure, a degree of uniformity and transparency in the treatment of corporate wrongdoing.

The DA's Office is undoubtedly hoping to reap some of the same benefits that the federal guidelines have produced for the Department of Justice: namely, the ability to significantly increase the number of corporate criminal prosecutions that can be brought with limited resources by enticing companies to conduct full-blown internal investigations and self-disclose the results with promises of greater leniency for voluntary self-reporting and cooperation. Since self-disclosure is only one of many factors listed in the memo, it remains to be seen how much weight it will be given when the Alonso memo begins to be implemented.

The author of this LawFlash was an assistant district attorney at the Manhattan D.A.'s Office for eight years, from 1998 through 2006. Additionally, there are several partners in Morgan Lewis's New York office with lengthy tenures in supervisory positions at both the Southern and the Eastern Districts of New York U.S. Attorney's Offices.

If you have any questions regarding this LawFlash or the DA Guidelines for Criminal Charges Against Organizations, or require assistance with any other issue relating to the defense of any other government enforcement matters, please contact the author, Martha B. Stolley (212.309.6858; mstolley@morganlewis.com), or any of our white collar practitioners:

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