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BLOG

# AAG Polite Warns of Rigorous DOJ Scrutiny, Urging Companies to Beef up Compliance Programs

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The recent announcement by U.S. Deputy Attorney General Lisa Monaco of major changes in corporate enforcement policy signals a strong commitment by the Department of Justice (DOJ) to more rigorous scrutiny of prior corporate misconduct, greater focus on holding individuals accountable, and renewed emphasis on the utilization of monitorships to ensure compliance.[1] Kenneth Polite, Assistant Attorney General (AAG) for the Criminal Division, who is responsible for implementing this new policy, was recently interviewed.[2] His remarks, which focused on the "carrots and sticks" approach and the benefits of proactively implementing strong compliance programs, provide valuable guidance on what companies should expect and steps that can be taken now in order to be in the best position for addressing government investigations of alleged corporate wrongdoing.

## TAKEAWAYS FROM AAG POLITE'S INTERVIEW:

- **The framework of the new policy is modeled on a "carrots and sticks" approach**. According to Polite, the most effective way to "change the landscape and culture within the corporate environment" is to use both incentives and potential punishments to encourage companies to be more "proactive" in efforts to ensure compliance. On the "sticks" side, Polite said that companies should expect significant scrutiny and oversight both from an individual and corporate perspective, noting that "there's no greater deterrent than the exposure of an individual to jail time." On the "carrots" side, Polite said that cooperation is "critical" and in the context of a question regarding non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs), he highlighted the value of rewarding companies and people "making the right decisions."
- **Companies should be proactive and take affirmative steps to ensure the strength and effectiveness of their compliance programs.** Polite warned that scrutiny of corporate compliance programs will be "very rigorous." He stated that there would be "significant rewards" for organizations that are proactive now, properly resource their compliance programs, and give compliance personnel the power to actually be independent. Accordingly, taking steps now to ensure a strong and effective compliance program, as well as prompt remediation where issues are discovered, will go a long way if an organization finds itself within the crosshairs of the government. Doing so increases the likelihood of achieving a favorable resolution of a government investigation, including one that does not involve the increased costs of a monitorship.

- **A return to the Yates Memo disclosure requirements.** The new policy makes clear that companies are now expected to provide information related to "all individuals involved," an original requirement under the Yates Memo, as opposed to only those individuals that were "substantially involved" in the misconduct, which had been the requirement under the Trump administration. Simply put, companies seeking cooperation credit are now expected to give prosecutors the "full universe of individuals" involved in the misconduct.
- **Greater use of data analysis tools to detect fraud and to evaluate compliance programs.** The government is being proactive about getting investigators the resources they need, such as data analysis tools, which will be used to identify potential targets and to evaluate compliance programs. Polite commented that the quality of compliance programs will be evaluated on the front end based on an assessment of (i) the maturity of the program, (ii) the adequacy and rigor of the program, and (iii) the independence of the program. On the back end, such as after a company enters into an NPA or a DPA, the government will be analyzing and evaluating data from compliance reports and providing feedback.
- **Prosecutors will consider all prior misconduct in evaluating the proper resolution.** Polite stated that prosecutors will no longer be required to narrow their consideration to "related" misconduct and will now be given "discretion to consider the full breadth of misconduct." Polite made clear, however, that "not everything is going to be weighted the same," and prosecutors will evaluate the prior misconduct based on factors such as (i) the involvement of leadership, (ii) whether the same individuals were involved in prior misconduct, (iii) the pervasiveness of the misconduct, (iv) the recency of the prior misconduct, and (v) the similarity of the prior misconduct to the conduct currently under scrutiny.
- **Monitorships may be costly, but they are appropriate and effective in certain circumstances.** Polite explained that in determining whether a corporate resolution should include a monitorship, the cost of the monitorship is an important consideration, and monitorships should be narrowly tailored to the misconduct in question. It is also important to consider whether the existing compliance program is "rigorous enough" and "tested enough" to be effective. Polite wants to send a message that the imposition of a monitor empowers the compliance function, which is important where existing compliance programs do not meet expectations.

If you have additional questions or need further assistance, please reach out to the authors of this article or your Winston & Strawn relationship attorney.

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[1] "DOJ Announces Major Changes in Corporate Enforcement Policies," Oct. 29, 2021, available at https://www.winston.com/en/thought-leadership/doj-announces-major-changes-in-corporate-enforcement-policies.html.

[2] "New DOJ Crime Chief Talks 'Carrot And Stick' Enforcement," Dec. 8, 2021, available at https://www.law360.com/articles/1447069/new-doj-crime-chief-talks-carrot-and-stick-enforcement.

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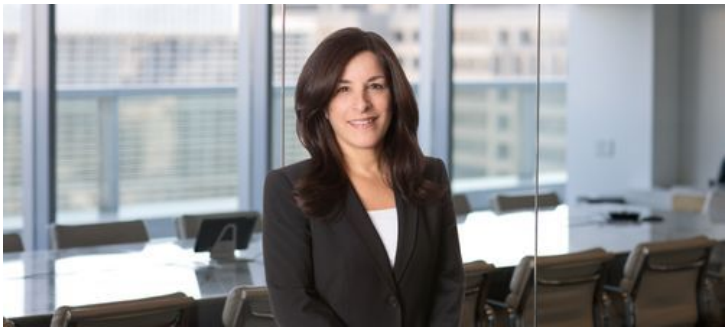

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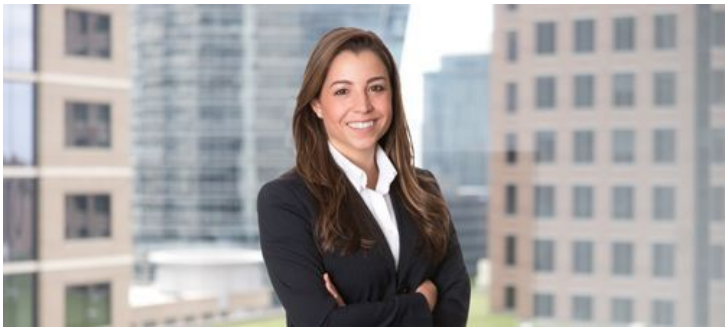

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