New DOJ Crime Chief Talks 'Carrot And Stick' Enforcement

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Law360 (December 8, 2021, 4:57 PM EST) -- As the federal government ramps up its anti-corruption and white-collar enforcement efforts, U.S. Department of Justice Criminal Division chief Kenneth Polite has a clear message for corporations: Beef up your compliance programs before he comes knocking.
Law360 sat down with the former New Orleans U.S. attorney and ex-Morgan Lewis & Bockius LLP partner to discuss how the Justice Department is buckling down on corporate malfeasance, cybercrime and global corruption. The onetime Entergy Corp. compliance chief says that from his perspective, the administration's new get-tough policy isn't all sticks and no carrots.

"As someone who has been in their shoes, they should understand that my scrutiny is going to be very rigorous," Polite said of compliance officers. "I'm not trying to scare people. But I'm trying to highlight that if you are proactive now, and you properly resource these programs, and you give them the power to actually be independent, there will be significant rewards for your organization."

Polite is tasked with carrying out a corporate enforcement policy shakeup unveiled by Deputy Attorney General Lisa Monaco in October. That includes sweeping scrutiny of prior misconduct, a wider net for individuals potentially involved in malfeasance, and a renewed emphasis on monitorships.

The Justice Department's commitment to policing corporate crime has been unwavering, according to Polite. But under President Joe Biden, the government is being proactive about getting investigators the resources they need, particularly data analysis tools to better detect fraud and evaluate compliance programs.

"When we talk about using data as a basis for not just the way we investigate cases, but the way we identify potential targets of cases, has this administration started to lean in more than in the past? I think that's the case," Polite said.

This is the first of three excerpts from Law360's exclusive sitdown with Polite at Main Justice. The interview has been edited for length and clarity.

The Monaco memo has been getting a ton of attention. Do you see this as a return to the enforcement standards spelled out in the Yates memo under the Obama administration, an expansion upon that, or a bit of both?

If we're talking specifically about the issue of cooperation and what it means to provide information related to "substantially involved" versus "all individuals involved," it is certainly a return to the Yates memo.

Prior to the Yates memo, one of the factors we might consider in evaluating cooperation was providing information related to relevant actors. Under the Yates memo, that became more of a linchpin requirement in order for a corporation to get cooperation credit. [Former Assistant Attorney General Rod Rosenstein] added the "substantially involved" piece, and our [deputy attorney general] is returning back to the previous standard.

In practice, I'm not sure if it's made a substantial difference in the way that outside counsel evaluates what information to provide to us. What we are trying to flag is, you are not in the best position to evaluate who's substantially involved or not — there's information that we might have that indicates to us which individuals could be helpful to our case.

Having the full breadth of all individuals that you've identified as being involved in misconduct is always helpful to our investigations, and frankly, is expected now. I'm not sure if it's going to make a big difference in terms of work necessary as part of an internal investigation. In order to decide who's substantially involved, you have to also evaluate who's less substantially involved. So you already have the full universe of individuals. We're asking you to give us that whole universe.

Can you elaborate on why the department thinks it's important to increase the expectations for corporate defendants on cooperation?

The framework that we think about involves both incentives and potential punishments. It's carrots and sticks. It's trying to use both of those levers to encourage more companies to be proactive, because, from my perspective, that's the most effective way for us to actually change the landscape and the culture within the corporate environment.

There's more of the carrot side — be more proactive — and on the stick side, if you do ultimately come within the crosshairs of the government, there's going to be significant oversight. There's going to be significant scrutiny of your actions, both from an individual perspective as well as from a corporate perspective. So trying to moderate and modulate those levers of carrots and sticks is really where we're trying to do better.

There can be tension between encouraging self-reporting and tightening up cooperation standards, and heightening requirements for non-prosecution agreements and deferred prosecution agreements. How do you balance that?

I don't view them as being in tension with one another. And maybe that's just because of my background of being in-house as a chief compliance officer. But carrots and sticks, they're both important. In order to really change corporate culture or activity by individuals, you need to have the deterrent effect of punishments. But you also need to lift up where people are doing it right. You need to make sure that we are elevating examples of people who are actually making the right decisions and being rewarded for that. And so that's where the cooperation piece is critical.

Can you speak a little more about the ways that the department has been evaluating compliance programs lately? It seems there's a greater emphasis on data.
It's been eye-opening to see how much sophisticated experience we have in this space. Coming in as a former chief compliance officer, I was kind of expecting to be one of the few people here who has real-world experience in that space. But we actually have a whole unit of folks who have that experience.

Primarily, that function falls within a group in the Fraud Section called the Corporate Enforcement, Compliance and Policy Unit. They're the individuals evaluating the quality of your compliance program — its maturity, what type of testing, what type of rigor you have in place, what degree of independence you have. That unit is pretty sophisticated in its experience evaluating compliance programs on the front end.

And then on the back end — when we're talking about monitorships, or self-reporting, or enhanced self-reporting, any number of ways that we exercise oversight on the back end of NPAs and DPAs — that same group receives compliance reports from corporations. They're evaluating those reports, all the information that's coming in. They're giving feedback. They're having a dialogue with companies on follow-up questions that might come up.

How do you feel your compliance and in-house experience will help you in this role?

During my time as U.S. attorney in New Orleans, we happened to be the one jurisdiction that had not one, but two consent decrees in place, both for the New Orleans Police Department as well as for the parish prison there.

Being there on the ground, having experience with all the stakeholders that are in play in those types of arrangements, I'm mindful of the benefit of them. I'm also very mindful of the costs that are often associated with monitors. Both of those considerations are, frankly, the touch points of how we evaluate whether a monitorship is appropriate when we consider our resolutions for companies.

One of the most common criticisms of monitorships is that they're costly and onerous, but some claim they lead to a lot of paper changing hands and billable hours for firms without actually accomplishing a whole lot. How would you respond to that?

I think companies act at their own peril if they decide to ignore the obligations imposed by those agreements and by those monitorships. We have seen some recent examples of companies that we have notified of breaches of those agreements, and those will carry very significant exposure for those organizations.

In terms of the costliness, that is certainly an important consideration for me. When we're trying to decide whether a monitorship is appropriate, it's always narrowly tailored to the misconduct in question. And what we're ultimately trying to decide is whether this compliance program that's in place is mature enough. Is it rigorous enough? Is it tested enough to actually ensure that it will get some results from that program?

If a resolution is now in place, but you just hired your first chief compliance officer a month ago and you're just standing up a compliance program, that's great remediation, but a monitorship is probably appropriate because we have no assurance that it's actually going to be effective.

Evaluating whether this is a properly tested compliance program is what we're trying to do. Having been in the trenches of a compliance program, I know that those folks are always advocating for resources. They want to be able to share information and have access to the information. They don't want to be siloed within an organization, and they want to have the independence to report out if they actually find some problems in place.

Take the steps to do that now, as opposed to waiting until DOJ tells you that you have to do that, because it's probably going to be costlier. And you're probably not going to enjoy the fact that there's somebody now standing over your shoulder watching you.

And from that perspective, the imposition of a monitor means you're empowering those compliance people.

That's exactly the message that I've been trying to deliver. And I want to reiterate to compliance folks here, as someone who has been in their shoes, they should understand that my scrutiny is going to be very rigorous. I'm not trying to scare people. But I'm trying to highlight that if you are proactive now, and you properly resource these programs, and you give them the power to actually be independent, there will be significant rewards for your organization.

Monaco's policy of toughening up on corporate recidivism takes an expansive view of past misconduct, and that's caused some concern among the defense bar. Can you describe how the department is going to evaluate corporate rap sheets?

When we're looking at lists of prior misconduct; not everything is going to be weighted the same. Our trial attorneys have the discretion to evaluate them accordingly, based on factors such as the involvement of leadership. Are the same individuals involved in misconduct? It would be a bad sign if you haven't removed those individuals from their roles. The pervasiveness across the organization, is it isolated to one geography or occurring across the organization? The recency of it.

And then, is it analogous to the conduct in question right now?

Those are the types of factors that we're going to be considering. It's not an entire list, but that's the same type of thing we do when we sentence individuals. If a defendant is in front of me for a bribery charge and they haven't had misconduct for years, and it goes back to when they were a teenager, and it was completely unrelated to this misconduct, maybe I'm considering it a little bit. But is it going to be the most significant thing? Maybe not.

It's the same thing for a corporation. There was a $5,000 customs fine from 15 years ago, and now we're trying to evaluate an FCPA resolution. Is that customs fine from 15 years ago going to be the most significant issue for us? Probably not. But if five years ago there was an FCPA resolution involving your same function, also in the same country, and you made no changes to the compliance program as a result of that last resolution, that's going to carry more significance in terms of how you get hit this time.

Was this something that you guys were considering even before this policy? Were you already kind of assembling rap sheets?

Yes. I think that that's fair, that it was often part of the information that we gathered as part of our investigation, the due diligence that we were doing. The language of the Corporate Enforcement Policy talked about us explicitly considering related misconduct, so we're removing that "related" misconduct and giving our trial attorneys discretion to consider the full breadth of misconduct in evaluating the proper resolution.

Defense counsel have expressed concern that under the new recidivism policy, they're not sure what to tell clients when they're considering whether to report something. There is concern that tougher standards make companies more leery of self-reporting misconduct. What's your response to those concerns?

I would still err on the side of advising clients to come forward in making the self-disclosures. I'm not sure if it really changes the calculus too much for most folks.

It's only been a couple months since [this policy] was announced. I think one of the critical additional pieces of the announcement was the establishment of the corporate crime advisory group, which is made up of a membership of folks across the entire department that are involved in corporate resolutions. But I think we'll also be very mindful of including the voices of folks that have these concerns, and as we're seeing it play out, that group will consider additional changes or modifications of the way that we make enforcement decisions.
Prosecuting individual white-collar defendants has been a consistent priority across administrations, but it's in many ways more risky and time-consuming than going for corporate resolutions. Can you speak to the value of individual prosecutions and how you balance the risks they carry?

There is always some litigation risk if you decide to go to trial or make a decision to actually charge individuals or corporations. In my view, and I know that our DAG and our AG share this view, there's no greater deterrent than the exposure of an individual to jail time. So it is absolutely important for that to always be part of the consideration of our enforcement of a potential resolution — even if it carries with it litigation risk, even if it means us spending additional time on the investigative side.

If it means us spending the resources to actually identify potential cooperators and working with a foreign law enforcement partners to get access to documents that we otherwise can't, that ultimately bears fruit. Because again, the deterrence we get from a potential conviction of an individual, particularly a senior executive — there's nothing like it.

Do you think there's an overarching shift occurring in the department's attitude toward corporate enforcement under this administration compared to the previous one?

It's important to highlight that the folks who are responsible for investigating and prosecuting these cases are not the AAGs. They're the career trial attorneys that have been here in the Department of Justice for years, if not decades, and their emphasis on this space has been unwavering.

What [the administration has] looked at is, perhaps, their requests for additional resources. So, for example, when we talk about using data as a basis for not just the way we investigate cases, but the way we identify potential targets of cases, has this administration started to lean in more than in the past? I think that's the case.

We're seeing some greater coordination with law enforcement and fighting for them and being receptive to the need to have dedicated agents working with certain units like our fraud unit, day to day, shoulder to shoulder. I think you're seeing some shift to that. We've been fortunate to see our department leadership embrace that as well. But frankly, I think corporate enforcement has remained a very high priority for our career prosecutors regardless of political winds.

--Editing by Philip Shea.