

Client Alert: DOJ Clarifies Monitorship Factors and Monitor Selection Considerations

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In March 2023, Assistant Attorney General (AAG) Kenneth A. Polite, Jr. issued a memorandum (the Polite Memorandum) and delivered a speech clarifying and compiling several recent revisions to the Department of Justice's (DOJ) policies and practices on the selection of monitors in Criminal Division matters. As the Polite Memorandum explains, DOJ sought to clarify and update the following four points:

1. In resolving a criminal investigation, prosecutors should apply no presumption for or against monitors, and should consider ten non-exhaustive factors when assessing the need for, and potential benefits of, a monitor;
2. The qualifications and requirements for the named monitor also apply to the monitor's team;
3. Monitor selections are and will be made in keeping with DOJ's commitment to diversity, equity, and inclusion; and
4. The cooling off period for monitors is now not less than three years from the date of termination of the monitorship, up from two years.

We discuss each of these points in turn.

1. Driving principles for determining the need for a monitor

The Polite Memorandum's instruction not to apply a presumption for or against monitors reflects policy changes made by the Biden Administration after 2018 guidance from Trump Administration AAG Brian Benczkowski^[1] was widely interpreted to suggest monitorships would be disfavored. Specifically, in October 2021, Deputy Attorney General (DAG) Lisa Monaco gave a speech^[2] and issued a memorandum^[3] in which she distinguished and explained that the 2018 DOJ monitorship guidance^[4] was rescinded "[t]o the extent that [it] suggested that monitorships are disfavored or are the exception."^[5] She further clarified that "there is no default presumption against corporate monitors," and that decision to require a monitor "will be made by the facts and circumstances of

each case.”^[6] In September 2022, DAG Monaco issued a memorandum (the 2022 Memorandum) reiterating that point—DOJ “will not apply any general presumption against requiring an independent compliance monitor . . . as part of a corporate criminal resolution, nor will they apply any presumption in favor of imposing one. Rather, the need for a monitor and the scope of any monitorship must depend on the facts and circumstances of the particular case.”^[7]

In this month’s speech^[8] and memorandum,^[9] AAG Polite compiled this more recent guidance into a comprehensive policy, again clarifying that “prosecutors should not apply presumptions for or against monitors and should consider ten non-exhaustive factors when assessing the need for, and potential benefits of, a monitor.”^[10] Those factors are:

1. Whether the corporation voluntarily self-disclosed the underlying misconduct in a manner that satisfies the particular DOJ component’s voluntary self-disclosure policy;
2. Whether, at the time of the resolution and after a thorough risk assessment, the corporation has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future;
3. Whether, at the time of the resolution, the corporation has adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future;
4. Whether the underlying criminal conduct was long-lasting or pervasive across the business organization or was approved, facilitated, or ignored by senior management, executives, or directors (including by means of a corporate culture that tolerated risky behavior or misconduct, or did not encourage open discussion and reporting of possible risks and concerns);
5. Whether the underlying criminal conduct involved the exploitation of an inadequate compliance program or system of internal controls;
6. Whether the underlying criminal conduct involved active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags;
7. Whether the corporation took adequate investigative or remedial measures to address the underlying criminal conduct, including, where appropriate, the termination of business relationships and practices that contributed to the criminal conduct, and discipline or termination of personnel involved, including with respect to those with supervisory, management, or oversight responsibilities for the misconduct;
8. Whether, at the time of the resolution, the corporation’s risk profile has substantially changed, such that the risk of recurrence of the misconduct is minimal or nonexistent;

9. Whether the corporation faces any unique risks or compliance challenges, including with respect to the particular region or business sector in which the corporation operates or the nature of the corporation's customers; and
10. Whether and the extent to which the corporation is subject to oversight from industry regulators or is receiving a monitor from another domestic or foreign enforcement authority or regulator.^[11]

Most of the factors are not an articulation of new DOJ policy but rather clarify and formalize older DOJ guidance, including from the 2018 Benczkowski Memorandum.^[12] Likewise, the Polite Memorandum lists as the first factor whether a corporate defendant has voluntarily disclosed misconduct. Consistent with the importance placed on self-reporting in DAG Monaco's September 2022 memorandum, DOJ announced a new Voluntary Self-Disclosure Policy on February 22, 2023 that applies to investigations conducted by all United States Attorney's Offices. The policy is a further attempt by DOJ to incentivize companies to maintain effective compliance programs, disclose and remediate misconduct, and cooperate with the government in corporate criminal investigations.

2. Selection requirements apply to monitor teams, in addition to the titular monitor

The policy also clarifies that the term monitor "signifies both the leader of the monitorship team and the entire team." Although that clarification was not the focus of AAG Polite's speech or memorandum, it is significant nonetheless.^[13] In stating that that "many of the requirements for monitors apply to monitor teams,"^[14] AAG Polite's memorandum provides an explicit recognition and appreciation the titular monitor is supported by a team that helps the monitor carry out their mandate. DOJ intends to ensure that those teams follow its policies and guidance, including, as described below, its commitment to diversity, equity, and inclusion, and bars on working for the monitored entity following the conclusion of a monitorship.

3. Continuing commitment to diversity, equity, and inclusion in selecting monitors

AAG Polite stated that DOJ's policy announcement "makes explicit what has been the case the last several years – that any submission of a monitor candidate by the company and selection of a monitor candidate by the Criminal Division should be made in keeping with the department's commitment to diversity, equity, and inclusion."^[15] This builds off of DOJ's earlier guidance.^[16] And in line with the above-described clarification, the commitment to diversity, equity, and inclusion in selecting monitors will be considered in light of the entire monitorship team and not just the named monitor.

The policy also clarified that "[c]orporate defendants should also expect that corporate resolution agreements themselves—whether guilty pleas, deferred prosecution agreements, or non-prosecution agreements that contemplate selection and imposition of a monitor team—specify this [diversity, equity, and inclusion] requirement and commitment," highlighting the inclusion of such a

commitment in four recent corporate resolution agreements.^[17] When nominating monitor candidates to DOJ, companies should be cognizant to focus on this selection criteria.

4. Extended cooling off period

AAG Polite also clarified that the cooling off period—the period in which a monitored company “will not employ or be affiliated with the monitor, the monitor’s firm, or any of the personnel or entities assisting in the monitorship”—will now be a period of not less than three years from the date of monitorship instead of the previous two year restriction.^[18] This clarification is notable, and goes hand-in-hand with the second update, in that DOJ now uses the term “monitor” to “signif[y] both the leader of the monitorship team and the entire team.”^[19] Consistent with prior guidance,^[20] monitored companies must certify that it will adhere to the three-year cooling off period, while all monitor candidates must certify that the monitor candidate, the monitor candidate’s firm, and any personnel or entities will adhere to the three-year cooling off period unless there is prior written consent of the AAG of the Criminal Division.^[21] Taken together, DOJ makes clear it wants to guard against any potential revolving door between monitorship teams—nominated and selected—and monitored entities to avoid the appearance of impropriety and to increase the public’s trust.

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AAG Polite’s speech and memorandum reflects DOJ’s continued effort to demystify monitorships, including why monitorships are required and how monitors are selected. Although this latest memorandum does not represent a dramatic shift in policy toward monitorships, the rearticulation and clarification of DOJ’s practices into a comprehensive framework is meaningful guidance for corporate entities who are facing a potential monitorship in a criminal resolution. The Polite Memorandum also provides important considerations for identifying monitor candidates and their teams, consistent with DOJ’s broader focus on clearly articulating expectations and guidelines for corporate defendants.

Footnotes

[1] Memorandum from the Assistant Attorney General re: “Selection of Monitors in Criminal Division Matters” (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download> (Hereinafter October 2018 Memorandum).

[2] DOJ, “Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA’s 36th National Institute on White Collar Crime” (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute> (Hereinafter Monaco October 2021 Address).

[3] Memorandum from the Deputy Attorney General re: “Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies” (Oct. 28, 2021),

<https://www.justice.gov/dag/page/file/1445106/download> (Hereinafter October 2021 Memorandum)

[4] *See* October 2018 Memorandum.

[5] Monaco October 2021 Address.

[6] *Id.*

[7] Memorandum from the Deputy Attorney General re: “Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group” (September 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>, at 11-12 (Hereinafter September 2022 Memorandum).

[8] DOJ, “Assistant Attorney General Kenneth A. Polite, Jr. Delivers Keynote at the ABA’s 38th Annual National Institute on White Collar Crime” (Mar. 3, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national> (Hereinafter Polite March 2023 Keynote).

[9] Memorandum from the Assistant Attorney General re: “Revised Memorandum on Selection of Monitors in Criminal Division Matters” (Mar. 1, 2023), <https://www.justice.gov/criminal-fraud/file/1100366/download> (Hereinafter March 2023 Memorandum).

[10] March 2023 Memorandum at 2.

[11] March 2023 Memorandum at 2-3.

[12] *See* October 2018 Memorandum at 2.

[13] March 2023 Memorandum at 4 n.4.

[14] March 2023 Memorandum at 2.

[15] Polite March 2023 Keynote; *see also* March 2023 Memorandum at 6.

[16] September 2022 Memorandum at 13.

[17] March 2023 Memorandum at 6.

[18] March 2023 Memorandum at 2, 6.

[19] *Id.* at 4 n.4

[20] *See* October 2018 Memorandum at 5.

[21] March 2023 Memorandum at 6.

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