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DOJ Corporate Enforcement Policy Revisions Target Executive Compensation, Following Multi-Agency Trend

On March 2, 2023 and March 3, 2023, in a pair of speeches by Deputy Attorney General (DAG) Lisa Monaco and Criminal Division Assistant Attorney General (AAG) Kenneth Polite, the U.S. Department of Justice (DOJ) announced revisions to its corporate enforcement policy. The changes tie corporate wrongdoing to executive compensation through a two-pronged approach: (1) mandating that companies that enter into agreements to resolve criminal allegations adopt prospective compliance-related criteria in their compensation and bonus structures and (2) offering fine reductions to companies that attempt to claw back compensation from individual wrongdoers.

This alert provides an overview of the policy changes. It also situates the changes within the Justice Department's—and the government's—evolving approach to monetary consequences for corporate wrongdoing, then concludes with compliance- and compensation-related takeaways.

DEPUTY ATTORNEY GENERAL MONACO'S SPEECH

The DOJ announced the rollout of the revised Corporate Disclosure Policy in a [speech](#) delivered by DAG Monaco, who framed the Department's efforts to promote a "culture of corporate compliance" as including a focus on both timely, voluntary self-disclosure and retooling company compensation programs to incentivize good corporate behavior.

On the former, DAG Monaco's emphasis on timely, voluntary self-disclosure reiterated the priorities outlined in the Department's overhaul of corporate enforcement policies [announced](#) in September 2022. She provided an update on efforts to ensure that voluntary self-disclosure is reflected in the enforcement policies applicable to each of the various divisions in the DOJ and across every U.S. Attorney's Office. DAG Monaco also reemphasized that the Department considers prompt self-disclosure key to a favorable resolution. She explained that absent aggravating circumstances, no DOJ component will seek a guilty plea from a company that has voluntarily self-disclosed, cooperated, and remediated the misconduct.

On the latter, DAG Monaco advocated that executives and employees should be individually incentivized to promote compliance. Linking



compliance to financial incentives, she explained, means that executives and employees “hav[e] skin in the game.” From her perspective, the policy change reallocates the costs of corporate wrongdoing from uninvolved shareholders to the people more directly responsible for the harm.

As mentioned above, the DOJ announced two specific policy changes to actualize its goals of tying corporate misconduct to financial compensation for executives and employees.

First, the Department announced that corporate criminal resolutions will now require companies to implement compliance-promoting criteria within their compensation and bonus systems. Pointing to last year’s [Danske Bank \\$2 billion criminal settlement](#), DAG Monaco noted that the Department has already begun rolling out such an approach to resolutions. Specifically, as part of the Danske Bank money laundering-related resolution, the company agreed to include compliance-related criteria in its bonus and performance review systems. Danske Bank’s [plea agreement](#) obligates it to evaluate each executive based on what actions are taken to ensure that aspects of the business within their purview are consistent with the company’s compliance program and any applicable laws and regulations. When executives fail to satisfy the criteria, they become ineligible for their annual bonus.

Second, the DOJ announced that it will offer fine reductions to corporations that attempt to claw back compensation from employees who engaged in wrongdoing and supervisors who knew or were willfully blind to the misconduct. The DOJ will allow companies to keep compensation that they are able to recover, and it will reduce fines for companies that attempt to claw back compensation if the attempt is made in good faith. The DOJ will require companies to pay their fine at the time of the resolution, minus a reserved credit for the amount of money the company is attempting to claw back from corporate wrongdoers. In making this point, DAG Monaco noted feedback from stakeholders about the expense and challenge corporations face in pursuing clawbacks—suggesting that the pilot program’s partial credit for attempted clawbacks is, at least in part, a response to that feedback.

In concluding her speech, DAG Monaco discussed links between corporate crime and national security, promising more resources to the DOJ’s National Security Division and emphasizing the Department’s interest in national security-related compliance. She also reiterated the DOJ’s focus on individual accountability.

ASSISTANT ATTORNEY GENERAL POLITE’S SPEECH

On March 3, 2023, the DOJ elaborated on DAG Monaco’s statements from the prior day and, in addition, announced that it would be revising its guidance in the Evaluation of Corporate Compliance Programs in two ways: one related to data retention, and the other to compensation.

In his [speech](#) outlining those changes, AAG Polite addressed the Department’s interest in how corporations preserve and access business-related electronic data and communications—a key point in the January 2023 [revisions](#) to the criminal division’s corporate enforcement and voluntary self-disclosure policy. Perhaps recognizing that storing and accessing electronic data, including third-party messaging applications, can be complicated and not easily susceptible to a one-size-fits-all approach, AAG Polite explained that prosecutors will evaluate whether these policies are tailored to the corporation’s needs, communicated to employees, and consistently enforced. He also hinted that prosecutors will be persistent with corporations that fail to produce communications from third-party messaging applications, suggesting that prosecutors may ask for specific answers about a corporation’s ability to access those communications, where they are stored, and what privacy laws govern their access.

AAG Polite then turned to the compensation-related policy changes. In accordance with the January 2023 revisions, he reiterated that while determining the terms of a resolution, prosecutors are instructed to closely monitor compensation structures as part of their assessment of a corporation’s compliance program. AAG Polite then turned to the Department’s pilot program, as announced by DAG Monaco the day before, that will (1) require as part of criminal settlements that corporate compliance programs include prospective compensation-related criteria and (2) offer fine reductions for companies that try to claw back compensation for past wrongdoing.

AAG Polite provided additional details to DAG Monaco’s announcement in two respects. First, he noted that many of the compensation-related changes outlined in DAG Monaco’s speech are commencing as part of a three-year pilot program.



Second, he noted that companies that fully cooperate and remediate wrongdoing may receive additional fine reductions if those companies implement programs to recoup compensation and exercise those programs in good faith. Companies that succeed in clawing back compensation get to keep the recovered money, plus they receive a dollar-for-dollar reduction in their fine amount. And companies that are unsuccessful in clawing back compensation during the term of the settlement agreement nonetheless may be awarded a fine reduction of up to 25% of the amount they sought to claw back.

MULTI-AGENCY TRENDS IN CORPORATE ENFORCEMENT & POLICIES ON EXECUTIVE COMPENSATION

The DOJ's new policy reflects a trend among federal enforcement authorities to hold individual executives financially responsible for corporate wrongdoing.

The DOJ gave this issue renewed attention in September 2022, when it published a memorandum (the Monaco memo) revising its corporate criminal enforcement policies. Among the changes to those policies, DAG Monaco instructed prosecutors evaluating the effectiveness of a company's compliance program to assess whether it has both financial penalties and financial incentives to promote compliance. On penalties, the Monaco memo offered that compensation clawback provisions and escrow of compensation might be mechanisms for organizations to consider in addressing executive and employee misconduct. As for incentives, the memo suggested that compliance metrics be incorporated into compensation calculations and performance reviews to tie executive compensation to compliant behavior. The Monaco memo also provided that prosecutors will weigh these factors—among others—in determining the terms of a resolution, including the need for a compliance monitor.

The DOJ is not the only governmental entity focused on executive consequences for corporate wrongdoing. In September 2022, the U.S. Securities and Exchange Commission (SEC) announced a similar enforcement priority: that the SEC would use the Sarbanes-Oxley Act as a vehicle to claw back compensation bonuses and stock sale profits from certain executives following misconduct at their firms.

The U.S. Department of Health and Human Services (HHS) also relies on compensation clawbacks to address corporate misconduct—and has been doing so for over a decade. The HHS's Office of the Inspector General (OIG) negotiates corporate integrity agreements (CIAs) with health care providers and other corporate entities during settlements of civil false claims statutes. Clawbacks of compensation from executives involved in significant misconduct—or provisions allowing clawbacks in connection with future misconduct—are now part and parcel of those agreements.

Commentators have observed that the government's evolving approach to corporate criminal misconduct risks influencing executive behavior in undesirable ways. Senior executives may not be incentivized to go above and beyond industry requirements to invest more in internal controls and staff to detect misconduct by others if they will be held accountable for every misstep by subordinates in divisions under their ultimate supervision. They might also have less appetite to pursue beneficial strategies that carry any legal risk traceable back to them. Critics point out that these changes may burden shareholders—who, according to DAG Monaco, the DOJ's proposed policy changes are intended to help.

INSIGHTS FROM PRACTICE AND KEY TAKEAWAYS

Through its focus on clawback and compensation practices, the DOJ is employing concepts that have been operationalized by other enforcement agencies, such as HHS, for over a decade.

Similarly, though the DOJ announcements on March 2 and 3, 2023, formalized certain new policies, we have observed these changes already being implemented by the Department for at least several months. The DOJ has active investigations in which it has been requesting documents from companies about how those companies structure compensation and incentives and how compliance may factor into awarding compensation to employees. In other instances, while negotiating resolutions, the Department has also been scrutinizing bonus and compensation policies for evidence of compliance-related criteria.



Still, the DOJ's recent announcements cement the importance of proactively assessing corporate compliance programs before an investigation begins. Corporations benefit from taking a fresh eye to their compliance program—especially by examining current compensation structures to consider whether they reflect the specific strategies and values that the DOJ has encouraged over the past two years. Of course, executive compensation decisions are often technical, can be difficult to navigate contractually, and by definition would have to be individualized to each company or executive. But a company may have options available to it that advance its business objectives while also reducing the potential for friction in future interactions with the DOJ.

Finally, it remains to be seen how the policy updates will affect corporate appetite for clawbacks. To attract and retain top talent, many companies have generous policies regarding fee advancement and indemnification. Practically speaking, this means that corporations are often contractually obligated to fund executives' legal fees throughout an attempted clawback process. Although partial fine reduction may alleviate those burdens, fine reductions are subject to significant limits. They are available only to companies the DOJ deems fully cooperative and where a clawback was pursued in a manner the DOJ deems of sufficient good faith. Even then, prosecutors have discretion as to the percent by which the fine will be reduced, up to a 25% reduction for an unsuccessful effort—only a portion of the likely expense to the company. Those variables make it difficult for a company and its legal counsel to gauge whether and to what extent it will be advantaged by pursuing a clawback of an employee's compensation.

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