

DOJ Announces Significant Changes to Corporate Enforcement Policies & Other Highlights from the ABA 38th Annual National Institute on White Collar Crime

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The 38th Annual National Institute on White Collar Crime, hosted by the American Bar Association, took place in Miami from March 1 through March 3, 2023. The conference featured speakers from across the nation, including officials from the Department of Justice (DOJ), Securities and Exchange Commission (SEC) and Commodities and Futures Trading Commission (CFTC), as well as members of the white collar defense bar, and senior legal and compliance officers from several multinational corporations.

Intensified Focus on Corporate Compliance Dominates DOJ Keynote Speeches

Deputy Attorney General Lisa Monaco and Assistant Attorney General Kenneth Polite, Jr. both delivered keynote speeches at the conference. Their remarks focused largely on the DOJ's endeavors to incentivize corporate compliance and also referenced department successes, goals and the necessity for working closely with both national and international partners. Additionally, they both highlighted recent significant changes in DOJ policies.

Increased Incentives for Self-Disclosure

Both Monaco and Polite addressed the stepped-up efforts to curb corporate misconduct embodied in the [DOJ's January 17, 2023 change to its Corporate Enforcement Policy \(CEP\)](#) as well as [the United States Attorneys' Offices \(USAO\) Voluntary Self-Disclosure Policy](#) released on February 24, 2023. The CEP, which applies to all corporate criminal matters handled by the Criminal Division, and the USAO Policy, which applies to all USAOs nationwide, creates new incentives to entice corporations to voluntarily self-disclose misconduct. For example, if a corporation voluntarily self-discloses, cooperates with prosecutors and remediates, there will be a presumption of declination absent aggravating circumstances. Additionally, even where there are aggravating circumstances that would eliminate the presumption,¹ prosecutors may determine that a declination is still appropriate if the corporation (1) "immediately" self-discloses misconduct, (2) had a robust compliance program at the time of the misconduct and (3) engages in "extraordinary" cooperation and remediation efforts.

Despite emphasizing the importance of "immediate" self-disclosure and "extraordinary" efforts to cooperate with the government, neither Monaco nor Polite offered any guidance as to how the DOJ would evaluate whether a corporation met those standards. Nonetheless, both warned that failure to satisfy these factors may result in more severe consequences.

New Pilot Program for Corporate Compensation

Monaco and Polite also addressed the [DOJ's new three-year pilot program regarding corporate compensation incentives and clawbacks](#). Under the pilot program, the DOJ will require companies, prior to any resolution with the criminal division, to enact compensation and bonus programs that incentivize compliance and impose concrete penalties on the wrongdoers within the company.

¹ Aggravating circumstances include, among others, misconduct that (1) involves current executive management of the corporation, (2) is "deeply pervasive" at the corporation or (3) presents a serious threat to national security, public health or the environment. See [USAO Policy](#) at 4.

Further, Monaco and Polite both stated that in order to encourage compliance, companies being prosecuted will receive reduced fines if they enact compliance programs with compensation clawbacks for executives and non-executive employees found responsible for wrongdoing. Companies that seek to claw back compensation from corporate wrongdoers may obtain a reduction in penalties and fines. Monaco and Polite acknowledged the challenges associated with seeking to claw back compensation from a wrongdoer and noted that if a company has made good-faith attempts to claw back compensation but is unsuccessful, it would still be eligible to receive a fine reduction up to 25 percent of the amount of compensation the company attempted to claw back.

Significant Changes to ECCP

Building on the comments regarding the new CEP, Polite also reported [changes to the criteria set forth in the Evaluation of Corporate Compliance Programs \(ECCP\)](#), which is a set of guidelines the DOJ uses to assist in making decisions relating to prosecuting corporations. As part of the new ECCP revisions, the DOJ will now take into account a corporation's consequence management procedures (meaning the procedures in place to identify, investigate and remediate violations) and whether the corporation is tracking data relating to disciplinary actions to determine the efficacy and deterrence impact amongst its employees. Additionally, the DOJ will now consider whether a corporation's compensation structure incentivizes compliance and disincentivizes risky behavior.

Another new provision relates to a corporation's policies and procedures regarding the use of personal devices, communications platforms, and messaging applications, with a particular focus on ephemeral messaging applications. As part of its new criteria, the DOJ will consider whether a corporation's policies and procedures are appropriately tailored to ensure that all business-related data is preserved.

Emphasis on DEI and Community

Additionally, Polite discussed the [DOJ's March 1, 2023 revised memorandum](#) clarifying how monitors are selected, along with articulating and clarifying the conflict of interest obligations associated with serving as a lead monitor or part of a monitor team. He highlighted that the submission and selection of a monitor candidate should be made with the DOJ's commitment to diversity, equity and inclusion in mind.

Polite's remarks also referenced the DOJ's community-based problem-solving approach. Specifically, he noted that protecting the community requires more than simply prosecuting crime. Instead, it requires working towards preventing the problems from occurring in the first place. Polite believes this can be done by (1) proactive and sophisticated methods of identifying criminal wrongdoing, (2) collaboration across governmental departments, (3) working with both domestic and international partners, (4) focusing on the prosecution of righteous cases, (5) refining policies and (6) providing transparency on expectations and consequences.

Key Takeaways

Companies should carefully review the DOJ's recent policy changes and evaluate whether and how they can revise their compliance infrastructure to best position themselves should misconduct be discovered within the company. The following takeaways should be given due consideration:

- Developing a robust compliance program that proactively identifies, investigates and remediates potential wrongdoing prior to government involvement will significantly increase the likelihood of a declination of prosecution.
- Once wrongdoing is discovered, companies should move quickly and work with counsel to determine if voluntary self-disclosure is appropriate. Given the ambiguity in how the DOJ interprets "immediate" disclosure, a company that decides to self-disclose would be best served by doing so as soon as possible.
- Companies should examine their compensation structures to determine whether and how to implement procedures to claw back compensation from employees who engage in wrongdoing. In doing so, companies should consult counsel to weigh the benefits of potentially obtaining a more favorable resolution from the DOJ against the risks of costly litigation stemming from attempts to claw back compensation.
- The government's increased attention to personal devices and the use of mobile messaging applications such as standard text messaging, WhatsApp, or Signal should prompt companies to review and revise their policies to specifically address the parameters of business communications that occur on such platforms. Companies should further determine their capabilities to access and preserve any such communications. Failure to do so may well have an adverse impact on a company's ability to obtain a favorable resolution from the DOJ.

Other Conference Highlights

In addition to the keynote addresses, the conference featured panel discussions relating to building effective compliance programs, trends in health care fraud actions, enforcement efforts relating to cryptocurrency, negotiating settlements with the DOJ and SEC, and various other topics. Highlights from these panel discussions include the following:

- Members of the SEC and DOJ addressed the agencies' latest enforcement priorities. The panelists noted that the government is continuing to focus on charging individuals with violations. In particular, they highlighted an increased attention to crypto as well as private funds. Additionally, the panelists discussed the DOJ's desire to shorten the time between an individual's misconduct and an arrest. Accordingly, the DOJ is investing more resources to move quickly on cases, especially in an effort to persuade cooperators to meet with the DOJ. The panelists also noted that the government will not hesitate to take cases to trial, as demonstrated by the DOJ obtaining over 340 convictions or guilty pleas from individuals in 2022, 56 of which were trial convictions. Finally, the panelists emphasized the importance of timely self-reporting for purposes of obtaining cooperation credit. They stated that if a company delays in self-reporting, the company will need to convincingly explain to prosecutors the rationale for the delay, such as pointing to a meaningful internal investigation.
- In a conversation with government regulators, panel members discussed a need to focus on compliance issues and move quickly, with a goal to achieve meaningful relief for investors and promote confidence in the market. The panel members noted that there will not be a slow-down in traditional cases such as insider trading, health care fraud, COVID-related fraud and tax fraud. However, the remarks indicated a new focus on emerging issues in the digital asset space, including market manipulation in the cryptocurrency area. The panel members discussed the clear need for harsher penalties as a future deterrence and issuing new policies to provide a level of transparency.
- A panel of government attorneys discussed their continued focus on investigating crypto and other digital assets. While the panel members acknowledged the need to foster innovation, they emphasized that there will be an increased pursuit of wrongdoers who engage in fraud and unregistered offerings relating to digital assets. The SEC, DOJ, and CFTC noted their dedication to adding more resources to investigate and prosecute future violations, including by training more attorneys in this area, hiring in-house specialists, and increasing the use of data analytics to identify misconduct.
- Senior Deputy Chief of the DOJ's Fraud Section, Allan Medina, participated in a panel on health care fraud. Medina stated that the DOJ will continue to use data to identify target areas of concern. He stated that practitioners can expect an increased focus on telehealth, genetic testing and other novel health care issues that have arisen during the pandemic. Additionally, he stated that data trends show a need for increased scrutiny on sober homes and anemia treatments, utilizing the Eliminating Kickbacks in Recovery Act and other applicable statutes. Medina stated that when the DOJ considers whether an individual's conduct rises to the level of criminality, it will focus on the economic realities behind the actions of an individual, not just what the documents show. Overall, practitioners can expect data-driven enforcement, particularly with novel issues driven by the pandemic.
- Another panel focused on how companies can work to meet the expectations of the DOJ and SEC when it comes to their compliance programs, indicating that a large part of meeting these expectations will involve continuously updating their compliance programs based on emerging risks. Both agencies also focused on the importance of construction, design, implementation, funding and consistency in compliance programs, along with what training, assessments and disciplinary actions a company is implementing. In response to concerns from corporations regarding the difficulties in perfecting compliance programs, the DOJ and SEC representatives stated that although the agencies recognize no program will prevent 100 percent of bad acts, companies should be able to demonstrate that their program is largely effective despite small, unforeseen gaps.
- In discussing negotiations of corporate resolutions with the government, members of the DOJ and SEC noted that the "Filip Factors," which the DOJ uses to guide corporate prosecutions, and the *Seaboard* Factors, which the SEC uses to evaluate cooperation by corporations, are substantially the same. However, they stated that the DOJ and SEC generally do not meet with defense counsel at the same time for purposes of settlement discussions and will go through their guidelines independently. The regulators noted that effective negotiating strategies for corporations include (1) focusing on a select few Filip/*Seaboard* Factors as opposed to trying to convince the regulators that every factor favors the corporation, (2) explaining actual (as opposed to speculative) collateral consequences of a particular resolution and (3) including a senior management official from the company (such as the general counsel or chief compliance officer) in the meetings who is prepared to answer questions and evaluate settlement proposals in real time.

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