

Client Alert: Key Insights from Updated DOJ Guidance Regarding the “Evaluation of Corporate Compliance Programs” and New Compensation Clawback Pilot Program

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On Friday, March 3, 2023, the Department of Justice (DOJ) Criminal Division released updated guidance regarding the “Evaluation of Corporate Compliance Programs.” Now in its fourth iteration, this guidance replaces the June 2020 version, which originated from a set of 2017 “questions” from Criminal Division’s Fraud Section. The updated guidance, like the prior versions, seeks to make corporations aware of the criteria DOJ uses when evaluating compliance programs. The latest version incorporates additional factors for prosecutors to consider, including how companies manage employee misconduct, and corporate policies that govern the retention of communications data. On Friday, DOJ also announced the Criminal Division’s new three-year “Pilot Program Regarding Incentives and Clawbacks”

These latest moves are part of a continuing trend of DOJ efforts to influence corporate compliance efforts by considering those efforts in the negotiation of criminal resolutions or declinations. The current set of revisions reflects DOJ’s increased attention to how organizations can use financial incentives to influence employee conduct. In addition, the revisions set forth DOJ’s expectations regarding the retention and preservation of company communications data, including from employees’ personal devices. We have previously reported on DOJ’s expanded self-disclosure policies, changes to DOJ’s Corporate Enforcement Policy, and DOJ Fraud Section’s 2022 Annual Report, and anticipate that more guidance is forthcoming.

Emphasis on Consequence Management

The changes to the compliance guidance and the pilot program were announced by Deputy Attorney General Lisa Monaco on March 2, 2023 as part of DOJ’s efforts in “advancing the fight against corporate crime.” DAG Monaco expressed the view that companies should “align executives’ financial interests with the company’s interest in good corporate citizenship.”^[1] DOJ’s new guidance is thus aimed, in the Department’s view, at promoting behavior that bolsters compliance efforts by

encouraging “direct and tangible financial incentives,” while also encouraging compensation clawback programs.^[2]

More generally, the updated guidance amplifies the importance of companies having and enforcing what DOJ calls “consequence management procedures” as part of their compliance programs. The guidance makes clear that prosecutors may consider a variety of factors when determining whether a compliance program has established incentives to encourage compliance, or in the alternative, discourage non-compliance, and that the “design and implementation of compensation schemes play an important role in fostering a compliance culture.” In evaluating a compensation scheme, prosecutors may consider whether compensation is “tied to conduct consistent with company values and policies” or if companies institute and enforce policies and contract provisions that “permit the company to recoup previously awarded compensation” when a recipient is found to have engaged in misconduct.

The guidance instructs that when evaluating whether the company’s “compensation and consequence management schemes are indicative of a positive compliance culture,” prosecutors should consider the following five factors:

- **Human Resources Process** – This factor includes the process for disciplinary decisions and whether the company has been transparent in designing, implanting, announcing, and explaining enforcement decisions.
- **Disciplinary Measures** – This factor focuses on what types of disciplinary actions are available, including whether there are policies and procedures to recoup compensation attributable to the misconduct.
- **Consistent Application** – This factor instructs prosecutors to evaluate whether disciplinary actions and incentives are fairly applied across the organization.
- **Financial Incentive Systems** – This factor incorporates whether the company considers the impact of its financial incentives on compliance, including evaluating whether commercial targets are achievable in an ethical manner.
- **Effectiveness** – This factor instructs prosecutors to evaluate how the company has ensured effective consequence management and the quality of the company’s investigations. Prosecutors are also instructed to consider whether compensation is subject to cancellation or recoupment for ethical violations and how much compensation has been impacted (either positively or negatively) by compliance activities.

Implementing a New Clawback Pilot Program

In addition to the updating the Evaluation of Corporate Compliance Programs guidance, Kenneth Polite, Assistant Attorney General for the DOJ Criminal Division, also announced the Division’s new

Pilot Program Regarding Compensation Incentives and Clawbacks. Under this program—which will last three years—companies resolving criminal investigations with the Criminal Division will be required as part of the resolution to adopt compensation-related criteria in their compliance programs. Moreover, companies that in fact seek to claw back compensation related to the misconduct will be eligible for reductions in the amount of the criminal penalty.

Specifically, to be eligible for credit under the Pilot Program, a company must have a clawback provision applicable to employees who have engaged in misconduct, as well as those who had supervisory authority over the employees or business area that engaged in the misconduct, and knew of, or were willfully blind to it. DOJ will also consider whether the program includes incentives for employees who demonstrate full commitment to compliance processes. If a company meets these factors and, in good faith, has initiated an effort to recover the compensation at the time of the criminal resolution, prosecutors have discretion to accord an additional fine reduction equal to the amount of any compensation recouped within the resolution term. If a company receives such a credit, but at the end of the resolution term the company has not actually recouped the full amount of compensation sought, the company must pay the government the portion of the credit it did not actually claw back. But in recognition of the difficulties of attempting to claw back compensation, as long as the company has made good faith efforts to do so, prosecutors have discretion to accord a fine reduction of up to 25% of the compensation that the company unsuccessfully sought to claw back.

Monitoring Evolving Methods of Communication

Recognizing that employees at most, if not all, modern companies use personal devices and messaging applications for business-related communications, the revised Evaluation of Corporate Compliance Programs guidance addresses how DOJ will evaluate a company's policies, mechanisms, and procedures governing the use of personal devices, communications platforms, and messaging applications. The updated guidance regarding data retention of communications reflects the importance that communications evidence plays in criminal investigations. The new guidance provides that corporate communications policies "should be tailored to the corporation's risk profile and specific business needs" and ensure that business-related data is preserved. The guidance specifically instructs prosecutors to consider "whether the corporation has enforced the policies and procedures on a regular and consistent basis." AAG Polite also noted that prosecutors will ask about the company's ability to access personal device and messaging application communications during the investigative stage.

Further, the guidance makes clear that the Criminal Division expects companies to implement robust and inclusive policies and procedures to collect and preserve communication data during investigations. Specifically, the guidance directs that prosecutors consider what electronic communications channels the company and its employees use and what mechanisms the company has "put in place to manage and preserve information." With respect to policies and procedures, prosecutors will assess whether they sufficiently govern the company's "ability to ensure security

or monitor/access business-related communication.” This includes examining any “bring our own device” programs, the rationale behind those programs, and how the company’s data retention and conduct policies are applied and enforced with respect to personal devices.

Based on the updated guidance and the new clawback pilot program, along with DAG Monaco’s and AAG Polite’s recent speeches on these topics, it is clear that DOJ is increasing its expectations of corporate compliance efforts. How DOJ will implement these new factors for evaluating compliance programs and institute its new pilot program is yet to be seen, but at first glance the new emphasis on compensation clawbacks may push companies into a tension between seeking favor from the Department and seeking to avoid knotty employment litigation—particularly for companies that do business in jurisdictions that have employee-friendly legal regimes. The emphasis on preserving and collecting communications data also comes as no surprise given the key role of such data in advancing investigations—but here again, the new policies may push companies into areas where employee preferences, and in some cases employees’ legal rights, are in tension with corporate policy. While these policies may or may not prove to be effective, they represent DOJ’s efforts to use its enforcement authority to attempt to modify corporate behavior in difficult areas.

This article is available in the Jenner & Block Japan Newsletter. / この記事はJenner & Blockニュースレターに掲載されています。

Footnotes

[1] Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime | OPA | Department of Justice

[2] Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime | OPA | Department of Justice

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