

PUBLICATION

Companies Take Heed: DOJ Announces Key Updates and Corporate Compliance Guidance

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On March 3, 2023, Assistant Attorney General Kenneth Polite delivered the keynote speech at the 38th Annual National Institute on White Collar Crime of the American Bar Association (ABA) in Miami, Florida. AAG Polite's speech served as DOJ's announcement of three key initiatives to incentivize companies to act as "good corporate citizens": (1) updates to DOJ's Evaluation of Corporate Compliance Programs (ECCP) guidance, (2) introduction of the Compensation Clawback Pilot Program, and (3) revisions to DOJ's Corporate Monitorship Program policy. This alert discusses the first two announcements.

I. Background

In September of 2022, Deputy Attorney General Lisa Monaco issued a Memorandum supplementing prior DOJ guidance on corporate criminal enforcement policies (the "Monaco Memo"). The Monaco Memo outlined DOJ's priorities to (a) encourage corporate cooperation and self-disclosure, (b) penalize the specific individuals accountable for any violations, and (c) ensure that resolutions mirror these and other DOJ priorities. The Monaco Memo required relevant branches in the DOJ to develop various policies necessary to prioritize these initiatives, which were adopted by each office in the Justice Department in winter 2023 and are referred to collectively as DOJ's Voluntary Self-Disclosure Policy.

Of great significance to whether a company might benefit from the presumption of declination under the Voluntary Self-Disclosure Policy is (a) whether the company's corporate compliance program meets the standards set forth in DOJ's ECCP; (b) the extent of the company's cooperation with DOJ's subsequent investigation; and (c) any remedial measure that may be necessary, including subjection to a monitorship. Because AAG Polite's March 3, 2023, remarks announced updates to each of these factors, companies should take heed.

II. Key Takeaways from AAG Polite's March 3 Announcements

A. 2023 Updates to DOJ's ECCP

DOJ's ECCP guidance (first introduced in 2017 and revised in 2020) reviews factors that prosecutors consider in evaluating the efficacy of a company's compliance program. Factors affecting the efficacy of a compliance program include a company's (a) risk management processes and risk-tailored resource allocation; (b) due diligence of acquisition targets; (c) oversight over compliance and remediation efforts; (d) design, comprehensiveness, and accessibility of compliance policies and procedures; and (e) commitment to compliance by senior and middle management, among others.

During this evaluative process, prosecutors will ask three fundamental questions:

Whether the corporation's compliance program is well designed;

Whether the program is being applied earnestly and in good faith; and

Whether the corporation's compliance program works in practice.

On March 3, 2023, upon AAG Polite's speech, DOJ issued a [2023 ECCP](#), with two key updates:

1. Ephemeral Messaging Policies and Oversight

[AAG Polite announced](#) that DOJ will now consider a company's policies and procedures pertaining to ephemeral messaging platforms to determine whether its compliance program is sufficient and effective. A company's Ephemeral Messaging Policy must be "tailored to the company's risk profile and specific business needs" in a way that ensures that electronically stored information (ESI) remains appropriately accessible. In addition, DOJ will consider how these policies are communicated to a company's employees and the extent to which these Ephemeral Messaging Policies are enforced.

AAG Polite further emphasized that a company's responses – or lack thereof – relating to the use of such third-party messaging applications are likely to affect the offer it receives to resolve criminal liability. For example, if a company is not able to produce communications from third-party messaging applications used by its employees during DOJ's investigation, the company will be expected to disclose its ability to access such communications, where the communications are stored, and applicable privacy laws and local laws. Companies are expected to be forthcoming and provide information about the electronic communication channels used by their business, the preservation policies and/or settings used, and how a company's access to such information is preserved through any "bring your own device" programs.

2. Compensation Metrics to Incentivize a Culture of Compliance

AAG Polite also announced that, when evaluating the efficacy of a company's compliance program under the 2023 ECCP, "our prosecutors will consider more closely compensation structures and consequence management." At a high level, compensation structures that reward and incentivize compliance and/or outright deter misconduct and other risky behavior – as opposed to merely rewarding profit and productivity – are now necessary aspects of an effective corporate compliance program.

On March 2, 2023, during a panel discussion about "Meeting Expectations of DOJ and the SEC for Your Compliance Programs," DOJ Assistant Chief Lauren Kootman of the Fraud Section's Corporate Enforcement, Compliance, & Policy Unit emphasized that effectively staffing and compensating a compliance department (separate from the legal or human resources departments) is one compensation metric that indicates a strong culture of compliance. In addition, a company could track its employees' dedication to compliance through performance reviews and provide calibrated compensation adjustments to incentivize compliance through compensation.

B. Introduction of a Compensation Clawback Pilot Program

In addition to the 2023 ECCP updates, [AAG Polite announced](#) that DOJ's Criminal Division is launching a three-year pilot program "(1) to require, as part of a criminal resolution, that corporate compliance programs include compensation-related criteria; and (2) to offer fine reductions for companies that seek to clawback compensation in appropriate cases."

Through this Compensation Clawback Pilot Program, companies that cooperate fully with government investigations and remediate misconduct appropriately may receive an additional fine reduction if the company makes efforts to recoup compensation previously paid to individual wrongdoers. Specifically, DOJ expects companies to make efforts to clawback compensation from both (a) employees who engaged in wrongdoing in connection with the conduct under investigation and (b) those who had supervisory authority over the

employees engaged in the misconduct and acted either with knowledge of or willful blindness to that misconduct.

If a company is able to clawback compensation, prosecutors will reduce the company's fine equal to the amount of any recouped compensation. However, should a company's good faith efforts prove unsuccessful by the time the resolution term ends, prosecutors will have the discretion to accord a fine reduction up to 25 percent of the amount of compensation sought. Because of the potential difficulties associated with clawback efforts, a company should make case-by-case assessments about the potential costs to shareholders and the prospect of success in clawback litigation, weigh those risks against the value of the potential recoupment, and proceed in accordance with the company's stated corporate policies about executive compensation (which will ideally allow for clawback of a portion of compensation under such circumstances).

III. The Path Forward

DOJ's March 3, 2023, announcements further promote its efforts to combat corporate crime by rewarding companies for (a) incentivizing a culture of compliance and (b) holding individual wrongdoers and their supervisors accountable.

With DOJ's Voluntary Self-Disclosure Policy now in play, companies with effective compliance programs who meet other requirements can reap the rewards of a declination of prosecution and significantly reduced fines should a bad apple turn up in their ranks. It is in a company's best interest to ensure that their compliance programs introduce policies and procedures pertaining to ephemeral messaging and compensation metrics in line with DOJ's [2023 ECCP](#). And, in light of DOJ's introduction of the Compensation Clawback Pilot Program, companies should consider introducing such clauses into their executive compensation and other employment agreements.

Consistent with the Monaco Memo and DOJ's Voluntary Self-Disclosure Policy, and to further motivate company cooperation, the DOJ is turning to companies to incentivize a "culture of compliance" to stamp out corporate crime through "good corporate citizenship." If companies may want to take advantage of DOJ's incentives, they should ensure that their compliance programs meet DOJ's evolving expectations.

With extensive Government Enforcement & Investigations and Corporate Governance experience, Baker Donelson has the tools to help clients navigate potential challenges posed by these and other aspects of DOJ's Corporate Enforcement Policies.

If you have any questions about this topic, please contact [Sean B. O'Connell](#), [Lindsay E. Ray](#), or other members of Baker Donelson's [Government Enforcements and Investigations Group](#).