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DOJ Targets Executive Compensation in Compliance Failures: A Novel Approach Becomes Standard Practice

Speaking before the American Bar Association National Institute on White Collar Crime on March 2, 2023, Deputy Attorney General Lisa Monaco unveiled a new and unprecedented Department of Justice (DOJ) pilot program concerning compensation incentives and clawbacks.

According to Deputy AG Monaco's remarks, the program will have two components. First, all disputes resolved with the Department's Criminal Division will feature a requirement that the resolving company "develop compliance-promoting criteria within its compensation and bonus system." Second, DOJ will reduce the size of the penalties and fines it metes out to companies that "seek to claw back compensation from corporate wrongdoers."

The targeting of executive compensation and bonuses and the encouraged use of clawbacks have moved from regulatory novelty to standard operating procedure with breathtaking speed. Deputy AG Monaco's remarks used the Department's recent investigation and prosecution of Danske Bank to illustrate the first prong of the pilot program. As part of its December 2022 plea agreement and in addition to forfeiting \$2 billion, Danske Bank agreed to revise its performance review and bonus system to include criteria related to compliance, such that "Danske executives with a failing score for compliance will also fail to secure a bonus." We remarked in a recent episode of The Justice Insiders podcast on the Danske Bank case that the settlement-agreement compensation provision was, to our knowledge, the first of its kind and discussed in detail the implications of such a provision for businesses. It would seem that in the span of three months we have progressed from groundbreaking approach to established Department practice.

What this means to you

The DOJ's new pilot program makes more explicit a theme that has permeated the current administration's regulatory posture, namely, that compensation will be targeted within the context of compliance failures. Risk managers, in-house counsel, and HR and compensation consultants should take note and begin thinking through how this impacts the development and maintenance of new and/or existing compliance and executive performance-assessment programs.

Contact us

If you have further questions regarding how DOJ's pilot program concerning compensation incentives and clawbacks could impact your compliance program and procedures, contact Salvador Hernandez, Gregg Sofer, or your Husch Blackwell attorney.