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FCPA update: Recent enforcement, DOJ clawback program

By Thad McBride and Lindsey Fetzer

The Foreign Corrupt Practices Act (FCPA) is the U.S. government’s main tool for punishing US actors involved in corruption of non-U.S. governments. The U.S. Department of Justice (DOJ) has imposed significant penalties on corporate organizations and individuals alike under the FCPA. Recent enforcement action—including several actions against prior offenders—suggests that such penalties will continue. Recent guidance issued by DOJ also suggests that DOJ and the U.S. Securities and Exchange Commission (SEC)—which also administers and enforces the FCPA—are particularly interested in individual compensation as a driver of compliance. This focus on individuals presents challenges and opportunities for compliance personnel.

This article begins with a brief overview of the FCPA, followed by details of recent enforcement actions. Through the lens of those actions, the article addresses the focus on individual enforcement and the DOJ guidance related to individual compensation. The article concludes with practical suggestions for managing this evolving enforcement and compliance landscape.

Background on the FCPA

Enacted in 1977, the FCPA is a federal statute that prohibits payments to foreign officials for the purpose of obtaining or retaining business or an improper advantage or directing business to any person.^[1] The law and its terms are defined broadly. For example, a “payment” can be money, a gift, a business courtesy, or anything of value to the recipient, regardless of monetary value. A “foreign official” can be any official or employee—regardless of rank or title—of any government agency or any entity owned or controlled by a government, including a national oil company, a national airline, or a state-run hospital. The FCPA also includes accounting and internal controls provisions. While these provisions only apply directly to companies that are publicly traded in the US, it is incumbent on all companies to keep and maintain accurate books and records that fairly reflect transactions and controls to prevent and detect potential FCPA violations.

FCPA enforcement actions have dipped slightly in recent years—from more than 50 actions brought by DOJ and SEC in 2016 to only 20 in 2021.^[2] Glenn Leon, the head of the Fraud Section of DOJ’s Criminal Division, has emphasized that the Fraud Section (which takes the lead on FCPA investigations and prosecutions) is prioritizing quality over quantity.^[3] Moreover, enforcement policy changes mean that companies need to approach FCPA compliance with an eye to the increasing focus on individual accountability.

Focus on individual accountability

DOJ sharpened its focus on individual wrongdoers in 2015 with a memo from then-Deputy Attorney General Sally

Yates.^[4] Yates called individual accountability “one of the most effective ways to combat corporate misconduct” as it “incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.”^[5] The so-called Yates Memo offered six steps to strengthen DOJ’s pursuit of individual corporate wrongdoing including:

- Requiring companies to provide DOJ with relevant information related to individual wrongdoers to qualify for cooperation credit;
- Refocusing investigators to prioritize prosecution of individuals from the outset of an investigation; and
- Ensuring DOJ attorneys do not resolve matters with corporations without a plan to resolve the cases of related individuals.

Current Attorney General Merrick Garland himself has also expressed his intention of prosecuting individuals, stating, “I have made it clear that the Department’s first priority in corporate criminal cases is to prosecute the individuals who commit and profit from corporate malfeasance.”^[6]

Recent FCPA enforcement actions suggest DOJ is indeed focusing on individuals. Since 2000, DOJ has charged nearly 250 individuals with FCPA criminal offenses.^[7] In 2022, there were more than 20 FCPA and related charges against individuals. For example, in September 2022, DOJ charged Cary Yan and Gina Zhou, two Marshallese nationals, with conspiring to pay government officials from the Marshall Islands in return for passing certain legislation.^[8] Both pleaded guilty and now face up to five years in jail. Similarly, Asante Berko, a former executive at a UK subsidiary of US bank Goldman Sachs, was indicted on six counts related to his participation in a bribery scheme in Ghana.^[9]

Using compensation as a lever for change

In September 2022, Deputy Attorney General Lisa Monaco released a DOJ-wide memo emphasizing the goal of shifting costs of corporate crime to individual wrongdoers through “shap[ing] financial compensation around promoting compliance and avoiding improperly risky behavior” and instructing prosecutors when determining penalties, to examine compensation structures to evaluate whether they promote a compliance culture.^[10]

The Monaco Memo was followed by a major update to the *Evaluation of Corporate Compliance Programs (ECCP)* guidance.^[11] The *ECCP* helps prosecutors assess a company’s compliance program at the time of offense to determine the appropriate form of resolution and corresponding compliance obligations. Under the *ECCP*, a prosecutor is instructed to examine a compliance program through the lens of whether it was applied in good faith, adequately resourced, well-designed, and worked effectively.

Perhaps most notably, in a speech in March 2023, Deputy Attorney General Monaco encouraged companies “to retool their programs and get ahead of the curve” and announced a new three-year Pilot Program.^[12] A day later, Assistant Attorney General Kenneth Polite announced further policy changes, including a requirement for prosecutors to reference the *ECCP* when assessing a corporation’s compensation program. The assistant attorney general also further sketched out the new Pilot Program.^[13] (The new Pilot Program is separate from a program DOJ established in 2016 to offer reduced fines and even declinations to incentivize voluntary disclosure of potential corporate misconduct.)^[14]

The Pilot Program

The Pilot Program consists of two principal initiatives: compliance changes to corporate resolutions and deferred fine reductions for employee compensation recouped by a company.

First, the Pilot Program now requires prosecutors to incorporate a provision into every corporate resolution mandating that the offending company implement compliance-promoting criteria within its compensation system. Acceptable measures include mechanisms that would deny bonuses for employees who underperform certain compliance-related metrics and provide financial incentives to employees promoting compliance. Prosecutors also have discretion to require additional measures depending on the circumstances.

Second, the Pilot Program will allow companies that have promptly remediated misconduct and cooperated fully with DOJ to reduce the applicable fines by the total amount the company is able to recoup from individual wrongdoers. At the close of the resolution period, the government will credit the company up to 100% of the compensation it sought to recoup. If unable to recoup the full amount, the company will pay the difference between the amount withheld from the original penalty and what was actually recouped. However, those companies that pursue recoupment in good faith can still be eligible for fine reductions.

DOJ's plan to tie compensation criteria to corporate resolutions is well exemplified by a December 2022 resolution between DOJ and Danske Bank. Although the matter was not resolved pursuant to the FCPA, the Danish bank pleaded guilty to one count of conspiracy to commit bank fraud and agreed to forfeit over \$2 billion.^[15] As part of the plea agreement, the bank is required to "implement evaluation criteria related to compliance in its executive review and bonus system so that each bank executive is evaluated on what the executive has done to ensure that the executive's business or department is in compliance with the Compliance Programs and applicable laws and regulations."^[16] The bank also established a policy whereby a "failing score in compliance will make the executive ineligible for any bonus for that year."^[17]

Similarly, in his March 2023 remarks, Assistant Attorney General Polite referenced the DOJ's FCPA resolution with Safran S.A.^[18] as another example of effectively addressing compensation as part of remediation.^[19] The declination "noted that the company's timely and full remediation included the withholding of deferred compensation of a former employee involved in the misconduct." Assistant Attorney General Polite called this an example of a company "taking appropriate action as to a culpable employee's compensation."^[20]

How should companies respond?

With the recent changes, companies should review and potentially restructure employee compensation packages. As described below, this should be done with four factors in mind.

First, compliance-centered compensation arrangements should be prioritized for positions with the most exposure to potential violations. Since companies do not have unlimited resources to implement extensive compensation-related arrangements and there is a push and pull between the arrangements and attracting talent, focus should be on the high-risk positions that most frequently interface with vectors of FCPA liability, such as foreign officials. These positions include sales and marketing professionals, employees and representatives involved in government contracting and bidding, accounting personnel, and personnel—including representatives—responsible for regulatory oversight and compliance.

Second, companies should look to implement compensation structures that reward and incentivize compliant behavior. Under the new guidelines, prosecutors will review and consider incentive mechanisms when determining penalties. Incentives can be designed into compensation structures by tying promotions to improving and developing a compliance program or demonstrating ethical leadership, implementing compliance metrics tied directly to bonuses, making promoting compliance a necessary element of career advancement, or

deferring or escrowing compensation tied to conduct reflecting company policies.

Third, companies must not hesitate to design penalties into compensation structures. Companies should establish a whistleblower hotline, implement clawback provisions into employee contracts to permit the recoupment of previously dispersed compensation, and define “just cause” to include violations of the law. These mechanisms and other related corporate policies should be clearly communicated to employees, including through training. Companies should also strive to consistently demonstrate strict adherence to the policies and effective investigatory processes.

Lastly, compliance efforts should be fully integrated into an organization’s corporate functions. Companies should consider establishing compensation committees where new policies are drafted and implemented, ideas are raised, and concerns are brought. Compliance policies should also be revised as needed to reflect the new DOJ priorities. This could include augmenting compliance responsibilities for some personnel, for example, human resources, because of the need to ensure employment arrangements reflect compliance priorities.

While DOJ’s emphasis on holding individuals accountable is not necessarily new, the specific guidance related to employee compensation is. Updating compliance programs to reflect DOJ’s priorities will not only make for a more effective program in reducing the likelihood of violations altogether, but it will be essential for reducing penalties if a violation occurs.

Takeaways

- The U.S. Department of Justice (DOJ) is increasingly targeting individuals to shift the responsibility for violations from shareholders to those who perpetrated the misconduct. DOJ is increasingly using employee compensation to effectuate its goals.
- A new Pilot Program will require every corporate resolution to stipulate that a company must implement “compliance-promoting criteria within its compensation and bonus system” and will reduce fines for those companies that seek to recoup compensation from offending employees in good faith.
- Recent enforcement actions exemplify how the “compensation-related criteria” will be applied in corporate resolutions and how compensation programs may be structured to provide relief when considering penalties.
- Companies should review and potentially restructure employee compensation packages prioritizing high-risk positions, incorporate incentive mechanisms to encourage compliant behavior, penalize employees for compliance failures, and integrate compliance efforts into everyday company functions.
- Updating compliance programs to reflect DOJ priorities will both make for a more effective program and help reduce penalties if a violation occurs.

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² Stanford Law School, “2022 FCPA Year in Review,” Foreign Corrupt Practices Act Clearinghouse, 2023, <https://fcpa.stanford.edu/fcpac-reports/2022-fcpa-year-in-review.pdf>.

³ Dylan Tokar, “More Cases, Policy Changes Are on the Horizon, DOJ’s New Fraud Section Chief Says,” *Wall Street Journal*, November 30, 2022, <https://www.wsj.com/articles/more-cases-policy-changes-are-on-the-horizon-doj-s-new-fraud-section-chief-says-11669855279>.

⁴ U.S. Department of Justice, Deputy Attorney General Sally Quillian Yates, “Individual Accountability for Corporate Wrongdoing,” memorandum, September 9, 2015,

<https://www.justice.gov/archives/dag/file/769036/download>.

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6 U.S. Department of Justice, Attorney General Merrick Garland, “Attorney General Merrick B. Garland Delivers Remarks to the [American Bar Association] ABA Institute on White Collar Crime,” speech, Washington, DC, March 3, 2023, <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime>.

7 FCPA Professor, “A Focus On DOJ Individual FCPA Enforcement Actions,” January 12, 2023, <https://fcpaprofessor.com/focus-doj-individual-fcpa-enforcement-actions/>.

8 U.S. Department of Justice, Office of Public Affairs, “Former Heads of New York-Based Non-Governmental Organization Plead Guilty to Conspiring to Bribe Elected Officials of the Marshall Islands,” news release, December 1, 2022, <https://www.justice.gov/opa/pr/former-heads-new-york-based-non-governmental-organization-plead-guilty-conspiring-bribe>.

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11 U.S. Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs*, updated March 2023, <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

12 U.S. Department of Justice, Deputy Attorney General Lisa O. Monaco, “Deputy Attorney General Lisa Monaco Delivers Remarks at American Bar Association National Institute on White Collar Crime,” speech, Miami, FL, March 2, 2023, <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national>.

13 U.S. Department of Justice, Assistant Attorney General Kenneth A. Polite Jr., “Assistant Attorney General Kenneth A. Polite, Jr. Delivers Keynote Remarks at the American Bar Association National Institute of White Collar Crime,” speech, Miami, FL, March 3, 2023, <https://www.justice.gov/opa/video/assistant-attorney-general-criminal-division-kenneth-polite-jr-delivers-keynote-remarks>.

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15 U.S. Department of Justice, Office of Public Affairs, “Danske Bank Pleads Guilty to Fraud on U.S. Banks in Multi-Billion Dollar Scheme to Access the U.S. Financial System,” news release, December 13, 2022, <https://www.justice.gov/opa/pr/danske-bank-pleads-guilty-fraud-us-banks-multi-billion-dollar-scheme-access-us-financial>.

16 United States vs. Danske Bank A/S, “Plea agreement,” December 12, 2022, <https://www.justice.gov/opa/press-release/file/1557611/download>.

17 United States vs. Danske Bank A/S, “Plea agreement.”

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19 U.S. Department of Justice, Criminal Division, “Re: Safran S.A.,” declination memo, December 21, 2022, <https://www.justice.gov/criminal-fraud/file/1559236/download>.

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