



FIVE COMPLIANCE PREDICTIONS FOR 2023

by Gregory A. Brower

Corporate compliance has only become more important in recent years and 2022 was no exception. This trend is sure to continue in 2023 in a variety of ways. Here are five things to watch for in the coming year.

1. Crypto Regulation

Despite rapidly growing acceptance of cryptocurrency as a legitimate means of exchange and payment, recent events have highlighted some significant vulnerabilities in this space which are likely to prompt policymakers and financial industry regulators to move quickly. This perceived urgency will inspire hearings, legislation, rulemaking, and enforcement actions, all focused on creating a much more robust regulatory reality aimed at creating stability and protecting investors. As a result of these efforts, legal and compliance professionals in the industry will face a quite different regulatory reality by the end of 2023.

2. ESG 2.0

As the popularity of environmental, sustainability, and governance ("ESG") investing continues to increase, the regulatory reality surrounding corporate reporting of ESG performance is likely to become more complicated. Companies in all industries need to be ready for this coming reality which will include the development of more detailed rules for disclosure standards, comparable metrics, and reporting requirements. And compliance departments will inevitably see a more prominent role in ESG reporting as regulatory and litigation risks become more complicated.

3. Communications Management

Federal government enforcement agencies including the SEC, the CFTC, and DOJ have been applying greater scrutiny to the way companies monitor and retain their employees' business communications conducted on personal devices and via unofficial messaging platforms. Recent enforcement actions have revealed widespread gaps in companies' ability to adequately manage such communications, leading to billions of dollars in fines and penalties. This led to a [recent memorandum](#) from the Deputy Attorney General to federal prosecutors which made clear that the manner in which a company under investigation manages such communications should be a factor to be considered when making charging decisions. The coming year will almost certainly see an increased focus on this issue.

Gregory A. Brower is Chief Global Compliance Officer for Wynn Resorts. He also serves on WLF Legal Policy Advisory Board and is a former U.S. Attorney.

4. Certification Requirements

During the past year, DOJ announced a policy of requiring corporate executives to certify certain representations that their company has met its compliance obligations pursuant to an agreement to settle an enforcement action. Just this month, Danish financial institution, Danske Bank, became the first defendant, in a non-FCPA case, whose CCO and CEO **were required to sign** such a certification. This development has caused considerable discussion and concern within compliance circles as the new policy has been seen by many to put executives at risk for potential criminal liability for certified statements that later turn out to be false. While DOJ has maintained that this policy is not intended to be punitive, and it is unlikely that a corporate officer would be held personally liable absent a knowing misrepresentation, further clarification from DOJ on exactly how his policy will be applied is sure to come in the months ahead.

5. DOJ and Compliance

And speaking of DOJ, it is virtually certain that 2023 will see a continued emphasis on compliance by the Department. Over the past two years, DOJ leaders, including Deputy Attorney General Lisa Monaco and Assistant Attorney for the Criminal Division Kenneth Polite, have taken every opportunity to remind companies subject to U.S. jurisdiction of the importance of compliance programs. AAG Polite, himself a former CCO, has been especially clear about the Criminal Division's expectation that companies devote appropriate focus and resources to compliance efforts, including anti-corruption and anti-money laundering programs. This emphasis will no doubt continue throughout 2023 and beyond and companies of all types are well-advised to respond by developing, implementing, maintaining, and resourcing their compliance programs in a way that will allow them to confidently discuss them with confidence should DOJ have occasion to examine them.

* * * *

All in all, 2023 promises to me another challenging year for corporate compliance efforts as regulatory requirements and government expectations increase in complexity. Now, more than ever, companies need to ensure that their compliance departments and programs are equipped to respond to this new reality.