

*Fox Rothschild Podcast*

**The Presumption of Innocence Podcast Series: Episode 23**

**DOJ Policy Shifts on Business Ethics and the Culture of Compliance**

*Featuring Matt Adams and Joe DiMaria of Fox Rothschild LLP*

**Adams:** Hi everyone, and welcome to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense & Regulatory Compliance Practice at Fox Rothschild. I'm your host for today, Matt Adams. I'm also a partner and co-chair of the white-collar group here at Fox.

And I am delighted to be joined once again, a return guest, Joe DeMaria, one of our partners in Miami. Joe spent a long time in this practice area and was formally at DOJ. He is a wealth of knowledge when it comes to the ebbs and flows, and I think, most importantly, has had a front row seat for some of the policy shifts that have occurred at DOJ which have resulted in a change in the direction of enforcement action.

And Joe, where I really wanna open up today is, in your experience, what drives a policy shift at DOJ?

**Joe DeMaria:** You have to go back to the George W. Bush administration when the Enron and WorldCom debacles led to those criminal prosecutions, beginning back then in 2001. So, this has been going on now for the better part of 20 years. The federal government, whether it was a Republican administration or a Democratic administration, the government was of the view that they needed to find a way to get better compliance within corporations to follow the law.

Whether it be an FCPA bribery scandal, or a money laundering scandal, or a health care fraud scandal -- the federal government's view was that the people that run corporations, public and private, were just not incentivized to make sure that their compliance was appropriate.

If we go back, they started the focus with banks some years ago. And now banks have full and complete corporate compliance departments. In fact, bankers will tell you that their compliance officers, who are mostly former federal compliance officers, sometimes are too dominant and sometimes suppress the reasonable business decisions that are made in banking. But banking has been subject to compliance for many years now, and it's a pretty well developed compliance culture. Not so much in non-banking corporations.

So, when the Enron and WorldCom crisis occurred in 2001, the federal government started looking for ways. So, the first thing they did is they put these principles of federal prosecution of business organizations into effect, in which they basically tried to pressure corporations to become adjuncts to the Department of Justice and investigate their own people and turn over their people for prosecution.

Well that had a big problem. And there was actually an infamous case up in New York, the Stein case, they call it, where they went too far. Where the pressure of the government on the private actors -- it was an accounting firm of that case -- just went too far. And of course, in the Arthur

Anderson case, after that accounting firm dissolved, the Supreme Court found that the federal government had gone too far.

So, there was this balance between how much is too far and how much is far enough. So, let's fast forward. They decided not to be so heavy handed in pressuring corporations to basically become adjuncts to the Department of Justice, although that still happens from time to time.

So instead they said, "Okay, how can we incentivize corporations to do the right thing?" And so prior to the Biden administration, I think the focus was more on self-reporting and the benefits one would get if you self-report. And that still is a pretty substantial part of the Department of Justice policy, the self-reporting, which is a big part of the fraud section, what they do.

Now, the criminal division of the antitrust section does it. Other sections do it. So, self-reportings become a popular way in the Department of Justice to have corporations come forward. But remember, self-reporting only works once a crime is committed.

I think the change that occurred in the Biden administration is they wanted to go a step further and say, "How can we try to prevent crime in the first place?" And so I think that's the next step. The step we're at now is going beyond self-reporting to say, "How can we incentivize corporations to prevent crime in the first place?"

**Matt Adams:** Well, you've chronicled sort of the history. Does it really come down to political prerogative? Does it really come down to whatever administration is in power determining what it wants to focus on? Or is it usually, in your experience, a recognition of events? You mentioned Enron, Arthur Anderson, the big, wholesale issues where a lot of people got hurt. Let's just be honest. Does it take a major cataclysmic event like that? Or is it strictly, sort of, the political winds blowing? Or is it a combination of both?

**Joe DeMaria:** I don't think it's politics. So remember, Enron and WorldCom changes occurred in a Republican administration, the administration of George W. Bush. When Barack Obama was president, they were just as aggressive in trying to enforce this law. There is some notion that the Trump administration may not have been as aggressive in enforcing these rules and regulations as had been the Bush administration and the Obama administration. But no, I don't think it's primarily politics.

I think it's this balance between how much freedom to give in our capitalistic system for corporations to operate and become profitable, versus what do you do when they go too far and either violate laws or cause harm? So, I think it's more of a balance between allowing capitalism to thrive appropriately versus when corporate greed gets to be too much. Or when illegality occurs, how do you regulate and punish that?

And the other issue is, I don't think they want to destroy valuable corporations. I think Arthur Anderson proved that. I think the government is very hesitant to taking down a legitimate corporation. So, what they want the corporations to do is identify the individuals who are the wrongdoers so the government can prosecute them.

**Matt Adams:** So, let's come full circle. We were in Miami at the ABA White-Collar Institute back in the spring of 2023. You and I were both there. And one of the speakers was Deputy Attorney General Lisa Monaco. She delivered what is typically the keynote speech that comes from DOJ at that White-Collar Institute. Sometimes it's the attorney general, sometimes it's the DAG as it was this year. But in looking at her remarks through the lens of 20/20 hindsight a couple of months later, a

couple of her comments really stand out to me as indicators of a policy shift. She said, quote, "Two years ago, in October of 2021, I directed some immediate policy changes to invigorate corporate criminal enforcement, and I did so based on a few fundamental principles."

And I think these fundamental principles that she articulates are really exactly what you were alluding at with respect to the potential for a policy shift here: Preventing misconduct before it happens, holding individual wrongdoers accountable -- which is not really a shift -- and deterring and punishing recidivism.

That first principle, the preventing misconduct before it happens, is that what you keyed to as it relates to the potential for a policy shift here?

**Joe DeMaria:** Yes. And let me read what she said in the beginning of her speech. Quote, "Our goal is to empower companies to do the right thing. By investing in compliance, in culture and in good corporate citizenship, while at the same time empowering our prosecutors to hold accountable those who don't follow the law," end quote.

So yes, I believe that's what the focus is. But I'm doubtful that you can use criminal prosecutions -- after the fact prosecutions -- to change corporate culture. I think it may be a step too far. It remains to be seen if it's going to work because I think it presents a lot of complications.

So, first of all, I don't see any problem with the aspect of giving credit, for example, for self-reporting. And that was developed almost a decade ago now and is fully developed in the corporate compliance programs.

**Matt Adams:** Is that the Yates memo? Is that what --

**Joe DeMaria:** Yeah, that goes back even before that. So, that's been around for a while and that's fully developed and I see no problem with that. Because that is after a corporation identifies a crime, how do you deal with it? I see no problem with that.

Secondly, this issue of recidivism. They made a point in her speech and in the Assistant Attorney General college speech the next day of what they called the Erickson two case, which was a company Erickson, a big company that had entered into a non-prosecution agreement. And then when the DOJ found that they violated it, they came down much harder on them.

So, I do believe this notion of recidivism, nothing new about that. And in fact, in March they did an updated evaluation of corporate compliance programs. And I think that any general counsel or outside counsel that advises companies has a pretty good template on what they need to do when you get that information that comes to your desk that says a crime has occurred.

In addition, AG Polite gave a speech to the New York City Bar Association and said that more companies are voluntarily disclosing misconduct. So, I think from a standpoint of voluntary disclosure, that's working.

Here's what was new. So Monaco, DAG Monaco made the speech the first day, but she turned it over to Polite the next day. And what he unveiled was that they were going to look at compensation structures that clearly and effectively imposed financial penalties for misconduct that they believe can deter risky behavior and foster a culture of corporate compliance.

**Matt Adams:** That's a buzzword for the DOJ these days, isn't it? That "culture of compliance."

**Joe DeMaria:** Right. And then they said they wanted to encourage positive incentives such as promotions, rewards, bonuses. So now, you're gonna have the DOJ put its hands into labor law, I guess. So they're gonna now get into how employees and how HR works to properly compensate, to punish. And it's raising a number of serious questions.

So for example, this issue of using the compensation structure. One of the things DOJ referred to was the SEC issued a new rule called Listing Standards for Recovery of Erroneously Awarded Compensation, which applies to public companies, and it has very detailed provisions on what public companies are supposed to do. However, the DOJ is taking that a step further, because it's one thing to recover erroneously awarded compensation, but DOJ, at least in their suggestions, is telling both private and public companies that they're going to have to have a process and effect on the front end to both discourage criminality and encourage, for lack of a better term, I guess, you know, good Samaritan-ness.

Now, there's problems with that because there's any number of jurisdictions -- you take New York and California, Massachusetts, New Jersey, some of our biggest commercial jurisdictions -- prohibit or place strict limits on an employer's ability to make deductions from an employee's wages or require repayment of wages, even when you have consent.

So, there's these labor laws. So you're now gonna have to not only have your white-collar lawyers involved this, you better have your employment lawyers involved. There's an interplay with wage and hour laws. So, I don't know that DOJ has thought through. What are they gonna say, DOJ preempts state law?

This is gonna cause a serious issue about what should companies do. So, I think they're gonna have to determine which state you're operating in, what are the prohibitions? What is the interplay between state and local and international law? There's a number of companies that have to deal with international jurisdictions that have very protective HR laws. Evaluating the policies, tracking the incentive-based compensation.

So I think it was nice to throw this out in March to say, "We want you to use your compensation structure as a way to discourage criminality and encourage good Samaritanism." But I think it's brought a lot of complications. And from my review, it hasn't been well developed yet. It's in its infancy stage, so I think it's gonna have to be further developed.

There's any number of lawyers that are looking at it, raising all kinds of questions of how do we comply with this? And I think it's a new issue that really hasn't been well developed.

**Matt Adams:** In DAG Monaco's March speech, she goes on to talk about what she calls a "cross-department approach to promoting voluntary self-disclosure." And then she goes on to talk about how compensation structures can foster responsible corporate behavior. That thing that you were keying on from the subsequent address from her office the following day. But if we can just key to something for a second, this cross department approach, what does she mean by that in your mind?

**Joe DeMaria:** You asked the question of was politics involved? I will say this: In the DAG's own comments, they also mentioned issues such as ESG, which is a subset of diversity initiatives. And so when they say cross-department, if what they mean is inter as well as intra departments, does that mean they're gonna be dealing with the Department of Labor and guidance from the Department of Labor on how they want companies to operate?

So, I think you're getting into a broader issue. The fact that the Department of Justice itself referred to ESG, and now dealt with this, you know, good Samaritanism. I think it may be a step too far. What's the interplay between that and capitalism and profitability and clear guidance and labor laws? I think it's complicated.

**Matt Adams:** Are we criminalizing business ethics?

**Joe DeMaria:** I wouldn't go that far. What I think they're trying to say is that we believe that business ethics can prevent criminality. And I totally agree with that. Here's the issue: Once you've identified the issue, can proper business ethics prevent criminality? That's an easy answer, yes. Here's the tough question: How do you encourage proper business ethics? And I think where they go too far is they believe that the all-encompassing Department of Justice and the SEC can use their regulations and tools and threats of criminal prosecution or threats of SEC action to develop proper business ethics.

That's what I have a serious question about. No doubt that proper business ethics can prevent criminality. But can the SEC and the Department of Justice through these programs really develop proper business ethics? I think it's more of a bottom-up approach, where a company has proper business ethics and develops those ethics for good reasons rather than under the threat of the Department of Justice. I think that's the concern I would have.

**Matt Adams:** So, if a culture of compliance is the goal and the focus of the department, clearly injecting some prospective look into what's going on at a company rather than just how they respond to some sort of incident, so to speak. What's the carrot and what's the stick? The carrot has always been early disclosure, cooperation, credit and get into the department as quickly as you can so that they treat you with some compassion and some empathy. And treat you as a cooperative so that they don't come down hard.

**Joe DeMaria:** I would say two things. Number one, now you're really getting into George Orwell and Big Brother. Because now, Big Brother is involving itself much more into the minutiae of how to operate your company when they try these type of techniques.

But secondly, I think what it really calls for is general counsel and compliance directors within companies who are well educated in what the requirements are, but are sophisticated enough to know that there has to be, you know, a soft touch, so to speak, on how to deal with some of these issues.

Otherwise, I think you could disrupt your organization in such a way that you could destroy the organization by an over-emphasis on compliance.

Compliance can be good, but compliance can be destructive. I mean, look what's happened with whistleblowers. The federal government, from Dodd-Frank forward... again, going back to early Obama administration with Dodd-Frank, this notion that a whistleblower was this great thing because we'd have these private attorneys general and we would help.

But now look what's happened. Let's look in the health care area. You have contingency lawyers that take matters on a contingency with a whistleblower. And they file these False Claims Act, cause the Department of Justice has to get notice of it. They then start their own internal investigation with a criminal subpoena, which is basically like a grand jury subpoena.

And then they work in tandem with the contingency lawyers. 'Cause what happens is if the whistleblower can get a fee, then the contingency lawyer gets a fee. So, what you've done now is created this whole system of -- we'll use the word compliance -- which is really investigation and prosecution. Which then costs a lot of money to investigate, to defend.

Some of these cases are clear cut. Some of these whistleblower cases are clearly righteous. But many of them are not. And the courts are now dealing with cases where the cost of the investigation makes a lot of companies say, "What can I pay to settle just to get out of this mess?" And that's one of the problems that I see.

**Matt Adams:** So, let's come full circle, Joe. We've got a situation where the Department of Justice is saying, we are going to pay close attention to some of the proactive steps that you take as a company to prevent criminality, to foster business ethics. I mean, that's not gonna prevent every unethical or criminal actor from doing something wrong.

So, let's go full circle. Let's assume, for the moment, hypothetically, that an organization both has established this culture of compliance that the Department has really focused in on proactively and something goes wrong, and then has not established this culture of compliance and something goes wrong.

Let's walk through that hypothetical scenario under both of those variables. And what do you see transpiring?

**Joe DeMaria:** I don't think they're going to succeed in using these compensation systems to materially change the ethics of corporations. I think the ethics of companies are based on the people that work on those companies, that run those companies, that are leadership of those companies.

I mean, I guess the question is, do speed limits prevent speeding? No. What happens is some people get caught speeding and some people don't. And the people that get caught speeding get a ticket. Or if they really speed too much, they might get thrown in jail.

But the criminal law prosecutes crimes after they occur. What the Department of Justice is doing here is trying to stop crime before it occurs. Which is a great, noble thing to do, I just don't think it's gonna work. It hasn't worked in the history of man. So, what makes us think this is gonna be any different?

**Matt Adams:** So, assume for a second that there is a compliant culture. As a defense lawyer, how do you represent the company? What do you do with that compliant culture? The culture of compliance that the DOJ is talking about? When the event happens, are you running in saying, "Oh, don't prosecute us, here's our 300 page compliance manual?"

**Joe DeMaria:** That's what many corporate law firms do. And here's the problem. There's always gonna be human beings involved in these acts. So, another question's gonna be, who is it? Is it the CEO? Is it the salesperson? How valuable is that person to the company?

So now, of course what's gonna happen is the general counsel identifies the problem, brings in their outside counsel, whose notion's gonna be, "We need to investigate. We need to gather all the documents. We need to interview people."

And of course, we need to give them what we call the corporate Upjohn warnings to tell all these people that we don't have an attorney-client privilege with you. And if we decide to turn over what

you tell us to the Department of Justice, we might just do that. So, they've now become an adjunct to the Department of Justice. Oh, by the way, we'll have an attorney represent you that we'll pay for, somebody that we pick, somebody that's gonna be close to that law firm that's not gonna be too problematic.

So, the system is designed to protect the company at the expense of the individual. And unless that individual is invaluable to the company, that individual is at great risk. So, I will use a quaint term -- due process. Where is the due process in this kind of a procedure? It's a serious problem.

**Matt Adams:** There's a sacrificial lamb that's identified within the organization, almost by design.

**Joe DeMaria:** No doubt about it. Let's expand it. Let's say in the defense procurement world. So, let's say you're a small company and an allegation is made that you've done something wrong.

So, do you think one of these big defense contractors are gonna continue to wanna work with you? They're gonna wash their hands of you just because you've been accused of something. Just because there's an investigation. There's plenty of subcontractors they can deal with. And so therefore, you're gonna lose your business.

You know, there's an old saying we say in the criminal law, "You might be able to beat the rap, but can you beat the ride?" The ride is the investigation. And so at the end of the day, these investigations can be very destructive.

**Matt Adams:** It definitely seems to mark a sea change. Is this an acknowledgement that general deterrence from reactive prosecutorial action doesn't work? That they're trying to place this emphasis on proactive measures and the culture of compliance?

**Joe DeMaria:** I haven't heard them admit that, but they probably should. Because there's a lot of sophisticated judges and practitioners that realize that the notion of general deterrence is overstated.

Specific deterrents, no doubt. You know, somebody that's committed a crime and what happens now in the Department of Justice is they not only put you in jail, they take all your money through restitution and forfeiture. Does that work for specific deterrents? No doubt. Does retribution work, an eye for an eye? No doubt. But does general deterrence really work?

Let's take the FCPA with foreign bribery. Does the fact that somebody was written up in the newspaper for being prosecuted, for being involved in a foreign bribery, does that stop the next company? Or the next politician in a foreign country from putting their hand out? I think the evidence is, no, it doesn't.

So, I would seriously question the value of general deterrents from these programs. Specific deterrents, no doubt. Retribution, no doubt. And of course the federal government has abandoned any notion of rehabilitation. They don't care about rehabilitation.

**Matt Adams:** So, we have this sea change at DOJ. We see this new policy. And I think we've raised some questions today in our discussion about whether this might be a bridge too far.

Have you seen anything in the months that have followed DAG Monaco's address at the ABA White-Collar Institute to indicate that they're gonna be able to successfully harness this new policy and actually turn it into a bonafide prosecutorial strategy?

**Joe DeMaria:** No. What you see is practitioners and experts talking about it, but it hasn't happened yet. And also, I have to wonder whether it's really a sea change or if it's just an announcement made by the DAG and the AG that's a nice political announcement, but will it really be implemented?

It has not been implemented yet and I don't know if it can be. I think it'll be more effectively implemented at the SEC level with public companies and reporting. I think that's where you'll see it first. Or you'll see it potentially in corporate resolutions with a non-pros agreement or a deferred pros agreement.

And you might see a component of that, just like the way DOJ uses monitors. I think what you'll see in the non-pros agreements and the deferred action agreements notions where they have a corporate monitorship, or as an alternative of a corporate monitor, might be specific compensation plan. But I gotta tell you that the first time they go after a senior level executive on his or her bonus, that's when you're gonna see litigation under the labor laws and the employment laws about being deprived of a bonus. And it hasn't happened.

**Matt Adams:** Is what you're saying that this could just be some saber rattling?

**Joe DeMaria:** I think there's no doubt that it's saber rattling. And you know what, that's okay because it may cause companies and individuals to be more in compliance. I think that's okay. I think that's probably a proper thing to do.

I think the implementation, though, is gonna be a lot more difficult.

**Matt Adams:** And as it relates to those other principles that DAG Monaco mentioned in her address in Miami back in March, that's really business as usual, I think, as you alluded to earlier. And that's the phenomenon that brought us this concept of outside internal investigations and getting in early for cooperative credit. How has that changed, if at all?

**Joe DeMaria:** That's full speed ahead.

**Matt Adams:** So, it's the same as been for the last decade.

**Joe DeMaria:** Yeah, and think about it, you have some very entrenched interests that make a lot of money doing that kind of compliance. Major law firms that conduct internal investigations, major accounting firms, major forensic firms, add in cybersecurity. There is a whole industry that's been developed because of those disclosure programs and internal investigations. And that's full speed ahead.

**Matt Adams:** So as we wind down our time together today, Joe, one of the takeaways I'm getting is that those of us that are out there in the white-collar bar representing individuals really have to beware. Because there is a stated incentive by the Department of Justice to pursue that sacrificial lamb under circumstances where things go wrong because it will benefit the organization.

And on the other hand, the people that are doing the internal investigations and representing the corporation may very well have to identify somebody that they're willing to throw to the wolves, so to speak.

**Joe DeMaria:** I would say this: When that first phone call comes, whether it's from the general counsel wanting the investigation or from an individual who might be a subject of that internal investigation, this sensitivity is extremely important. Because you have to try to prevent mines from

being set before the evidence is reviewed. And if their concern of the company is, "Hey, we got the DOJ looking at us, we gotta find a scapegoat," then that's a real problem. You gotta let the lawyers follow the evidence instead of making the decision where the evidence should go and then designing the investigation to go that way. And that's a real dangerous thing.

**Matt Adams:** Sort of prematurely drawing the line around --

**Joe DeMaria:** Well, think about it. Think about the incentives. The incentives from the DOJ are for the corporation to find a scapegoat. If that's the incentive right from the first call, that's what they're gonna be looking for.

**Matt Adams:** So, let's end on a note that sort of touches on that. The general counsel gets that call, brings forth robust machinery of that external investigation -- the law firm, the accountants, the computer forensics folks -- and they identify that individual where the evidence seems to point, may very well be the culpable party or what we've been referring to as the sacrificial lamb.

When does that corporation have the obligation to identify and secure outside counsel for that individual? Now we talked about Upjohn, but is there more than just Upjohn or is the corporation in good stead in just issuing the Upjohn warning and letting that individual determine whether or not they want to get outside counsel?

**Joe DeMaria:** So let's answer this by going back to what Upjohn is. It's a derivation of the Miranda warnings, right? So, let's think about what police officers have to struggle with every day. At what point in the interview process do you tell the person you're interviewing their Miranda warnings?

Well, the police don't wanna do it too early in the process 'cause they wanna get as much information as they can before they give that warning and the person may shut down the interview. Same thing happens with the corporate employee. The outside counsel isn't going to want to give that Upjohn/Miranda warning until they have to, because they want to get as much information as they can. They're basically acting like law enforcement, and law enforcement doesn't wanna shut down the interview. So, it's the same effect.

Now, one would argue that as soon as the internal investigation begins and they identify the universe of individuals that might have been involved in this alleged criminal act, that right from that point forward they should inform the individuals: We're starting an investigation. Let's get you counsel. But I don't think they do it because the corporations don't want to suppress the information, so they wait a while. And I think that's a danger area. Just like the law enforcement, the police officer, who's investigating the murder and has a suspect, they don't want to give the Miranda warnings too soon 'cause then they'll shut down the interview. They want information.

**Matt Adams:** It's almost like we started with this notion of trying to use business ethics to create criminal prosecutions, and we're ending with a discussion of legal ethics. But it all comes back to some form of ethics.

**Joe DeMaria:** Yes, and I think the problem is it comes back to pressure. If the Department of Justice puts too much pressure on companies -- so on the one hand they say, "We don't want to destroy a good company," it's not like a mafia organization. They'll destroy them because they're criminal organizations, but a legitimate company, they don't wanna destroy. They saw what happened to Arthur Anderson when we used to have what, the Big Eight, now what do we got, the Big Four in the accounting world, right? So, they destroyed a big company with a lot of employees. They don't wanna do that.

So on the one hand, they kind of send the message, "Well, we really don't want to destroy you." But then they tell the company, especially if you're a smaller company, "Don't make us destroy you. Cooperate with us. Turn over the criminality. Identify it. Do our investigation for us and turn it over."

And so I think, especially with small companies, entrepreneurial companies, I think that's the danger. The big companies, in the banking system, they have a thing called "too big to fail." I think that with big companies, they're too big to be effectively prosecuted. But small companies can be.

**Matt Adams:** Well, I think there's a lot of things that are gonna flow from this. It has been a very interesting time discussing this with you today, Joe. I think there's gonna be a lot more to unpack. And hopefully you'll join me again on "The Presumption of Innocence" so that we can see where this takes us maybe six months from now, and if we start to see what you've predicted in this coalescence of labor laws and other regulations coming into play around charging decisions, especially as it relates to this idea of clawing back compensation.

That's all the time that we have for today, but I hope to see you next time on "The Presumption of Innocence." Thanks for joining us, Joe.

**Joe DeMaria:** Thank you.