

## Danske Bank Deal Sees DOJ Tie Exec Bonuses To Compliance

By Sarah Jarvis

*Law360 (January 31, 2023, 6:31 PM EST)* -- Danske Bank's recent \$2 billion fine from the U.S. Department of Justice for misleading U.S. banks about its anti-money laundering controls for high-risk customers in Estonia stands out for at least one reason besides the hefty price tag: It specifically ties executive bonuses to compliance.

On Jan. 5, Danske Bank was sentenced to three years' probation and formally ordered to forfeit roughly \$2.06 billion in a global resolution with the DOJ, the Securities and Exchange Commission and Danish authorities. The bank's Estonian unit ran a lucrative business that allowed nonresidents, including high-risk customers from Russia and other former Soviet bloc countries, to funnel vast sums of money through Danske Bank Estonia with little oversight, according to court documents filed by prosecutors and the SEC.

One provision in the bank's plea agreement with the DOJ caught the eye of compliance experts — a mandate that Danske Bank 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."

The plea agreement further notes that a failing score in compliance will make the executive ineligible for any bonus for that year.

Rebecca Walker, a partner with the corporate compliance and ethics firm Kaplan & Walker LLP, told Law360 she hasn't previously seen such a provision in a DOJ agreement.

"That is really interesting, because that's really one of the first times we've seen a plea agreement in which the DOJ very specifically says this needs to be part of the way in which you evaluate employees," Walker said.

Danske Bank pled guilty to one count of bank fraud conspiracy in December. At its sentencing, the lender was credited for about \$178.6 million it paid to the SEC and \$672.3 million it paid in a settlement with the Danish government, meaning a final forfeiture of just over \$1.2 billion to the DOJ satisfied the \$2 billion judgment.

According to an agreed-upon statement of facts filed in connection with the DOJ's case, Danske Bank Estonia processed \$160 billion on behalf of nonresidents through U.S. banks from 2007 to 2016. In total,

the lender has estimated that it generated gross income of around 1.5 billion Danish kroner (now \$219 million).

The bank knew by at least February 2014 that some of its customers were engaged in suspicious and potentially criminal transactions, including transactions through the U.S., according to the statement of facts.

Danske Bank lied about the state of its Estonian unit's anti-money laundering compliance program and its transaction monitoring, and about its customers and their risk profile, according to court records. A whistleblower came forward in 2018 with public revelations about billions of dollars in suspicious payments the bank processed.

The racket was by far the most successful line of business for Danske Bank's Estonian unit, accounting for over 50% of its profits over the life of the scheme. Danske Bank said it has since shuttered all its operations in the Baltic countries and Russia.

According to the Justice Department, Danske Bank received full credit for cooperation and remediation, accepted responsibility for its criminal conduct and enhanced its compliance program.

The DOJ didn't respond to a request for comment on the plea agreement or an inquiry into whether the executive bonus provision might be more common in such agreements going forward.

A spokesperson for Danske Bank declined to comment beyond a December statement announcing the bank had reached agreements with regulators. In that statement, the company noted it had taken extensive remedial action to prevent the misconduct, including new leadership and investments in "systems, controls and competencies to fight financial crime."

The bonus provision in Danske Bank's plea agreement is consistent with previous Justice Department messaging, according to Michael Volkov, CEO and owner of The Volkov Law Group LLC. But Volkov hopes the DOJ releases additional guidance on incentives.

He noted the language in the Danske Bank agreement is very broad in targeting people who supervise those who engage in misconduct. "You can bet your bottom dollar" that the issue is going to be a focus for companies that are subject to DOJ review for compliance going forward, he said.

"I do think it's going to become more than a 'just check your box' inquiry," Volkov said, referencing minimal compliance programs. "In future administrations, I can't guarantee that this would be as important an issue as it appears to be right now, but ... as long as this Justice Department is operating, this is going to be a high-priority issue."

He added that the DOJ has ramped up its internal capabilities to assess the efficacy of compliance programs, pointing to the department's hiring last year of Matt Galvin, former global vice president of ethics and compliance at Anheuser-Busch InBev SA. Volkov said Galvin built a state-of-the-art data analytics compliance program at InBev.

He also pointed to an SEC rule — finalized in October and effective as of Jan. 27, according to the Federal Register — that requires executives to return bonuses in the event of accounting errors. Volkov said it's imperative for companies to bring their HR and compliance teams together to develop rules that will fit all regulatory requirements.

Among other things, Danske Bank's plea agreement with the government says it will ensure that all levels of management will reinforce its compliance program and incentivize employees to adhere to it.

"The bank shall notify all employees that compliance with the compliance programs is the duty of individuals at all levels of the bank and in all lines of defense of the compliance programs," the plea agreement reads.

Walker, of Kaplan & Walker, noted that the plea agreement comes at a time when the DOJ has been focusing on compliance incentives.

In a September 2022 memorandum, Deputy Attorney General Lisa Monaco said prosecutors should consider how a corporation incentivizes or sanctions the behavior of its employees and executives, "including through compensation plans, as part of its efforts to create a culture of compliance." And in December, acting Principal Deputy Assistant Attorney General Nicole Argentieri indicated guidance on incentives and clawback policies may be forthcoming.

"The sentencing guidelines have talked about incentives for compliance and discipline for noncompliance for many years, so it wasn't new to the profession that there was this discussion about incentives," Walker said. "But the department really started focusing on this and highlighting it last year, in a way that they hadn't previously."

Daniel Tehrani, partner at Morgan Lewis & Bockius LLP and former federal prosecutor, said the Biden administration is focused on compensation structures and incentivizing a culture of compliance while disincentivizing noncompliant behavior.

"I think what it shows here is if those aren't in place, the DOJ is going to insist that they be put in place as part of a resolution," Tehrani said of the Danske Bank resolution.

Tehrani said the tie between compensation and compliance in the Danske Bank plea agreement shows that the department views it as an important part of a culture of compliance. While the concept of tying compliance and compensation together isn't necessarily new, he said it is relatively new that the DOJ is emphasizing it so much.

Still, he said he is keeping an eye out for further guidance on the matter from the DOJ, noting he hasn't yet seen these specific provisions in a policy document from the department.

Tehrani said another takeaway from the Danske Bank case is that where foreign financial institutions make use of the U.S. banking system, they are required to comply with U.S. laws.

"Even if the specific [anti-money laundering, Bank Secrecy Act] requirements don't apply to them on their face, there will be other tools that the DOJ has to ensure compliance," Tehrani said. "I think this is an example of that."

--Editing by Robert Rudinger.