

Justice Department Updates Self-Disclosure Policy; Deputy AG Announces Further Requirements

Alert

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On February 22, 2023, the Department of Justice (DOJ) announced an update of its [Voluntary Self-Disclosure Policy](#) applicable to all United States Attorneys' Offices in their prosecution decisions, effective immediately. The purpose of the updated policy is to encourage companies to develop compliance programs capable of identifying criminal misconduct and to swiftly report identified criminal misconduct to government authorities. On March 2, 2023, Deputy Attorney General Lisa Monaco announced that DOJ will require all corporate criminal resolutions to include commitments to implement a compensation system that rewards compliance.

Background

DOJ has long maintained principles of corporate criminal enforcement that lay out factors used to guide the exercise of prosecutorial discretion over corporate targets. Every recent administration has identified thresholds and factors it will require in return for lenient treatment—often announced by department leaders at a public forum, and then reduced to a useful guidance “memo” that is not enforceable through the courts against the government should it not be honored as stated.

A chief consideration for winning the government's favor always has been whether—and to what extent—companies under investigation cooperate with the investigating authorities. Every administration has set its own threshold for what meaningful cooperation amounts to, and whether there are some permissible limits (e.g., withholding vs waiving privileged information) that still will permit an entity to receive favorable consideration. Broadly speaking, the current Justice department considers it “good” if a company cooperates with an investigation after it begins, “better” if the company has implemented policies capable of detecting and self-reporting criminal misconduct, and “best” if those policies led to detection and self-

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disclosure before any government investigation began.

The Voluntary Self-Disclosure Policy announced last week stems from a Memorandum issued on September 15, 2022, by Deputy Attorney General Lisa Monaco titled “[Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group.](#)” That memorandum announced DOJ expectations for cooperation and self-disclosure, clarifying that it will not seek a guilty plea where a company has a) voluntarily self-disclosed the criminal misconduct; b) fully cooperated with the investigating authorities; and c) timely and appropriately remediated the criminal misconduct.

The policy adopts a uniform standard based on the memorandum that will be applied by prosecutors at all 94 United States Attorneys’ Offices, and that closely tracks self-disclosure policies already in place for several prosecuting units at Main Justice in Washington, D.C.

The Voluntary Self-Disclosure Policy

The policy requires prosecutors to consider whether a company’s self-reporting was voluntary, timely, and accompanied by appropriate remedial action. A disclosure will not be considered voluntary when it is made in fulfillment of a preexisting obligation to disclose—for instance, if the disclosure is required by regulation or by an existing non-prosecution or deferred prosecution agreement. A disclosure will not be considered timely unless it is made before the misconduct is revealed publicly or becomes known to the government, before an imminent threat of public disclosure or government investigation, and within a reasonably prompt time after the company becomes aware of the misconduct. The burden is on the company to demonstrate timeliness, and the term “reasonably prompt” is left undefined. “Appropriate remediation” means that the company must pay all disgorgement, forfeiture, and restitution resulting from the misconduct. Finally, and critically, the disclosure must include all relevant and known facts concerning the misconduct, even if not all relevant facts are known to the company at the time of disclosure. If the company is undertaking an internal investigation, DOJ expects the company to provide ongoing updates concerning the results of that investigation, and to preserve, collect, and produce relevant documentation. Satisfaction of these factors will lead to a presumption against prosecution.

In general, if these factors are satisfied, prosecutors will not seek a guilty plea and may discount any penalty 50% to 100% off the low end of the U.S. Sentencing Guidelines fine range. Further, if the company has an effective compliance program, prosecutors will not seek imposition of a compliance monitor. The benefits available to companies who meet the voluntary self-disclosure factors are reduced—and possibly not available—for companies whose misconduct is aggravated because it:

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- Poses a grave threat to national security
- Is deeply pervasive throughout the company
- Involved current executive management of the company

It is important to note that the presumption against prosecution created by voluntary self-disclosure is limited to criminal prosecution. Parallel civil and administrative investigations and possible civil charges remain on the table under the Voluntary Self-Disclosure Policy. Moreover, government contractors remain at risk of temporary or permanent debarment based on disclosed misconduct. Thus, although voluntary self-disclosure has important benefits, it does not remove the need to consider impacts beyond criminal prosecution and, if self-disclosure is made, to negotiate a global resolution with the government.

Moreover, even if your company believes it is potentially benefited by this new policy, there are additional considerations. For instance, since a company can no longer shield any culpable executives from prosecution if it wants to avoid prosecution itself, it will be incumbent to quickly consider who will be the appropriate corporate representative through which attorney-client privileged investigative results are funneled, and whether insurance policies are adequate to assist with legal fees for conducting an internal investigation before the government has identified your company as a potential target. These are just some considerations that each entity should make well ahead of time, so they are ready to be implemented—rather than first discussed—when a potentially volatile event arises.

DAG Monaco Announcement

On March 2, 2023, Deputy AG Monaco announced at the ABA National Institute on White Collar Crime that corporate criminal resolutions with the DOJ will now require companies to institute a compensation system that promotes corporate compliance, including good faith efforts to claw back compensation from law-breaking executives and employees where permitted by law. Further refinements to DOJ policy are expected to be announced tomorrow in remarks to the same group by Assistant AG Ken Polite, who heads the Criminal Division at DOJ.

Conclusion

Although the updated voluntary self-disclosure policy largely tracks existing self-disclosure policies at Main Justice, its public and formal extension to every U.S. Attorneys' Office highlights DOJ's desire to encourage self-disclosure of corporate criminal misconduct. The policy provides useful guidance to companies facing potential prosecution from DOJ offices and units outside the umbrella of Main Justice. Nonetheless, companies should remain vigilant in defending themselves against inaccurate or overstated allegations of misconduct.

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