

Cooperation with the Justice Department: The Rules are Changing

By Glenn Davis on April 18, 2023

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No, this blog post is not about weaponization of federal enforcement mechanisms. It is about new developments in federal policy that inform how to respond to federal investigations.

What You Need to Know

1. The U.S. Department of Justice's new policies on rooting out corporate^[1] crime emphasize individual culpability and attempt to create more consistency in how federal prosecutors approach leniency.
2. Effective voluntary disclosure is still a client's best path to avoiding a guilty plea.
3. Seeking the advice of experienced legal counsel is essential before making any disclosure to the government.

There is no doubt, business crimes undermine the integrity of financial markets and institutions, threaten public safety and national security, and redirect money to undeserving criminals. The federal government uses a wide range of tools to identify and combat corporate crime. For decades, the United States Department of Justice (DOJ) and other government agencies have maintained voluntary disclosure programs to create incentives for businesses to comply with laws and cooperate in investigations of potential wrongdoing.

The DOJ has recently revised its guidelines for voluntary self-disclosure and cooperation by being more transparent on how a company benefits by voluntarily disclosing misconduct, clarifying what a corporation needs to do to receive a declination of prosecution, emphasizing individual culpability, and attempting to create more consistency in how federal prosecutors approach leniency.

New Voluntary Disclosure Policies

In September 2022, Deputy Attorney General Monaco announced new self-disclosure policies (see the Monaco Memo) that reward companies with strong compliance programs that voluntarily self-report misconduct as soon as it is discovered, even if, with some exceptions, there are aggravating circumstances. The DOJ will reduce fines and potentially not prosecute companies that fully cooperate with investigators, remediate, and achieve compliance.

Each of the DOJ's sections that prosecutes corporate crime is now required to issue a formal written policy on voluntary disclosure. For example, the Criminal Division's general policy has been that when a company timely self-discloses misconduct, fully cooperates, and effectively remediates, there was a

presumption that if there were no aggravating circumstances, the company would receive a declination to prosecute.

The revised policy re-emphasizes the importance of self-disclosure but now specifies that a company can still be eligible for a declination—although not a declination *presumption*—if it: (1) voluntarily and immediately self-discloses when becoming aware of *allegations of misconduct*, (2) had an effective compliance program at the time of the misconduct and disclosure, and (3) provides “extraordinary cooperation” with the DOJ’s investigation. (Unfortunately, the policy itself does not clearly explain what “extraordinary cooperation” means.)

Even when criminal prosecution is warranted, a company may still qualify for enhanced partial credit and a partial fine reduction if it voluntarily self-discloses, fully cooperates, and timely remediates the violation. Notably, when a company does not voluntarily self-disclose misconduct but later fully cooperates and remediates, the DOJ may still award limited credit. This policy vests substantial discretion in prosecutors to determine the starting point for any reduction.

New Guidance for Local Assistant United States Attorneys

The DOJ recognizes that companies may self-report conduct to local Assistant United States Attorneys (AUSAs) before the DOJ is aware of the underlying conduct. Accordingly, the DOJ also recently announced new policy guidance for federal prosecutors. This policy applies to all United States Attorney’s Offices (USAOs). The purpose is to credit voluntary self-disclosure of misconduct by companies and ensure individual accountability for misconduct. The AUSAs are directed to weigh and appropriately credit all disclosures on a case-by-case basis.

At their sole discretion, local USAOs will also evaluate the adequacy of disclosures on a case-by-case basis by carefully assessing the circumstances of the disclosure. The USAO will require that a disclosure meet each of the following standards to constitute a voluntary disclosure under this policy:

1. **Voluntary.** The disclosure of misconduct must be made voluntarily without any pre-existing obligation to disclose, pursuant to regulation, contract, a prior Department resolution (e.g., consent decree, plea agreement, non-prosecution agreement or deferred prosecution agreement) or otherwise.
2. **Timely.** A disclosure will only be timely when a company demonstrates the disclosure is made to the USAO: (a) before there is an imminent threat of disclosure or government investigation; (b) before the misconduct is publicly disclosed or otherwise made known to the government; and (c) within a reasonably prompt time after the company becomes aware of the alleged misconduct.
3. **Includes Full Disclosure.** The disclosure must include all relevant facts that are known to the company at the time of the disclosure. The USAO recognizes that a company may not be in a position to know all relevant facts because the company disclosed reasonably promptly after becoming aware of the misconduct. Therefore, a company should make clear that its disclosure is based upon a preliminary investigation or assessment of information. It should nonetheless provide a full disclosure of the relevant facts known to it at the time. The company must also preserve, collect, and produce relevant documents and/or information and provide timely factual updates to

the USAO, including appropriate factual updates as any internal investigation progresses.

The DOJ continues to encourage corporations to conduct internal investigations and disclose the relevant facts to the appropriate authorities. A corporation's timely and voluntary disclosure of wrongdoing are among the factors prosecutors will consider in deciding who and what to investigate, whether to bring charges, and negotiating pleas or other agreements.

Clawback Policy

In addition to updating its guidance on voluntary disclosure, the DOJ is also implementing a new clawback policy seeking to impose the cost of corporate crime on responsible executives. The DOJ's criminal division will give discounts on fines for companies that seek to claw back compensation from corporate wrongdoers. The policy explicitly links a reduction in fines leveled on a company to clawbacks from individuals, so that the financial hit essentially comes out of the pockets of the culpable executives/employees. In addition, the clawback extends explicitly to individuals who had supervisory authority over the employees or business area involved and knew of, or were willfully blind to, the misconduct. Any company seeking to resolve a U.S. investigation will also have to implement a plan to include compliance goals as part of executive compensation and bonus plans.

Appropriate Guidance Required

The updated revisions provide companies with additional clarity on how to avoid prosecution or avail themselves of reduced penalties. But securing favorable treatment is not automatic or easy. Companies now start at "zero cooperation credit" and can earn credits as opposed to the prior policy where they started with the "maximum available credit" from which credits were deducted. The DOJ has set a high bar to achieve these incentives, including requiring companies to make early disclosures—before it becomes clear that there is valid evidence of a violation. And while the DOJ better quantifies what type of conduct qualifies for certain levels of credit, other concepts remain less clear.

Conclusion

The revised guidance re-emphasizes the DOJ's consistent demand for effective compliance programs. Without effective compliance programs and the collection of data to demonstrate their effectiveness, companies will be unable to satisfy the DOJ. Overall, voluntary disclosure can be a useful tool in mitigating potential corporate criminal liability, but it should be carefully and strategically considered. And the continuing emphasis on individual culpability ramps up the pressure on both management and counsel.

More Corporate Enforcement Policy guidelines are expected in the coming months, including guidance on personal devices, ephemeral messaging platforms, and executive compensation structures. As changes are made, companies should evaluate their compliance programs to ensure they reflect current DOJ guidance.

[This article provides only a short synopsis of the DOJ's new program guidelines. A more detailed explanation of those guidelines is available in this extended blog post.]

[1] The terms “corporation” and “company” apply to all types of business organizations, including but not limited to partnerships, sole proprietorships, government entities, and unincorporated associations.

Tags: Clawback Policy, Department of Justice, United States Attorneys, Voluntary Disclosure Policies, White-Collar Crime