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The Department of Justice really, really wants you to voluntarily disclose your company's violations. Considerations for GCs and CCOs. (Part I of II)

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DOJ's Mixed Signals Undermine Confidence for Voluntary Disclosures

Have the expected benefits of voluntary disclosure of potential criminal violations become more clear or more cloudy? In a series of announcements over the last year, culminating in a speech on September 15, 2022, Deputy Attorney General Lisa Monaco rolled out a series of significant changes[1] to federal corporate criminal enforcement policies.

In separate speeches, Assistant Attorney General Kenneth Polite touted DOJ's new corporate enforcement polices, including DOJ's controversial new requirement, in settlements and resolutions with companies, that CCOs certify, *under penalty of criminal prosecution*, "that the company's compliance program is reasonably designed and implemented to detect and prevent violations of the law … and is functioning effectively." These policies are intended to encourage companies to voluntarily disclose potential offenses and expand their cooperation with federal prosecutors, but will they have the desired effect?

> *The presumption that a company can avoid a guilty plea and a corporate monitor if it does all the right things is a dramatic change from where the government started.*

Companies have a powerful and reasonable aversion to voluntary disclosure. GCs, CCOs and Boards know they will thereafter lose virtually all control and predictability over the duration, breadth, and/or expense of the investigation and resolution that will inevitably follow.

Making the case for companies to disclose in the face of this perception requires DOJ to alter the calculus by creating more certainty and specificity as to the expected result. On balance, DOJ's new corporate enforcement policy is positive, but there are reasons to be wary as some of the provisions introduce new concerns that may discourage companies from making a voluntary disclosure.

Below, we will decipher the key elements of the new corporate enforcement policies and identify what actions companies should consider taking in response. We will discuss the policy initiatives in the order of likely significance to in-house counsel.

(1) Attempted clarity on the benefits of voluntary disclosure and cooperation

(2) Additional guidance on how prosecutors will evaluate a company's "history of misconduct"

(3) New guidance encouraging companies to deploy "claw backs" and other measures to remove individual financial incentives to engage in misconduct

(4) Attempted clarity on when compliance monitors will be imposed

(5) Renewed priority on prosecting individuals

In Part I, we will discuss DOJ's attempts to clarify the expected benefits of voluntary disclosure and how it will evaluate a company's history of misconduct. In Part II,[2] we will discuss DOJ's intended approach to employee compensation and the use of "claw backs," attempted clarifications about its use of compliance monitors and, finally, its efforts to improve the rate of prosecuting individuals.

1. Attempted clarity on the benefits of voluntary disclosure and cooperation

DOJ believe that the most noteworthy shift in the new corporate crime policy is the focus on increasing individual prosecutions. But we believe that DOJ "buried the lead" both because prioritizing individual prosecutions is not new and because the new policy statements on the benefits of voluntary disclosure are much more significant. DOJ's headlines should have been the following:

- *For the first time, every DOJ component prosecuting corporate crime will implement a policy providing that companies that self discloses, fully cooperates, and effectively remediate misconduct will not be required to plead guilty to an offense.*

- *DOJ components must also commit that a corporate monitor will not be imposed on a cooperative, self-disclosing company if, at the time of resolution, it has remediated the weaknesses and tested those new program features.*

Of course, this policy has already been in place for FCPA investigations since 2016[3] with DOJ adding the expected and necessary caveats that there must be no "aggravating circumstances" such as pervasive senior level misconduct. But even with these caveats, the presumption that a company can avoid a guilty plea and a corporate monitor if it does all the right things is a dramatic change from where the government started.

Since the dawn of the modern era of corporate enforcement,[4] prosecutors have been urging companies to voluntarily disclose their misconduct but offering only vague assurances that the company would receive "substantial benefit" in return. Not surprisingly, these vague assurances were not terribly effective in persuading companies to disclose. Companies had little difficulty weighing the dubious possibility of a favorable resolution against the certainty that they would endure a complete loss of control and suffer an endless and expensive investigation that would distract the company, executives, and employees from their duties if they chose voluntary disclosure.

Only in recent years with the Criminal Division's FCPA Corporate Enforcement Policy[5] did the Department experiment with getting specific about the benefits of voluntary disclosure and offer companies the realistic opportunity to avoid a criminal conviction. The long-awaited clarity and specificity was enthusiastically received, and a few other components of DOJ have now adopted their own policies and approach to encouraging disclosure.

With this month's announcement, DOJ is trying to drive consistency in policy across all of its many litigating units and provide more clarity in expected treatment. Deputy Attorney General Monaco and Assistant Attorney General Polite should be applauded for this broad and fundamental policy change. Of course, there are some caveats for General Counsel and CCOs to consider:

- *The Policy Only Applies to DOJ*: This observation is not a criticism of DOJ's initiative. They can only set policy for DOJ. But companies considering a voluntary self-disclosure usually can't limit their disclosure to only DOJ. A company must also consider the potential actions of other US enforcement agencies and other US regulatory agencies, not to mention the reactions of federal customers and state, and local agencies. Moreover, companies contemplating disclosures involving international operations must consider foreign enforcement and regulatory agencies. Very few if any of these other enforcement agencies offer specific rewards for voluntary disclosure and they can be expected to prosecute or punish the disclosing company without regard to the new DOJ policy. Driving alignment in these situations of shared enforcement jurisdiction may determine whether the new policy is fully effective.
- *Policy Application/Execution Risk:* Companies need to trust DOJ to apply its prosecutorial discretion fairly and wisely. There are many terms and caveats embedded in the policy and the application or interpretation of those terms by prosecutors applying the policy will make the difference in whether companies feel voluntary disclosure is being incentivized.
- Self-discipline by DOJ prosecutors will be required. For example, the policy contains the usual caveat that there be an absence of "aggravating circumstances" as is necessary to prevent abuse of the policy. But if the Department too often finds that "aggravating circumstances" are present and a voluntary disclosure should not be fully rewarded, it will destroy confidence in the policy.
- If DOJ too often determines that companies who voluntarily disclosed did not adequately "cooperate," the policy will be undermined, and there will be fewer voluntary disclosures.
- If compliance monitors are regularly imposed because the Department concludes that the newly adopted compliance controls are not sufficiently "tested" or other aggravating circumstances are present, voluntary disclosures will similarly decline.

The laudable goal of the policy is to ensure that companies with repeated compliance issues are treated differently than first time offenders.

There are many areas where Department prosecutors could undermine confidence in the policy and General Counsel, CCOs and practitioners will undoubtedly elect to wait and observe how the policy will be applied in practice. If companies perceive that the "gauntlet" of conditions necessary to achieve leniency is too long and uncertain, the policy will fail in its objectives.

It is in this regard that the controversial CCO certification policy of the Department is so problematic. DOJ's argument that it is somehow "helpful" to a CCO for the DOJ to threaten them with individual prosecution for their program's failure to prevent a future compliance issue does not build trust in DOJ's judgment or belief that the company will be treated reasonably in the event of a voluntary disclosure.

2. More guidance on how prosecutors will evaluate a company's "history of misconduct"

One of the most attention-grabbing features of the Department's initial policy announcements last fall was the notion that the Department, in deciding how to resolve an investigation, would begin considering a company's "history of misconduct." The laudable goal of the policy is to ensure that companies with repeated compliance issues are treated differently than first time offenders.

Thus far, the types of prior misconduct history within scope are prior criminal, civil, and regulatory resolutions, both domestically and internationally. The new policy announcement made clear that not all prior resolutions should or would carry the same weight and it provided additional details on the specific criteria that prosecutors would use to evaluate prior misconduct.

For example, prosecutors are directed to give the most weight to recent US criminal resolutions and misconduct involving the same personnel or management. Criminal conduct older than ten (10) years and civil/regulatory resolutions older than five (5) years should generally be accorded less weight. Additionally, the prior misconduct associated with an acquired entity should receive less weight assuming the acquiring company had fully remediated the prior issues and integrated the acquired operations into the parent compliance program.

Two additional policies merit attention. First, prosecutors are instructed to determine and consider whether there is a common "root cause" between the prior misconduct and the current issues. If so, prosecutors should consider whether appropriate remediation was taken to address the prior issue and common root cause. Second, prosecutors are instructed to determine if there is an "overlap in involved personnel — at any level" between the prior misconduct and the conduct currently under investigation. The Department's formal guidance is that an overlap of personnel with the prior conduct *"could indicate a lack of commitment to compliance or insufficient oversight at the management or board level."*

Considerations: It is fair and appropriate policy for DOJ to treat "frequent flyers" less leniently than first time offenders. However, the GCs and CCOs of companies with prior government resolutions will necessarily have to weigh these "aggravating circumstances" in assessing whether to voluntarily disclose a new issue.

- The DOJ has made clear that it may consider successive or multiple compliance issues under the same executive and board leadership as a potential sign of insufficient commitment or oversight. This fact underscores the importance of conducting a thorough root cause analysis in the wake of a compliance issue, making necessary process, personnel, or compliance control changes and then documenting the remediation. A failure to do so may well result in the company executives and legal/compliance program being viewed as contributing to any subsequent problems that arise.
- GCs and CCOs should anticipate what lurks around the corner. The speeches and policy announcements about a company's "history of misconduct" have thus far only talked about *formal resolutions* the company has reached with enforcement agencies. *All companies, especially those considering a voluntary disclosure, should expect that the DOJ inquiries about "prior misconduct" will expand from formal resolutions to other misconduct that the company has investigated and remediated but did not voluntarily disclose or result in a resolution.* The potential that the government will second-guess those prior decisions not to voluntarily disclose and go on to prosecute the persons who made such decisions is unfortunately a distinct possibility. In a recently concluded prosecution in San Francisco,[6] DOJ charged and convicted the chief security officer and Deputy General Counsel at Uber (with misprision of felony) for failing to voluntarily disclose to the FTC a hack and ransomware attack.[7] And the prosecution relied heavily on arguments that NDAs constituted an obstruction of the government investigation, and they induced the testimony of another in-house lawyer against the defendant with threats of prosecution and formal promises of immunity.[8]

Notes

[1] https://bit.ly/3D6J2Zp

[2] https://bit.ly/3zpgSaO

[3] https://bit.ly/3sqOGRg

[4] Arthur Anderson, Enron, et. al.

[5] https://bit.ly/3SlUhx6

[6] *U.S. v. Sullivan*

[7] https://bit.ly/3spRIVX

[8] https://bit.ly/3fc1oQC

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