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Navigating The DOJ's Latest Corporate Self-Disclosure Policy

By **John Pease and Steven Strauss** (February 28, 2023, 4:20 PM EST)

John Pease

Steven Strauss

The U.S. Department of Justice has announced a new policy aimed at incentivizing companies to make voluntary self-disclosures of misconduct to any U.S. attorney's office in the country.

The DOJ issued the policy on the heels of Assistant Attorney General Kenneth Polite's Jan. 17 remarks summarizing revisions to the Criminal Division's corporate enforcement policy, which attempted to incentivize self-disclosure even when aggravating circumstances were present.

The policy, which is effective immediately and applies to all U.S. attorney's offices, attempts to incentivize self-reporting, standardize the definition of voluntary self-disclosure, and increase the consistency and predictability of the consequences of disclosing misconduct to the government.

However, it will be challenging for companies to comply with the policy because it narrowly and strictly defines voluntary self-disclosure, provides several important exceptions, and still permits U.S. attorney's offices to exercise broad discretion in determining a company's fate following a disclosure.

Voluntary Self-Disclosure Defined

To qualify as a voluntary self-disclosure, a company's disclosure must meet each of the following requirements.

Voluntary

The disclosure must be made voluntarily. A disclosure is not voluntary if it is made based on a preexisting obligation, including a regulation, contract or prior resolution, e.g., a nonprosecution agreement or deferred prosecution agreement.

Timely

According to the policy, the voluntary self-disclosure must be made in a timely manner, including "prior to an imminent threat of disclosure or government investigation"; prior to the public disclosure of the conduct or the conduct otherwise being made known to the government; and within a "reasonably prompt time" after the company becomes aware of the misconduct, with the company bearing the burden to show timeliness.

Substantive

According to the policy, the voluntary self-disclosure must include "all relevant facts concerning the misconduct that are known to the company at the time of the disclosure."

If a company does not yet know all relevant facts at the time of disclosure, it should disclose the relevant facts that it knows at the time and inform the U.S. attorney's office that its "disclosure is based upon a preliminary investigation or assessment of information."

The company should also "move in a timely fashion to preserve, collect, and produce relevant documents and/or information, and provide timely factual updates" to the U.S. attorney's office, including information learned during a subsequent internal investigation.

Additional Considerations

The policy encourages companies to make voluntary self-disclosures even if they believe the government is already aware of the misconduct.

Moreover, U.S. attorney's offices will look favorably upon expeditious disclosures, even when they do not meet every disclosure requirement.

Benefits of Voluntary Self-Disclosure

Policies and practices have varied widely among U.S. attorney's offices across the country regarding whether voluntary self-disclosure provides tangible benefits, whether and to what extent companies receive reduced fines or can avoid a conviction by agreeing to a deferred prosecution agreement, and many other potential outcomes.

Many companies have found themselves in a location with a U.S. attorney's office that has no policy or history of considering or rewarding a company that makes a voluntary self-disclosure.

Therefore, a primary and important benefit of this policy is that it applies to every U.S. attorney's office across the country.

Where a company makes a voluntary self-disclosure, fully cooperates, and timely and appropriately remediates the criminal conduct — including, but not limited to, disgorgement, forfeiture and restitution resulting from the misconduct — the U.S. attorney's office will not seek a guilty plea, absent any aggravating factors.

Instead, the U.S. attorney's office may decline to bring charges, or seek a nonprosecution agreement or deferred prosecution agreement.

The nationwide availability of this benefit to a company considering a voluntary self-disclosure presents important questions and considerations to companies and white collar practitioners.

Aggravating Factors

If an aggravating factor is present, the U.S. attorney's office will evaluate the facts and circumstances in deciding how to proceed.

Aggravating factors include, but are not limited to, misconduct that (1) "poses a grave threat to national security, public health, or the environment"; (2) "is deeply pervasive throughout the company"; or (3) "involved current executive management of the company."

If a company complies with the policy in full, the U.S. attorney's office may choose not to impose a penalty. And even if it still does so, the U.S. attorney's office will not seek a penalty greater than 50% below the low end of the U.S. sentencing guidelines fine range.

When a company makes a voluntary self-disclosure, cooperates and remediates the criminal conduct, but there is an aggravating factor present and the U.S. attorney's office seeks a guilty plea, the U.S. attorney's office:

- Will recommend a 50%-75% reduction off the low end of the sentencing guidelines fine range, in addition to any other reduction under Section 8C2.5(g) of the U.S. sentencing guidelines, or the penalty reduction in an alternate voluntary self-disclosure policy, if one applies; and

- Will not require the company to appoint an independent monitor if it "has implemented and tested an effective compliance program."

To evaluate whether a company implemented and tested an effective compliance program, the U.S. attorney's office will refer to Deputy Attorney General Lisa Monaco's Sept. 15 memo.

The evaluation will also "consider resources developed by the Department of Justice's Criminal Division to assist prosecutors in assessing the effectiveness of a company's compliance program" or another DOJ component's guidance regarding specialized areas of corporate compliance.

Challenges Resulting from the Policy

Despite the DOJ's attempt to provide clarity and predictability, several aspects of the policy will prove problematic for companies attempting to understand and comply with it.

The Disclosure Decision

A disclosure must be made prior to an imminent threat of disclosure or government investigation, before the government is aware of the underlying conduct, and before the conduct is publicly disclosed. It also must be made before any whistleblower files a False Claims Act complaint under seal in a qui tam action.

However, it is impossible for companies to know what the DOJ knows, or what has been reported in a filing that is under seal, and government investigations may exist and remain ongoing for a significant amount of time without the target company's knowledge.

Further, the likelihood that a whistleblower has already reported conduct to the DOJ, or will do so before the company is able to gather all relevant facts, will also perpetually cast doubt on whether the company will be able to comply with the policy.

A disclosure must also be made within a reasonably prompt time after the company learns of the misconduct, and it is the company's burden to show that its disclosure was timely. This creates uncertainty as to how soon a company must make a disclosure for it to be considered timely.

Companies must exercise diligence in gathering and assessing the facts and their implications, which can take considerable time.

A company moving too quickly may trigger an expensive and burdensome DOJ investigation and resulting internal investigation that is ultimately meritless.

But if a company waits too long to learn the facts and ensure that it is confident in its decision to disclose, its disclosure may be treated as untimely by the DOJ.

During that time, the DOJ may have learned of the issues, even without the knowledge of the company; the issues may have become public; or the DOJ may believe that the company took too much time to investigate internally prior to disclosure.

A company must also provide "appropriate factual updates" as its investigation progresses, thereby placing the burden and expense of a costly internal investigation on the company.

This requirement may also obligate a company to disclose potentially worse and more incriminating facts as the investigation progresses, including facts potentially suggesting the participation of senior management, an aggravating factor that could eliminate the company from consideration for a declination or deferred prosecution agreement.

Thus, there is significant uncertainty surrounding whether a company contemplating a voluntary self-disclosure will qualify as having made a proper and timely disclosure.

Exceptions and Discretion

The policy includes important exclusions from receiving credit for a voluntary self-disclosure in several circumstances, including where conduct involved current executive management of the company.

It may be difficult or impossible for companies to know the extent to which current executive management is involved in alleged misconduct at the time the voluntary self-disclosure decision is made.

That uncertainty creates additional risk that companies endeavoring to comply with the policy and make a voluntary self-disclosure will still be unable to receive the full benefits of doing so.

Further, there is tension between the requirement that companies make a disclosure in a reasonably prompt time, and the need to assess whether and to what extent management is involved.

Any delay resulting from the uncertainty could undermine the policy's goal of encouraging timely and appropriately detailed voluntary self-disclosures.

Under the policy, U.S. attorney's offices across the country retain discretion to pursue criminal charges and felony convictions, which carry extraordinary potential fines up to twice the gross gain and disastrous collateral consequences.

Even with full credit from making a voluntary self-disclosure, companies will still be required to pay disgorgement, forfeiture and restitution resulting from the misconduct at issue. These are all significant financial considerations that form part of the calculus in any company's decision-making process on whether to self-disclose.

Any attempt to measure the potential financial impact of a decision to make a voluntary self-disclosure will require time and effort, including an internal investigation. The delay caused by that process may require companies to choose between making an informed decision — and risking that its disclosure will be deemed untimely — or moving ahead quickly with a disclosure without the luxury of making a well-informed decision.

The policy also leaves open the possibility that a U.S. attorney's office may seek to impose an independent compliance monitor even if a company cooperates and makes a voluntary self-disclosure because, in its sole judgment, it determines the company has not sufficiently implemented and tested an effective compliance program.

Monitorships are extraordinarily intrusive, burdensome and costly. Many companies considering a voluntary self-disclosure may also question whether their compliance program will pass muster with the U.S. attorney's office. This creates additional uncertainty and risk that a company deciding whether to make a voluntary self-disclosure may incur potentially crippling costs and burdens under a monitorship it had not anticipated when it decided to make the disclosure.

Other Voluntary Self-Disclosure Policies

Finally, if a "company is being jointly prosecuted by a [U.S. attorney's office] and another Department office or component, or where the misconduct reported by the company falls within the scope of the conduct covered by [voluntary self-disclosure] policies administered by other Department offices or components," the U.S. attorney's office retains discretion to apply "any provision of an alternate [voluntary self-disclosure] policy in addition to, or in place of, any provision of this policy."[1]

Companies must therefore weigh the risk that, even after making a disclosure, they could face charges from multiple DOJ offices or components, and the U.S. attorney's office may opt to apply a less favorable voluntary self-disclosure policy.

For example, whereas the new U.S. attorney's office voluntary self-disclosure policy applies even to companies "that have been the subject of prior resolutions," the Criminal Division's voluntary self-disclosure policy cites recidivism as a basis to exclude a company from the presumption that it will receive a declination.

Instead, the company must overcome four requirements to potentially qualify for a declination, including a requirement that the "voluntary self-disclosure was made immediately upon the company becoming aware of the allegation of misconduct."[2]

The U.S. attorney's office policy does not require immediate disclosure of allegations as soon as the allegations are made, but rather "within a reasonably prompt time after the company becoming aware of the misconduct."[3]

There are other variations to be found between the Criminal Division's policy and the U.S. attorney's office voluntary self-disclosure policy, as well as other voluntary self-disclosure policies.

For example, under the Antitrust Division's policy, to qualify for Type A leniency, the company itself — rather than merely its directors, officers or employees — must admit to wrongdoing, and the company must not have coerced another party to participate in the activity or have been a leader or originator of the conduct.

Additionally, the National Security Division's voluntary self-disclosure policy requires disclosure be made to a particular point of contact.

The critical point here is that it is necessary to understand and examine differences between voluntary self-disclosure policies and consider potential implications for a disclosure decision, as a company may not ultimately receive the full benefits of its disclosure under the U.S. attorney's office policy.

Conclusion

The policy's attempt to provide clear guidance and transparency across all U.S. attorney's offices is welcome, but it raises new issues that companies will need to consider as they decide whether to make a voluntary self-disclosure.

Disclosure decisions have always been complex, and the expansion of the DOJ's voluntary self-disclosure policy to U.S. attorney's offices across the country will result in more opportunities, but also potential challenges and pitfalls to companies that are not deliberate and careful in making the self-disclosure decision.

Companies need to carefully weigh and balance the benefits of doing a more thorough analysis of the facts and potential consequences before making a disclosure decision, versus the risks of waiting too long and losing substantial benefits.

The analysis becomes more complex if a company's compliance program is weak or of questionable effectiveness. And the risks and uncertainty become greater if other DOJ criminal litigating components are involved and conflicting incentives are presented.

John J. Pease III is a partner at Morgan Lewis & Bockius LLP. He previously served as assistant U.S. attorney for the Eastern District of Pennsylvania.

Steven Strauss is an associate at Morgan Lewis.

[1] The new VSD policy cites to other DOJ policies related to self-disclosure that may also be in play, including the "Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy (Criminal Division); Leniency Policy and Procedures (Antitrust Division); NSD Enforcement Policy for Business Organizations (National Security Division); Environmental Crimes Section Voluntary Self-Disclosure Policy (Environment and Natural Resources Division); Consumer Protection Branch Voluntary Self-Disclosure

Policy for Business Organizations (Consumer Protection Branch); [and] The Corporate Voluntary Self-Disclosure Policy of the Tax Division (Tax Division)."

[2] Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy § 9-47.120, at 2.

[3] VSD Policy I.A.2(c).