

Tips to Follow DOJ Guidance and Survive Corporate Investigations

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When recently announcing updates to the Department of Justice's corporate criminal enforcement policies, Deputy Attorney General Lisa Monaco said, "[a]bsent aggravating factors, the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct."

This policy allows general counsel and chief compliance officers to "make a business case for responsible corporate behavior." Monaco, however, emphasized that the DOJ would bring charges and require guilty pleas "where facts and circumstances require," including for companies that are repeat offenders.

Companies should therefore take steps to ensure their compliance policies and programs are structured to position the organization to avoid a guilty plea. Specifically, companies should be able to quickly identify wrongdoing, assess the full nature and extent of the misconduct, implement remediation, and determine whether to voluntarily self-disclose to the authorities.

Voluntary self-disclosure must be made only after a thorough consideration of the potential benefits and risks, including risks presented by the company's prior history of misconduct, which may negatively impact the company's eligibility for a declination from the DOJ.

While the new policy revisions certainly leave room for interpretation, affirmatively enhancing compliance programs in the manner suggested by the DOJ will help companies remediate and make important self-disclosure decisions once wrongdoing is discovered.

Putting Guidance Into Action

The updated DOJ policies highlight three factors that, absent aggravating circumstances, will weigh in favor of a resolution that does not include a required guilty plea: self-disclosure, cooperation, and remediation.

Self-Disclosure. Voluntary self-disclosure of misconduct is the "clearest path for a company to avoid a guilty plea," according to Monaco. As she explained in a memo released the same day as her remarks, DOJ policies must

“ensure that a corporation benefits from its decision to ... voluntarily self-disclose misconduct, through resolution under more favorable terms than if the government had learned of the misconduct through other means.” Monaco also noted that failure to self-report was a factor in seeking guilty pleas in some recent prosecutions.

Significantly, tension exists between the DOJ’s guidance regarding the benefits of voluntary self-disclosure and its announcement that companies with histories of misconduct might be ineligible for declination. Companies with such histories may believe that voluntary self-disclosure is fraught with greater risk of a required guilty plea, and will therefore be disincentivized to make such a disclosure.

Recognizing this tension, Assistant Attorney General Kenneth Polite recently clarified that prior misconduct will not “necessarily mean an automatic guilty plea” absent other aggravating factors such as “deeply pervasive conduct” or misconduct raising a threat to national security.

If these aggravating factors are not present, a company that cooperates, expeditiously remediates the misconduct, and makes a timely, voluntary self-disclosure may still earn declination. Thus, it is imperative that companies with histories of prior misconduct assess the pervasiveness of the conduct and whether it involves potential national security threats when deciding whether a voluntary self-disclosure is likely to avoid a guilty plea.

Remediation. The DOJ will consider a company’s efforts to remediate identified misconduct in determining whether to seek a guilty plea. Accordingly, after discovering misconduct, a company should identify its root cause and the extent of the harm, swiftly act to rectify the harm, prevent the misconduct from recurring, and discipline wrongdoers.

Effective remediation may require the assistance of outside consultants or counsel to ensure rapid and thorough action, while carefully considering relevant employment laws. Notably, DOJ’s assessment of remediation includes considering whether the company imposed monetary consequences for employees whose actions or omissions contributed to criminal conduct, such as compensation clawbacks.

DOJ noted that compensation systems that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance, and it will view companies without such compensation plans less favorably when making resolution decisions.

Following the New Guidance

While there are no guarantees that voluntary self-disclosure, cooperation, and remediation will allow a company to escape a guilty plea, the DOJ’s announcements must be seriously considered.

Tailoring a compliance program with DOJ guidance in mind will help a company ensure that it is best-positioned to make significant and complicated cooperation, self-disclosure, and remediation decisions when wrongdoing is discovered, which could ultimately lead to the avoidance of a guilty plea.

Of course, even the most carefully tailored corporate compliance programs will not effectively achieve the desired results unless they are backed by a culture of compliance that fosters and supports the programs.

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